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## Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers

Nantiya Ruan

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# Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers

Nantiya Ruan

63 Vand. L. Rev. 727 (2010)

*In race and sex discrimination class actions, if a defendant employer makes a Rule 68 offer of judgment to the named plaintiffs, courts routinely refuse to dismiss the class claims. In stark contrast, in collective actions for failure to pay lawful wages, if a defendant employer makes a Rule 68 offer of judgment, courts will often dismiss the entire collective action as having been mooted by the named plaintiffs' recovery. The outcome of such a dichotomy is that low-wage workers are increasingly unable to challenge unlawful wage violations successfully because the aggregation mechanism is too easily defeated. Without an ability to group wage and hour claims in an aggregate action, multitudes of wage violations will go unheard because individual wage claims do not attract the attention of plaintiffs' attorneys.*

*This failure to protect an underprivileged group of low-wage workers—workers the laws explicitly try to protect—is striking, and it effectively subverts the statutory protections in place since the 1930s to combat wage theft by employers. By most accounts, the civil rights movement of the 1960s was successful in addressing discriminatory practices through not only substantive statutory rights, but also through procedural mechanisms by which those rights could be vindicated easily and appropriately via access to the courts.*

*In contrast, the right of low-wage workers to receive what they lawfully earn has a longstanding statutory remedy but an antiquated procedural mechanism. That procedural mechanism diminishes their ability to fully vindicate their rights. Furthermore, it is also now being cited as the structural difference that allows another procedural rule, Rule 68, to deny standing in federal court at the outset.*

*This Article examines this rising phenomenon by first outlining the pressing societal need for collective litigation to ensure*

*that adequate and available legal remedies remain for underrepresented groups such as low-wage workers. It also compares the procedural mechanisms for bringing aggregate litigation—Rule 23 class actions and § 216(b) collective actions—and examines how Rule 68 has both intended and unintended consequences when used by defendants to battle collective actions. Lastly, the Article identifies how federal courts have treated Rule 68 offers of judgment inconsistently in the class action context compared to the § 216(b) collective action context.*

# Facilitating Wage Theft: How Courts Use Procedural Rules to Undermine Substantive Rights of Low-Wage Workers

Nantiya Ruan\*

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## INTRODUCTION

If the rising number of lawsuits against major corporate employers is any indication, the United States is suffering a crisis of wage theft against its workers. Claims by workers that they are not being paid lawfully have quadrupled over the last ten years—increasing by 73 percent from 2006 to 2007 alone<sup>1</sup>—without any corresponding increase in protections in the wage and hour laws. What has changed? Perhaps employers with dwindling revenues are taking the bite out of the backs of their workers. Or perhaps plaintiffs’ attorneys are becoming increasingly savvy at bringing these suits successfully. Either way, management attorneys are becoming correspondingly creative in finding ways to block them—including use of a tactic that this Article identifies as troubling.

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1. JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 150 tbl.C-2A (2007), available at <http://www.uscourts.gov/judbus2007/contents.html> (noting that there were 4,207 claims under the Fair Labor Standards Act in 2006, and that the number rose to 7,310 in 2007).

Federal Rule of Civil Procedure 68 (“Rule 68”) offers of judgment are being used with increased frequency by employers attempting to avoid liability for wage theft in cases involving numerous plaintiffs. When defendants make offers of judgment that equal or exceed the named plaintiffs’ maximum recovery in collective actions brought under the opt-in provision of 29 U.S.C. § 216(b) (for violations of the wage rights provisions of the Fair Labor Standards Act (“FLSA”)),<sup>2</sup> courts frequently rule the collective claims moot and dismiss the collective suit. By making early offers of judgment in collective actions,<sup>3</sup> employers seek to “pick off” named plaintiffs and thereby avoid compensating all of the workers to whom they have failed to pay correct wages.

By contrast, the courts have not allowed this same Rule 68 tactic similarly to preempt Rule 23 class actions. Indeed, courts have historically been critical of defendants attempting to use Rule 68 to avoid liability in Rule 23 class actions, such as those brought under Title VII, because such attempts “would frustrate the objectives of class actions.”<sup>4</sup> Perhaps because Title VII class actions and Rule 23 have a more celebrated statutory history within the civil rights tradition,<sup>5</sup> these types of suits have received judicial protection from Rule 68 abuses.<sup>6</sup>

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2. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2010).

3. “Collective actions” refer to suits utilizing the collective mechanism for grouping multiple similar claims in one lawsuit, under 29 U.S.C. § 216(b), as distinct from class actions brought under Federal Rule of Civil Procedure 23. Section 216(b) lawsuits include violations under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. §§ 201–219, the Equal Pay Act (“EPA”), 29 U.S.C. § 206(d) (2006), and the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. §§ 621–634 (2006). Under each of these federal statutes, a Rule 23 class action is not permitted. Instead, these statutes require that all employees covered by the class definition opt in to the lawsuit by giving written consent to join the class within the opt-in period. See 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).

4. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980); see also *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004) (considering and rejecting the defendant’s claim that a Rule 68 offer of settlement to the named plaintiff in a class action mooted the entire action); *Morgan v. Account Collection Tech., L.L.C.*, No. 05-CV-2131 (KMK), 2006 U.S. Dist. LEXIS 64528, at \*10 (S.D.N.Y. Aug. 29, 2006) (“[W]hen a class has been certified, mootness of the named plaintiffs’ personal claim does not render the entire controversy moot.”). *But see Davis v. Ball Mem’l Hosp. Ass’n*, 753 F.2d 1410, 1416–17, 1420 (7th Cir. 1985) (affirming a decertification of the plaintiff class after a settlement between one of the defendants and the class representative plaintiffs and dismissing the claim as moot).

5. For a discussion of the civil rights history of Rule 23 and Title VII class actions, see Nantiya Ruan, *Bringing Sense to Incentives: An Examination of Incentive Payments to Named Plaintiffs in Employment Discrimination Class Actions*, 10 EMP. RTS. & EMP. POL’Y J. 395, 400–04 (2006).

6. See *Deposit Guar. Nat’l Bank*, 445 U.S. at 339 (discussing the policy against finding mootness in the context of a Rule 68 offer to settle to the class representative); *Hennessey v.*

This Article examines this rising phenomenon first by outlining in Part I the pressing societal need for collective litigation to ensure that adequate and available legal remedies remain for underrepresented groups, such as low-wage workers. Part II compares the procedural mechanisms for bringing aggregate litigation—Rule 23 class actions and § 216(b) collective actions—and examines how Rule 68 has both intended and unintended consequences when used by defendants to battle collective actions. Part III identifies the inconsistencies apparent in the federal case law, which denies the applicability of Rule 68 in the class context but often dismisses collective claims when Rule 68 offers are made to collective action plaintiffs. Lastly, Part IV makes the argument that Rule 68 offers are intrinsically incompatible with both class *and* collective actions because of its automatic function, which subverts judicial oversight of aggregate litigation.

#### I. COLLECTIVE LITIGATION UNDER SECTION 216(b): ENSURING WORKERS' ABILITY TO REMEDY WAGE THEFT

The mechanism for collective action under § 216(b) provides an avenue of redress to a large group of underprivileged and underrepresented people and has been utilized widely in furthering the rights of minority and low-wage workers. Congress has acknowledged the important societal role these statutory protections provide and has created incentives to encourage private enforcement of public goods through statutory fees, shifting costs, and statutory penalties. For example, the statutory regime relies upon plaintiffs' attorneys to act as "private attorneys general" to vindicate important societal interests by allowing one-way fee-shifting in order to encourage prosecution of these rights.<sup>7</sup>

##### A. *FLSA Collective Actions: A Brief History*

Roughly seven decades after enactment, "the Fair Labor Standards Act remains the primary federal statute setting the

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Conn. Valley Fitness Ctrs., Inc., No. CV980504488S, 2001 WL 1199840, at \*5 (Conn. Super. Ct. Sept. 12, 2001) (same).

7. See, e.g., *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 502 (1969) ("As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition."); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam) ("[A plaintiff suing under Title II of the Civil Rights Act of 1964] does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.").

minimum wage and maximum hour standards applicable to most American workers.”<sup>8</sup> Congress enacted the sweeping legislation in 1938 to address substandard labor conditions, finding after numerous hearings that the unregulated and detrimental labor conditions prevalent at the time negatively affected the “health, efficiency and general well-being” of workers.<sup>9</sup>

With an aim of rectifying these labor conditions, the FLSA, in addition to certain exemptions and enforcement provisions, includes provisions: (1) setting a minimum wage,<sup>10</sup> (2) requiring premium overtime pay for work exceeding forty hours per week,<sup>11</sup> (3) prohibiting child labor,<sup>12</sup> and (4) requiring employers to keep accurate time records.<sup>13</sup> To ensure that these rights are vindicated, the FLSA authorizes both the Department of Labor and private parties to sue in federal court to recover damages.<sup>14</sup>

Congress explicitly granted employees the right to recover for multiple similarly situated workers in the same FLSA lawsuit.<sup>15</sup> These “collective actions” utilize the 29 U.S.C. § 216(b) mechanism for grouping multiple similar claims in one lawsuit. Section 216(b) also permitted employees to designate a completely uninterested third party, such as a labor union that itself suffered no overtime injury, to bring and maintain the employees’ overtime suit. What followed was a significant increase of representative suits filed by parties with no personal stake in the outcome.<sup>16</sup> Such fishing expeditions were costly

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8. Scott Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 25 (2001) (quoting HEALTH, EDUC., & HUMAN SERV. DIV., GEN. ACCOUNTING OFFICE, REPORT TO THE SUBCOMMITTEE ON WORKFORCE PROTECTIONS, COMMITTEE ON EDUCATION AND THE WORKFORCE, U.S. HOUSE OF REPRESENTATIVES, FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 1 (1999) (GAO/HEHS-99-164) (urging the United States Department of Labor to revise the white-collar tests)).

9. Carol Abdelmeseeh & Deanne M. DiBlasi, *Why Punitive Damages Should Be Awarded For Retaliatory Discharge Under the Fair Labor Standards Act*, 21 HOFSTRA LAB. & EMP. L.J. 715, 719 (2004) (quoting ABA SEC. OF LAB. & EMP. LAW, THE FAIR LABOR STANDARDS ACT 13 (Ellen C. Kearns et al. eds., 1999) (discussing the legislative history of the Act)).

10. 29 U.S.C. § 206 (2006).

11. *Id.* § 207(a)(1).

12. *Id.* § 212.

13. *Id.* § 211(c).

14. *Id.* § 216(b).

15. *Id.*

16. See *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (noting the “excessive litigation spawned by plaintiffs lacking a personal interest in the outcome” in the context of a discussion of Congress’s later amendments to the FLSA in the Portal-to-Portal Act); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1248 (11th Cir. 2003) (“In 1947, Congress enacted the Portal to Portal Act ‘in response to a “national emergency” created by a flood of suits under the FLSA aimed at collecting portal-to-portal pay allegedly due employees.’” (quoting *Arrington v. Nat’l Broad. Co.*, 531 F. Supp. 498, 500 (D.D.C. 1982))); *United Food &*



to employers because they had to respond to numerous complaints and discovery requests from parties without a cognizable claim of their own.<sup>17</sup>

Congress reacted by limiting private FLSA plaintiffs to employees who asserted claims in their own right.<sup>18</sup> Specifically, Congress amended the FLSA to change the representative procedure in the 1947 Portal-to-Portal Act ("PPA").<sup>19</sup> The PPA did not alter the right of employees to bring representative suits on behalf of others similarly situated. Rather, it simply prevented employees from designating uninterested third parties (i.e., "representatives") to bring the suit on their behalf.<sup>20</sup>

In addition, while leaving intact the similarly situated language providing for collective actions, Congress required workers who wished to participate to affirmatively opt in by filing a written consent to join.<sup>21</sup> Importantly, opt-in actions were, at the time, a well-established vehicle for representative actions under the then-current version of Federal Rule of Civil Procedure 23. Commonly referred to as

Commercial Workers Union, Local 1564 v. Albertson's, Inc., 207 F.3d 1193, 1200 (10th Cir. 2000) (noting that the Portal-to-Portal Act amendment targeted the "fear that unions, as representatives, were concretely benefitting from participation in" FLSA actions (quoting *Arrington*, 531 F. Supp. at 502 n.8)).

17. James M. Fraser, Note, *Opt-in Class Actions Under the FLSA, EPA, and ADEA: What Does it Mean to be "Similarly Situated"?*, 38 SUFFOLK U. L. REV. 95, 98 (2004) (referring to such claims as "blackmail" suits).

18. On this point, Senator Donnell, then Chairman of the Senate Judiciary Committee, made the following remarks before Congress:

It will be observed, Mr. President, that two types of action are permitted under this [then-current] sentence in section 16(b) of the [FLSA]: First, a suit by one or more employees, for himself and all other employees similarly situated. That I shall call for the purpose of identification a collective action . . . . The second class of actions . . . embrace those in which an agent or a representative who may not be an employee of the company at all can be designated by the employee or employees to maintain an action on behalf of all employees similarly situated. . . . *In the first case, an employee, a man who is working for the X steel company can sue for himself and other employees. We see no objection to that. But the second class of cases, namely, cases in which an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all, is permitted to be the plaintiff in the case, may result in very decidedly unwholesome champertous situations which we think should not be permitted under the law.*

93 Cong. Rec. 2182 (1947) (emphasis added), quoted in *Arrington*, 531 F. Supp. at 501.

19. Pub. L. No. 80-49, § 5(a), 61 Stat. 84, 87 (1947) (codified as amended at 29 U.S.C. § 216(b)).

20. *Hoffmann-La Roche Inc.*, 493 U.S. at 173 ("[T]he representative action by plaintiffs not themselves possessing claims was abolished, and the requirement that an employee file a written consent was added.").

21. 29 U.S.C. § 216(b).

spurious class actions,<sup>22</sup> these actions required individuals to opt in to be bound by a class action judgment.<sup>23</sup> The addition of the opt-in requirement to § 216(b) thus simply codified the common practice of treating aggregate claims as spurious class actions.<sup>24</sup>

*B. Rule 23 Class Actions vs. Section 216(b) Collective Actions: A Procedural Matter That Has Made All the Difference*

Two decades after the FLSA amendments, the Civil Rights Act and corresponding litigation moved to the forefront of the legal scene. The creation of new statutory rights led advocates to push for an aggregate plaintiffs' vehicle that would support the movement.<sup>25</sup> The result was the current version of Rule 23, which replaced the spurious

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22. See FED. R. CIV. P. 23 advisory committee's note, 1966 amends. (defining spurious class actions to include suits "involving 'several' rights affected by a common question and related to common relief"); 8 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 24:3 (4th ed. 2002) ("This statutory class action [§ 216(b)] resembles the permissive intervention type of spurious class action under former Rule 23."); Fraser, *supra* note 17, at 102 (discussing spurious class actions); Brian R. Gates, Note, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 NOTRE DAME L. REV. 1519, 1545 (2005) ("[A]fter Congress enacted the Portal-to-Portal Act in 1947, section 16(b) and Rule 23 were alike in their common use of an 'opt-in' procedure that came to be known as a 'spurious' class action device. . . . [S]ection 16(b) and Rule 23 possessed a nearly identical mechanism to create a representative group of plaintiffs.").

23. See 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE & PROCEDURE: CIVIL* § 1752 (3d ed. 2005) (discussing generally the nature of spurious class actions, including the joinder procedure); see also *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 549–50 (1974) (noting that, when construing rules of timeliness for joining in spurious class actions, the majority of courts emphasized and were guided by the "representative nature" of such class actions in their decisions to relax the rules of timeliness); *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1965) (emphasizing the "representative character" of a spurious class action); *Nat'l Hairdressers' & Cosmetologists' Ass'n v. Philad. Co.*, 34 F. Supp. 264, 266 (D. Del. 1940) (recognizing the propriety of such a spurious class action).

24. Fraser, *supra* note 17, at 100–01; see, e.g., *Pentland v. Dravo Corp.*, 152 F.2d 851, 853–56 (3d Cir. 1945) (analyzing how courts treated § 216(b) group actions prior to the 1947 amendments and treating the claim as a spurious class action); *Barrett v. Nat'l Malleable & Steel Castings Co.*, 68 F. Supp. 410, 416 (W.D. Pa. 1946) (treating an aggregate claim as a spurious class action); *Fink v. Oliver Iron Mining Co.*, 65 F. Supp. 316, 317–18 (D. Minn. 1941) (same); see also WRIGHT, MILLER & KANE, *supra* note 23, § 1752, at 33 ("The 'spurious' class action was used extensively in Fair Labor Standards Act litigation . . .").

25. See FED. R. CIV. P. 23(b)(2) advisory committee's note, 1966 amends. (stating that the primary cases that fall within this Rule are "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration"); James E. Pfander, Brown II: *Ordinary Remedies for Extraordinary Wrongs*, 24 LAW & INEQ. 47, 72 (2006) ("[T]he official account of the rule change makes clear its desire to foster civil rights litigation."); Rachel Tallon Pickens, *Too Many Riches? Dukes v. Wal-Mart and the Efficacy of Monolithic Class Actions*, 83 U. DET. MERCY L. REV. 71, 74 (2006) ("[T]he Federal Rules Advisory Committee explicitly noted that broad civil rights cases are appropriate under Rule 23."); Ruan, *supra* note 5, at 400–04 (discussing the civil rights history of Rule 23 class actions).

class action classification<sup>26</sup> by allowing each person that fit within the described class to be a class member—and thus, to be bound by the judgment unless she opted out of the suit.<sup>27</sup> This change caused opt-in collective actions under § 216(b) to have irreconcilable differences with, and provide fewer rights than, opt-out Rule 23 class actions.<sup>28</sup>

Both types of collective actions began with the same general policy goals: allowing plaintiffs to aggregate their claims to vindicate important legal rights by minimizing costs, encouraging private attorneys general to bring these claims, and promoting judicial economy.<sup>29</sup> The fact that § 216(b) was not similarly amended along with Rule 23 to provide for a more robust aggregation may have simply been an oversight. Similarly, it may have been a byproduct of the reality that only Congress can amend § 216(b) even though the Supreme Court's Advisory Committee drafted the amendment to Rule 23.<sup>30</sup>

Despite their common beginnings, the two procedural mechanisms affect important substantive rights in different ways. For instance, requiring an affirmative action—such as the filing of a signed document indicating the desire to opt in—causes a lower rate of participation by those actually affected by the unlawful practice.<sup>31</sup> This negative effect on participation is exacerbated further when the person must file the document within a restricted time period. One key difference between Rule 23 and § 216(b) actions is critical to the inquiry here. If the named plaintiffs lose their personal stake in the proceedings (e.g., because their claims are deemed moot), a Rule 23 representative still retains a personal stake in obtaining class

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26. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844 n.20 (1999) (stating that the Advisory Committee drafted subdivision (b)(3) “to replace the old spurious class action category”).

27. FED. R. CIV. P. 23(c)(2)(B)(v).

28. See *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288–89 (5th Cir. 1975) (discussing this distinction between § 216(b) and Rule 23).

29. Fraser, *supra* note 17, at 99, 102–03.

30. See *id.* at 104–05 (discussing possible explanations for the discrepancy between the amended Rule 23 and § 216(b)).

31. See Andrew C. Brunsten, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 291–301 (2008) (empirically documenting low participation rates produced by the opt-in rule, analyzing the reasons for the low participation rates and discussing how these low rates influence the effectiveness of wage law enforcement); see also Rachel Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 AM. U. L. REV. 515, 518 (2009) (“Historically, the FLSA’s opt-in mechanism has limited the size of the FLSA action, with estimates indicating that typically only between fifteen and thirty percent of potential plaintiff-employees opt-in.”).

certification.<sup>32</sup> In the § 216(b) context, however, the opposite is true: a § 216(b) representative has no right to represent other plaintiffs.<sup>33</sup>

As described below, this difference becomes critical in the face of an acknowledged and growing defense tactic: buying off named plaintiffs to avoid collective litigations. If the named plaintiffs in a § 216(b) collective action cannot represent the interests of absent members of the class, then § 216(b) named plaintiffs are easy targets for being picked off.

*C. Attempts to Prevent Wage Violations against Low-Wage Workers  
and the Subsequent Backlash*

There can be little doubt that actions to recover unpaid wages from employers have increased in recent years. Over 1,600 FLSA suits were filed in federal court in 1997.<sup>34</sup> Ten years later, in 2007, the number of FLSA suits filed in federal court jumped to 7,310.<sup>35</sup> In just one year, from 2006 to 2007, the number of FLSA cases filed increased by 73 percent.<sup>36</sup> Interestingly, this increase has not stemmed from a change in the law: the wage and hour protections have remained mostly unchanged since the FLSA's birth in 1938. Instead, it could be due to the increased pressure on businesses to lower costs and therefore cut (sometimes unlawfully) workers' wages. Likely, a combination of factors is responsible for the increase, including economic pressures, the increased number of plaintiffs' lawyers successfully pressing wage claims, and changing attitudes about entitlements.

The increasing number of FLSA actions also reflects a new social movement that seeks to protect the rights of low-wage workers through vindication of the statutory rights bequeathed to them in the 1930s. Equal protection and substantive due process claims have generally failed to protect those living below the poverty line on

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32. See *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 401–02 (1980) (holding that a named plaintiff who brings a class action challenging the validity of the U.S. Parole Commission's Parole Release Guidelines could appeal the denial of class certification even after his claim becomes moot).

33. *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 127 (D. Conn. 2005) (citing *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 288 (5th Cir. 1975)).

34. LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1997 ANNUAL REPORT OF THE DIRECTOR 133 tbl.C-2A (1997), available at [http://www.uscourts.gov/judicial\\_business/contents.html](http://www.uscourts.gov/judicial_business/contents.html).

35. DUFF, *supra* note 1, at tbl.C2-A.

36. *Id.*

economic justice issues.<sup>37</sup> As such, the focus of economic rights advocates has moved away from a constitutional rights agenda and toward securing the rights afforded by Congress through statute.

This renaissance of wage and hour protections comes on the heels of the “war on welfare”<sup>38</sup> and its subsequent welfare-to-work policies of the 1980s and 90s.<sup>39</sup> Attention has moved to “disempowered groups . . . in jobs with lower pay, less job security, and more difficult and dangerous working conditions.”<sup>40</sup> Poverty law scholars, such as Professors Peter Edelman, Joel Handler, Yeheskel Hasenfeld, and Julie Nice have provided a comprehensive look at the “dissonance between the rhetoric of supporting work and the reality of denying work’s rewards.”<sup>41</sup> This new social movement focuses on reforms to achieve a “living wage.”<sup>42</sup>

The media has certainly noticed this explosion of private lawsuits attempting to vindicate statutory wage rights. From a *New York Times* article on the multi-state, multi-million dollar Wal-Mart

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37. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 4 (1972) (denying equal protection claim seeking equalization of school funding); *Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (affirming the application of the rational basis test to a “state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights”); William P. Quigley, *The Right to Work and Earn a Living Wage: A Proposed Constitutional Amendment*, 2 N.Y. CITY L. REV. 139, 171 (1998) (citing Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987) (noting that scholars have failed to identify a constitutional right to a subsistence or minimum income)).

38. Julie Nice, *Forty Years of Welfare Policy Experimentation: No Acres, No Mule, No Politics, No Rights*, 4 NW. J.L. & SOC. POLY 1, 1–2 (2009) (explaining that while the government’s attempt during the 1990s and 2000s to reduce dependence on welfare was successful, it did not address the need for more livable wages).

39. 42 U.S.C. §§ 601–619 (2000) (including both Temporary Assistance for Needy Families and Clinton’s “Welfare-to-Work” programs).

40. Nice, *supra* note 38, at 9 (citing TERESA L. AMOTT & JULIE A. MATTHAEI, RACE, GENDER, AND WORK: A MULTI-CULTURAL ECONOMIC HISTORY OF WOMEN IN THE UNITED STATES 318 (1996)).

41. Nice, *supra* note 38, at 4; see JOEL F. HANDLER & YEHESEKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 6–7 (2007) (arguing that America demonizes welfare while those who are “playing by the rules” cannot make it because wages in the low-wage labor market have stagnated); Peter B. Edelman, *Changing the Subject: From Welfare to Poverty to a Living Income*, 4 NW. J.L. & SOC. POLY 14 (2009) (providing a historical account of America’s simultaneous rhetoric against welfare and lack of support for higher wages).

42. See, e.g., BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 213 (2001) (advocating for a living wage, rather than simply the current minimum wage); Peter B. Edelman, *Promoting Family By Promoting Work: The Hole in Martha Fineman’s Doughnut*, 8 AM. U. J. GENDER SOC. POLY & L. 85, 89–91 (2000) (advocating for a living wage, rather than simply minimum wage); cf. *Economic Analysis of the New Orleans Minimum Wage Proposal*, ACORN, July 1999, at 1, available at <http://www.acorn.org/index.php?id=8047> (finding that the benefits a higher minimum wage would have on families outweighs the cost to the economy of New Orleans).

wage and hour class settlement<sup>43</sup> to a front page *Business Week* cover story,<sup>44</sup> FLSA collective actions are making news.

Widespread wage violations can be seen across industries. As Kim Bobo writes in her book, *Wage Theft in America*, “[B]illions of dollars in wages are being illegally stolen from millions of workers each and every year.”<sup>45</sup> Workers in construction,<sup>46</sup> garment factories,<sup>47</sup> nursing homes,<sup>48</sup> agriculture,<sup>49</sup> poultry processing,<sup>50</sup> and restaurants<sup>51</sup> have all suffered extensive and systematic wage theft. In some instances, these workers have successfully recouped the wages illegally withheld by employers in violation of the FLSA and state wage and hour laws.

A judicial effort to stymie this influx of complex federal lawsuits might be at the heart of the inconsistent treatment of Rule 68 offers in aggregate litigation. Finding a category of lawsuits moot is one expedient remedy for the problem of increased litigation.<sup>52</sup>

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43. Steven Greenhouse & Stephanie Rosenbloom, *Wal-Mart Settles 63 Lawsuits Over Wages*, N.Y. TIMES, Dec. 24, 2008, at B1.

44. Michael Orey, *Wage Wars: Workers—From Truck Drivers to Stockbrokers—Are Winning Huge Overtime Lawsuits*, BUS. WK., Oct. 1, 2007, at 50.

45. KIM BOBO, WAGE THEFT IN AMERICA 6 (2009).

46. See, e.g., *Strouse v. J. Kinson Cook, Inc.*, 634 F.2d 883, 886 (5th Cir. 1981) (granting construction workers' request for attorneys' fees in a breach of FLSA case). Included in this category are day laborers, who are paid a daily wage and have little recourse if that wage is denied to them. See *Marroquin v. Canales*, 236 F.R.D. 257, 262 (D. Md. 2006) (permitting certification of FLSA class action against employer where day laborers cleaned up debris from Hurricane Katrina).

47. See, e.g., *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002) (denying employer's attempt to counter an FLSA class action brought by Chinese-American employees).

48. See, e.g., *Hamelin v. Faxton-St. Luke's Healthcare*, No. 6:08-CV-1210 (DNH/DEP), 2009 U.S. Dist. LEXIS 9793, \*33-34 (N.D.N.Y. Jan. 26, 2009) (permitting class certification for employees of health care facilities who were allegedly compelled to work during unpaid lunch breaks).

49. See, e.g., *Reich v. Tiller Helicopter Servs.*, 8 F.3d 1018, 1023-27 (5th Cir. 1993) (discussing the FLSA's agricultural exemption).

50. See, e.g., *Perez v. Mountaire Farms, Inc.*, 610 F. Supp. 2d 499, 528 (D. Md. 2009) (finding that workers of a poultry processing plant performed work for which they were not compensated).

51. See, e.g., *Long John Silver's Rests., Inc. v. Cole*, 514 F.3d 345, 353-54 (4th Cir. 2008) (declining to vacate an arbitration award for employees that were not compensated adequately for overtime work).

52. Cf. Scott A. Moss, *Reluctant Judicial Factfinding: When Minimalism and Judicial Modesty Go Too Far*, 32 SEATTLE UNIV. L. REV. 549, 563 (2009) (“Andrew Siegel has persuasively shown that hostility to litigation is the most unifying theme of the Supreme Court's jurisprudence since the Rehnquist Court era, explaining more of the Court's jurisprudence than originalism, federalism, or political conservatism . . . .” (citing Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006))).

Although a potential outcome of closing the collective action avenue would be more *individual* lawsuits, such a result would be unlikely to occur given that attorneys have negligible incentives to bring individual wage claims. The result is fewer lawsuits and more wage violations going unpunished.

There can be no doubt both that there have been an increased number of wage theft claims and that courts have inconsistently applied Rule 68 to dispose of many FLSA collective actions. Just as workers are starting to succeed at vindicating their wage rights with more successful lawsuits, courts are allowing defendants to use Rule 68 to destroy those lawsuits—something courts have never allowed for Rule 23 class actions. In this way, courts effectively facilitate wage theft.

## II. THE CONSEQUENCES OF RULE 68 IN REPRESENTATIVE LITIGATION

Under Federal Rule of Civil Procedure 68, offers of judgment may occur at two stages of a lawsuit: before trial begins, and after the liability portion of the trial has ended. First, at any time more than fourteen days before a trial begins, a defendant may serve the plaintiff with an offer to allow judgment to be taken against herself.<sup>53</sup> If the plaintiff accepts the offer by giving written notice within fourteen days after the service of the offer, either party may then file the offer and notice of acceptance, together with proof of service thereof, with the clerk, who shall enter judgment.<sup>54</sup> If the offer is not accepted in this fashion, or is overtly rejected, the offer is deemed withdrawn, and evidence of the refusal is inadmissible in court outside of a proceeding to determine costs.<sup>55</sup> If the judgment finally obtained by the plaintiff at trial is not more favorable than the offer, the plaintiff must pay costs incurred by the defendant after it made the offer.<sup>56</sup>

Offers of judgment may also occur when the liability portion of a trial (or the liability trial in a bifurcated proceeding) has ended. If the amount or extent of the liability still remains to be determined by future proceedings, the party found liable may make an offer of judgment. This offer would have the same effect as a pretrial offer, provided it is served not less than fourteen days prior to the

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53. FED. R. CIV. P. 68(a).

54. *Id.*

55. *Id.* at 68(b).

56. *Id.* at 68(d).

commencement of hearings to determine the amount and extent of liability.<sup>57</sup>

The purpose of Rule 68 is to encourage settlements and avoid protracted litigation.<sup>58</sup> By making a Rule 68 offer, the defendant shifts to the plaintiff the risk of continuing the litigation, as the plaintiff may be saddled with the defendant's post-offer costs. Although commentators have suggested a "two way" offer of judgment rule,<sup>59</sup> the current Rule 68 is entirely one sided—only defendants can attempt to shift this risk. As stated by the Supreme Court in *Marek v. Chesny*, the rule "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success" at trial on the merits.<sup>60</sup> This incentive might work for individual litigation—though many have criticized the negative effect of Rule 68 on civil rights litigation, especially after *Marek*<sup>61</sup>—but when offers of judgment are advanced in collective actions, several problems arise.

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57. *Id.* at 68(c).

58. *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

59. See Harold S. Lewis, Jr. & Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases* 19 (Univ. of Ga. School of Law Research Paper Series, Paper No. 08-012, 2008) ("Rule [68] may induce compromise even more frequently if the benchmark against which the ultimate trial result is tested were an average of the counteroffers made by both parties (under a two-way rule), rather than, as now, against the defendant's offer alone.").

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

61. *Marek* involved a wrongful death suit brought under 42 U.S.C. § 1983 by the father of a man killed by the police. The Court analyzed a rejected offer of judgment after the plaintiff won at trial but for less than defendant's offer and held that defendants were not liable for attorneys' fees incurred by plaintiff after officers' pretrial offer of settlement, where plaintiff recovered judgment less than offer. A sharply divided Court found that "costs" under Rule 68 included attorneys' fees where the underlying statute permits them as part of costs allowed to a prevailing party. *Marek*, 473 U.S. at 7–11. For an analysis of the effects of Rule 68 on civil rights litigation, see Lesley S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 403–14 (1997) (discussing the benefits and risks of using Rule 68); Peter Margulies, *After Marek, the Deluge: Harmonizing the Interaction Under Rule 68 of Statutes that Do and Do Not Classify Attorneys' Fees as "Costs,"* 73 IOWA L. REV. 413, 427–30 (1988) (explaining some of the negative effects that Rule 68 has on litigants following *Marek*, including *ex ante* conduct uncertainty); Roy D. Simon, Jr., *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. CIN. L. REV. 889, 892 (1984) (discussing, prior to the Court's decision in *Marek*, how "[i]f the Court decides that Rule 68 in effect incorporates the definition of costs used in the attorney's fees statute, Rule 68 will become an enormously powerful settlement tool in cases involving fee-shifting statutes" and noting that "[o]ne third or more of all federal litigation will thus be affected by the decision in *Marek v. Chesny*").



*A. Courts Refuse to Moot Named Plaintiffs' Claims in  
Rule 23 Class Actions*

1. The Workings of Rule 23

In order to obtain class certification, plaintiffs move for designation as a class action under Federal Rule of Civil Procedure 23. According to the Supreme Court, a "ruling on the certification issue is often the most significant decision rendered in . . . [a] class-action proceeding[]." <sup>62</sup> In moving for class certification, plaintiffs must establish that they have met all four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). <sup>63</sup> Rule 23(a) provides that class certification is proper only if: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class."<sup>64</sup>

After meeting the prerequisites of Rule 23(a), the putative class must qualify under one of the three subdivisions of Rule 23(b). <sup>65</sup> Plaintiffs may opt to use Rule 23(b)(1), under which a class may be certified where a multitude of individual plaintiffs might create inconsistent standards or impair the interests of nonparties. <sup>66</sup> A court may certify a class action under Rule 23(b)(2) if "the party opposing the class has acted or refused to act on grounds generally applicable to the class," which makes injunctive or declaratory relief applicable to the entire class. <sup>67</sup> Rule 23(b)(3) applies when questions of law or fact common to the entire class predominate over questions affecting individual class members and when class resolution provides the superior method for adjudication. <sup>68</sup>

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62. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980).

63. FED. R. CIV. P. 23(a)–(b).

64. *Id.* at 23(a).

65. *Id.* at 23(b).

66. *Id.* at 23(b)(1).

67. *Id.* at 23(b)(2).

68. *Id.* at 23(b)(3). When making findings regarding the superiority of a class action under Rule 23(b)(3), the court must consider:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

*Id.*

In deciding whether to certify a class, the Supreme Court has warned courts not to consider the merits of the underlying action.<sup>69</sup> Nonetheless, the Court still requires a “rigorous analysis” to determine if the plaintiffs have proffered evidence to meet each of the requirements of Rule 23.<sup>70</sup> While this has led to some degree of confusion in the courts over how to analyze class certification requirements,<sup>71</sup> courts generally agree that they are to be construed liberally and that a full merits determination is inappropriate.<sup>72</sup>

## 2. The Prohibition of Rule 68 in Class Actions

Both prior to class certification and after a class is certified by the court, a Rule 23 class will typically be protected against the possibility of an offer of judgment to the named plaintiffs that aims to eliminate the entire class’s claims.

The Supreme Court has made clear that named plaintiffs are representatives of the class members’ interests. In *Deposit Guaranty National Bank v. Roper*, a Rule 23 class action was brought by credit card holders challenging finance charges applied to their accounts.<sup>73</sup> Following the district court’s denial of plaintiffs’ motion for class certification, the defendant bank tendered to each named plaintiff a Rule 68 “Offer of Defendant to Enter Judgment as by Consent and Without Waiver of Defenses or Admission of Liability.”<sup>74</sup> The plaintiffs rejected the offer.<sup>75</sup> Nevertheless, the court entered judgment based upon the offer and dismissed the action as moot.<sup>76</sup>

The Supreme Court, however, reversed.<sup>77</sup> According to the Court, the case was still justiciable because the named plaintiffs retained an interest in getting the class certified in order to share the

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69. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (“In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.” (quoting *Miller v. Mackey Int’l, Inc.*, 452 F.2d 424, 427 (5th Cir. 1971))).

70. *Gen. Tel. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

71. See, e.g., L. Elizabeth Chamblee, *Between “Merit Inquiry” and “Rigorous Analysis”*: *Using Daubert to Navigate the Gray Areas of Federal Class Action Certification*, 31 FLA. ST. U. L. REV. 1041, 1045–50 (2004) (discussing the complexities of determining class certifications).

72. *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003); *Doran v. Mo. Dep’t of Soc. Servs.*, 251 F.R.D. 401, 404 (W.D. Mo. 2008); *In re Control Data Corp. Sec. Litig.*, 116 F.R.D. 216, 219 (D. Minn. 1986), *rev’d on other grounds*, 933 F.2d 616 (8th Cir. 1991).

73. 445 U.S. 326, 327–28 (1980).

74. *Id.* at 329.

75. *Id.*

76. *Id.*

77. *Id.* at 340.

expenses of the litigation with other members of the class.<sup>78</sup> Furthermore, the Court reasoned that mootting the entire case would defeat the purpose of class actions and invite waste of judicial resources.<sup>79</sup> The Court readily identified the pragmatic concerns raised by this litigation tactic, which would “be contrary to sound judicial administration,” “frustrate the objectives of class actions,” and “invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.”<sup>80</sup>

Once a court certifies the class action pursuant to Rule 23, the named plaintiffs take on a fiduciary role in representing the interests of the absent class members who are not given the opportunity to participate meaningfully in the litigation.<sup>81</sup> Because of the important rights being vindicated, courts acknowledge that the named plaintiffs play a crucial role in bringing justice to those who would otherwise be hidden from judicial scrutiny.<sup>82</sup> By aggregating claims, class actions provide plaintiffs “the advantage of lower individual costs to vindicate rights by the pooling of resources”<sup>83</sup> and promote judicial economy because “[t]he judicial system ‘benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.’”<sup>84</sup>

By the same process, however, defendants to a Rule 23 class action face costly and time-consuming litigation.<sup>85</sup> To avoid class-wide

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78. *Id.*

79. *Id.*

80. *Id.* at 339; *see also* Weiss v. Regal Collections, 385 F.3d 337, 344 (3d Cir. 2004) (“[A]llowing the defendants here to ‘pick off’ a representative plaintiff with an offer of judgment less than two months after the complaint is filed may undercut the viability of the [Rule 23] class action procedure, and frustrate the objectives of this procedural mechanism . . .”).

81. *Deposit Guar. Nat’l Bank*, 445 U.S. at 330.

82. *Cf.* Ruan, *supra* note 5, at 408–13 (describing the role of named plaintiffs in employment discrimination class actions under Rule 23); *see also* *Deposit Guar. Nat’l Bank*, 445 U.S. at 338 (discussing importance of named plaintiff); *Bowens v. Atl. Maint. Corp.*, 546 F. Supp. 2d 55, 80 (E.D.N.Y. 2008) (discussing importance of named plaintiff in class action); *Morales-Arcadio v. Shannon Produce Farms*, 237 F.R.D. 700, 702 n.2 (S.D. Ga. 2006) (noting that “courts have been concerned about defendants strategically making offers in an attempt to cut off litigation before all of the class members have been identified”); *Geer v. Challenge Fin. Investors Corp.*, No. 05-1109-JTM, 2006 WL 704933, at \*3 (D. Kan. Mar. 14, 2006) (denying defendant’s motion to dismiss in order to protect the rights of similarly situated plaintiffs); *Villatoro v. Kim Son Rest.*, 286 F. Supp. 2d 807, 811 (S.D. Tex. 2003) (discussing the importance of ensuring that similarly situated individuals are given adequate notice).

83. *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989).

84. *Id.*

85. *See In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (holding that mandamus appeal from grant of class certification was appropriate because an appeal from the final judgment “will come too late to provide effective relief for these defendants [due to] the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them”).

liability, defendants have attempted to invoke Rule 68 offers of judgment to settle the named plaintiffs' claims in order to moot the class allegations. Defendants style an offer of judgment to include damages to the named plaintiffs, ignoring the absent class members' claims. This litigation strategy is easily identifiable by the courts as a "thinly-veiled effort[] to 'pick off' the putative class representative."<sup>86</sup> These attempts to circumvent the class vehicle and avoid liability from the absent class members are often rejected by the courts.<sup>87</sup>

The Supreme Court has further protected class actions from early dismissal by finding that named plaintiffs' claims cannot be mooted even if their claim is "so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."<sup>88</sup> In *County of Riverside v. McLaughlin*, the Court recognized the important policy considerations addressed in *Roper* and held that a putative class action may proceed regardless of whether the named plaintiff's claim has been mooted.<sup>89</sup> The plaintiff in *Riverside* argued that the County of Riverside should alter its policies for providing hearings to in-custody arrestees who were arrested without warrants.<sup>90</sup> Shortly after filing the complaint, the plaintiff filed for class certification, which was granted. The Court found that certification of the class provided the unnamed members of the class a legal status separate from the named plaintiff. Relying upon *Sosna v. Iowa*,<sup>91</sup> the Court stated that so long as a named plaintiff with the requisite case or controversy is involved in the suit at the time of certification, the case is not deemed moot by an offer of judgment.<sup>92</sup>

To accomplish this, the Court related back the date of the certification to the date of the filing of the original complaint. This creates an exception to the traditional mootness doctrine and nullifies

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86. *McDowall v. Cogan*, 216 F.R.D. 46, 51 (E.D.N.Y. 2003) ("[O]ffers of judgment made to named representatives immediately after putative [Rule 23] class actions are filed often are thinly-veiled efforts to 'pick off' the putative class representative.").

87. See *Yeboah v. Cent. Parking Sys.*, No. 06 CV 0128(RJD)(JMA), 2007 WL 3232509, at \*5 (E.D.N.Y. Nov. 1, 2007) (finding that the presence of even one opt-in plaintiff foreclosed defendant's argument that plaintiff's FLSA claim had been mooted by the offer of judgment); *Geer*, 2006 WL 704933, at \*3 ("Although nothing in the rules prevents the parties from engaging in tactics to moot the case early on, this court is reluctant to allow defendants to bar the courtroom doors so early in the litigation."); *Asch v. Teller, Levit & Silvertrust, P.C.*, 200 F.R.D. 399, 401 (N.D. Ill. 2000) (describing the misuse of Rule 68 as a "clever device for gaining an advantage by racing to the courthouse").

88. *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991).

89. *Id.*

90. *Id.* at 47-48.

91. 419 U.S. 393 (1975).

92. *County of Riverside*, 500 U.S. at 51-52.

the application of Rule 68 in the class action context. Despite being introduced in a footnote in *Sosna*, the relation-back doctrine has reappeared as the central underpinning for decisions holding that full offers of judgment to plaintiffs do not render class actions moot.<sup>93</sup>

*B. Courts Dismiss Named Plaintiffs' Claims in Collective Actions by Finding Them Moot after an Offer of Judgment*

1. How a Collective Action Is Brought under Section 216(b)

To bring a collective action under § 216(b), plaintiffs must bring a “timely” motion to determine whether a suit may proceed as a collective action.<sup>94</sup> Courts typically employ a two-step approach in determining collective action status.<sup>95</sup> At the initial notice stage, the court determines on the basis of pleadings and affidavits whether to notify potential members of the collective action that the case is pending.<sup>96</sup> At this stage, plaintiffs must establish the existence of other employees who are similarly situated to them.<sup>97</sup> Other employees are similarly situated if they, too, were subjected to the conduct being challenged by plaintiffs in the litigation.<sup>98</sup>

At the initial stage, the burden for demonstrating that plaintiffs and potential plaintiffs are similarly situated is minimal.<sup>99</sup> Plaintiffs need to make only a modest factual showing that they and other employees were victims of “a common policy or plan that

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93. *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (“This case belongs, however, to that narrow class of cases in which the termination of a class representative’s claim does not moot the claims of the unnamed members of the class.”); *Weiss v. Regal Collections*, 385 F.3d 337, 347 (3d Cir. 2004) (discussing application of the relation-back doctrine); *Hennessey v. Conn. Valley Fitness Ctrs., Inc.*, No. CV980504488S, 2001 WL 1199840, at \*6 (Conn. Super. Ct. Sept. 12, 2001) (“Although one might argue that *Sosna* contains an implication that the crucial factor for Article III purposes is the timing of class certification, other cases, applying a ‘relation back’ approach, clearly demonstrate that timing is not crucial.” (citing *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 398 (1980))).

94. 29 U.S.C. § 216(b).

95. *E.g.*, *Cuzco v. Orion Builders, Inc.*, 477 F. Supp. 2d 628, 632 (S.D.N.Y. 2007) (“Courts typically undertake a two-stage review in determining whether a suit may proceed as a collective action under the FLSA.”); *Sipas v. Sammy’s Fishbox, Inc.*, No. 05 Civ. 10319 (PAC), 2006 U.S. Dist. LEXIS 24318, at \*6–7 & n.1 (S.D.N.Y. Apr. 24, 2006) (explaining that certification of a class action requires two steps).

96. *Torres v. Gristede’s Oper. Corp.*, No. 04 Civ. 3316 (PAC), 2006 U.S. Dist. LEXIS 74039, at \*23–24 (S.D.N.Y. Sept. 28, 2006).

97. *Realite v. Ark Rests. Corp.*, 7 F. Supp. 2d 303, 306 (S.D.N.Y. 1998).

98. *Gjurovich v. Emmanuel’s Marketplace, Inc.*, 282 F. Supp. 2d 101, 104 (S.D.N.Y. 2003).

99. *Damassia v. Duane Reade, Inc.*, No. 04 Civ. 8819 (GEL), 2006 U.S. Dist. LEXIS 73090, at \*9–10 (S.D.N.Y. Oct. 5, 2006).

violated the law.”<sup>100</sup> The court applies “ ‘a fairly lenient standard’ and (when it does so) typically grants ‘conditional certification.’ ”<sup>101</sup> While full discovery into liability and damages is not required, some discovery typically must occur. Minimal discovery is needed because courts rely upon allegations supported by employee declarations or affidavits, in addition to the complaint to determine whether plaintiffs and potential opt-ins are similarly situated.<sup>102</sup>

Because workers must affirmatively opt in by filing a written consent to participate, allowing plaintiffs conditional certification is crucial to enabling these workers to vindicate their rights.<sup>103</sup> In order to decide whether to opt in, these workers must be apprised of the pendency of the case in a timely manner; otherwise, the claims of many would be barred or diminished by the statutes of limitations of the FLSA, EPA, or ADEA.<sup>104</sup> Without notice, these potential plaintiffs would be severely prejudiced by being unable to prosecute their rights. The Supreme Court has recognized this urgency. It has held that courts have the discretion to manage the notice process to give prospective class members an early opportunity to join, both because of the broad remedial goal of the FLSA and because of the “wisdom and necessity for early judicial intervention.”<sup>105</sup>

At the second stage, after full liability discovery, courts make a more searching factual determination as to whether members of the collective are, in fact, similarly situated.<sup>106</sup> This determination typically occurs following a motion for decertification. If the members are found not to be similarly situated at that point, the court can decertify the class.<sup>107</sup>

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100. *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997).

101. *Torres*, 2006 U.S. Dist. LEXIS 74039, at \*23.

102. *Gjurovich*, 282 F. Supp. 2d at 104.

103. See 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).

104. See *id.* (explaining the circumstances in which claims will be terminated); *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989) (stating that the district court found it permissible for a court to “facilitate notice of an ADEA suit to absent class members in appropriate circumstances”); *Hoffmann*, 982 F. Supp. at 260 (discussing that the running of the statute of limitations motivated plaintiff’s request for court-authorized notice informing potential plaintiffs of the opportunity to opt in).

105. *Hoffmann-La Roche Inc.*, 493 U.S. at 171–73.

106. *Torres*, 2006 U.S. Dist. LEXIS 74039, at \*37–38; *Gjurovich*, 282 F. Supp. 2d at 103–04.

107. See, e.g., *Smith v. Lowe’s Home Ctrs.*, 236 F.R.D. 354, 357 (S.D. Ohio 2006) (“[I]f the claimants are not similarly situated, the district court de-certifies the class.”).

## 2. The Acceptance of Rule 68 in Collective Actions

In contrast to how courts refuse to dismiss Rule 23 actions, courts readily dismiss § 216(b) collective action cases where a valid offer of judgment is made to the named plaintiffs.<sup>108</sup> Because under § 216(b) no person can become a plaintiff or be bound by the litigation unless she has affirmatively opted into the action, courts reason that the named plaintiff has no right to represent similarly situated people.<sup>109</sup> Therefore, when a defendant makes a valid Rule 68 offer of judgment that fully addresses the damages of the particular named plaintiffs, the named plaintiffs no longer have a stake in the action, and the case is dismissed as moot.<sup>110</sup>

One particularly stark example of this trend occurred in *Ward v. Bank of New York*, a Southern District of New York decision by Judge Denny Chin.<sup>111</sup> A former bank cashier brought overtime pay claims under the FLSA and New York state law. The defendant bank made a Rule 68 offer of judgment to the plaintiff for \$1,000 plus reasonable attorneys' fees less than two months after the complaint was filed and prior to anyone opting in to the case.<sup>112</sup> The plaintiff

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108. For examples of courts dismissing § 216(b) cases when a valid offer of judgment is made to named plaintiffs, see *Collins v. Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 716 (E.D. La. 2008); *Louisdor v. Am. Telecomms., Inc.*, 540 F. Supp. 2d 368, 370 (E.D.N.Y. 2008); *Tallon v. Lloyd & McDaniel*, 497 F. Supp. 2d 847, 853–54 (W.D. Ky. 2007); *Darboe v. Goodwill Indus. of Greater N.Y. & N.N.J., Inc.*, 485 F. Supp. 2d 221, 224 (E.D.N.Y. 2007); *Ward v. Bank of N.Y.*, 455 F. Supp. 2d 262, 264 (S.D.N.Y. 2006); *Briggs v. Arthur T. Mott Real Estate LLC*, No. 06-0468 (DRH) (WDW), 2006 U.S. Dist. LEXIS 82891, at \*12 (E.D.N.Y. Nov. 14, 2006); *Vogel v. Am. Kiosk Mgmt.*, 371 F. Supp. 2d 122, 130 (D. Conn. 2005); *Taylor v. CompUSA, Inc.*, No. 1:04-CV-718-WBH, 2004 U.S. Dist. LEXIS 14492, at \*8 (N.D. Ga. July 14, 2004); *Tratt v. Retrieval Masters Creditors Bureau, Inc.*, No. 00-CV-4560 (ILG), 2001 U.S. Dist. LEXIS 22401, at \*5–6 (S.D.N.Y. May 23, 2001). For examples of courts denying motions to dismiss in § 216(b) cases, see *Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F. Supp. 2d 178, 181 (W.D.N.Y. 2007); *Roble v. Celestica Corp.*, 627 F. Supp. 2d 1008, 1015 (D. Minn. 2007); *Yeboah v. Cent. Parking Sys.*, No. 06 CV 0128 (RJD) (JMA), 2007 WL 3232509, at \*5 (E.D.N.Y. Nov. 1, 2007); *Reyes v. Carnival Corp.*, No. 04-21861-CIV-GOLD/TURNOFF, 2005 U.S. Dist. LEXIS 11948, at \*28 (S.D. Fla. May 25, 2005).

109. See *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) (“Even if the § 216(b) plaintiff can demonstrate that there are other plaintiffs ‘similarly situated’ to him, he has no right to represent them.”); *LaChapelle v. Owens-Illinois, Inc.*, 513 F.2d 286, 287 (5th Cir. 1975) (“The appeal presents for decision a single, well defined question of law. This is whether suits brought under the Age Discrimination in Employment Act of 1967 may be Rule 23-type class actions. We conclude that they may not and, therefore, affirm the decision below.”).

110. See *Ward*, 455 F. Supp. 2d at 268 (noting that it is “proper to dismiss a complaint for lack of subject-matter jurisdiction when a plaintiff is offered all that the plaintiff could recover at trial”).

111. *Id.* at 262.

112. *Id.* at 265.

rejected the defendant's offer, and the defendant promptly filed a motion to dismiss the plaintiff's claims.<sup>113</sup>

In granting the defendant's motion, the court held that the defendant's offer of judgment rendered the plaintiff's claims moot, even though the offer was rejected.<sup>114</sup> Because no other employees had opted in to the case and the defendant's offer exceeded the amount that the plaintiff could potentially recover if the case went to trial, the named plaintiff no longer had a stake in the matter, and therefore, his claims were moot.<sup>115</sup> The court specifically emphasized the fact that no additional plaintiffs had come forward.<sup>116</sup> However, this lack of plaintiffs should not have been surprising given that the offer came only weeks after the complaint and before notice had been sent out informing other workers of the litigation.

The district court, like others that have examined this issue, acknowledged the plaintiff's policy arguments that a defendant should not be allowed to pick off a representative-action plaintiff and noted that these points gave the judge some pause.<sup>117</sup> Ultimately, however, the court held that an early offer of judgment that exceeds the named plaintiffs' claims results in a dismissed action.

### III. RULE 68 REVEALS THE INCONSISTENT JUDICIAL TREATMENT OF RULE 23 CLASS ACTIONS AND SECTION 216(b) COLLECTIVE ACTIONS

Examining how courts disparately treat offers of judgment in Rule 23 class actions and in FLSA collective actions reveals the preferred status given to class over collective actions. This disparate treatment was not mandated by Congress, as there is no expressed legislative intent to provide FLSA actions with less power to vindicate plaintiffs' statutory rights. The § 216(b) opt-in procedure was the preferred aggregate vehicle in the 1930s, when the FLSA was enacted.<sup>118</sup> Rule 23 was amended in 1966 by the Advisory Committee for the Federal Rules of Civil Procedure. But only Congress can amend a statutory provision such as § 216(b), and it has failed to do so. The congressional failure to amend FLSA statutory rights to authorize the opt-out class vehicle modernized in the 1960s has had a major, and likely unintended, impact on workers' ability to secure their substantive rights.

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113. *Id.*

114. *Id.*

115. *Id.* at 269–70.

116. *Id.* at 270.

117. *Id.* at 269.

118. 29 U.S.C. § 216(b).



Courts give Rule 23 class actions preferred status by not allowing a Rule 68 offer of judgment to moot the named plaintiffs' claims in class actions, whereas they increasingly allow such offers to moot FLSA collective actions. The explanations courts offer for the disparate outcomes in Rule 68 cases have no basis in the language of the FLSA. Indeed, dismissal subverts the statutory purpose of protecting workers from abuses such as wage violations. The inferior treatment of FLSA collective actions is significant because the likelihood of recovery of lawful wages diminishes if workers are unable to aggregate their claims.

Moreover, this inconsistency cannot be explained by structural distinctions<sup>119</sup> between the aggregation rules. Similarly exacting safeguards are already in place for both the Rule 23 class and § 216(b) aggregate vehicles. Currently, courts require both that § 216(b) cases show exacting evidence that the members of the class are similarly situated and that they can be "decertified" if they fail to make the requisite showing of common wage and hour practices and numerous affected workers.<sup>120</sup>

The inconsistency also cannot be explained by differences among the role of named plaintiffs. Named plaintiffs in both contexts are required to perform extensive work for the class, and neither FLSA collective action claims nor Rule 23 class actions can be brought without their assistance. Additionally, it is unfair to ask FLSA named plaintiffs to make decisions on offers of judgment given the effect such offers have on their exposure to defendants' costs.

Lastly, the inconsistency directly contravenes the goal of judicial oversight of class and collective settlements. Rule 68 works in both contexts to subvert the goal of having judges make reasoned decisions on whether settlements are fair and equitable in light of the facts.

*A. Early Dismissal of FLSA Collective Actions Subverts the Statutory Scheme of Preventing Wage Abuses*

As outlined in Part II, courts too often dismiss § 216(b) actions as moot upon a defendant employer's offer of judgment to named plaintiffs in wage and hour collective actions. Such determinations are

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119. *Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119, 1122 (9th Cir. 2009).

120. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1261–62 (11th Cir. 2008) (“[A]lthough the FLSA does not require potential class members to hold identical positions, the similarities necessary to maintain a collective action under § 216(b) must extend beyond the mere facts of job duties and pay provisions.” (citing *Anderson v. Cagle’s Inc.*, 488 F.3d 945, 953 (11th Cir. 2007))).

inconsistent with both the statutory intent of the FLSA and the treatment of Rule 23 class actions.

Dismissing collective actions through the application of Rule 68 thwarts the purpose and intent of the FLSA. The FLSA was enacted to ensure that every employee receives “a fair day’s pay for a fair day’s work.”<sup>121</sup> The FLSA requirements that workers be paid a minimum wage for all hours worked and a premium wage for overtime hours are necessary tools to ensure that workers earn a living wage. Given the relatively small amounts of money at issue in an individual case seeking lawful compensation, Congress included provisions in the FLSA to encourage litigation, including the § 216(b) collective action mechanism. Collective actions under the FLSA reflect a policy to encourage judicial economy by efficiently resolving multiple claims through one action and providing enough incentive for private attorneys general to bring the claims to court.<sup>122</sup>

Picking off named plaintiffs through Rule 68 offers thus impedes judicial economy and forces multiple individual lawsuits stemming from the same allegations. Courts should discourage defendants’ attempts to buy off individual claims of named plaintiffs attempting to represent a class of claimants.<sup>123</sup> The Supreme Court and other federal courts have explicitly rejected this strategy in the Rule 23 context because they “encourage a ‘race to pay off’ named plaintiffs very early in litigation.”<sup>124</sup> “A dismissal for mootness is a tool to comply with jurisdictional limitations imposed by the Constitution of the United States and not a ploy for an agile defendant to escape compliance with the Fair Labor Standards Act.”<sup>125</sup>

The doctrine of mootness requires that the parties maintain a “legally cognizable interest in the outcome” of the litigation.<sup>126</sup> If a case is rendered moot, the federal courts lack subject-matter jurisdiction over the matter because they “are without power to decide

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121. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

122. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam); see also *Holt v. Rite Aid Corp.*, 333 F. Supp. 2d 1265, 1269 (M.D. Ala. 2004) (citing *Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989)).

123. See, e.g., *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (“To deny the right to appeal simply because the defendant has sought to ‘buy off’ the individual private claims of the named plaintiffs would be contrary to sound judicial administration.”).

124. *Liles v. Am. Corrective Counseling Servs., Inc.*, 201 F.R.D. 452, 455 (S.D. Iowa 2001). Rejecting this tactic “restore[s] Rule 68 to the role it should have—a means of facilitating and encouraging settlements, rather than a clever device for gaining an advantage by racing to the courthouse.” *Asch v. Teller, Levit & Silvertrust, P.C.*, 200 F.R.D. 399, 401 (N.D. Ill. 2000).

125. *MacKenzie v. Kindred Hosps. E., L.L.C.*, 276 F. Supp. 2d 1211, 1213 n.2 (M.D. Fla. 2003).

126. *County of L.A. v. Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)).

questions that cannot affect the rights of litigants in the case before them.”<sup>127</sup> Cases are found to be moot only in certain, well-defined circumstances: “[A] case becomes moot . . . when it is impossible for the court to grant any effectual relief whatever to a prevailing party.”<sup>128</sup>

As an initial matter, courts should deny a motion to dismiss for mootness unless a pleader fails “to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.”<sup>129</sup> In the context of collective actions, because the named plaintiffs targeted by the defendant’s offer represent a class of people who have been similarly harmed, the court should continue to exercise its remedial powers with regard to the class and only dismiss a collective action for mootness when the offer of judgment is for the maximum possible recovery for *all* potential plaintiffs.<sup>130</sup>

At the very least, courts should defer rulings on offers of judgment until a reasonable time after initial notice is sent to the putative class members. Court-sanctioned notice to putative class members is the first opportunity for workers to learn of an action to recover lost wages. In order to receive notice, first, courts must make a determination whether plaintiffs have shown that similarly situated employees exist.<sup>131</sup> This requires substantial discovery on the parameters of the claims and the class, in order to determine how many putative employees have been affected and to make an initial calculation of how much money in wages these putative members are owed. This discovery requires time and effort by both parties. The

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127. *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

128. *In re Kurtzman*, 194 F.3d 54, 58 (2d Cir. 1999) (quoting *Capital Commc’ns Fed. Credit Union v. Boodrow*, 126 F.3d 43, 46 (2d Cir. 1997)); see also *Cook v. Colgate Univ.*, 992 F.2d 17, 19 (2d Cir. 1993) (holding that a case becomes moot “when it becomes impossible for the courts, through the exercise of their remedial powers, to do anything to redress the injury” (quoting *Alexander v. Yale*, 631 F.2d 178, 183 (2d Cir. 1980))).

129. *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev’d in part on other grounds*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (generally citing *Bell Atl. v. Twombly*, 550 U.S. 544 (2007)).

130. When a Rule 68 Offer of Judgment is made to only one of several plaintiffs, the offer will not moot the collective action. This is true regardless of the number of additional opt-ins. See *Geer v. Challenge Fin. Investors Corp.*, No. 05-1109-JTM, 2006 WL 704933, at \*3 (D. Kan. Mar. 14, 2006) (denying motion to dismiss as offer covered only two of three opt-in plaintiffs and evidence was insufficient to determine if offer covered all damages); *Reyes v. Carnival Corp.*, No. 04-21861-CIV-GOLD/TURNOFF, 2005 U.S. Dist. LEXIS 11948, at \*8 (S.D. Fla. May 25, 2005) (“[T]wo other persons . . . have opted in to this suit, and [defendant] has not made offers of judgment to them.”); *Reed v. Tjx Cos.*, No. 04 C 1247, 2004 U.S. Dist. LEXIS 21605, at \*5 (N.D. Ill. Oct. 26, 2004) (refusing to dismiss where plaintiff “has identified two similarly situated individuals who have filed written consents with this court to join this lawsuit”).

131. 29 U.S.C. § 216(b).

defendant employer must identify and provide contact information for all employees who fit the class description.<sup>132</sup> Then, plaintiffs' counsel must interview multiple employees to determine both the scope of the affected class and the amount of damages that these employees suffered from the alleged unlawful wage practices.

Once the parties have had an opportunity to identify and collect data on the putative class, the court makes an initial § 216(b) determination to analyze whether plaintiffs have made the modest required showing of similarly situated employees that suffered similar wage violations.<sup>133</sup> If the court determines that plaintiffs have made such a showing, notice is sent to the putative class members to have an opportunity to opt in to the law suit. Once the court determines that potential opt-in plaintiffs are similarly situated for the purposes of authorizing notice, the court conditionally certifies the collective action,<sup>134</sup> and plaintiffs send court-approved notices to potential class members.<sup>135</sup> The initial conditional certification determination is merely a preliminary finding.<sup>136</sup> Upon receiving notice, the potential plaintiffs may elect to opt in pursuant to § 216(b) by filing written consents with the court.<sup>137</sup>

At this point, the identities and names of the class members are knowable, and an offer of judgment can be made to all of them.<sup>138</sup> Courts that moot these claims *before* the workers have an opportunity to learn about the action obstruct the statutory intent of protecting

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132. See ABA SEC. OF LAB. & EMP. LAW, THE FAIR LABOR STANDARDS ACT 1162 (Ellen C. Kearns et al. eds., 1999) ("In order to enable the joinder of additional employees who might wish to join in the suit, a plaintiff may seek discovery of the names and addresses of similarly situated employees and former employees.").

133. *Hoffmann v. Sbarro, Inc.*, 982 F. Supp. 249, 261 (S.D.N.Y. 1997).

134. *Masson v. Ecolab, Inc.*, No. 04 Civ. 4488(MBM), 2005 WL 2000133, at \*13 (S.D.N.Y. Aug. 17, 2005) (citing *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213–14 (5th Cir. 1995)).

135. See *Patton v. Thomson Corp.*, 364 F. Supp. 2d 263, 266 (E.D.N.Y. 2005) ("A court may, but need not, authorize [opt-in] notification, and direct an employer defendant to disclose the names and addresses of similarly situated potential plaintiffs." (citing *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989))).

136. *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 197 (S.D.N.Y. 2006); *Patton*, 364 F. Supp. 2d at 268.

137. *Lee*, 236 F.R.D. at 197; *Masson*, 2005 WL 2000133, at \*13.

138. Circuit courts generally agree that if a trial court determines that initial certification is improper because of a lack of showing that similarly situated employees exist, then dismissing this type of "voluntary" offer of judgment as mooting the named plaintiffs' claims is proper. *Smith v. T-Mobile USA, Inc.*, 570 F.3d 1119, 1121 (9th Cir. 2009); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 916 (5th Cir. 2008); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1244 (11th Cir. 2003). This analysis is not in conflict with the article's broader argument. The plaintiffs in these cases had an opportunity to determine and make a showing of similarly situated employees but failed to make that requisite showing.

workers from wage violations.<sup>139</sup> Courts should be wary of this practice because it “defeats the purpose of the collective action mechanism.”<sup>140</sup>

Courts should more consistently remain “mindful of the inherent danger that motions to dismiss grounded on a Rule 68 offer may be wielded as a strategic weapon to frustrate the FLSA’s very object—ensuring that every employee receives ‘a fair day’s pay for a fair day’s work.’”<sup>141</sup> Some courts have successfully navigated this procedural minefield. For example, in *Reed v. The TJX Companies, Inc.*, the district court denied a motion to dismiss in a similar situation.<sup>142</sup> The defendant proffered an affidavit from a witness who had calculated the plaintiff’s damages, offered the maximum recovery under this calculation, and then moved to dismiss on the grounds of mootness.<sup>143</sup> The court rejected the defendant’s calculation and denied the motion.<sup>144</sup> The court noted the particular concerns that arise when defendants attempt to moot collective actions early in the case.<sup>145</sup> Unfortunately, only a minority of courts have chosen to do so.

### *B. Rule 23 Class and Section 216(b) Collective Procedures Protect against Similar Abuses*

The inconsistent treatment of class and collective actions by courts is not reasonably explained by the structural differences of Rule 23 and § 216(b). One argument that courts have adopted to support dismissal of § 216(b) collective actions after offers of judgment is that the way in which such actions are structured makes them different in kind from Rule 23 class actions,<sup>146</sup> which have more exacting requirements and consequently are more deserving of protection.

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139. See *Ward v. Bank of N.Y.*, 455 F. Supp. 2d 262, 268 (S.D.N.Y. 2006) (“Furthermore, courts are wary of attempts by defendants to evade FLSA collective actions by making Rule 68 offers of judgment ‘at the earliest possible time.’” (quoting *Reyes v. Carnival Corp.*, No. 04-21861-CIV-GOLD/TURNOFF, 2005 U.S. Dist. LEXIS 11948, at \*10–11 (S.D. Fla. May 25, 2005))).

140. *Reyes*, 2005 U.S. Dist. LEXIS 11948, at \*10–11; see also *Reed v. TJX Cos.*, No. 04 C 1247, 2004 U.S. Dist. LEXIS 21605, at \*2 (N.D. Ill. Oct. 26, 2004) (“Of particular concern in this case is the ability of defendant purposefully to moot the class action complaint between the time of filing and class notification or certification.”).

141. *Rubery v. Buth-Na-Bodhaige, Inc.*, 494 F. Supp. 2d 178, 180–81 (W.D.N.Y. 2007) (quoting *A.H. Phillips v. Wailing*, 324 U.S. 490, 493 (1945)).

142. *Reed*, 2004 WL 2415055, at \*3.

143. *Id.* at \*1.

144. *Id.* at \*2.

145. *Id.* at \*3.

146. See *Davis v. Abercrombie & Fitch*, No. 08 Civ. 1859 (PKC), 2008 WL 4702840, at \*8 (S.D.N.Y. Oct. 23, 2008) (noting that class certification under the “similarly situated” standard is

Rule 23 requirements may at first appear more strenuous in ensuring that the putative class actually meets the goals of aggregate litigation. Such an appearance results from the four-step inquiry of Rule 23—which requires both that the class be sufficiently numerous, with common issues predominating, and that the case be litigated in one forum to promote efficiency and consistency.<sup>147</sup> The requirements of § 216(b), however, are streamlined but no less rigorous than the four-step model used in Rule 23 class actions. Those requirements are therefore appropriately tied to the goals of class litigation.

As outlined above, the first step under § 216(b) before notice can be sent is the minimal showing that there are numerous similarly situated employees.<sup>148</sup> At the second step, typically on a motion for decertification, the court undertakes a more stringent analysis as to whether members of the collective are, in fact, similarly situated.<sup>149</sup> Courts look to factors similar, if not identical, to the requirements of Rule 23: whether there are common issues of fact (such as common policies or practices of wage violations), whether there is sufficient evidence of a numerous class (through evidence of worker affidavits), and whether the named plaintiffs have typical claims that fairly represent the claims of the worker class.<sup>150</sup> If, after merits discovery, it is apparent that the named plaintiffs and the opt-in plaintiffs are not similarly situated, the court may decertify the collective action and dismiss the claims of the opt-in plaintiffs without prejudice.<sup>151</sup>

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more liberal than under the requirements of Rule 23) (citing *Iglesias-Mendoza v. La Belle Farm, Inc.*, 239 F.R.D. 363, 328 (S.D.N.Y. 2007)).

147. *Whitten v. ARS Nat'l Servs.*, No. 00 C 6080, 2001 WL 1143238, at \*2 (N.D. Ill. Sept. 27, 2001).

148. 29 U.S.C. § 216(b).

149. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1240 (11th Cir. 2008); *Mooney v. Aramco Serv. Co.*, 54 F.3d 1207, 1214 (5th Cir. 1995); *Lee v. ABC Home & Carpet*, 236 F.R.D. 193, 197 (S.D.N.Y. 2006); *Patton v. Thomson Corp.*, 364 F. Supp. 2d 263, 267 (E.D.N.Y. 2005).

150. *See, e.g., Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001) (“During this ‘second stage’ analysis, a court reviews several factors, including ‘(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant which appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) whether plaintiffs made the filings required by the ADEA before instituting suit.’” (quoting *Bayles v. Am. Med. Response*, 950 F. Supp. 1053, 1060–61 (D. Colo. 1996)); *Sushan v. Univ. of Colo.*, 132 F.R.D. 263, 267 (D. Colo. 1990) (arguing that Rule 23 procedures apply in the 216 context as well); *St. Leger v. A.C. Nielsen Co.*, 123 F.R.D. 567, 569 (N.D. Ill. 1988) (refusing to certify a class where individual questions of fact predominated over common ones). *But see Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n.12 (11th Cir. 1996) (“[I]t is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23.”).

151. *Lee*, 236 F.R.D. at 197; *see also Patton*, 364 F. Supp. 2d at 268 (discussing ability to revisit the certification issue if discovery shows that the opt-in plaintiffs are not similarly situated); *Gjurovich v. Emmanuel's Marketplace, Inc.*, 282 F. Supp. 2d 101, 105 n.1 (S.D.N.Y. 2003) (noting that discovery may lead to decertification down the line); *Jackson v. N.Y. Tel. Co.*,

Plaintiffs' initial burden is minimal, in part, because the court's decision to certify the collective action at the first stage is a preliminary one that may be modified or reversed at the second certification stage, once discovery is completed.<sup>152</sup>

Accordingly, both aggregation devices allow courts to make a detailed analysis of whether the putative class meets the goals of aggregate litigation based on factual findings developed by the parties through strenuous discovery efforts. Among these goals, the most critical is that the putative class members meet a commonality requirement that the workers were subject to common violations of the law stemming from similar factual backgrounds.<sup>153</sup>

### *C. Named Plaintiffs Play a Critical Role in Both Rule 23 and Section 216(b) Litigations*

Courts have reasoned that Rule 23 named plaintiffs are irreconcilably different from § 216(b) named plaintiffs, which allows them to moot § 216(b) plaintiffs' claims even though they refuse similarly to moot Rule 23 claims.<sup>154</sup> However, in important ways, the role of named plaintiffs in Rule 23 and § 216(b) actions is substantially similar and equally important to ensuring that the goals of aggregate litigation are met.

There are many similarities between named plaintiffs under Rule 23 and § 216(b). Rule 23 requires that named plaintiffs show that their claims are typical for their class and that they will "fairly and adequately protect the interests of the class."<sup>155</sup> Likewise, § 216(b) requires the court to determine that the named plaintiffs' claims are similarly situated to numerous other workers subjected to workplace violations.<sup>156</sup> Additionally, both Rule 23 and § 216(b) require that at least one named plaintiff participate in any class action.

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163 F.R.D. 429, 431 (S.D.N.Y. 1995) ("The inquiry at the inception of the lawsuit is less stringent than the ultimate determination that the class is properly constituted.").

152. *Lee*, 236 F.R.D. at 197; *Mazur v. Olek Lejbzon & Co.*, No. 05 Civ. 2194(RMB)DF, 2005 WL 3240472, at \*5 (S.D.N.Y. Nov. 30, 2005); *Patton*, 364 F. Supp. 2d at 267–68; *Gjurovich*, 282 F. Supp. 2d at 105; *Realite v. ARK Rest., Corp.*, 7 F. Supp. 2d 303, 308 (S.D.N.Y. May 15, 1998).

153. 29 U.S.C. § 216(b) (permitting actions by "any one or more employees for and in behalf of himself or themselves and other employees similarly situated"); FED. R. CIV. P. 23(a)(2) (requiring that "there are questions of law or fact common to the class").

154. *See Cameron-Grant v. Maxim Healthcare Serv., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) ("Thus, the structure of Rule 23 reflects that the named plaintiff has a claim that he is entitled to represent a class." (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 338, 402 (1980))).

155. FED. R. CIV. P. 23(a)(4).

156. 29 U.S.C. § 216(b); *see, e.g., Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1102–03 (10th Cir. 2001) (discussing three approaches that courts have used to determine whether plaintiffs

The role of named plaintiffs under both aggregation devices is demanding, time intensive, and filled with many personal risks. As one federal district court noted in *Frank v. Eastman Kodak Co.*, “In employment litigation, the [named] plaintiff is a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers.”<sup>157</sup> Further, named plaintiffs do substantially similar work in both types of actions. Employment discrimination and wage and hour cases are both typically initiated by an employee who informs an attorney of systemic abuses by an employer. This begins a long investigation process by the plaintiff’s attorney that can take many months to conclude. During that time, the employee is an important fact witness, providing crucial information on the employment practices at issue in discrimination suits, including decisionmaking, promotion and hiring practices, and managerial hierarchy. At the request of class counsel, “the employee submits to numerous and sometimes lengthy interviews in the investigation stage of the litigation.”<sup>158</sup>

Once litigation begins, named plaintiffs for both Rule 23 and § 216(b) cases are intimately involved with the preparation of the case. They provide input and review drafts of the complaint, respond to specific and detailed document demands, respond to numerous and detailed interrogatories, and sit through one or several days of depositions, following considerable preparation.<sup>159</sup>

In employment matters, the stakes are high because workplace status and the ability to earn a living are at issue. The financial and

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are “similarly situated” for purposes of § 216(b) (citing *Bayles v. Am. Med. Response*, 950 F. Supp. 1053, 1060–61 (D. Colo. 1996)); *Sushan v. Univ. of Colo.*, 132 F.R.D. 263, 265 (D. Colo. 1990) (holding that “the named representative plaintiffs in an ADEA class action must satisfy all of the requirements of rule 23, *insofar as those requirements are consistent with 29 U.S.C.A. § 216(b)*” (emphasis in original)); *St. Leger v. A.C. Nielsen Co.*, 123 F.R.D. 567, 568–69 (N.D. Ill. 1988) (denying motion for class notice because of a lack of commonality of working hours).

157. *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 187 (W.D.N.Y. 2005).

158. *Cf. Ruan*, *supra* note 5, at 409 (discussing the investigation process in the context of employment discrimination class actions).

159. *See, e.g., W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) (overturning district court’s denial of discovery from named plaintiffs); *Carnegie v. Mut. Sav. Life Ins. Co.*, No. Civ.A.CV-99S3292NE, 2004 WL 3715446, at \*24 (N.D. Ala. Nov. 23, 2004) (reciting plaintiffs’ discovery responses); *In re S. Ohio Corr. Facility*, 175 F.R.D. 270, 275 (S.D. Ohio 1997) (characterizing incentive awards to class representatives as litigation expenses); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299–300 (N.D. Cal. 1995) (awarding class representative \$50,000 in incentive awards); *Women’s Comm. for Equal Employment Opportunity v. Nat’l Broad. Co.*, 76 F.R.D. 173, 182 (S.D.N.Y. 1977) (deeming disproportionate damage award to representative plaintiffs proper); *Brenda Berkman et al., Roundtable Discussion: Berkman v. City of New York*, 26 FORDHAM URB. L.J. 1355, 1359 (1999) (discussing the time commitment and personal risk named plaintiffs in gender discrimination class action must undertake).



personal risks that named plaintiffs bear are also substantial. For a current employee, risk of retaliation by her employer, including losing her job or being assigned less favorable tasks and responsibilities, is a real threat. Also, the named plaintiff can expect to be ostracized by coworkers and to experience general discomfort at the workplace. This aspect gains importance when viewed in conjunction with the fact that most employees spend a significant amount of their waking hours at work and that our self-respect and self-identify are often tied to our work. In many industries, former or departing employees find themselves on a do-not-hire list and find future employment in their chosen field difficult. “Although not always the result of actionable retaliation, named plaintiffs looking for work sometimes face unearned, disparaging references when potential employers check resumes that are traceable to their legal struggle with a former employer.”<sup>160</sup>

One important difference is that § 216(b) actions require other workers affirmatively to opt in to the lawsuit. Courts have relied upon this difference to argue that Rule 23 named plaintiffs are more critical to their opt-out cases and therefore should not have their cases mooted.<sup>161</sup> However, the role of § 216(b) named plaintiffs is equally important because without their work, initial certification would not be granted, and the workers would *never* get notice that their wages might have been withheld unlawfully. Prior to certifying a collective action under § 216(b) for notice to be sent to other workers, named plaintiffs must make an initial showing.<sup>162</sup> Named plaintiffs assist their attorneys by providing names and interviewing workers to supply the court with supportive declarations or affidavits to reflect that there are other numerous similarly situated workers to meet that initial threshold. Without the work of the named plaintiffs, § 216(b) collective actions would never get off the ground.

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160. Cf. Ruan, *supra* note 5, at 411 (describing the personal risks associated with employment discrimination class actions that named plaintiffs bear).

161. See U.S. Parole Comm’n v. Geraghty, 445 U.S. 388, 402 (1980) (recognizing that a named class plaintiff may have a legally cognizable interest in pursuing class certification beyond his claim on the merits); Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 334–37 (1980) (observing that named plaintiffs may continue to have a personal interest in the class certification question, even after an adverse judgment on the merits); Cameron-Grant v. Maxim Healthcare Serv., Inc., 347 F.3d 1240, 1245 (11th Cir. 2003) (explaining that a named Rule 23 plaintiff may pursue his special interest in appealing denial of class certification where his individual claims have become moot).

162. Hoffmann-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989); Cryer v. Intersolutions, Inc., No. 06-2032, 2007 U.S. Dist. LEXIS 29339, at \*5 (D.D.C. Apr. 7, 2007) (“[A] court may conditionally certify the collective action class early in the litigation upon an initial showing the members of the class are similarly situated . . .”).

#### IV. WHY RULE 68 OFFERS ARE INCONSISTENT WITH CLASS AND COLLECTION ACTIONS GENERALLY

##### A. “Gun to the Head” Approach Should Not Be a Judicial Tactic for Promoting Settlement

The stated purpose of Rule 68 is to promote settlement.<sup>163</sup> It does so by encouraging plaintiffs to accept the offer of judgment, because to reject it means to risk having to pay the costs the defendant incurs after the offer.<sup>164</sup> Moreover, if the offer is rejected and the plaintiff does not win a better judgment than the offer, the same plaintiff is unable to recover her own post-offer costs even if she prevails.<sup>165</sup>

This settlement motive behind Rule 68 is especially insidious in § 216(b) collective actions, where an offer of judgment may discourage named plaintiffs from proceeding with the litigation by creating the risk of personal financial loss. Named plaintiffs in an FLSA case retain class counsel with the hope that statutory fees will be imposed on the employer to pay the attorneys for bringing the case. Accordingly, named plaintiffs are more willing to provide service to the unnamed class and be exposed in the workplace because they feel insulated from having to cover the costs and fees of the litigation. In essence, the risk is minimal because if the case is ultimately unsuccessful, named plaintiffs have not risked anything monetarily.<sup>166</sup>

In contrast, if a Rule 68 offer is made the named plaintiff's risks become sizeable. The named plaintiff then risks having to pay the defendant's costs (which can be quite substantial) if the ultimate judgment is less than the offer. The Supreme Court specifically approved the use of Rule 68 to create financial exposure on the part of a non-settling plaintiff: “To be sure, application of Rule 68 will require plaintiffs to ‘think very hard’ about whether continued litigation is worthwhile . . . .”<sup>167</sup>

But in the § 216(b) context, this puts the named plaintiff between the proverbial rock and a hard place: Suffer the financial

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163. *Marek v. Chesny*, 473 U.S. 1, 6 (1985).

164. FED. R. CIV. P. 68(d); Ian H. Fisher, *Federal Rule 68, A Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 DEPAUL BUS. L.J. 89, 91 (2001).

165. FED. R. CIV. P. 68(d); see *Marek*, 473 U.S. at 6 (“[T]he offer [must] be one that allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued.”).

166. However, the personal risks are still quite high. See *supra* Part II.C (discussing personal risks that the named plaintiff bears).

167. *Marek*, 473 U.S. at 11.

risks of rejecting the offer and possibly having the court deem the claim to be moot, or accept the “tactical trick bag”<sup>168</sup> and allow defendant employers to “short-circuit”<sup>169</sup> a collective action that is the only hope of fighting against systemic violations in the workplace.

*B. Offers of Judgment in Class Litigation Violate Judicial Oversight of Settlement*

To address the fear of collusion between parties in class action settlements, the Federal Rules of Civil Procedure were recently amended to provide more judicial oversight over the settlement of class actions.<sup>170</sup> Rule 23(e)(2) now requires that a proposed class settlement be approved by the court, which will determine if the proposed settlement is fair, reasonable, and adequate.<sup>171</sup> Courts make this determination by conducting a “thorough analysis of both procedural fairness and substantive fairness.”<sup>172</sup>

Judicial oversight of settlements is likewise critical to FLSA collective actions. Judges take an active role in determining whether the settlement is reasonable in light of the claims being made. They do this by examining extensive preliminary and final approval briefing from the parties and by conducting a fairness hearing to consider any objections to the settlement.<sup>173</sup>

In both instances, judicial oversight of settlements ensures that courts are guardians, or gatekeepers, to protect the mostly absent class members.<sup>174</sup> In evaluating procedural fairness, courts consider “whether the negotiations were a result of ‘arm’s length negotiations’ and whether plaintiffs’ counsel possessed the experience and ability to

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168. *Gibson v. Aman Collection Serv., Inc.*, No. IP 00-1798-CT/G, 2001 WL 849525, at \*2 (S.D. Ind. May 21, 2001).

169. *Kremnitzer v. Cabrera & Rephen, P.C.*, 202 F.R.D. 239, 243 (N.D. Ill. 2001).

170. See FED. R. CIV. P. 23(c) advisory committee’s note, 1966 amends. (“Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between ‘certification discovery’ and ‘merits discovery.’”).

171. FED. R. CIV. P. 23(e)(2); *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *Joel A. v. Giuliani*, 218 F.3d 132, 138–39 (2d Cir. 2000); see also 2 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 11.43 (4th ed. 2002) (listing factors to determine whether a settlement is fair, reasonable, and adequate); *MANUAL FOR COMPLEX LITIGATION (FOURTH)* §§ 21.61 to 21.62 (2004) (discussing the “fair, reasonable, and adequate” standard).

172. *In re Auction Houses Antitrust Litig.*, 42 Fed. Appx. 511, 520 (2d Cir. 2002).

173. Because FLSA 216(b) actions are often brought with Rule 23 state wage and hour actions, settlement approval by the court is often merged under these two doctrines.

174. *Weinberger v. Kendrick*, 698 F.2d 61, 69 n.10 (2d Cir. 1982).

represent effectively the class's interests."<sup>175</sup> If the court makes a favorable determination on these queries, it will approve the settlement only after extensive briefing and factual showing by the parties.

By contrast, Rule 68 operates *automatically*. It strips the court of its gatekeeping function to oversee settlements that affect multiple claimants. It requires no showing that the offer is reasonable in light of the facts of the litigation. In aggregate litigation, where the offer of judgment could be made to multiple plaintiffs simultaneously, Rule 68 is in direct contravention to this important judicial role.

### CONCLUSION

Using procedural bars to combat an influx of cases protecting substantive rights is nothing new. However, the inconsistency with which some rules are applied, as well as the failure to protect an underprivileged group the laws are explicitly designed to protect, is striking. By most accounts, the civil rights movement of the 1960s was successful in spearheading an effort to address discriminatory practices against racial minorities through substantive statutory rights (e.g., Title VII) and procedural mechanisms (e.g., Rule 23) by which those rights could be more easily and appropriately vindicated through access to the courts.

In contrast, the right of low-wage workers to receive what they lawfully earn has a longstanding statutory remedy (i.e., the FLSA) but an antiquated procedural mechanism (i.e., § 216(b)). This disconnect both diminishes the law's ability to fully vindicate workers' rights and can be the structural difference that allows other procedural rules (i.e., Rule 68) to deny standing in federal court at the outset. Word of this judicial tactic has spread. Indeed, a recent bar association article geared towards management attorneys proclaimed: "Use the [Rule 68] offer early and often."<sup>176</sup>

With regard to allowing Rule 68 offers to moot named plaintiffs' claims, the solution is squarely within the power of the judiciary: Deny these attempts to evade wage litigation as inconsistent with established Rule 23 law and with the legislative intent of the wage laws.

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175. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001) (citing *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 173–74 (S.D.N.Y. 2000)).

176. Teresa Rider Bult, *Practical Use and Risky Consequences of Rule 68 Offers of Judgment*, 33 LITIGATION, Spring 2007, at 26, 27.

The courts are not the only hope, however. Congress holds the power to update the FLSA by explicitly authorizing the opt-out class action mechanism. By allowing opt-out class actions, Congress will make clear that systemic wage theft deserves a collective remedy comparable to class actions challenging race and sex discrimination. Given the recently renewed federal commitment to workers' rights—as seen through the Americans with Disabilities Amendments Act, the Lilly Ledbetter Fair Pay Act, and other labor and employment legislation—perhaps the time is ripe for such action. In the meantime, courts should apply Rule 68 offers of judgment to § 216(b) collective actions in a manner consistent with how they apply them to Rule 23 class actions. No longer allowing Rule 68 to preempt collective actions would end the judicial facilitation of wage theft.