ADDRESSING WHAT ISN'T THERE: HOW DISTRICT COURTS MANAGE THE THREAT OF RULE 68'S COST-SHIFTING PROVISION IN THE CONTEXT OF CLASS ACTIONS

*Jack Starcher**

For almost two decades now, courts have struggled with a seemingly irreconcilable conflict between Rule 23 class actions and Rule 68 offers of judgment. The apparent tension between these two rules arises in the limbo between the filing of a putative class representative's complaint and the court's resolution of the class certification motion. During this time the class has not yet been certified, so defendants are able to make Rule 68 offers to putative class representatives as individuals. Rule 68's cost-shifting provision then pressures putative class representatives to settle before class certification can be completed. In this way an individual Rule 68 settlement offer can "pick off" a putative class representative before a court is able to consider the merits of class certification. Thus, when a Rule 68 "pick off" offer is made to a putative class representative, judges are forced to balance the prosettlement objectives of Rule 68 against the benefits of Rule 23 class actions and the need to protect putative class members. This issue has come to the attention of district courts through motions to strike these individual offers. These offers, plaintiffs argue, exert inappropriate pressure on putative class representatives and should be preemptively stricken to protect the putative class. While most district courts to confront this issue agree with plaintiffs and strike the Rule 68 "pick off" offer, this Note advocates for a different approach. By refusing to strike Rule 68 "pick off" offers and providing guidance to parties as to the effect of the offer, courts can simultaneously respect the purposes of both Rule 68 and Rule 23.

INTRODUCTION

Whenever possible, the Federal Rules of Civil Procedure should be read so as to "harmonize the Rules" because the Rules were "designed to be interdependent."[1] In some cases, however, the Rules are so at odds with one another that a court must ultimately choose to give force to one rule over another. For almost two decades now, courts have struggled

* J.D. Candidate 2014, Columbia Law School.

1. Weiss v. Regal Collections, 385 F.3d 337, 342 (3d Cir. 2004); see also Fed. R. Civ. P. 1 ("[The Federal Rules of Civil Procedure] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

with one such seemingly irreconcilable conflict: the tension between Rule 23 class actions and Rule 68 offers of judgment.[2]

The apparent tension between these two rules arises in the limbo between the filing of a putative class representative's complaint and the court's resolution of the class certification motion. During this time period the class has not yet been certified, so defendants are able to make settlement offers to putative class representatives as individual plaintiffs. These individual settlement offers can exert pressure on named plaintiffs in ways that potentially undermine the class certification process. By pushing putative class representatives to settle before class certification can be completed, an individual settlement offer can derail class certification and force a new plaintiff to pick up the torch and pursue certification on behalf of the putative class. Rule 68, which allows defendants to make offers of judgment, is frequently used to exert this sort of "pick off" pressure against plaintiffs seeking to certify a class. This is because Rule 68 contains a cost-shifting mechanism that forces the plaintiff to pay postoffer costs incurred by the defendant "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer."[3] Thus, by making Rule 68 offers of judgment, defendants are able to exert settlement pressure in two ways: by making offers of full recovery in order to moot named plaintiffs' individual claims,[4] or by creating threats of individual liability for named plaintiffs through Rule 68's cost-shifting mechanism.[5] When faced with these offers, judges are forced to balance the prosettlement objectives of Rule 68 against the benefits of Rule 23 class actions and the need to protect putative class members.

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2. A number of the cases discussed in this Note involve statutory collective actions. These collective actions are commenced pursuant to federal laws that grant individuals harmed by violations of a statute the right to bring claims on behalf of others similarly harmed. See, e.g., Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b) (2006) ("An action to recover the liability prescribed in [this act] may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated."). Plaintiffs in these cases seek certification under the relevant statutory framework rather than Rule 23 itself, but federal courts often draw on Rule 23 doctrine in handling these statutory collective actions. A majority of the Supreme Court recently observed, however, that "Rule 23 actions are fundamentally different from collective actions under the FLSA." Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523, 1529 (2013) (citing Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 177–78 (1989) (Scalia, J., dissenting)). Although this distinction between statutory collective actions and Rule 23 class actions is beyond the scope of this Note, it is likely to play an important role as this area of the law continues to develop.

3. Fed. R. Civ. P. 68(d).

4. When an offer purports to offer full recovery for all of the putative class representative's individual claims, the offer might strip federal courts of subject matter jurisdiction by negating the "case or controversy" upon which the plaintiff's claims are based. See Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991) (explaining, when plaintiff is offered all he could hope to attain at trial, he "loses outright, under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake").

5. Fed. R. Civ. P. 68(d).

The legal world has taken note of circuit court disagreement over the propriety of settlement offers that seek to moot a putative class representative's individual claims ("full-recovery offers").[6] But district court disagreement over the propriety of offers that exert pressure through Rule 68's cost-shifting mechanism ("partial-recovery offers") has received little attention. Putative class representatives bring these partial-recovery offers to the attention of district courts by filing motions to strike Rule 68 offers made to them as individuals. These plaintiffs argue that offers of judgment exert improper pressure when made to individuals seeking to represent a class, and that such offers must be preemptively stricken by the court in order to protect named class representatives. Three approaches have developed among district courts that have ruled on such motions to strike: (1) grant the motion to strike, (2) refuse to grant the motion but declare the Rule 68 offer to be unenforceable, or (3) refuse to take any action regarding the Rule 68 offer on procedural grounds. None of these approaches, this Note argues, adequately resolves the issue.

This Note recommends a fourth approach to this problem. Because Rule 68's cost-shifting provision is a useful tool to encourage settlement prior to class certification, such offers should not be preemptively stricken or declared invalid. Unlike full-recovery offers, which are made to named plaintiffs in an effort to moot the class representative's claims and threaten the class action mechanism, Rule 68's cost-shifting provision exerts pressure on putative representatives in a way more in line with the purposes of Rule 23. At the same time, refusing to take any

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6. See *Genesis HealthCare*, 133 S. Ct. at 1528–29 ("While the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot, we do not reach this question, or resolve the split . . . ." (footnote omitted)). Note that, insofar as the Supreme Court implied that there is a circuit split over whether an offer of full recovery can moot a plaintiff's claim, it misstates the law. Although the Court cites a Second Circuit case for the proposition that some courts do not allow an offer of full recovery to moot a claim, that case was decided based on the narrow facts of that case. See McCauley v. Trans Union, L.L.C., 402 F.3d 340, 342 (2d Cir. 2005) (noting settlement offer at issue did not render claim moot because it was conditional on plaintiff's acceptance of confidentiality agreement). But the Second Circuit has long held that, where a defendant offers "the maximum amount for which the defendant could be held liable, 'there is no justification for taking the time of the court and the defendant in the pursuit of . . . claims which [the] defendant has more than satisfied.'" Doyle v. Midland Credit Mgmt., Inc., 722 F.3d 78, 80 (2d Cir. 2013) (per curiam) (alterations in *Doyle*) (quoting Abrams v. Interco Inc., 719 F.2d 23, 32 (2d Cir. 1983)). However, there is disagreement among the circuits as to how this doctrine applies when a plaintiff seeks to represent a statutory or Rule 23 class. See Edward A. Hartnett, Against (Mere) Restyling, 82 Notre Dame L. Rev. 155, 172 n.54 (2006) ("There are conflicting decisions whether a Rule 68 offer to provide a plaintiff with the maximum he could recover individually moots a proposed class action."); M. Andrew Campanelli, Note, You Can Pick Your Friends, but You Cannot Pick Off the Named Plaintiff of a Class Action: Mootness and Offers of Judgment Before Class Certification, 4 Drexel L. Rev. 523, 534 (2012) ("[C]ourts have split on this issue, and the differing outcomes regarding the mootness of a named plaintiff have resulted from courts applying various temporal cut-off points in class action litigation.").

action regarding a Rule 68 offer made to a putative class representative creates confusion and may fail to establish the proper incentives for the plaintiff. The key to ensuring that Rule 68 offers create the right incentives for putative class representatives, this Note argues, is establishing that an offer's ability to shift costs to the plaintiff is dependent on the success or failure of the class certification motion. By making it clear that successful class certification will defeat a Rule 68 offer made to an individual plaintiff, courts can simultaneously discourage frivolous class certification motions (which are unlikely to succeed) and encourage meritorious ones.

Part I of this Note lays out the policy objectives of both Rules 23 and 68, and further discusses Rule 68 "pick off" offers. Part II lays out the three approaches currently used by district courts to address the tension between Rule 68 cost-shifting and Rule 23 class certification. Finally, Part III of this Note suggests a fourth approach that focuses parties on the merits of the class certification motion in a way that simultaneously encourages settlement, preserves judicial resources, and incentivizes pursuing meritorious class actions.

I. TENSION IN THE RULES: RULE 23, RULE 68, AND THE "PICK OFF" OFFER

As this Note addresses an apparent conflict between two of the Federal Rules of Civil Procedure, Part I begins with an overview of the relevant features of Rules 23 and 68. Section A gives a brief history of the Federal Rules of Civil Procedure, focusing on the structure of the Rules and their underlying purpose. Section B then summarizes the procedural mechanisms provided by Rule 23. Finally, section C discusses the language and evolution of Rule 68 offers of judgment.

"Pick off" offers are offers made to putative class representatives in order to pressure the representative to settle prior to class certification, thereby preventing class certification from ever taking place. Although this Note focuses on "pick off" offers that exert this pressure through Rule 68's cost-shifting provision, the conflict between Rules 23 and 68 has also come to courts' attention in the form of a second "pick off" strategy. This second strategy uses Rule 68 to moot plaintiffs' claims by offering them full individual recovery. Section D discusses the mechanics of the Rule 68 "pick off" offer, the two distinct "pick off" strategies that have arisen,[7] and the current circuit split over the propriety of full-recovery "pick off" offers.

A. *Underlying Principles of the Federal Rules of Civil Procedure*

In 1934 Congress passed the Rules Enabling Act, which empowered the Supreme Court to promulgate uniform procedural rules for civil

7. See supra notes 4–5 and accompanying text (discussing "pick off" strategies).

actions in federal courts.[8] Congress, however, retained the power to review and limit any rules the Supreme Court chose to promulgate.[9] The Rules Enabling Act also explicitly limited the Court's rulemaking authority to procedural rules, providing that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[10] The Supreme Court quickly acted on this newly granted authority, establishing the Federal Rules of Civil Procedure in 1938.[11] Rule 1 instructs that courts should interpret and administer the Rules to promote "the just, speedy, and inexpensive" resolution of all federal civil cases.[12] Although the Federal Rules of Civil Procedure are diverse, they "were intended to embody a unitary concept of efficient and meaningful judicial procedure," so "no single Rule can . . . be considered in a vacuum."[13] At the same time, "[i]n the event of an irreconcilable conflict . . . one rule of procedure may have to take precedence over another."[14]

B. *Mechanics of Rule 23*

Rule 23 of the Federal Rules of Civil Procedure allows plaintiffs to file class actions in order to promote efficient use of judicial resources by consolidating similar claims into one action.[15] Class actions also "'overcome the problem that small recoveries do not provide the incentive for

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8. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)).

9. Id.

10. Id. For a recent Supreme Court decision invoking this limitation, see Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) ("In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure . . . but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right.'" (citation omitted)).

11. See generally Supreme Court Adopts Rules for Civil Procedure in Federal District Courts, 24 A.B.A. J. 97 (1938) (providing detailed account of events leading up to adoption of rules).

12. Fed. R. Civ. P. 1; see also Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962) (describing principles set forth in Rule 1 as "touchstones of federal procedure").

13. Nasser v. Isthmian Lines, 331 F.2d 124, 127 (2d Cir. 1964); see also Weiss v. Regal Collections, 385 F.3d 337, 342 (3d Cir. 2004) ("The Federal Rules of Civil Procedure are designed to be interdependent." (citing Fed. R. Civ. P. 1)); Castro v. United States, 310 F.3d 900, 902 (6th Cir. 2002) (per curiam) ("When interpreting statutory language, a court should interpret the statute as a coherent whole . . . . These principles apply to our construction of the Federal Rules of Appellate Procedure."); Boeing Airplane Co. v. Coggeshall, 280 F.2d 654, 658 (D.C. Cir. 1960) ("[Rules 26, 30, and 45] must be read in *pari materia*.").

14. *Weiss*, 385 F.3d at 342.

15. Fed. R. Civ. P. 23(a) (providing "one or more members of a class may sue or be sued as representative parties on behalf of all members" so long as certain conditions are met); see also Mevorah v. Wells Fargo Home Mortg. (In re Wells Fargo Home Mortg. Overtime Pay Litig.), 571 F.3d 953, 958 (9th Cir. 2009) ("A principal purpose behind Rule 23 class actions is to promote 'efficiency and economy of litigation.'" (quoting Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974))).

any individual to bring a solo action prosecuting his or her rights.'"[16] Thus, Rule 23 ensures that a defendant whose conduct causes minimal injury to each of a large number of potential plaintiffs is held accountable for her actions.[17] In furtherance of these goals, Rule 23 allows "members of a class [to] sue or be sued as representative parties on behalf of all members."[18]

But in order to promote efficiency and prevent abuse, Rule 23 imposes limitations on the class action mechanism.[19] For example, before a class may sue or be sued on behalf of its members, a federal judge must certify the class via court order.[20] This certification process requires individual plaintiffs to raise claims on behalf of a group of similarly situated persons in a complaint and then seek certification of the class under Rule 23.[21] After filing a complaint that includes class claims, a putative class representative may file a class certification motion to begin the formal process of certifying the class.[22] Rule 23(a) sets out the prerequisites that must be met before any class can be certified.[23] Furthermore, a class certification motion must include information that shows each of these prerequisites is satisfied before the court will consider a motion for class certification.[24] If a court finds that a proposed class fulfills these prerequisites, it must then determine whether the class falls within one of the class types set forth in Rule 23(b).[25]

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16. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997)).

17. See Deposit Guar. Nat'l Bank of Jackson v. Roper, 445 U.S. 326, 338 (1980) ("[A class action] may motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise.").

18. Fed. R. Civ. P. 23.

19. Fed. R. Civ. P. 23(a)–(c).

20. See Fed. R. Civ. P. 23(c)(1) (discussing procedures for granting class certification order).

21. Id. (stating class certification order may be granted "[a]t an early practicable time after a person sues or is sued as a class representative").

22. Id. Although it is possible to file a class certification motion contemporaneously with a complaint including class claims, many parties wait until after some discovery has taken place before filing the motion. See generally Fed. Judicial Ctr., Manual for Complex Litigation, Fourth § 21.14 (2004) [hereinafter Manual for Complex Litigation] (discussing precertification discovery).

23. Fed. R. Civ. P. 23(a). The Rule 23(a) prerequisites are commonly referred to as: (1) numerosity ("the class is so numerous that joinder of all members is impracticable"), (2) commonality ("there are questions of law or fact common to the class"), (3) typicality ("claims or defenses of the representative parties are typical of the . . . class"), and (4) adequacy ("representative parties will fairly and adequately protect the interests of the class"). Id.

24. The Rule 23 certification requirements can be satisfied by merely referring to information in the parties' pleadings, but often additional discovery is needed. Manual for Complex Litigation, supra note 22, § 21.14.

25. Fed R. Civ. P. 23(b).

As class certification becomes an increasingly fact-intensive process,[26] the level of discovery potentially needed to certify a class continues to rise.[27] A putative class representative must often wait for some period of time between the filing of the complaint as an individual, which triggers access to various discovery mechanisms, and the filing of a class certification motion.[28] This means that, before class certification can take place, individual plaintiffs are acting as placeholders for what may become a class later in litigation. At all times before the class is certified, a putative class representative bears the additional risks and costs associated with the class certification process—court costs, attorney's fees, and the like are not distributed across class members unless the class is certified.[29]

In spite of these risks, class certification continues to be appealing to many plaintiffs seeking relief in federal courts. The benefits of class certification are substantial. Attorney's fees and costs, which might otherwise eclipse the amount of recovery sought, are spread across the entire class, thereby making practical litigation that might otherwise be cost-prohibitive.[30] From a strategic standpoint, class certification exerts great pressure on defendants to reach a settlement. Because the number of plaintiffs seeking relief in a class action can be substantial, defendants face huge risks should they see the case through to trial and suffer an adverse

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26. See, e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2554–57 (2011) (suggesting commonality under 23(a) may be more similar to predominance element of 23(b)(3) than previously thought).

27. See Andrew J. Trask, *Wal-Mart v. Dukes*: Class Actions and Legal Strategy, 2011 Cato Supreme Ct. Rev. 319, 352 (suggesting one "consequence [of *Dukes*] may be more demanding requests for discovery from plaintiffs" as "they will need more facts demonstrating that their common issues can be resolved with classwide proof"); Sherry E. Clegg, Comment, Employment Discrimination Class Actions: Why Plaintiffs Must Cover All Their Bases After the Supreme Court's Interpretation of Federal Rule of Civil Procedure 23(a)(2) in *Wal-Mart v. Dukes*, 44 Tex. Tech L. Rev. 1087, 1115 (2012) ("Because *Dukes* affirmed that judges must conduct rigorous inquiries at the class certification stage, plaintiffs may need to make more detailed and comprehensive requests for discovery early on.").

28. Although class discovery may not be needed when a class motion can be decided based on undisputed facts or issues of law, "[s]ome discovery may be necessary . . . when the facts relevant to any of the certification requirements are disputed." Manual for Complex Litigation, supra note 22, § 21.14. Discovery of information relevant to the Rule 23 certification requirements takes place concurrently with discovery on the merits of individual claims. See Zachary W. Biesanz & Thomas H. Burt, Everything That Requires Discovery Must Converge: A Counterintuitive Solution to a Class Action Paradox, 47 U.S.F. L. Rev. 55, 81–82 (2012) (discussing interaction between class and merits discovery).

29. See Johnson v. U.S. Bank Nat'l Ass'n, 276 F.R.D. 330, 332 (D. Minn. 2011) ("It is the time before the certification of the class when the work of the class representative . . . is often most important, time-consuming, and risky . . . .").

30. See Deposit Guar. Nat'l Bank of Jackson v. Roper, 445 U.S. 326, 338 (1980) ("The use of the class-action procedure for litigation of individual claims may offer substantial advantages for named plaintiffs; it may motivate them to bring cases that for economic reasons might not be brought otherwise.").

judgment.[31] As the Court of Appeals for the Eleventh Circuit succinctly put it, "the fight over class certification is often the whole ball game."[32]

C. *Mechanics of Rule 68*

Rule 68 permits a defendant, at least fourteen days before trial, to make an offer of judgment to a plaintiff.[33] If the plaintiff chooses to accept this offer within fourteen days after receiving it, either party may file the offer and a notice of acceptance with the court, at which time the judgment is entered by the clerk.[34] If the plaintiff does not accept the offer within fourteen days, the offer is considered withdrawn, and the defendant is free to make additional offers. The key to Rule 68 is its unique cost-shifting provision: If an offer is not accepted and "the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."[35] A defendant can then file the unaccepted offer in a proceeding to recover these costs.[36] The threat of this cost-shifting is intended to exert pressure on the plaintiff and thereby "encourage settlement and avoid litigation."[37]

The cost-shifting provision contained in Rule 68 interacts closely with Rule 54(d)'s presumption in favor of awarding costs to the prevailing party. Rule 54 provides that generally "costs—other than attorney's fees—should be allowed to the prevailing party" in federal courts.[38]

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31. See, e.g., Coopers & Lybrand v. Livesay, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability . . . that he may find it economically prudent to settle and to abandon a meritorious defense."); In re Diet Drugs Prods. Liab. Litig., 93 F. App'x 345, 350 (3d Cir. 2004) ("Orders granting class certification may expose defendants to enormous liability while orders denying certification may effectively eviscerate the plaintiffs' ability to recover."); Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. (In re Visa Check/MasterMoney Antitrust Litig.), 280 F.3d 124, 145 (2d Cir. 2001) ("The effect of certification on parties' leverage in settlement negotiations is a fact of life for class action litigants."), overruled by Miles v. Merrill Lynch & Co. (In re Initial Pub. Offerings Sec. Litig.), 471 F.3d 24 (2d Cir. 2006), and superseded by statute, Fed. R. Civ. P. 23(a)(4), as recognized in Brown v. Kelly, 609 F.3d 467 (2d Cir. 2010).

32. Hartford Accident & Indem. Co. v. Beaver, 466 F.3d 1289, 1294 (11th Cir. 2006).

33. Fed. R. Civ. P. 68(a).

34. Id.

35. Fed. R. Civ. P. 68(d).

36. See Fed. R. Civ. P. 68(b) ("Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.").

37. Marek v. Chesny, 473 U.S. 1, 5 (1985), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

38. Fed. R. Civ. P. 54(d)(1) ("Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."). Examples of such costs include:

> (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket

Courts have uniformly treated Rule 68 as an exception to this presumption.[39] Thus Rule 68 deals a double blow to the plaintiff: shifting the defendant's postoffer costs to the plaintiff and simultaneously precluding the plaintiff from recovering her own costs from the defendant.

But in spite of its appealing prosettlement push, Rule 68 "rarely has been invoked" by defendants in federal courts.[40] The reasons for the scarcity of the Rule's usage are unclear. Some commentators suggest that the underutilization may be due to the unavailability of attorney's fees under Rule 68(d)'s cost-shifting provision.[41] It is also possible that Rule 68 offers are just severely underreported. As the rule itself specifies, unaccepted offers of judgment are only filed with the court by a defendant in an action to recover costs under 68(d), so there is no reliable way to track the number of Rule 68 offers actually made.[42] Regardless of the reason for the apparent scarcity of Rule 68 offers, the Rules Advisory Committee itself has opined that Rule 68 has been "largely ineffective as a means of achieving its goals."[43]

D. *Mechanics of the "Pick Off" Offer*

Despite the general underutilization of Rule 68, defendants frequently make offers of judgment when facing potential class actions in order to exert "pick off" pressure on plaintiffs.[44] The appeal of this strategy is straightforward: By exerting pressure on named plaintiffs prior to

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> fees . . . ; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services . . . .

28 U.S.C. § 1920(1)–(6) (2006).

39. See Delta Air Lines, Inc. v. August, 450 U.S. 346, 351 (1981) ("Under Rule 54(d) . . . , the party prevailing after judgment recovers costs unless the trial court otherwise directs. Rule 68 could conceivably alter the Rule 54(d) presumption . . . after [certain] judgments are entered . . . ." (footnote omitted)).

40. Comm. on Rules of Practice and Procedure of the Judicial Conference of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, 102 F.R.D. 407, 433 (1984) [hereinafter Proposed Court Rules].

41. See, e.g., 13 James Wm. Moore et al., Moore's Federal Practice § 68.02[4] (3d ed. 2013) (suggesting defendants do not invoke Rule 68 because costs alone "simply do not make it worth their effort"); Jay Horowitz, Rule 68: The Settlement Promotion Tool that Has Not Promoted Settlements, 87 Denv. U. L. Rev. 485, 485 (2010) ("[P]arties seeking to induce a settlement with their adversary likely will not even bother to invoke a rule that does not shift the burden of paying attorney's fees, reasoning that the shifting of costs alone is not worth the effort." (emphasis omitted)).

42. Fed. R. Civ. P. 68(b) ("Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.").

43. Proposed Court Rules, supra note 40, at 433.

44. See Ian H. Fisher, Federal Rule 68, a Defendant's Subtle Weapon: Its Use and Pitfalls, 14 DePaul Bus. L.J. 89, 113–17 (2001) (discussing special appeal of Rule 68 offers prior to class certification).

class certification, a defendant might avoid class liability by short-circuiting the certification process itself.[45] If a named plaintiff settles or otherwise withdraws her complaint prior to class certification, any pending class claims or motions are usually dismissed.[46] Such a dismissal has no res judicata effect on other potential class members and other plaintiffs may seek to certify the class at a later date.[47] But a defendant can exert the same pressures on subsequent putative class representatives, conceivably "picking off" each putative representative in turn until the stable of viable class representatives has been exhausted.[48] Taken to its extreme, this "pick off" strategy would allow a defendant to dictate the class certification process, essentially opting out of defending against a class action if so desired.[49]

Rule 68 provides defendants with two distinct means of exerting "pick off" pressure on a putative class representative: trying to moot a plaintiff's individual claims by offering full recovery or threatening the plaintiff with Rule 68's cost-shifting provision.[50] Each of these strategies has distinct strategic and legal consequences for both plaintiffs and defendants. The more powerful method by which a defendant can exert pressure against a putative class representative under Rule 68, as will be

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45. See Johnson v. U.S. Bank Nat'l Ass'n, 276 F.R.D. 330, 332–33 (D. Minn. 2011) ("A defendant faced with the risk of a multi-million dollar . . . class action with thousands of small claims collected in one suit has a strong incentive to pay off the representative plaintiff . . . and put an end to the threat posed by class action at . . . a pittance.").

46. See Potter v. Norwest Mortg., Inc., 329 F.3d 608, 611 (8th Cir. 2003) ("[A] federal court should normally dismiss an action as moot when the named plaintiff settles its individual claim, and the district court has not certified a class.").

47. See Player v. Maher Terminals, Inc., No. 87-3535, 1988 WL 4581, at *1 (4th Cir. Jan. 19, 1988) (per curiam) (unpublished table decision) (noting where summary judgment is granted before question of class certification is decided, defendant "is only protected against the would-be class members by the doctrine of *stare decisis* rather than *res judicata*").

48. See Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1050 (5th Cir. Unit A July 1981) ("By tendering to the named plaintiffs the full amount of their personal claims each time suit is brought as a class action, the defendants can in each successive case moot the named plaintiffs' claims before a decision on certification is reached.").

49. Note that this strategy does not allow a defendant to short-circuit a class action after a court has certified the class. The Supreme Court has established that, once a class is certified by a district court, "the class of unnamed persons described in the certification [order] acquire[s] a legal status separate from the interest asserted by [the named representatives]." Sosna v. Iowa, 419 U.S. 393, 399 (1975). Additionally, any settlement or dismissal of class claims that takes place after certification is subject to Rule 23(e), which requires court approval of any such agreements. Fed. R. Civ. P. 23(e).

50. Although this Note focuses on district court treatment of offers that seek to exert pressure through Rule 68's cost-shifting provision rather than offers that seek to moot a plaintiff's claims outright, circuit court precedent relating to these full-recovery offers has been used by district courts asked to strike Rule 68 offers to prevent the threat of cost-shifting. See infra Part II (discussing district courts' handling of motions to strike Rule 68 offers to protect putative class representatives from threat of Rule 68(d) cost-shifting).

seen in the following section, is by making an offer of full recovery and mooting the offeree's claims.

1. *Full-Recovery "Pick Off" Offers.* — Generally, when a Rule 68 offer of judgment provides all of the recovery that a plaintiff could have possibly obtained from the defendant, that offer moots the plaintiff's claim because "at that point the plaintiff retains no personal interest in the outcome of the litigation."[51] If a court finds that a defendant has offered complete recovery to a plaintiff, then that plaintiff's claims must be dismissed for lack of subject matter jurisdiction.[52] This is true "whether or not the plaintiff accepts the offer."[53] This means that even where a plaintiff refuses to accept an offer of full recovery, a court will force the plaintiff out of court, either by entering judgment against the plaintiff outright or by entering judgment in the plaintiff's favor consistent with the terms of the unaccepted offer. This, in effect, forces the plaintiff to accept the offer.[54]

While this strategy is available to defendants in all federal cases, it raises special concerns where the plaintiff receiving the offer seeks to represent a class.[55] When class claims have been raised, a court "must consider the potential impact [of a settlement] on absent class members."[56] If defendants are allowed to force named representatives out of court by mooting their individual claims, putative members of a not-yet-certified class may be repeatedly robbed of the chance to recover

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51. Weiss v. Regal Collections, 385 F.3d 337, 340 (3d Cir. 2004); see also Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991) ("Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate . . . ."). This doctrine applies to any offer of settlement, whether or not it is made under Rule 68.

52. See *Rand*, 926 F.2d at 598 (observing where full recovery is offered "plaintiff . . . loses outright, under Fed.R.Civ.P. 12(b)(1), because he has no remaining stake"); see also Fed. R. Civ. P. 12(b)(1) (providing parties may move to dismiss claims for lack of subject matter jurisdiction).

53. Symczyk v. Genesis HealthCare Corp., 656 F.3d 189, 195 (3d Cir. 2011), rev'd, 133 S. Ct. 1523 (2013).

54. Courts disagree over how to resolve the plaintiff's claims in these circumstances. Some courts enter judgment for the defendant when a plaintiff refuses to accept an offer that the court determines to be an offer of full recovery. 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) . . . ." (citation omitted)). Other courts enter judgment for the plaintiff in accordance with the unaccepted Rule 68 offer. See, e.g., O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 575 (6th Cir. 2009) ("We disagree, however, with the . . . view that a plaintiff loses outright when he refuses an offer of judgment that would satisfy his entire demand. Instead, we believe the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment . . . ." (citation omitted)).

55. See, e.g., *Symczyk*, 656 F.3d at 195 ("We have recognized . . . that conventional mootness principles do not fit neatly within the representative action paradigm.").

56. Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500, 502 (N.D. Cal. 1980).

under the class action mechanism.[57] This practice may also undermine Rule 68's goal of judicial efficiency, because allowing plaintiffs to be "picked off" before a class is certified may waste judicial resources by "stimulating successive suits brought by others claiming [the same] aggrievement."[58] For these reasons, courts place limits on the ability of a defendant to moot a putative class representative's claims by making an offer for full recovery.[59]

2. *Circuit Disagreement over Full-Recovery "Pick Off" Offers.* — Supreme Court precedent provides some limitations on the reach of the full-recovery "pick off" offer strategy in the class action context. A certified class's claims cannot be mooted by merely satisfying the individual claims of the named class representatives.[60] Offers of full recovery made to plaintiffs after class certification has been denied do not preclude an appeal of the adverse class certification decision itself, as the putative class representatives maintain a sufficient interest in the ultimate disposition of the class certification process.[61] But the ability of an offer of full recovery to moot a putative class representative's case becomes less clear when it is made before a district court has ruled on a class certification motion.

Circuit courts seem to agree that a defendant cannot moot a putative representative's class claims where a timely class certification motion has already been filed.[62] Where "plaintiffs have filed a timely motion for

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57. See Weiss v. Regal Collections, 385 F.3d 337, 345 (3d Cir. 2004) ("Allowing defendants to 'pick off' putative lead plaintiffs contravenes one of the primary purposes of class actions—the aggregation of numerous similar (especially small) claims in a single action.").

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

59. See infra Part I.D.2 (describing limitations placed on this strategy).

60. See Sosna v. Iowa, 419 U.S. 393, 399 (1975) (finding certified class obtains legal status separate from that of named representatives, and this separate status can relate back to filing of complaint); Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1090 (9th Cir. 2011) (observing once "district court has certified a class, mooting the putative class representative's claim will not moot the class action" because, under reasoning of *Sosna*, "upon certification the class 'acquire[s] a legal status separate from the interest asserted by [the class representative]'" (alterations in *Pitts*) (quoting *Sosna*, 419 U.S. at 399)).

61. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980) (finding named plaintiff's interest in procedural right to represent class sufficient to prevent class certification question from becoming moot); *Roper*, 445 U.S. at 336 ("We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment.").

62. See Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1051 (5th Cir. Unit A July 1981) (finding offer to named plaintiffs does not render putative class action moot where there exists "timely filed and diligently pursued motion for class certification"); Susman v. Lincoln Am. Corp., 587 F.2d 866, 869–70 (7th Cir. 1978) (finding even though class must ordinarily be certified "to escape dismissal once the claims of the named plaintiff become moot," when class certification motion is pending and "has been pursued with reasonable diligence . . . a case does not become moot merely because of the tender to the named plaintiffs"); see also *Sosna*, 419 U.S. at 402 n.11 (observing "[t]here may be cases in which the controversy involving the named plaintiffs . . . becomes moot as to them before the district court can reasonably be expected to rule on a certification motion" and in

class certification and have diligently pursued it, the defendants should not be allowed to prevent consideration of that motion . . . before the district court reasonably can be expected to rule on the issue."[63] The circuits disagree, however, on how to handle an offer that purports to moot a class representative's individual claims *before* a class certification motion is filed. The Seventh Circuit has held that, where a plaintiff has "not even move[d] for class certification prior to the evaporation of his personal stake" due to an offer of full recovery, his case must be dismissed.[64] The Third, Fifth, Ninth, and Tenth Circuits, on the other hand, have adopted a more flexible standard. An offer of full recovery made to a plaintiff before a class certification motion has been filed does not moot the named representative's case, according to these circuits, so long as there is no undue delay in filing the certification motion.[65] This is because "the federal rules do not require certification motions to be filed with the class complaint, nor do they require or encourage premature certification determinations."[66] Thus, putative class representatives must have a reasonable opportunity to prepare for and file a class certification motion before they are pushed out of court by an offer that moots their individual claims.[67] Recognizing this ongoing circuit split, the Supreme Court recently granted certiorari to a Third Circuit case but disposed of the case on narrow grounds that did not resolve this disagreement.[68]

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such cases court may allow action to continue until resolution of certification motion). But cf. Bradley v. Hous. Auth., 512 F.2d 626, 629 (8th Cir. 1975) (per curiam) (affirming dismissal of class action as moot because named plaintiffs had individual claims remedied prior to class certification but while certification motion was pending).

63. *Zeidman*, 651 F.2d at 1045.

64. Holstein v. City of Chicago, 29 F.3d 1145, 1147 (7th Cir. 1994). In reaching this conclusion the court acknowledged that there is a class action exception to the mootness doctrine. Where a "district court has certified the class before the expiration of the plaintiff's [individual] claims, mootness is avoided." Id.; see also *Geraghty*, 445 U.S. at 397 (observing "mootness of [a] named plaintiff's individual claim *after* a class has been duly certified does not render the action moot"). But where a plaintiff has not even filed a motion for class certification he "cannot avail himself of the class action exception to the mootness doctrine." *Holstein*, 29 F.3d at 1147.

65. Weiss v. Regal Collections, 385 F.3d 337, 348 (3d Cir. 2004) (concluding "[a]bsent undue delay in filing a motion for class certification" Rule 68 offer of full recovery of individual claims does not moot class claims); see also *Pitts*, 653 F.3d at 1090–92 (holding "unaccepted offer of judgment did not moot [plaintiff's] case" under reasoning of *Weiss* and because plaintiff's claim was "transitory in nature and may otherwise evade review"); Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1249–50 (10th Cir. 2011) (adopting same standard); Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 918–21 (5th Cir. 2008) (agreeing with conclusion of Third Circuit in *Weiss*).

66. *Weiss*, 385 F.3d at 347.

67. Id. at 348 ("[T]he class action process should be able to 'play out' according to . . . Rule 23 and should permit due deliberation by the parties and the court on the class certification issues.").

68. Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523, 1528–29 (2013) (recognizing split between circuits but noting "we do not reach this question, or resolve the split"); see also Symczyk v. Genesis HealthCare Corp., 656 F.3d 189, 195–200 (3d Cir. 2011) (applying "undue delay" standard established in *Weiss*), rev'd, 133 S. Ct. 1523.

With the future of the Rule 68 mootness doctrine uncertain, defendants are increasingly turning to Rule 68's cost-shifting provision in order to exert pressure on putative class representatives.

II. DISAGREEMENT OVER THE APPROPRIATE MEANS OF CONTROLLING DEFENDANTS' THREAT OF RULE 68'S COST-SHIFTING PROVISION AGAINST PUTATIVE CLASS REPRESENTATIVES

The apparent tension between Rules 23 and 68 has manifested itself through two distinct "pick off" strategies. While the Supreme Court has recognized the ongoing circuit split regarding when an offer of full recovery made to putative class representatives can moot their claims,[69] another split regarding Rule 68 "pick off" offers has gone largely unnoticed. Rather than attempting to moot a plaintiff's claims by offering full recovery, defendants in these cases seek to exert pressure on named class representatives through the operation of Rule 68's cost-shifting provision.[70] Because defendants do not ask the courts to moot plaintiffs' claims in these cases, the issue is only brought to district courts' attention by plaintiffs who have received Rule 68 offers but do not wish to accept them.[71] These plaintiffs seek to preemptively strike the defendants' offers in order to remove the threat of Rule 68's cost-shifting provision prior to the resolution of class certification.[72]

Section A summarizes how such a motion to strike is usually filed and what arguments are given in favor of granting it. In addressing these motions, district courts across the country have gravitated to one of three camps. The majority of courts to address the issue agree with plaintiffs' arguments and preemptively strike defendants' Rule 68 partial-recovery offers. Section B explores the reasoning of courts that take this approach. A distinct minority of courts have refused to grant plaintiffs' motions to strike. Section C reviews the reasoning used by courts that refuse to strike an offer but nonetheless declare the offer, and more specifically Rule 68's cost-shifting mechanism, to be unenforceable when made to a putative class representative. Finally, section D discusses cases in which courts have avoided addressing the tension between Rules 23 and 68 by denying motions to strike on procedural grounds.

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69. See *Genesis HealthCare*, 133 S. Ct. at 1528–29 ("Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot.").

70. See infra Part II.A (discussing mechanics and details of this strategy).

71. See, e.g., Notice of Motion and Motion to Strike Rule 68 Offers of Judgment Made to Individual Plaintiffs; Points and Authorities at 1, Wang v. Chinese Daily News, Inc., No. CV 04-1498 CBM (JWJx) (C.D. Cal. Mar. 27, 2006), 2006 WL 3381361 ("Plaintiffs now move this Court to strike or otherwise to declare void these [Rule 68] offers of judgment on grounds that they conflict with the class action mechanism set forth in Rule 23 . . . .").

72. See id. at 3–4 (moving to strike Rule 68 offer as incompatible with putative class representatives' duty to class).

A. *Context of Motions to Strike Rule 68 "Pick Off" Offers*

Whenever a defendant makes an offer of judgment under Rule 68, the threat of cost-shifting is immediately brought to bear on the plaintiff offeree.[73] Even if the offer of judgment does not seek to moot the offeree's claims by offering full recovery,[74] the possibility of being forced to pay the defendant's costs spurs the offeree to "evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits."[75] In a case where the offeree is only acting in her individual capacity, this pressure furthers the goals of Rule 68 as it encourages the offeree to accept the offer and avoid litigation.[76] But where a plaintiff seeks to represent a class, the operation of Rule 68's cost-shifting mechanism conflicts with the policies of Rule 23 class actions.[77] Tension arises because Rule 68's cost-shifting provision creates the possibility of personal liability for the putative class representative receiving the offer.[78] This liability, in turn, creates a conflict of interest between the putative class representative and members of the class she seeks to represent.[79] Because the offer forces her to "weigh her own interest in avoiding personal liability for costs under Rule 68 against the potential recovery of the class," Rule 68 pressures the named plaintiff to abandon meritorious class certification efforts to the detriment of absent class members.[80] "The very feature that makes class treatment appropriate—small individual stakes and large aggregate ones—ensures that" a class representative will be unwilling to risk liability for the entirety of a defendant's costs.[81] As Judge Easterbrook of the Seventh Circuit has observed in a related

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73. See supra Part I.C (discussing operation of Rule 68 cost-shifting mechanism). Commentators sometimes observe that Rule 68's cost-shifting mechanism is ineffective because costs alone are unlikely to amount to large sums. Supra note 41 and accompanying text. But in the typical class action context, this concern is significantly reduced. Many cases in which "pick off" offers are used involve statutory damage caps or cases where the named plaintiff seeks recovery for minor harms, so even the possibility of a small liability can exert substantial pressure to settle.

74. See supra Part I.D (discussing mechanics and judicial treatment of full-recovery "pick off" offers).

75. Marek v. Chesny, 473 U.S. 1, 5 (1985), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

76. See id. ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation.").

77. See Weiss v. Regal Collections, 385 F.3d 337, 344 (3d Cir. 2004) ("As sound as is Rule 68 when applied to individual plaintiffs, its application is strained when an offer of judgment is made to a class representative.").

78. Fed. R. Civ. P. 68(d) (providing offeree "must pay the costs incurred [by the offeror] after the offer was made" if final judgment obtained by offeree "is not more favorable than the unaccepted offer").

79. See, e.g., Zeigenfuse v. Apex Asset Mgmt., L.L.C., 239 F.R.D. 400, 402–03 (E.D. Pa. 2006) ("[T]he inherent conflict between Rule 68 and Rule 23 placed plaintiff at odds with the putative class . . . .").

80. Id. at 402.

81. Rand v. Monsanto Co., 926 F.2d 596, 599 (7th Cir. 1991).

context, "[o]nly a lunatic would" bear such individual liability, and "[a] madman is not a good representative of the class."[82]

Whereas offers of full recovery that seek to moot the offeree's claims follow a clear procedural path—filing a motion to dismiss for lack of subject matter jurisdiction under 12(b)(1)[83]—there is no clear procedural counterpart by which Rule 68 partial-recovery offers may come to a court's attention. Unless the offer is accepted or the defendant brings an action to recover costs after the plaintiff has obtained final judgment, Rule 68 does not provide any means to bring an offer of judgment to the attention of the court.[84] Thus the tension between Rule 68's cost-shifting provision and Rule 23 class actions comes to the attention of district courts through motions to strike filed by putative class representatives who have received Rule 68 offers and do not wish to accept them.[85] In other words, plaintiffs ask the court to strike from the record unaccepted offers of judgment that are neither filed nor admissible.

Plaintiffs filing these motions claim that any Rule 68 offer made to a putative class representative exerts improper pressure on the representative as she seeks to certify a class. Striking the offer of judgment is necessary, they argue, in order to protect the putative class and the obligations of the class representative to members of the proposed class.[86] District

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82. Id.

83. Fed. R. Civ. P. 12(b)(1); see, e.g., Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1085 (9th Cir. 2011) ("Because [defendant's] offer fully compensated [plaintiff] for his individual monetary claim, [defendant] filed a motion to dismiss the action for lack of subject matter jurisdiction [under Rule 12(b)(1)]."); see also supra Part I.D (discussing mechanics of full-recovery "pick off" offers).

84. Fed. R. Civ. P. 68(a) (allowing parties to file accepted offer with court); Fed. R. Civ. P. 68(b) ("Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs."); see also supra notes 33–39 and accompanying text (discussing general procedural operation of Rule 68 offers of judgment).

85. Although a motion to strike may seem an odd way to raise this issue, some courts allow motions to strike matters other than pleadings where the Federal Rules provide no other means to challenge a matter's reliability or sufficiency. See Delano Farms Co. v. Cal. Table Grape Comm'n, 623 F. Supp. 2d 1144, 1182 (E.D. Cal. 2009) ("[A] 'motion to strike' materials that are not part of the pleadings may be regarded as an 'invitation' by the movant 'to consider whether [proffered material] may properly be relied upon.'" (second alteration in *Crisp*) (quoting United States v. Crisp, 190 F.R.D. 546, 551 (E.D. Cal. 1999))); McLaughlin v. Copeland, 435 F. Supp. 513, 519 (D. Md. 1977) ("Although affidavits technically do not constitute pleadings, courts have permitted affidavits to be challenged by motions to strike because the Federal Rules provide no other means to contest their sufficiency.").

86. See, e.g., Boles v. Moss Codilis, LLP, No. SA-10-CV-1003-XR, 2011 WL 4345289, at *1 (W.D. Tex. Sept. 15, 2011) ("Plaintiff filed a motion to strike the [Rule 68] offer, arguing that it was an impermissible attempt to 'pick off' the named Plaintiff by . . . creating a conflict between the named Plaintiff and the class members by threatening to shift the costs of the litigation solely onto the named Plaintiff.").

courts across the country have struggled to address the legitimate concerns raised by these motions to strike Rule 68 offers.[87]

B. *Camp One: Grant the Motion to Strike*

Most district courts facing this issue grant a plaintiff's motion to strike the defendant's offer of judgment.[88] Subsection 1 discusses the policy justifications that lead these courts to strike individual offers of judgment made to putative class representatives. Courts have developed two rationales for granting these motions despite the lack of express authority to do so in the Rules. First, courts reason that granting such a motion to strike is an appropriate means of controlling class settlement as required by Rule 23(e). Subsection 2 evaluates this Rule 23(e) reasoning. Second, courts analogize their actions to circuit court decisions that declare Rule 68 offers to be invalid when they purport to grant putative class representatives full relief, thus mooting their claims.[89] Subsection 3 discusses district court reliance on these cases.

1. *Policy Considerations.* — As the Supreme Court has recognized, the purposes of Rule 68 and Rule 23 come into conflict when a Rule 68 offer is made to an individual seeking to represent a class.[90] While Rule 68 encourages settlement prior to class certification by exerting pressure on plaintiffs through its cost-shifting mechanism, Rule 23 relies on class representatives to persevere throughout the class certification process.[91]

Courts that have agreed to strike offers of judgment made to individual plaintiffs seeking to represent a class conclude that such an offer undermines the purposes of both Rule 68 and Rule 23. Rule 68 is intended to encourage settlement by prompting both parties "to evaluate the risks and costs of litigation."[92] Thus, if the offeree believes she is likely to recover more than the offer amount after trial, she will likely choose to

87. Research for this Note turned up twenty-nine district court opinions and orders dealing with motions to strike Rule 68 offers, most of them in the past ten years. Districts that have dealt with this issue are located across numerous circuits including the Second, see, e.g., McDowall v. Cogan, 216 F.R.D. 46 (E.D.N.Y. 2003), Fourth, see, e.g., White v. Ally Fin. Inc., No. 2:12-cv-00384, 2012 WL 2994302 (S.D.W. Va. July 20, 2012), and Ninth Circuits, see Wang v. Chinese Daily News, Inc., No. CV 04-1498 CBM, 2006 WL 1635423 (C.D. Cal. May 9, 2006).

88. See, e.g., *Boles*, 2011 WL 4345289, at *1; Johnson v. U.S. Bank Nat'l Ass'n, 276 F.R.D. 330, 331 (D. Minn. 2011); Stewart v. Cheek & Zeehandelar, LLP, 252 F.R.D. 384, 384 (S.D. Ohio 2008); Zeigenfuse v. Apex Asset Mgmt., L.L.C., 239 F.R.D. 400, 403 (E.D. Pa. 2006).

89. See supra Part I.D (discussing mechanics of these full-recovery "pick off" offers).

90. See Marek v. Chesny, 473 U.S. 1, 33 n.49 (1985) (Brennan, J., dissenting) (observing Rule 68 "does not mesh with . . . careful supervision" required for Rule 23 class action), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

91. See supra Part I.B (discussing mechanics and goals of Rule 23 class actions); supra Part I.C (discussing mechanics and goals of Rule 68 offers of judgment).

92. *Marek*, 473 U.S. at 5.

continue forward with her case rather than settle. Offers made to a named plaintiff prior to class certification, however, force her to "weigh her own interest in avoiding personal liability for costs under Rule 68 against the potential recovery of the class."[93] This mismatch of considerations, weighing personal liability on the one hand against class recovery on the other, does not further the goals of Rule 68. The named plaintiff's "evaluation of the offer [is] tinged by self-interest and [tends] to differ from that of absent class members."[94] This causes offerees to settle when settlement is not in the best interest of the class as a whole. Thus, Rule 68's purpose of encouraging reasonable settlements is undermined when an offer of judgment is made to an individual plaintiff seeking to certify a class.[95]

Offers of judgment made to putative class representatives also undermine the purposes of Rule 23. Potential class representatives have a "responsibility . . . to represent the collective interests of the putative class."[96] Allowing defendants to exert pressure on individuals seeking to certify a class, courts argue, undermines the goals of Rule 23 by pressuring putative representatives to abandon this responsibility.[97] An individual plaintiff seeking to represent a class already faces substantial risks, as "[i]t is the time before the certification of the class when the work of the class representative on behalf of the class is often the most important, time-consuming, and risky" and the process of seeking class certification is "an expensive proposition without a guarantee of success."[98] Therefore, courts should seek to protect putative class representatives from the additional burdens and risks imposed by Rule 68.[99]

A statement made by the Supreme Court in *Deposit Guaranty National Bank v. Roper* might also provide support for district courts that strike

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93. *Zeigenfuse*, 239 F.R.D. at 402; see also *Johnson*, 276 F.R.D. at 335 ("[B]y rejecting the offer and continuing to represent the class, Plaintiff now runs the risk that, in the end, he would incur the cost-shifting liability imposed by Rule 68.").

94. Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500, 503 (N.D. Cal. 1980).

95. But this mismatch may not be as concerning as it initially appears. This sort of tension is present throughout the class certification process regardless of whether a Rule 68 offer is made. At all times prior to class certification, individuals seeking to represent the class bear all risks and costs of the certification process. Unless the class is certified, none of the costs of certification are spread across absent class members. Thus some mismatch of motives is immanent to the certification mechanism contained in Rule 23, and any additional conflict of interest caused by the muffled risk of Rule 68 cost-shifting is unlikely to prevent otherwise meritorious classes from continuing forward to certification.

96. Deposit Guar. Nat'l Bank of Jackson v. Roper, 445 U.S. 326, 331 (1980).

97. See, e.g., id. at 339.

98. *Johnson*, 276 F.R.D. at 332.

99. Courts do not, however, purport to protect plaintiffs from offers of judgment should class certification fail. See, e.g., Zeigenfuse v. Apex Asset Mgmt., L.L.C., 239 F.R.D. 400, 403 (E.D. Pa. 2006) ("If class certification is ultimately denied, defendant . . . will then be free to make an offer of judgment containing the cost shifting provision of Rule 68.").

individual offers of judgment made to putative class representatives.[100] In *Roper*, the Court observed that allowing a defendant to "buy off" the named plaintiffs "would frustrate the objectives of class actions . . . [and] would invite waste of judicial resources by stimulating successive suits."[101] But the Court made this statement in the context of a non-Rule 68 offer of settlement that mooted the plaintiff's claims by offering full recovery.[102] The Court itself limited its holding by noting that "[t]he factual context in which this question arises is important."[103] In *Roper* "judgment was entered in [the plaintiffs'] favor by the court without their consent and the case was dismissed over their continued objections."[104] The defendant in *Roper* sought to use its settlement offer to preclude putative class representatives from seeking appellate review of a denial of class certification.[105] Thus, the plaintiffs were truly being "picked off," as they were involuntarily removed from court via the defendant's offer of full recovery. Where a Rule 68 offer does not seek to moot the plaintiff's claims, the plaintiff retains full control over the case and is able to proceed with certification or accept the offer as she sees fit.[106] The Supreme Court's concern for involuntary dismissal of putative class representatives, as expressed in *Roper*, is thus less compelling in cases where the defendant does not seek to moot the plaintiff's claims.

Even with these justifications, nothing in the Federal Rules of Civil Procedure authorizes a court to strike an unfiled document. Motions to strike can be filed pursuant to Rule 12(f), but this rule only authorizes motions to strike matters from pleadings.[107] Although some courts, in special circumstances, grant motions to strike matters outside of the pleadings, there is no precedent for striking matters that have not even been filed with the court.[108] Courts that strike unfiled Rule 68 offers of

100. See Jancik v. Cavalry Portfolio Servs., LLC, No. 06-3104 (MJD/AJB), 2007 WL 1994026, at *2–*3 (D. Minn. July 3, 2007) (referencing *Roper* in course of granting motion to strike); see also Potter v. Norwest Mortg., Inc., 329 F.3d 608, 612 (8th Cir. 2003) (discussing *Roper*'s treatment of involuntary settlement).

101. *Roper*, 445 U.S. at 339.

102. Id. at 329.

103. Id. at 332.

104. Id.

105. Id. at 329–30.

106. See Bogner v. Masari Invs., LLC, No. CV-08-1511-PHX-DGC, 2009 WL 1395398, at *1 (D. Ariz. May 19, 2009) ("The fact that the Court ultimately would have to approve any settlement of class claims, however, does not preclude Plaintiffs from initially accepting a settlement offer Plaintiffs believe to be adequate and reasonable.").

107. Fed. R. Civ. P. 12(f).

108. See McLaughlin v. Copeland, 435 F. Supp. 513, 519 (D. Md. 1977) ("Although affidavits technically do not constitute pleadings, courts have permitted affidavits to be challenged by motions to strike because the Federal Rules provide no other means to contest their sufficiency."). But cf. Fontell v. Hassett, 870 F. Supp. 2d 395, 415 (D. Md. 2012) ("[A] motion for attorneys' fees is not a pleading subject to a Rule 12(f) motion to strike."); Fisherman's Harvest, Inc. v. United States, 74 Fed. Cl. 681, 690 (2006) ("A motion to strike must be directed to a 'pleading,' which term has been construed narrowly by

judgment seek to avoid this problem by relying on the language of Rule 23(e), which requires court approval of any settlement or dismissal of class claims,[109] or by expanding on circuit court precedent limiting the ability of Rule 68 offers to moot a putative class representative's claims prior to certification.[110]

2. *Reliance on Rule 23(e).* — The seed for Rule 23(e)'s emergence as a procedural justification for striking Rule 68 offers was first planted in a footnote to Justice Brennan's dissent in *Marek v. Chesny*.[111] In footnote forty-nine, Justice Brennan reasoned that "Rule 23(e) requires the court's approval before a class action is compromised" and that this provision is intended to "protect[] class members 'from unjust or unfair settlements affecting their rights by representatives who lose interest or are able to secure satisfaction of their individual claims by compromise.'"[112] Justice Brennan cautioned that Rule 68 "does not mesh with such careful supervision" when it is applied in the class action context.[113] Rule 68 offers, when made to individuals acting as class representatives, "could lead to a conflict of interest between the named representatives and other members of the class" because "[an] offeree's rejection would burden a named representative-offeree with the risk of exposure to heavy liability [for costs and expenses] that could not be recouped from unnamed class members."[114] These words of caution eventually found their way into motions to strike Rule 68 offers made to putative class representatives.[115]

A district court first used Rule 23(e) to justify granting a plaintiff's motion to strike an unfiled offer of judgment in *Janikowski v. Lynch Ford, Inc.*[116] In *Janikowski*, the Northern District of Illinois was asked to strike an offer of judgment made to a putative class representative who alleged

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the courts. Other court documents may not be attacked by a motion to strike." (citation omitted)).

109. See infra Part II.B.2 (discussing district court reliance on Rule 23(e)).

110. See infra Part II.B.3 (analyzing district court expansion of circuit court treatment of Rule 68 offers of full recovery); see also supra notes 64–67 and accompanying text (laying out circuit split that currently exists on this issue).

111. 473 U.S. 1, 33 n.49 (1985) (Brennan, J., dissenting).

112. Id. at 34 n.49 (quoting Moreland v. Rucker Pharmacal Co., 63 F.R.D. 611, 615 (W.D. La. 1974)).

113. Id.

114. Id. at 33–34 n.49 (alterations in *Marek*) (quoting Proposed Court Rules, supra note 40, at 436) (internal quotation marks omitted). The proposed amendment to Rule 68 that Justice Brennan references in this footnote would have amended Rule 68 to explicitly exclude its application in the context of class actions. Proposed Court Rules, supra note 40, at 436. This proposed amendment was not adopted. See Fed. R. Civ. P. 68.

115. See, e.g., Taylor v. Unifund Corp., No. 98-CV-05921, 1999 WL 33541932, at *1 (N.D. Ill. Apr. 30, 1999) ("Plaintiff has moved to strike [defendant's Rule 68 offer] . . . . Plaintiff's principal authority for this position is Justice Brennan's dissent in *Marek v. Chesny* in which he expressed reservations concerning the use of Rule 68 in administering class actions because of Rule 23(e)'s requirement[s] . . . ." (citation omitted)).

116. No. 98 C 8111, 1999 WL 608714 (N.D. Ill. Aug. 5, 1999).

fraudulent execution of vehicle deals against a car dealership.[117] The putative representative claimed that, under Rule 23(e), she was unable to accept the offer of judgment made to her as an individual because of her duty to the putative class she sought to represent.[118] The court agreed and, relying on Rule 23(e), observed that "[s]ettlement of a class action, putative or otherwise, requires the court's approval."[119] Therefore, "[a]s the putative class representative, Janikowski could not consider a settlement offer made to her personally."[120] Because the mere existence of the individual Rule 68 offer threatened the rights of putative class members by exerting pressure on Janikowski, striking the offer was necessary despite the fact that it had not been filed with the court.

Janikowski's reliance on Rule 23(e) is problematic for three reasons. First, even if Rule 23(e) does grant a court the power to protect putative class members from adverse settlements prior to class certification, it does not follow that striking an offer made to the class representative as an individual is the appropriate mechanism for achieving this goal. Because striking something from a party's pleadings is such a severe remedy, "[m]otions to strike . . . are viewed with disfavor and are infrequently granted."[121] Also, there is no language in Rule 23(e) that suggests a court may take any means necessary to protect class members from an adverse settlement. On the contrary, Rule 23(e) requires a court to approve a settlement and observe certain procedural safeguards, but does not grant a court the authority to take broader, prophylactic measures.[122] Likewise, the only rule that explicitly allows a district court to strike matters before it, Rule 12(f), is limited to striking matters from parties' pleadings.[123]

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117. Id. at *1–*2.

118. Id.

119. Id. at *2.

120. Id. Note that the court implies that the filing of Janikowski's class certification prior to the expiration of the Rule 68 offer had some bearing on its decision, drawing attention to the fact that the "motion for class certification was pending during the [time] allotted by Rule 68." Id. The court does not expand on this observation, however, so it is unclear if the court intended to limit its holding to cases where a class certification motion is pending before the court prior to expiration of the Rule 68 offer.

121. Lunsford v. United States, 570 F.2d 221, 229 (8th Cir. 1977) (citing 5 Wright & Miller, Federal Practice and Procedure: Civil § 1380, at 783 (1969)); see also Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd., 647 F.2d 200, 201 (D.C. Cir. 1981) (per curiam) ("[M]otions to strike, as a general rule, are disfavored.").

122. Fed. R. Civ. P. 23(e) (requiring court approval of dismissal of certified class claims and providing five further procedural safeguards that must be implemented by court).

123. Fed. R. Civ. P. 12(f). At least one court acknowledged this limitation to Rule 12(f) and attempted to argue around it by reasoning that "Rule 12(f) does not exclude motions to strike for other reasons; it simply provides a mechanism to deal with deficient pleadings." Johnson v. U.S. Bank Nat'l Ass'n, 276 F.R.D. 330, 336 (D. Minn. 2011). The court went on to conclude "that a motion to strike the offer of judgment is an appropriate procedural mechanism" for exercising the court's responsibility under Rule 23(e) to pro-

Second, the Northern District of Illinois issued an order several months before *Janikowski* on a similar motion to strike but reached the opposite conclusion.[124] In *Taylor v. Unified Corp.*, the court made quick work of the plaintiff's argument that a Rule 68 offer should be stricken as improper when made to a putative class representative.[125] Although the plaintiff drew on Justice Brennan's dissent in *Marek* to support the motion to strike, the court found this argument to be unconvincing.[126] Because "Rule 68 does not on its face exempt class actions from its application," and because "Rule 1 states that all of the civil rules, including Rule 68, govern 'all suits of a civil nature,'" Rule 68 must be allowed to apply in the class action context.[127] The court concluded that Rule 68 offers can be made to putative class representatives, and therefore there was no reason to strike such an offer as improper.[128]

Finally, even if *Janikowski* relied upon a valid interpretation of Rule 23(e) at the time the opinion was handed down, Rule 23(e) was amended four years later to provide that only "[t]he claims, issues, or defenses of a *certified* class" require court approval before settlement or voluntary dismissal.[129] This amendment to Rule 23(e) makes it clear that courts should no longer take steps to protect putative class members prior to class certification. The notes to the amendment explain that the amendment was intended to "resolve[] the ambiguity in [the] former" language that "could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims."[130] This language indicates that the 2003 amendment

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tect the interests of the class. Id. This argument is ultimately unconvincing because Rule 23(e) explicitly limits its application to *certified* classes. Fed. R. Civ. P. 23(e).

124. Taylor v. Unified Corp., No. 98-CV-05921, 1999 WL 33541932, at *1 (N.D. Ill. Apr. 30, 1999). The *Taylor* court falls into camp three. See infra Part II.D (discussing camp three).

125. The court's order is only a few paragraphs long, and gives little credence to the plaintiff's arguments in favor of striking the defendant's Rule 68 offer. See *Taylor*, 1999 WL 33541932, at *1.

126. Id. ("Plaintiff has moved to strike [defendant's Rule 68 offer] . . . . Plaintiff's principal authority for this position is Justice Brennan's dissent in *Marek v. Chesny* . . . ."); see also supra notes 111–115 and accompanying text (discussing footnote forty-nine of Justice Brennan's dissent in *Marek*).

127. *Taylor*, 1999 WL 33541932, at *1 (quoting Fed. R. Civ. P. 1, 28 U.S.C. app. at 78 (2006) (repealed 2007)).

128. Id.

129. Fed. R. Civ. P. 23(e) (emphasis added); see also Wilder Chiropractic, Inc. v. Pizza Hut of S. Wis., Inc., 754 F. Supp. 2d 1009, 1012–13 (W.D. Wis. 2010) (discussing *Janikowski* but observing "Rule 23(e) has since been amended to make it explicit that court approval is required for 'certified class actions' only, so [*Janikowski*'s] reasoning no longer applies" (citing Fed. R. Civ. P. 23 advisory committee's note on 2003 amendment)).

130. Fed. R. Civ. P. 23 advisory committee's note on 2003 amendment; accord Bogner v. Masari Invs., LLC, No. CV-08-1511-PHX-DGC, 2009 WL 1395398, at *1 (D. Ariz. May 19, 2009) ("The fact that the Court ultimately would have to approve any settlement of class claims, however, does not preclude Plaintiffs from initially accepting a settlement offer Plaintiffs believe to be adequate and reasonable.").

to Rule 23(e) was intended to foreclose exactly the sort of precertification protective measures taken by the court in *Janikowski*. Thus, district courts can no longer rely on Rule 23(e) and *Janikowski* as support for granting motions to strike offers of judgment.

3. *Analogizing to Cases Involving Rule 68 Offers of Full Recovery.* — A number of circuits have issued opinions on Rule 68 "pick off" offers that attempt to force a putative class representative out of court by offering full recovery, thus mooting the representative's claims and robbing the court of subject matter jurisdiction.[131] District courts analogize to these circuit court holdings to support granting motions to strike Rule 68 offers of judgment.[132] The district courts reason that these circuit court opinions consider Rule 68 offers to be categorically improper when made to individual plaintiffs prior to a class certification motion. In *Hornicek v. Cardworks Servicing, LLC*, for example, the court relied on the Third Circuit's standard, established in *Weiss*, to state that "[i]t is undisputed that a Rule 68 offer of judgment is improper when directed at an individual plaintiff in a potential class action suit, unless there is 'an undue delay in filing a motion for class certification.'"[133]

But these opinions fail to address the fact that this circuit court precedent deals with an entirely different legal issue: involuntary mootness of a plaintiff's claims. Some district courts explicitly rely on the "case or controversy" language of these circuit opinions even though "case or controversy" is not in dispute where only partial recovery is offered.[134] In

131. See Pitts v. Terrible Herbst, Inc., 653 F.3d 1081, 1090–92 (9th Cir. 2011) (holding "unaccepted offer of judgment did not moot [plaintiff's] case" under reasoning of *Weiss* and because plaintiff's claim was "transitory in nature and may otherwise evade review"); Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1249–50 (10th Cir. 2011) (concluding Rule 68 offer to individual plaintiff did not defeat federal court's jurisdiction to hear motion for class certification); Sandoz v. Cingular Wireless LLC, 553 F.3d 913, 918–21 (5th Cir. 2008) (adopting conclusion of Third Circuit in *Weiss*); Weiss v. Regal Collections, 385 F.3d 337, 347–48 (3d Cir. 2004) (concluding offers do not moot claims where there was no "undue delay" in filing of class certification motion); Holstein v. City of Chicago, 29 F.3d 1145, 1147–48 (7th Cir. 1994) (finding case moot where plaintiff did not file for class certification before offer of full recovery on individual claims was made); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1051 (5th Cir. Unit A July 1981) ("[A] suit brought as a class action should not be dismissed for mootness upon tender to the named plaintiffs of their personal claims, at least when . . . there is pending . . . a timely filed and diligently pursued motion for class certification."); see also supra notes 64–68 and accompanying text (discussing circuit split over this question).

132. See, e.g., Zeigenfuse v. Apex Asset Mgmt., L.L.C., 239 F.R.D. 400, 403 (E.D. Pa. 2006) ("Instead of forcing the named representative to accept the carrot of full individual relief which cannot be done under *Weiss*, defendant is threatening the stick, that is, imposing costs against plaintiff if she is unsuccessful. Either way, a defendant is attempting to 'pick off' the named representative.").

133. No. 10-CV-3631, 2011 WL 1419607, at *1 (E.D. Pa. Mar. 18, 2011) (quoting *Weiss*, 385 F.3d at 348).

134. The standard for finding that a defendant has offered full recovery is high. See Warren v. Sessoms & Rogers, P.A., 676 F.3d 365, 370–73 (4th Cir. 2012) (holding Rule 68 offer must provide full recovery for all recoverable claims brought by plaintiff); Parella v.

Jenkins v. General Collection Co., for example, the court observed that the defendant had "not moved to dismiss Jenkins's claims as moot," so there was no dispute as to whether a "case or controversy" continued to exist between the parties.[135] Nonetheless, the court concluded that the plaintiff's interests in certifying the class preserved "a justiciable case in controversy," relying on opinions where the defendants made a full-recovery offer of judgment and moved to dismiss the plaintiff's claims.[136] Based in part on this reasoning, the court granted the plaintiff's motion to strike the Rule 68 offer.[137]

The coercive pressure exerted by Rule 68 offers that seek to moot a plaintiff's claims is also much stronger than that exerted in these district court cases. In full-recovery cases the plaintiff is literally being forced out of court by the defendant's offer: If the plaintiff's claims are mooted, a district court must dismiss the case even if the plaintiff does not accept the offer.[138] A defendant's ability to unilaterally terminate class certification creates a significant obstacle to the effective operation of Rule 23, as it enables defendants to potentially avoid ever facing class liability.[139]

Ret. Bd. of R.I. Employees' Ret. Sys., 173 F.3d 46, 57 (1st Cir. 1999) (proceeding to merits of case because "possibility of even a partial remedy is sufficient to prevent a case from being moot"). Also, defendants will often make clear that they do not seek to moot a plaintiff's claim in order to avoid unfavorable circuit precedent. See, e.g., Smith v. NCO Fin. Sys., Inc., 257 F.R.D. 429, 433 (E.D. Pa. 2009) ("Defendants contend that their 'amended offer of judgment merely presented a settlement offer to plaintiff' and that 'the sole purpose of the offer is to limit Defendants' responsibility for paying plaintiff's attorney's fees in the event plaintiff is unsuccessful in certifying her case as a class action.'").

135. 246 F.R.D. 600, 601–02 (D. Neb. 2007). The court did note that the defendant's Rule 68 offer included full payment of Jenkins's statutory damages under the Fair Debt Collection Practices Act (FDCPA). Id. at 601; see also 15 U.S.C. § 1692k(a)(2)(A) (2012) (laying out statutory damage amounts under FDCPA). But full statutory recovery does not moot an individual's claims where other forms of recovery, such as actual damages or punitive damages, are sought. As Jenkins sought actual damages (among other recoveries), Complaint and Demand for Jury Trial at 8–10, *Jenkins*, 246 F.R.D. 600 (No. 8:06-CV-00743-LSC-FG3), 2006 WL 4026484, there was no possibility that this offer mooted the plaintiff's claims, and thus the court's discussion of "case or controversy" seems misplaced.

136. *Jenkins*, 246 F.R.D. at 602 (citing Jancik v. Cavalry Portfolio Servs., LLC, No. 06-3104 (MJD/AJB), 2007 WL 1994026, at *4 (D. Minn. July 3, 2007)). In *Jancik*, the defendant argued that the court had no jurisdiction to decide the class certification motion, as full recovery had been offered under Rule 68. *Jancik*, 2007 WL 1994026, at *1–*2. The *Jenkins* court also drew support from the Third Circuit's opinion in *Weiss*, another case where the defendant argued that the plaintiff's claims were mooted by a Rule 68 offer. *Jenkins*, 246 F.R.D. at 602; see *Weiss*, 385 F.3d at 339–40.

137. *Jenkins*, 246 F.R.D. at 602–03. The court also relied heavily on Zeigenfuse v. Apex Asset Management, L.L.C., 239 F.R.D. 400 (E.D. Pa. 2006). *Jenkins*, 246 F.R.D. at 602–03.

138. See supra notes 51–54 and accompanying text (discussing mechanics of dismissal for mootness upon finding offer includes entire amount plaintiff could have obtained at trial).

139. See Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1050 (5th Cir. Unit A July 1981) ("By tendering to the named plaintiffs the full amount of their personal claims each time suit is brought as a class action, the defendants can in each successive case moot the named plaintiffs' claims before a decision on certification is reached.").

Partial-recovery offers, on the other hand, only exert pressure on the plaintiff by raising the possibility that Rule 68's cost-shifting provision might take effect.[140] Far from pushing putative class representatives out of court, the decision of whether to accept the offer or risk the possibility of cost-shifting down the road rests entirely on the plaintiff.[141] For these reasons district court analogies to cases that address full-recovery offers do not support the striking of Rule 68 offers of judgment that do not purport to moot a plaintiff's case.

Additionally, no appellate court has taken the extraordinary step of striking a document not in the pleadings. Ruling that a Rule 68 offer is incapable of mooting a plaintiff's claims, as some circuits have done, is a far cry from ruling Rule 68 offers to be categorically invalid where a plaintiff has made class allegations. Therefore, finding Rule 68 offers to be void when made to a plaintiff seeking to represent a class is an unwarranted expansion of circuit court precedent.[142] In spite of the policy reasons marshaled in favor of striking partial-recovery Rule 68 offers, district courts ultimately lack any compelling authority for taking such an extraordinary step, as the sole procedural support for these opinions is an outdated interpretation of Rule 23(e).

C. *Camp Two: Refuse to Strike the Offer, but Declare the Offer to Be Without Legal Meaning*

A different approach taken by several district courts recognizes that the extraordinary step of striking a matter not filed with the court is an inappropriate way to address the apparent tension between Rules 23 and 68.[143] These courts refuse to strike a Rule 68 offer because it has not been filed with the court, but simultaneously acknowledge policy concerns raised by district courts granting plaintiffs' motions to strike the offer.[144]

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140. Fed. R. Civ. P. 68(d) (providing plaintiff-offeree is liable for defendant-offeror's costs where final judgment is entered in offeree's favor and is less favorable than offer).

141. See Fed. R. Civ. P. 68(a)–(b) (giving offeree power to accept offer or allow it to expire).

142. Taken to its extreme, this position could create wasteful incentives for plaintiffs. Because the mere presence of class claims can immunize a plaintiff against the harmful effects of a Rule 68 offer, plaintiffs may be encouraged to defensively raise frivolous class claims. See Eran B. Taussig, Broadening the Scope of Judicial Gatekeeping: Adopting the Good Faith Doctrine in Class Action Proceedings, 83 St. John's L. Rev. 1275, 1277–78 (2009) (discussing problem of frivolous class claims and suggesting means of curbing them, including heightened certification requirements and good faith standard for class claims).

143. See, e.g., McDowall v. Cogan, 216 F.R.D. 46, 52 (E.D.N.Y. 2003) (denying motion to strike because "there is nothing to strike . . . , as an offer of judgment is not filed with the court until accepted or until offered by a deferred party to prove costs").

144. See id. at 49–52 (refusing to strike offer while noting "considerable debate about the perceived incompatibility of Rule 68 and Rule 23"); see also supra Part II.B.1 (discussing policy justifications for striking offer of judgment made to plaintiff seeking to represent class).

Because the Rule 68 offer is made to the class representative rather than the proposed class itself, these courts conclude that the defendant cannot use the offer to impose costs on the individual plaintiff under Rule 68.[145]

The Eastern District of New York was the first to reach this conclusion.[146] In *McDowall v. Cogan*, the court noted that the language of Rule 68 assumes that the offeree has the authority to unilaterally accept or reject an offer.[147] If an offeree accepts a Rule 68 offer and that offer is filed with the court along with notice of acceptance, "[t]he clerk *must* then enter judgment."[148] Courts have read this mandatory language literally, concluding that a court has no discretion in entering judgment should an offeree accept a Rule 68 offer.[149] But because "Rule 23(e) requires court approval of a class action settlement, in certain circumstances even when the class has not yet been certified," a class representative is unable to act on the settlement offer without first obtaining ap-

145. See *McDowall*, 216 F.R.D. at 50 ("[A]n offer to a named plaintiff alone is not an offer to the adverse party when the adverse party consists of a class."). An alternative theory for declaring a Rule 68 offer invalid relies on the fourteen-day window of consideration that Rule 68 provides for an offeree after she receives an offer. Fed. R. Civ. P. 68(a). Some courts declare a Rule 68 offer invalid but limit their holdings to situations where plaintiffs file class certification motions during the fourteen-day period in which the defendant's Rule 68 offer is pending. See, e.g., Giblin v. Revenue Prod. Mgmt., Inc., No. 07 C 3432, 2008 WL 780627, at *3–*4 (N.D. Ill. Mar. 24, 2008) (concluding that allowing plaintiff to avoid Rule 68 offer by moving to certify before offer expires "comports with both the letter and the spirit of Rule 68"). Giving the plaintiff the power to "avoid the Rule 68 offer by moving for class certification during its pendency," these courts conclude, "adds an appropriate degree of symmetry to the oft-observed asymmetrical bite of Rule 68." Asch v. Teller, Levit & Silvertrust, P.C., 200 F.R.D. 399, 401 (N.D. Ill. 2000). But cf. Marek v. Chesny, 473 U.S. 1, 10 (1985) ("Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits."), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

146. *McDowall*, 216 F.R.D. at 50. Although several earlier district court decisions reached the same ultimate conclusion as *McDowall*—refusing to strike the Rule 68 offer but declaring it to be invalid—none of them relied on this "adverse party" reasoning. See, e.g., Parker v. Risk Mgmt. Alts., Inc., 204 F.R.D. 113, 115–16 (N.D. Ill. 2001) (concluding "there is no point in striking defendant's offer because it is void of legal significance in the instant case" based on its reading of Rule 23(e) and circuit court precedent).

147. 216 F.R.D. at 47–48.

148. Fed. R. Civ. P. 68(a) (emphasis added) ("If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk *must* then enter judgment." (emphasis added)).

149. See Webb v. James, 147 F.3d 617, 621 (7th Cir. 1998) ("Rule 68 operates automatically, requiring that the clerk 'shall enter judgment' . . . . This language removes discretion from the clerk or the trial court as to whether to enter judgment upon the filing of the accepted offer.").

proval of the court.[150] An offer made to a class must be brought to the court for approval, but Rule 68's mandatory language provides no such exception. Therefore the Rule 68 offer is directly at odds with the language of Rule 23(e), implying that an individual Rule 68 offer is improper when made to a plaintiff seeking to represent a class. The court also recognized that a Rule 68 offer "places the personal interests of the named plaintiff at loggerheads with his fiduciary responsibilities to the putative class members," further undermining the purpose of Rule 23.[151]

But the court ultimately concluded that this apparent tension was not irremediable.[152] Rule 68, the court observed, imposes costs on the "offeree," and an offeree, in turn, must be an "opposing party" according to Rule 68(a).[153] Thus, a Rule 68 offer made to an individual plaintiff effectively disappears if class certification is granted. Once a district court "certifie[s] the propriety of [a] class action, the class of unnamed persons described in the certification acquire[s] a legal status separate from the [named class representative]."[154] Under the "relation back" doctrine, certification is deemed to relate back to the filing of the class complaint; a court treats the action as if named class representatives were acting in their representative capacity, rather than as individuals, throughout any precertification proceedings.[155] Rule 68 requires that the offeree be an adverse party in the action and, upon certification, the class, not the class representative, becomes the proper adverse party.[156]

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150. *McDowall*, 216 F.R.D. at 48; see Fed. R. Civ. P. 23(e), 28 U.S.C. app. (2000) (repealed 2003) ("[A] class action shall not be dismissed or compromised without the approval of the court . . . .").

151. *McDowall*, 216 F.R.D. at 49.

152. Id. at 50.

153. Id. Note that, at the time *McDowall* was handed down, Rule 68's language read "adverse party" rather than "opposing party." See Fed. R. Civ. P. 68(a) ("[A] party defending against a claim may serve on an *opposing party* an offer to allow judgment on specified terms . . . ." (emphasis added)); see also supra notes 90–99 and accompanying text (discussing in greater detail tension that arises when Rule 68 offer of judgment is made to plaintiff seeking to represent class under Rule 23).

154. Sosna v. Iowa, 419 U.S. 393, 399 (1975).

155. Id. at 402 n.11; see also U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980) ("If the appeal results in reversal of the class certification denial, and a class subsequently is properly certified, the merits of the class claim may be adjudicated pursuant to the holding in *Sosna*."). But note that the Supreme Court recently clarified that the relation back doctrine is only applicable in the context of Rule 23 class actions, and has no purchase where the class at issue is a statutory one. Genesis HealthCare Corp. v. Symczyk, 133 S. Ct. 1523, 1530 (2013) ("[E]ssential to our decisions in *Sosna* and *Geraghty* was the fact that a putative class action acquires an independent legal status once it is certified under Rule 23. Under the FLSA, by contrast, 'conditional certification' does not produce a class with an independent legal status . . . .").

156. *McDowall*, 216 F.R.D. at 50 ("In certain class actions, the adverse party should be conceived of as the indivisible class; the named plaintiff and other unnamed class members should not be thought of individually as adverse parties.").

The adverse party for purposes of a Rule 68 offer should be the class, according to *McDowall*, even before the class is certified.[157] This is so because Rule 23(e) requires courts to approve settlements entered into prior to certification, so a court must presume that the class action is proper even before the class is certified.[158] It follows, according to the court, that "if a defendant wishes to make an offer of judgment prior to class certification . . . it must [make that offer] to the putative class and not to the named plaintiff alone."[159] And if a defendant "makes its offer only to the class representative, it cannot then seek to impose costs on him . . . pursuant to Rule 68."[160] Numerous district courts have relied on *McDowall* and its reasoning in reaching the same conclusion.[161]

Even under the law as it stood prior to the 2003 amendment to Rule 23, *McDowall* stands on shaky footing. Although *McDowall* concluded that all settlement offers made to putative class representatives prior to a certification decision are invalid, this very interpretation of Rule 68 was proposed but not adopted in 1984.[162] At that time the Rules Advisory Committee declined to modify Rule 68 to prohibit its use in the class certification context.[163] The *McDowall* holding ignored this fact and wrote a class action exception into Rule 68. But even if *McDowall* was good law when it was decided, its reasoning, like that of *Janikowski*, is undermined

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157. Id. ("[A]n offer of judgment made to a named plaintiff . . . 'disappears' once the class is certified. . . . [T]his rule should not be restricted to cases where the class has already been certified."). For the rule that *McDowall* refers to, see Kremnitzer v. Cabrera & Rephen, P.C., 202 F.R.D. 239, 243–44 (N.D. Ill. 2001) ("[T]he 'adverse party' to whom the Rule 68 offer of judgment was directed is not the same 'adverse party' that exists post-certification. Instead, that first 'adverse party' disappears, taking with it the Rule 68 offer of judgment that once pended against it.").

158. See Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled . . . only with the court's approval."); see also Shelton v. Pargo, Inc., 582 F.2d 1298, 1314 (4th Cir. 1978) (determining "before a District Court may consider or approve a voluntary pre-certification settlement of an action begun as a class action" it must determine "whether the settling plaintiff has used the class action claim for unfair personal aggrandizement in the settlement, with prejudice to absent putative class members").

159. *McDowall*, 216 F.R.D. at 51.

160. Id.

161. See, e.g., Hrivnak v. NCO Portfolio Mgmt., Inc., 723 F. Supp. 2d 1020, 1029 (N.D. Ohio 2010) (observing "rule is straight-forward: 'an offer of judgment made to a named plaintiff prior to class certification "disappears" [if] the class is certified'" and "[t]his rule is not 'restricted to cases where the class has already been certified'" (alteration in *Hrivnak*) (quoting *McDowall*, 216 F.R.D. at 50)); Morales-Arcadio v. Shannon Produce Farms, 237 F.R.D. 700, 701 (S.D. Ga. 2006) ("The plain language of Rule 68 provides that an offer of judgment may only be made by 'a party defending against a claim . . . upon the adverse party.'" (quoting Fed. R. Civ. P. 68)).

162. Proposed Court Rules, supra note 40, at 436 ("The last sentence makes it clear that the amended rule [68] does not apply to class or derivative actions.").

163. See id. at 410 ("The Judicial Conference Standing Committee on Rules of Practice and Procedure has not approved these proposals . . . ."). No further action was taken on this proposal.

by the 2003 amendment to Rule 23.[164] Rule 23(e) now specifically states that court approval of a class action settlement is only required for "certified class[es]."[165] This amendment makes it clear that, for purposes of considering settlement prior to class certification, courts should treat the putative class representatives, not the uncertified class, as the proper adverse party.

D. *Camp Three: Refuse to Take Any Action*

The final group of courts refuses to take any action regarding the Rule 68 partial-recovery offer.[166] These district courts find that the question of whether a Rule 68 offer is effective when made against a putative class representative is not ripe before trial.[167] As Rule 68(d) cannot take effect until after judgment is entered for the plaintiff receiving the offer, these courts conclude that a motion to strike such an offer prior to entry of judgment essentially "requests an advisory opinion."[168] Some courts that have taken this route recognize that there does appear to be tension between Rule 68 and Rule 23,[169] but ultimately conclude that "the existence of a problem does not, without more, give [a court] the authority to craft a solution."[170] The justifications provided by courts in support of camps one and two, these courts conclude, "do[] little more than reiter-

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164. See Fed. R. Civ. P. 23 advisory committee's note on 2003 amendment ("The new rule requires approval only if the claims, issues, or defenses of a *certified* class are resolved by a settlement . . . ." (emphasis added)).

165. Fed. R. Civ. P. 23(e); see also supra notes 129–130 and accompanying text (discussing how revision of Rule 23(e) undermined court's reasoning in *Janikowski*).

166. See, e.g., Bryant v. Bonded Accounts Servs., No. Civ.00-1072 RHK/JMM, 2000 WL 33955881, at *4 (D. Minn. Aug. 2, 2000) ("The conflict counsel for Plaintiff seeks to resolve is a hypothetical one.").

167. See White v. Ally Fin. Inc., No. 2:12-cv-00384, 2012 WL 2994302, at *3–*4 (S.D.W. Va. July 20, 2012) ("With nothing to strike, the issue of whether a Rule 68 offer is appropriate in the context of Rule 23 is not ripe."); Stovall v. SunTrust Mortg., Inc., No. RDB-10-2836, 2011 WL 4402680, at *5 (D. Md. Sept. 20, 2011) (refusing to "strike a matter that is not a part of the record and indeed cannot properly be admitted to the record except in a proceeding to determine costs"); Buechler v. Keyco, Inc., No. WDQ-09-2948, 2010 WL 1664226, at *3 (D. Md. Apr. 22, 2010) ("The question whether the rejection of a Rule 68 offer warrants imposition of costs is not ripe until a request for costs is made . . . ."); see also Fed. R. Civ. P. 68(b) ("Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs [after final judgment has been obtained by the offeree].").

168. *Buechler*, 2010 WL 1664226, at *3; see also *Stovall*, 2011 WL 4402680, at *5 ("[B]ecause [the defendant] has not yet filed an unaccepted offer of judgment in a proceeding to determine costs, there is nothing to strike.").

169. See *White*, 2012 WL 2994302, at *3 ("[T]his court acknowledges this apparent conflict [between Rule 68's cost-shifting provision and the class certification process] . . . ."); *Buechler*, 2010 WL 1664226, at *3 (acknowledging plaintiff's argument that offer "is an attempt to frustrate the class action by forcing [plaintiff] to choose between accepting the offer, thus mooting the case, or risk[ing] incurring potentially considerable costs should he receive a judgment less favorable than the offer").

170. *White*, 2012 WL 2994302, at *4.

ate the apparent conflict between two of the Federal Rules of Civil Procedure."[171]

Courts that have refused to take any action regarding the Rule 68 offer also rely on the language of Rule 12(f). Rule 12(f) is the only means by which a federal court can strike documents, "and even then, it only permits striking matters from pleadings."[172] While some courts have used the rule to strike matters that do not appear in the pleadings, they do so without explicit authority from the Federal Rules.[173] Even if a court may strike matters that do not appear in the pleadings under rare circumstances, "[n]othing in the Federal Rules of Civil Procedure allows a court to strike a document that has not been filed with the court."[174] A defendant does not file a Rule 68 offer of judgment when the offer is made. In fact, "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs."[175] Accordingly, a Rule 68 offer of judgment is only filed with the court if the defendant files a notice of the refused offer of judgment and demands costs.[176] Without anything to strike at the pretrial stage, these courts dismiss a plaintiff's motion on procedural grounds and decline to reach substantive arguments regarding the propriety of Rule 68 in the class action context.[177]

Although this approach respects the language of the Federal Rules of Civil Procedure, it fails to give parties a clear picture of the consequences of the Rule 68 offer moving forward in the litigation. Putative class representatives seeking to strike Rule 68 offers made prior to class

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171. Id.; see also supra Part II.B (discussing reasoning of courts that grant motions to strike Rule 68 offers made to putative class representatives).

172. Sanchez v. Verified Person, Inc., No. 11-2548-STA-cgc, 2012 WL 1856477, at *2 (W.D. Tenn. May 21, 2012); see also Fed. R. Civ. P. 12(f) ("The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.").

173. See McLaughlin v. Copeland, 435 F. Supp. 513, 519 (D. Md. 1977) ("Although affidavits technically do not constitute pleadings, courts have permitted affidavits to be challenged by motions to strike because the Federal Rules provide no other means to contest their sufficiency."); cf. Fontell v. Hassett, 870 F. Supp. 2d 395, 415 (D. Md. 2012) ("[A] motion for attorneys' fees is not a pleading subject to a Rule 12(f) motion to strike."); Fisherman's Harvest, Inc. v. United States, 74 Fed. Cl. 681, 690 (2006) ("A motion to strike must be directed to a 'pleading,' which term has been construed narrowly by the courts. Other court documents may not be attacked by a motion to strike." (citation omitted)).

174. *White*, 2012 WL 2994302, at *3.

175. Fed. R. Civ. P. 68(b).

176. Stovall v. SunTrust Mortg., Inc., No. RDB-10-2836, 2011 WL 4402680, at *5 (D. Md. Sept. 20, 2011).

177. See *White*, 2012 WL 2994302, at *4 (concluding Federal Rules of Civil Procedure provide no mechanism for striking offer and "[a]ccordingly, the plaintiff's Motion to Strike is denied"); *Stovall*, 2011 WL 4402680, at *5 (finding plaintiff's motion to strike to be without merit because unaccepted offer had not yet been filed with court); Buechler v. Keyco, Inc., No. WDQ-09-2948, 2010 WL 1664226, at *3 (D. Md. Apr. 22, 2010) (denying plaintiff's motion to strike without reaching merits).

certification proceedings raise legitimate concerns.[178] Especially in cases where an individual plaintiff is seeking relatively insignificant recovery, Rule 68's cost-shifting provision can exert significant pressure to settle before the plaintiff has conducted sufficient discovery to satisfy Rule 23's certification standards.[179] Courts that dismiss a plaintiff's motion without addressing these concerns allow the defendant's Rule 68 offer to exert the full extent of this settlement pressure. As other courts have recognized, forcing a putative class representative to choose between her duty to the class and her personal exposure to liability for costs under Rule 68 undermines the purposes of Rule 23.[180] Although an unaccepted Rule 68 offer may not be filed with the court, the mere presence of such an offer "creates an ongoing conflict between the class representative and the putative class members."[181] Allowing this pressure to go unaddressed may result in viable classes being pushed out of court before a judge can evaluate the merits of certification.[182]

III. THE WAY FORWARD: A FOURTH APPROACH

As outlined in Part II, district courts have taken three approaches in addressing motions to strike Rule 68 offers made to putative class representatives. But each of these approaches leaves something to be desired. Courts that grant motions to strike Rule 68 offers address legitimate concerns about the threat of Rule 68's cost-shifting provision in the class context, but do so without authority from the Federal Rules of Civil Procedure.[183] District courts that refuse to grant motions to strike but instead declare an offer to be without legal significance face the same problem.[184] Finally, courts that refuse to take any action act within the bounds of the Federal Rules of Civil Procedure, but by doing so create uncertainty for parties and allow defendants to exert potentially crushing

178. See supra Part II.B.1 (outlining concerns that arise when Rule 68 offers of judgment are made to plaintiff seeking to represent class).

179. See supra notes 22–25 and accompanying text (discussing Rule 23(a)'s requirements and Rule 23(b)'s typologies).

180. See supra notes 76–82 and accompanying text (outlining tension between putative class representative and putative class when individual Rule 68 offer is made prior to class certification).

181. Boles v. Moss Codilis, LLP, No. SA-10-CV-1003-XR, 2011 WL 4345289, at *3 (W.D. Tex. Sept. 15, 2011). *Boles* goes on to conclude that this conflict "must be resolved immediately in order to prevent it from undermining the purpose of the class action device." Id.

182. See Weiss v. Regal Collections, 385 F.3d 337, 348 (3d Cir. 2004) ("[T]he class action process should be able to 'play out' according to . . . Rule 23 and should permit due deliberation by the parties and the court on the class certification issues.").

183. See supra Part II.B (discussing pros and cons of district court orders granting plaintiffs' motions to strike Rule 68 offers).

184. See supra Part II.C (evaluating cases where courts declare Rule 68 offer void and raising problems with this approach).

pressure on putative class representatives.[185] In short, none of these approaches arrives at a satisfactory resolution to the conflict between Rule 68's cost-shifting provision and Rule 23's class certification process.

This Note endorses a fourth means of controlling the threat of Rule 68 cost-shifting in the class context, one that simultaneously respects the Federal Rules of Civil Procedure and addresses legitimate concerns about the application of Rule 68's cost-shifting mechanism to putative class representatives. Section A outlines this proposed solution by discussing the only case to take this position. Next, section B explains how this approach furthers the goals of both Rule 23 and Rule 68. Finally, section C addresses a likely criticism of this solution.

A. Mey v. Monitronics International

In *Mey v. Monitronics International, Inc.*, the Northern District of West Virginia took a novel approach to addressing the tension between Rule 68's cost-shifting provision and Rule 23's class certification process.[186] The court acknowledged each of the three camps outlined in Part II,[187] but ultimately rejected them all.[188] Despite the justifications provided by courts in favor of striking an individual Rule 68 offer made to a putative class representative,[189] neither the text of the Federal Rules themselves nor the notes of the Rules Advisory Committee indicate that a potential conflict between putative class representatives and the class they seek to represent is grounds for a court to strike an offer of judgment.[190] In fact, as the *Mey* court correctly observed, in 1984 the Rules Advisory Committee rejected a proposal that would have precluded offers of judgment in class actions.[191] The court also dismissed analogies to circuit court opinions holding that Rule 68 offers cannot moot a putative class representative's claims prior to filing of a class certification motion, reasoning that these circuit cases hold "only that an offer of judgment to a

185. See supra Part II.D (examining cases in which courts refused to take action on procedural grounds and consequences of this approach for plaintiffs seeking to represent class).

186. No. 5:11CV90, 2012 WL 983766 (N.D.W. Va. Mar. 22, 2012).

187. Id. at *2–*4; see also supra Part II.B–D (discussing three approaches taken by district courts that have addressed this issue).

188. *Mey*, 2012 WL 983766, at *5.

189. See supra Part II.B.1 (discussing policy justifications used by district courts granting motions to strike Rule 68 offers made to plaintiffs seeking class certification).

190. See Fed. R. Civ. P. 12(f) (providing only that "court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter").

191. *Mey*, 2012 WL 983766, at *5; see Proposed Court Rules, supra note 40, at 436 ("The last sentence makes it clear that the amended [Rule 68] does not apply to class or derivative actions.").

class representative does not moot his claims" and, therefore, does "not bar outright the use of [Rule 68 offers of judgment] in a class action."[192]

Turning to the rationales provided by courts that refuse to grant a plaintiff's motion to strike but nonetheless declare the Rule 68 offer to be without legal meaning, the *Mey* court agreed that, until a defendant files a notice of the refused offer and demands costs, there is nothing on the record to strike.[193] Despite the possibility "that an offer of judgment to a named plaintiff could ignite a conflict between her and a future class," the court ultimately "decline[d] . . . to judicially amend Rule 68 in the context of class actions where no such exception exists either in . . . the Federal Rules or in the notes of the Advisory Committee."[194] Finding no justification for declaring Rule 68 offers to be categorically ineffective when made to class representatives seeking certification, the *Mey* court took no action regarding the challenged Rule 68 offer.[195]

Having found the solutions of both camp one and camp two to be unsatisfactory, the court seemingly arrived at the same resolution as courts in camp three.[196] But unlike camp three, the court in *Mey* went on to explain how the Rule 68 offer would be treated after resolution of the class certification question. Citing *McDowall*, the court observed that, "should this case proceed through class certification, [defendant's] offer of judgment to [plaintiff] will effectively 'disappear.'"[197] Unlike *McDowall*, however, *Mey* also explained what would happen if class certification turns out to be unsuccessful:

> [I]f this case does not proceed to class certification, [defendant]'s offer of judgment will stand, and, if applicable, [plaintiff] will be held to the cost requirements imposed by Rule 68(d). To the extent this possibility requires [plaintiff] to make a difficult choice at an early stage of litigation, this merely reflects the strategic nature of our adversary system and in no way indicates a defect in the Federal Rules of Civil Procedure.[198]

This outcome, as distinguished from camps one and two, is consistent with the 2003 amendment to Rule 23(e).[199] At the same time, this approach provides parties with guidance, missing in camp three, and

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192. *Mey*, 2012 WL 983766, at *5; see also supra notes 131–142 and accompanying text (discussing district court analogies to circuit court precedent).

193. *Mey*, 2012 WL 983766, at *5.

194. Id.

195. Id.

196. See supra Part II.D (discussing district courts that have refused to take any action regarding Rule 68 offers made to putative class representatives on procedural grounds).

197. *Mey*, 2012 WL 983766, at *5 (citing McDowall v. Cogan, 216 F.R.D. 46, 50 (E.D.N.Y. 2003)).

198. Id.

199. See Fed. R. Civ. P. 23(e) (requiring court approval only for settlement of "claims, issues, or defenses of a certified class").

limits the reach of the defendant's "pick off" strategy should the plaintiff successfully certify the putative class.

B. *Benefits of the* Mey *Approach*

The solution adopted in *Mey* strikes a proper balance among the three approaches used by other district courts. Like camp three, *Mey* conforms with the language of the Federal Rules of Civil Procedure and effects Rule 68's prosettlement goals. At the same time, *Mey* addresses the legitimate concerns recognized by camps one and two by protecting meritorious class certification and addressing the mismatch of incentives created by individual offers made to plaintiffs seeking to certify a class. Thus, this approach exercises judicial restraint, protects potentially meritorious putative classes, and exerts appropriate settlement pressure on putative class representatives.

1. *Respects Procedural Limitations of the Federal Rules.* — Unlike the solutions offered by camps one and two, the *Mey* approach stands on firm procedural ground. It refuses to take the extraordinary and disfavored step of granting a motion to strike.[200] It also recognizes the limitations contained in Rule 12(f), which provides that a court may only strike matters that appear in the pleadings.[201] As *Mey* correctly concludes, striking an unaccepted Rule 68 offer is inappropriate because there is nothing to strike, as the offer has not been filed with the court. Whereas courts that fall into camp two judicially amend Rule 68 to prohibit its use where a plaintiff seeks to represent a class,[202] the *Mey* approach recognizes that the Rules Committee considered and refused to adopt exactly such an exception to Rule 68,[203] implying that no such limitation should be read into the rule by federal judges. Additionally, *Mey*'s solution conforms with the language of both Rule 68 (containing no such exception)[204] and Rule 1 (providing that all Rules, unless otherwise specified, shall apply in all federal civil cases)[205] by allowing Rule 68 to apply where class certification does not take place.

2. *Addresses Mismatch of Incentives Caused by Rule 68 "Pick Off" Offers.* — When made to an individual, an offer of judgment forces the offeree to weigh the risk of liability for the offeror's subsequent costs against her own expected recovery should she proceed to trial. Where the offeree is attempting to represent a class, however, she is "forced to balance [her]

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200. See Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd., 647 F.2d 200, 201 (D.C. Cir. 1981) (per curiam) ("[M]otions to strike, as a general rule, are disfavored.").

201. Fed. R. Civ. P. 12(f).

202. See supra Part II.C (discussing courts taking this approach).

203. See Proposed Court Rules, supra note 40, at 436 ("The last sentence makes it clear that the amended [Rule 68] does not apply to class or derivative actions.").

204. Fed. R. Civ. P. 68.

205. Fed. R. Civ. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81.").

personal liability for costs against the prospects of sharing with the class in any recovery."[206] As courts in both camps one and two have recognized, this arrangement creates a mismatch in the offeree's evaluation of the offer: Her liability for costs is personal, whereas the recovery that she hopes to obtain at trial is shared by a class of individuals that does not share in this risk.[207] Even if expected class recovery would substantially outweigh the risk of cost-shifting, the putative class representative's evaluation of the offer may "be tinged by self-interest," causing her to make a decision against the interests of the absent class members.[208]

But under *Mey*'s approach the offeree's interests are more closely aligned with those of the putative class. On the one hand, the offeree considers the merits of her class certification motion, as it is clear to her that successful certification of the class nullifies any Rule 68 offers made to her in an individual capacity.[209] Against the merits of her class certification motion, the offeree weighs the benefits offered to her by the class mechanism.[210] Where class certification is likely, the strategic and financial benefits afforded by the class mechanism likely outweigh the small risk of Rule 68 cost-shifting.[211]

3. *Furthers Prosettlement Purpose of Rule 68.* — Forcing the plaintiff to take a hard look at the viability of her class certification prospects furthers the purposes of Rule 68.[212] By making it clear that an individual Rule 68 offer is rendered ineffective should class certification succeed, *Mey*'s approach focuses the plaintiff's attention on the viability of her class certification motion. As the Supreme Court has noted, Rule 68's plain purpose is to "prompt[] both parties to a suit to evaluate the risks and costs of litigation" and to encourage plaintiffs to refrain from wasting judicial resources on claims that are unlikely to succeed.[213] For an individual seeking to certify a class, the risks and costs associated with the class certification process itself fall within the "risks and costs of litiga-

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206. Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500, 502–03 (N.D. Cal. 1980) (footnote omitted).

207. See supra Part II.B.1 (discussing mismatch of incentives caused when threat of Rule 68 cost-shifting is exerted against putative class representative).

208. *Gay*, 86 F.R.D. at 503.

209. Mey v. Monitronics Int'l, Inc., No. 5:11CV90, 2012 WL 983766, at *5 (N.D.W. Va. Mar. 22, 2012).

210. See supra notes 30–32 and accompanying text (discussing benefits of class certification).

211. See supra notes 30–32 and accompanying text; see also King v. Rivas, 555 F.3d 14, 17 (1st Cir. 2009) (observing Rule 68 offers provide additional benefit to named representatives by providing "valuable bargaining information" about "which defendants are most eager to settle" and how much they are willing to pay in order to avoid further litigation).

212. See Marek v. Chesny, 473 U.S. 1, 5 (1985) ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation."), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

213. Id.

tion" that Rule 68 seeks to reduce, especially as the cost of class certification proceedings continues to rise.[214]

As courts and academics have recognized, class claims are often brought for primarily strategic purposes[215]—sometimes with no real interest in representing the putative class—as the mere presence of a class claim exerts additional settlement pressure on defendants.[216] The *Mey* approach encourages settlement and discourages parties from wasting resources in pursuit of frivolous class claims and motions by preserving the threat of Rule 68.[217] Where a plaintiff does not believe that class certification is likely, the risk of failing to obtain class certification and the threat of Rule 68 cost-shifting will be high, while the benefits offered by class certification, discounted by the low probability of success, will be low.[218] This encourages a plaintiff to accept settlement rather than continue to pursue potentially frivolous class claims. Thus, by focusing the operation of Rule 68's cost-shifting mechanism on the success or failure of class certification, *Mey* encourages settlement and saves judicial resources where class claims are frivolous or class certification is otherwise unlikely.

4. *Permits Certification of Meritorious Classes.* — At the same time, *Mey*'s solution respects the purposes of Rule 23 by providing incentives for plaintiffs with worthwhile class claims to continue forward with class certification rather than accept an individual Rule 68 offer. By messaging to putative class representatives that the adverse effects of Rule 68 are barred if certification is successful, courts can encourage plaintiffs to pursue class certification motions that stand a good chance of success. Where class certification is likely, cost-shifting is unlikely to occur and the

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214. See supra notes 26–29 and accompanying text (discussing increased difficulty of class certification after *Wal-Mart*).

215. See, e.g., Taussig, supra note 142, at 1283–85, 1292–95, 1350–56 (discussing problem of frivolous class claims and suggesting means of curbing abuse, including heightened certification requirements and good faith standard for class claims).

216. See Robert G. Bone & David S. Evans, Class Certification and the Substantive Merits, 51 Duke L.J. 1251, 1255 (2002) ("In many cases, the mere decision to certify creates intense pressure for defendants to settle, and this settlement leverage makes the class action attractive to plaintiffs with frivolous and weak claims."); supra note 31 and accompanying text (discussing settlement pressure exerted by class claims).

217. See Mey v. Monitronics Int'l, Inc., No. 5:11CV90, 2012 WL 983766, at *5 (N.D.W. Va. Mar. 22, 2012) ("[I]f this case does not proceed to class certification, [defendant]'s offer of judgment will stand, and, if applicable, [plaintiff] will be held to the cost requirements imposed by Rule 68(d).").

218. This reasoning follows the basic economic model of litigation, which assumes that plaintiffs determine the value of a case by discounting their expected recovery by the perceived probability of obtaining recovery and then subtracting expected transaction costs. See generally William M. Landes, An Economic Analysis of the Courts, 14 J.L. & Econ. 61 (1971); Richard A. Posner, An Economic Approach to Legal Procedure and Judicial Administration, 2 J. Legal Stud. 399 (1973); George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984).

benefits offered by class certification will likely outweigh this discounted risk.[219]

C. *Possible Criticism of the* Mey *Approach*

One likely criticism of this approach is that it essentially gives an advisory opinion to the parties by informing them of how the court would treat a Rule 68 offer should the class be certified. It is true that federal courts "do not render advisory opinions" because adjudication requires "concrete legal issues, presented in actual cases, not abstractions."[220] But as numerous courts have held, a Rule 68 offer made to a putative class representative immediately "creates an ongoing conflict between the class representative and the putative class members."[221] The "pick off" pressure exerted by the threat of cost-shifting creates an actual controversy between the offeree and offeror at the moment the Rule 68 offer is made. "[A] precertification offer of judgment has significant ramifications in a putative class action, long before a defendant seeks costs under Rule 68(d)."[222] Furthermore, a court can redress the threat caused by uncertainty by clarifying the effect of class certification on an individual Rule 68 offer made to a putative class representative.[223] Thus the *Mey* approach offers legitimate relief to plaintiffs without running afoul of the general prohibition against advisory opinions.[224]

CONCLUSION

Though the Federal Rules of Civil Procedure were intended to be read in harmony, district courts across the country have struggled with the tension that arises when Rule 68 offers are made to individuals seeking class certification under Rule 23. Judicial solutions have been diver-

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219. The higher the probability of successfully obtaining class certification, the lower the plaintiff's perceived risk of liability. See supra note 218 (discussing basic economic model of litigation).

220. Golden v. Zwickler, 394 U.S. 103, 108 (1969) (quoting United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 89 (1947)) (internal quotation marks omitted).

221. Boles v. Moss Codilis, LLP, No. SA-10-CV-1003-XR, 2011 WL 4345289, at *3 (W.D. Tex. Sept. 15, 2011); see also Lamberson v. Fin. Crimes Servs., LLC, No. 11-98 (RHK/JJG), 2011 WL 1990450, at *4 (D. Minn. Apr. 13, 2011) ("Because there are currently meaningful legal disputes regarding the effect of the offer of judgment, the motion to strike is ripe for adjudication.").

222. *Lamberson*, 2011 WL 1990450, at *4.

223. See supra text accompanying notes 197–198 (demonstrating how *Mey* approach removes uncertainty and decreases "pick off" pressure on putative class representative).

224. Cf. Declaratory Judgment Act, 28 U.S.C. § 2201 (2006) (providing federal courts "may declare the rights and other legal relations of any interested party, whether or not relief is or could be sought," and "[a]ny such declaration shall have the force and effect of a final judgment"); Teva Pharm. v. Novartis Pharm., 482 F.3d 1330, 1338 (Fed. Cir. 2007) (holding federal courts are able to issue declaratory judgment to plaintiff where "actual or imminent injury [is] caused by the defendant" and injury "can be redressed by judicial relief").

gent and ultimately unsuccessful in addressing the tension. Courts that strike Rule 68 offers made to putative class representatives or declare those offers to be ineffective do so without justification under the Federal Rules of Civil Procedure and in contradiction to the Rules Advisory Committee. At the same time, courts that refuse to take any action fail to address the legitimate concerns that arise when an individual Rule 68 offer is made to a putative class representative prior to class certification. These courts act within procedural boundaries, but risk undermining the salutary purposes of both Rule 23 and Rule 68. By advocating for a fourth approach, this Note suggests a way for courts to simultaneously respect these procedural boundaries and control the threat of Rule 68's cost-shifting mechanism in the context of putative classes. With a few words, district courts could encourage plaintiffs to settle where class claims are frivolous, promote pursuance of class certification where class claims are meritorious, and exercise judicial discretion by refusing to strike unfiled offers of settlement.