The Satisfied Class Plaintiff: How Individual Settlement Offers to Putative Class Plaintiffs Can Impact Class Litigation in California

On January 20, 2016, the United States Supreme Court issued its opinion in *Campbell-Ewald Company v. Gomez*.

Campbell-Ewald presented the issue of whether a defendant in a putative class action can extend a Rule 68 offer to a putative class plaintiff for the full amount sought and then successfully move to dismiss the class action as moot, even if the plaintiff rejects the offer. This strategy for defending against a class litigation—making an offer of full relief to the named plaintiff and then moving to dismiss when it is rejected—is often referred to as “picking off the plaintiff.” In 2015, four federal circuits rejected this strategy. The Supreme Court likewise rejected this “pick off” maneuver in *Campbell-Ewald*, holding that an unaccepted offer of full relief to a putative class plaintiff does not moot a class claim.

The plaintiff in *Campbell-Ewald* brought a putative class action in the Central District of California against an advertising communications agency for allegedly sending unsolicited text messages in violation of the Telephone Consumer Protection Act. In the course of the litigation, the defendant extended an individual settlement offer under Rule 68 in the full amount sought by that individual plaintiff, and the plaintiff rejected the offer by allowing it to lapse. The defendant then moved to dismiss, arguing that the plaintiff’s claims became moot once he rejected the offer. Both the district court and the Ninth Circuit rejected this pick-off tactic, holding that the plaintiff’s claim remained live. After hearing oral arguments in late 2015, the Supreme Court affirmed. Analyzing the issue under basic contract principles, the court held that, because a rejected Rule 68 offer has “no continuing efficacy,” such an offer cannot “render a controversy moot.”

While the *Campbell-Ewald* decision is clear with respect to unaccepted offers of full relief, the court left open some important questions about the impact of individual settlement offers on class litigation. For example, the court expressly declined to decide whether the result would have been different if the defendant had placed the full amount of the plaintiff’s individual claim in an account payable to the plaintiff. In addition, despite discussion at oral argument about whether an offer of full relief might be an important factor in determining whether to certify a class under Rule 23, the court did not address the issue in its opinion.

By disallowing the picking-off-the-plaintiff strategy in *Campbell-Ewald*, the United States Supreme Court mimicked well-established California law. The Supreme Court of California long ago rejected a similar attempt to pick off the plaintiff as a method for defending against class actions in *La Sala v. American Savings & Loan Association*. In *La Sala*, a plaintiff sued a defendant on behalf of a putative class, seeking injunctive relief, declaratory relief, and damages. When the defendant offered to halt the complained-of conduct as to the named plaintiff, the trial court dismissed the action, explaining that no controversy remained.

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2. Federal Rule of Civil Procedure 68 is a cost-shifting rule that encourages settlement.
5. See *Bais Yauko of Spring Valley v. ACT, Inc.* (1st Cir. 2015) 798 F.3d 46, 51; *Hooks v. Landmark Indus.*, Inc. (5th Cir. 2015) 797 F.3d 309, 314-15; *Chapman v. First Index, Inc.* (7th Cir. 2015) 796 F.3d 783, 786-87; *Taneasi v. New Alliance Bank* (2nd Cir. 2015) 786 F.3d 195, 199-200.
9. Id. at p. 668.
10. Ibid.
11. Id. at p. 672.
12. Id. at pp. 670-671.
13. Id. at p. 672.
16. Id. at p. 870.
17. Ibid.
The Supreme Court of California held that the trial court erred in dismissing the putative class action.\textsuperscript{18} It reasoned that granting dismissal because of an unaccepted offer to a named plaintiff would nearly always allow a defendant to avoid class litigation, thereby providing relief only to those plaintiffs with the resources and wherewithal to bring individual actions.\textsuperscript{19} The court held that this would contravene a basic purpose of the class action: to provide judicial relief to individuals who lack the resources to assert claims on their own.\textsuperscript{20}

Despite the denunciation of the picking-off-the-plaintiff strategy by the Supreme Court of California and the United States Supreme Court, individual settlement offers to putative class plaintiffs can meaningfully affect class litigation in California state courts. This article examines the other ways in which individual settlement offers to putative class plaintiffs might impact potential class actions in California. First, it discusses how a voluntary settlement agreement with a putative class plaintiff alters the availability of class litigation. Second, it analyzes how an individual settlement offer can impact a court's class certification decision. Third, it explores how a California Code of Civil Procedure section 998 ("Section 998") settlement offer might deter a plaintiff from pursuing class claims.

**Voluntarily Accepted Settlements**

In *La Sala*, the Supreme Court of California determined that a defendant could not avoid a class action simply by offering full relief to a putative class plaintiff.\textsuperscript{21} It did not decide, however, whether a class action can proceed after a named plaintiff voluntarily accepts an individual settlement offer. This situation is distinct from a unilateral attempt to pick off the plaintiff because it involves the named plaintiff actually accepting the defendant's offer of relief in exchange for dismissal of the plaintiff's individual claims.

**Standing to Appeal Denial of Class Certification**

Two recent California Courts of Appeal decisions have held that when a putative class representative settles her individual claims following a denial of class certification, she loses standing to appeal the decision.

In *Larner v. Los Angeles Doctors Hospital Associates, LP*, the plaintiff was a nurse who sued her former employer on behalf of a putative class for violations of wage and hour laws.\textsuperscript{22} The plaintiff moved for class certification, which the trial court denied.\textsuperscript{23} The plaintiff appealed the denial of class certification but settled her individual claims while the appeal was pending.\textsuperscript{24} On appeal, the defendant argued that the settlement mooted the plaintiff's class claims.\textsuperscript{25} The court agreed with the defendant and dismissed the appeal without reaching the merits.\textsuperscript{26} It reasoned that the plaintiff no longer possessed a personal stake in the litigation.\textsuperscript{27} The court distinguished the case from *La Sala*, explaining that the policy considerations preventing defendants from picking off named plaintiffs did not apply where the plaintiff voluntarily settled her claims.\textsuperscript{28}

In *Watkins v. Wachovia Corporation*, another California Court of Appeal came to a similar conclusion.\textsuperscript{29} As in *Larner*, the plaintiff sued her former employer on behalf of a putative class for wage and hour violations and moved for class certification.\textsuperscript{30} The trial court denied the plaintiff's motion for class certification, holding that common issues did not predominate.\textsuperscript{31} The parties then settled the plaintiff's individual wage and hour claims.\textsuperscript{32} In the settlement, the plaintiff agreed to dismiss her individual claims, but explicitly retained her right to assert claims on behalf of the class.\textsuperscript{33} The plaintiff then appealed the trial court's denial of class certification.\textsuperscript{34} Despite the settlement agreement's explicit provision allowing the plaintiff to proceed with her class action, the court dismissed the appeal as moot.\textsuperscript{35} The court held that by voluntarily entering into a settlement

\textsuperscript{18} Ibid.
\textsuperscript{19} Id. at p. 873.
\textsuperscript{20} Ibid.
\textsuperscript{21} *La Sala*, supra, 5 Cal.3d at p. 868.
\textsuperscript{22} *Larner*, supra, 168 Cal.App.4th at p. 1294.
\textsuperscript{23} Id. at p. 1295.
\textsuperscript{24} Id. at p. 1294.
\textsuperscript{25} Id. at p. 1296.
\textsuperscript{26} Id. at p. 1300.
\textsuperscript{27} Id. at p. 1304.
\textsuperscript{28} Ibid.
\textsuperscript{29} *Watkins*, supra, 172 Cal.App.4th at p. 1592.
\textsuperscript{30} Id. at p. 1581.
\textsuperscript{31} Id. at p. 1584.
\textsuperscript{32} Id. at p. 1585.
\textsuperscript{33} Id. at p. 1584.
\textsuperscript{34} Id. at p. 1585.
\textsuperscript{35} Id. at pp. 1588, 1592.
on her individual claim, the plaintiff no longer possessed any claim against the defendant. The court explained that the individual claim and class claim were not independent. Rather, the individual claim was part of the class action. The plaintiff could not proceed on behalf of a class of which she was not a part. As in Learner, the court distinguished voluntary settlements from unilateral attempts to pick off the plaintiff. Since voluntary settlements require the plaintiff's assent, they do not pose the same danger that defendants will unilaterally be able to suppress class actions.

**Settling Before Class Certification**

While entering into a settlement agreement pending appeal of a denial of class certification moots a class action, California courts have not weighed in on whether entering into such an agreement preceding the decision on a motion for class certification would have the same effect.

On the one hand, the reasoning in Learner and Watkins applies just as well to settlement offers accepted at the trial court level. While California courts do not mandate the same kind ofstanding required by federal courts under Article III, California courts must, in most situations, dismiss cases that no longer present actual controversies. Once a plaintiff voluntarily settles her claims, she no longer possesses an injury in need of redress. The plaintiff has weighed the costs and benefits of pursuing her claim and chosen to accept a settlement instead. The court in Watkins explained that a representative plaintiff must belong to the class she purports to represent. After settling her individual claims, a plaintiff arguably no longer belongs to the putative class, suggesting that she should not be allowed to proceed as the class's representative plaintiff.

On the other hand, a representative plaintiff has a duty to act in the best interests of the class even before class certification. As the Supreme Court of California explained in LaSala, "[e]ven if a named plaintiff receives all the benefits that [she] seeks in the complaint, such success does not divest [her] of the duty to continue the action for the benefit of others similarly situated." While the court made this statement in the context of an unaccepted offer of relief, this language suggests that a named plaintiff could continue to pursue a class action despite actually accepting an individual settlement offer. This continuing duty to the class may have been lacking in Learner and Watkins, where trial courts had already determined that class actions were not the proper vehicles for litigating the plaintiffs' claims. That said, the courts in Learner and Watkins did not rely on the trial court's denial of class certification in dismissing the appeals. They focused instead on the plaintiffs' decisions to enter into voluntary settlements. Since a plaintiff cannot represent a class to which she does not belong on appeal, there is little reason to believe she can represent such a class at the trial court level.

If a named plaintiff's acceptance of a settlement offer does moot a class action, then defendants may be able to limit their exposure to class litigation by offering settlements to individual plaintiffs. Attorneys must present settlement offers to their clients. Clients decide whether or not to settle, not their lawyers. Thus, a named plaintiff might be persuaded to accept a generous settlement offer, thereby mooting her class claims.

**The Impact of Offers—Accepted or Unaccepted—on Class Certification**

Whether or not a voluntary, individual settlement with a named plaintiff moots a potential class action, offers of relief can affect a court's class certification decision. In moving for class certification, the plaintiff must show that the class is ascertainable to litigate an issue. [Citation.]

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36. Id. at p. 1589.  
37. Ibid.  
38. Ibid.  
39. Id. at p. 1592.  
40. Id. at p. 1591.  
41. Ibid.  
42. See Roos v. Honeywell International, Inc. (2015) 241 Cal.App.4th 1472, 1484-85 ("Rather than being bound by the exacting requirements of 'concrete interest' of Article III, California courts are guided by 'prudential' considerations in evaluating a party's ability to litigate an issue. [Citation.]")  
43. See Wilson & Wilson v. City Council of Redwood City (2011) 191 Cal.App.4th 1559, 1574 ("The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness). [Citations.]"). When events render a case moot, the court, whether trial or appellate, should generally dismiss it. [Citations.].")  
45. LaSala, supra, 5 Cal.3d at p. 1116.  
46. California Rule of Professional Conduct 3-510.
and that it possesses a well-defined community of interest. The community of interest requirement hinges on three factors: (1) whether common questions of law or fact predominate over individual questions; (2) whether the class representative has claims or defenses typical of the class; and (3) whether the class representative can adequately represent the class. An offer of relief to an individual plaintiff does not per se render the plaintiff unfit to represent the class. But it may have enough of an impact on the typicality and adequacy factors to convince a trial court to deny class certification in certain circumstances.

**Typicality**

A representative plaintiff seeking class certification must establish that her claims are typical of the proposed class. To satisfy this requirement, “a plaintiff seeking to maintain a class action must be a member of the class [she] claims to represent.” In addition, the named plaintiff must have sustained the same or similar damages as the rest of the proposed class. A defendant who has made a full offer of relief to the named plaintiff can argue that the plaintiff no longer possesses an injury, making her claims atypical of the proposed class.

The typicality argument is especially compelling when the plaintiff actually accepts a settlement offer. In that situation, the plaintiff not only lacks an injury, but also a live individual claim. Courts in other contexts have dismissed class actions after dismissing plaintiffs’ individual claims. For example, in *Pfizer Inc. v. Superior Court*, a California Court of Appeal held that class certification was improper where the putative class plaintiff lacked standing to bring his unfair competition claim. Similarly, in *Chern v. Bank of America*, the Supreme Court of California dismissed a class action for want of a proper representative after affirming the trial court’s grant of summary judgment against the putative class plaintiff on her breach of contract claim.

Together, *Pfizer* and *Chern* support the proposition that dismissal of a putative class plaintiff’s individual claim weighs heavily against class certification. When a plaintiff no longer has a live claim due to settlement, a defendant can argue that the plaintiff cannot be typical of the proposed class.

**Adequacy of the Class Representative**

To adequately represent a class, a representative plaintiff must be able to vigorously pursue the class’s claims. The representative plaintiff’s interests also must not conflict with those of other class members. An offer of relief to a named plaintiff in the full amount sought may diminish her adequacy as a representative in both respects.

First, the offer of relief may satisfy the plaintiff to such a degree that she will not devote enough effort to the class action. Once the plaintiff’s injury has been remedied, she no longer has a serious stake in the litigation. She therefore may choose not to pursue vigorously the class’s claims.

Second, the offer of relief could cause the representative plaintiff’s interests to clash with the rest of the class. For example, imagine a typical class action in which the named plaintiff seeks both injunctive relief and money damages. If the defendant halts the complained-of conduct as to the named plaintiff, the plaintiff no longer has a personal incentive to fight for injunctive relief and may instead focus on obtaining damages. The rest of the class, however, may be more interested in obtaining injunctive relief than a damage award. In this situation, the defendant’s offer of relief divides the plaintiff’s interests to clash with the rest of the class.

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47. *Nebad v. Mukasey* (9th Cir. 2008) 535 F.3d 962, 970.
51. See *Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.* (2008) 160 Cal.App.4th 528, 548 (remanding to trial court so that it could determine whether the plaintiff could adequately represent the class after the defendant offered him full relief).
52. *Lockheed*, supra, 29 Cal.4th at p. 1104.
54. Id. at p. 664.
55. See *Ticconi*, supra, 160 Cal.App.4th at p. 548; *Wallace v. GEICO General Ins. Co.* (2010) 183 Cal.App.4th 1390, 1403 (although the defendant’s offer of relief did not deprive the plaintiff of standing, the court instructed the trial court to “take into account the fact of [the settlement offer when deciding, in connection with class certification, whether the plaintiff will adequately represent the class.” [Citation.]”). Notably, on remand, the trial court in *Wallace* denied the certification motion in part because the plaintiff had been reimbursed and thus failed to satisfy the typicality requirement.
58. *La Sala*, supra, 5 Cal.3d at p. 872.
59. Ibid.
61. *La Sala*, supra, 5 Cal.3d at p. 872.
class members' interests such that the representative plaintiff's desires differ from the rest of the class. When the interests of class members diverge, class litigation loses its status as a superior mechanism for resolving a dispute.62

Since an offer of individual relief diminishes both the typicality and adequacy of a class representative, such an offer might play a significant role in a trial court's class certification determination. It should be noted, however, that a denial of class certification after an offer of relief does not necessarily foreclose class litigation. When a court denies class certification because of an offer to the named plaintiff, it could provide an opportunity for the complaint to be amended to add a new class representative.63 Even so, defendants may be able to use offers of relief as strategic tools to hinder class certification.

Section 998 Offers to Putative Class Plaintiffs

Defendants also may be able to limit their exposure to class litigation by making Section 998 offers to putative class plaintiffs. Similar to Federal Rule 68, California Civil Code Section 998 provides for cost-shifting following particular settlement offers.64 Under Section 998, an offeror party may serve a written settlement offer on her adversary.65 The offeree party can choose whether to accept the offer. But if the offeree rejects the offer and ultimately receives a less favorable judgment, she will have to pay the costs the offeror incurs after service of the Section 998 offer.66 The statute is intended to encourage parties to settle lawsuits.67 It does so by advancing both a "carrot" and a "stick."68 It encourages parties to make reasonable settlement offers so that they can recover costs when the opposing party receives a judgment less favorable than their offer.69 It discourages parties from rejecting reasonable offers by forcing an offeree to pay the offeror's costs if she fails to obtain a more favorable result.70

California courts have not decided whether parties to putative class actions may make Section 998 offers, but some indicators suggest that they are available. First, Section 998 is silent as to its application to putative class actions, so there is no obvious reason why Section 998 offers would not be permitted. Second, courts look to the purpose of Section 998 when confronting a new question of the statute's applicability.71 The purpose of encouraging settlement seems particularly germane in putative class actions, which can be unwieldy and protracted.

Some complexity arises where the putative class plaintiff succeeds in certifying a class. In order for a Section 998 offer to be effective, it must expressly apportion the settlement proceeds among the plaintiffs.72 In Nelson v. Pearson Ford Company, the plaintiffs certified two classes in a civil consumer action.73 Following class certification, the defendant extended a lump-sum Section 998 offer to the classes.74 The plaintiffs did not accept the offer and ultimately recovered slightly less than the defendant offered.75 The defendant then moved for costs, arguing that the plaintiffs obtained a judgment less favorable than the Section 998 offer.76 The court rejected the defendant's argument.77 Even though the court assumed, without deciding, that Section 998 offers could be made in certified class actions, it held that the defendant's Section 998 offer was invalid.78 It explained that a Section 998 offer "to multiple plaintiffs is only valid if it is expressly apportioned between them and not conditioned on acceptance by all of them."79 Because the defendant failed to apportion the Section 998 offer among the two classes, the offer was invalid, and the court denied the defendant's cost request.80

Under Nelson, a Section 998 offer made to a putative class plaintiff may become ineffective upon the

63. La Sala, supra, 5 Cal.3d at p. 872.
65. § 998, subd. (b).
66. § 998, subd. (c).
68. Ibid.
69. Ibid.
70. Ibid.
71. Ibid.
73. Id. at p. 994.
74. Id. at p. 1024.
75. Ibid.
76. Ibid.
77. Id. at p. 1025.
78. Ibid.
79. Ibid.
80. Id. at p. 1026.
granting of class certification. Once a class becomes certified, the parties to the action change. Instead of a suit between the plaintiff and the defendant, it becomes a suit between the defendant and an entire class of plaintiffs. The original Section 998 offer therefore will not have expressly apportioned the offer among the plaintiffs.

That said, Section 998 offers could be quite impactful where the putative class plaintiff has not certified a class. Assuming Section 998 offers are permitted in putative class actions, making such an offer can significantly increase the plaintiff's risk in pursuing class claims. Courts have wide discretion in choosing whether to grant class certification, creating less certainty about a plaintiff's ability to certify a class. Without class claims, a plaintiff may have trouble obtaining an award larger than the defendant's Section 998 offer. Moreover, as detailed above, an offer of relief may make a court less likely to certify a class with the named plaintiff as the representative. A defendant therefore may be able to use a Section 998 offer as a dual weapon. It could both make class certification less likely and increase the plaintiff's risk in pursuing class claims.

Conclusion

Individual settlement offers can have a substantial effect on class litigation in California. While the Supreme Court of California has taken a hard stance against unilateral attempts to pick off the plaintiff followed by a motion to dismiss based on mootness, defendants still may be able to use individual settlement offers to limit their exposure to class litigation.