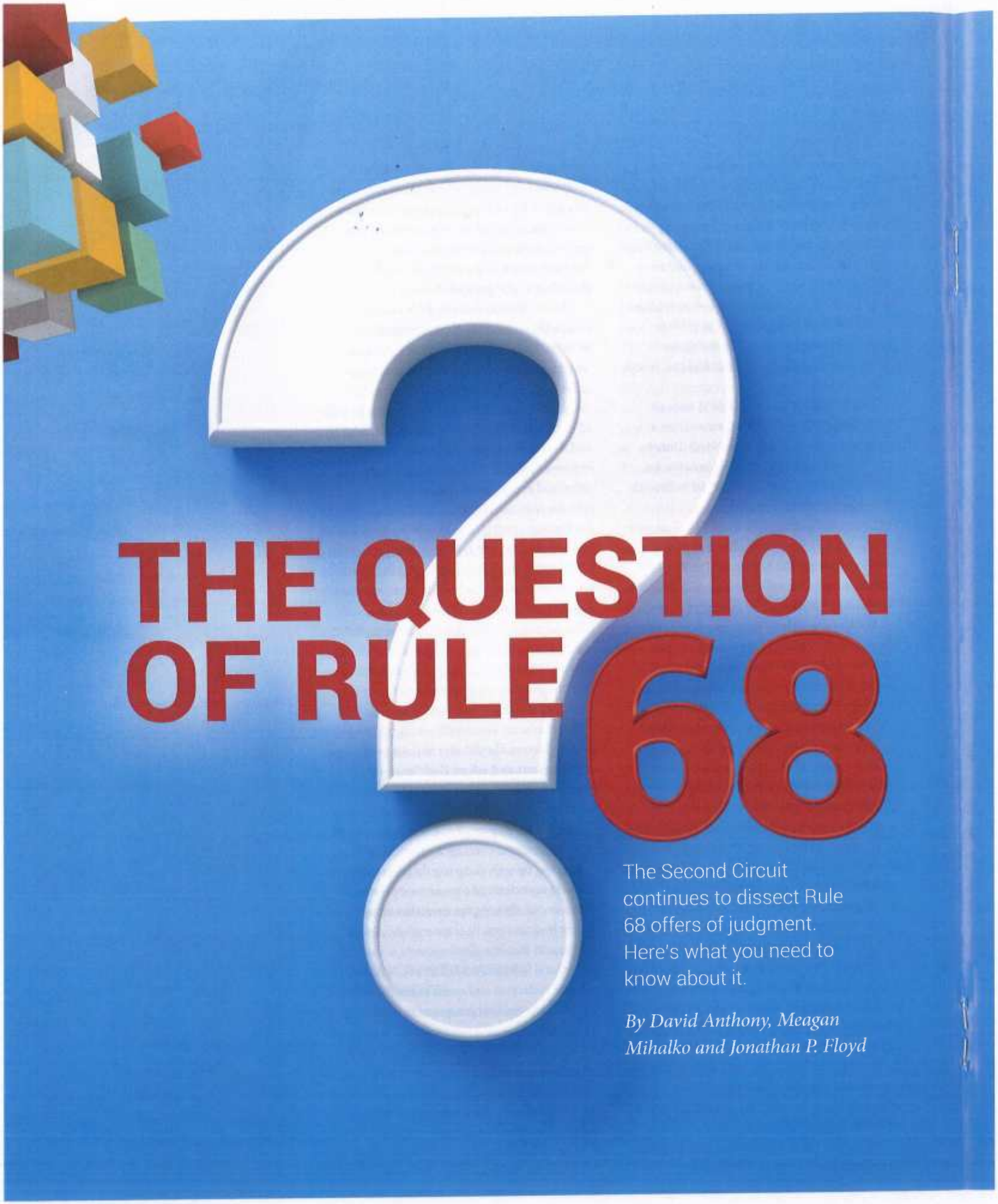

THE QUESTION OF RULE 68

The Second Circuit continues to dissect Rule 68 offers of judgment. Here's what you need to know about it.

By David Anthony, Meagan Mihalko and Jonathan P. Floyd

Do not abandon the offer of judgment just yet; it may still have a place in the defense attorney's quiver after all. Those in the credit and collection industry are all too familiar with the U.S. Supreme Court's January 2016 ruling in *Campbell-Ewald v. Gomez* that an unaccepted offer of full relief to individual litigants cannot be used to "pick off" class representatives.

The court's decision, however, left an unanswered question with which district courts continue to struggle. That hypothetical stems from language in the court's opinion that "[w]e need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that account. That question is appropriately reserved for a case in which it is not hypothetical."

Since the court's ruling in *Campbell-Ewald*, various appellate courts have declined to end class actions where defendants directly deposited the full claim amount into an account payable to the lead plaintiff.

For example, after *Campbell-Ewald* was remanded, the defendant attempted to deliver a certified check to the plaintiff's counsel while simultaneously moving to pay such funds into court. The trial court rejected this strategy and refused to dismiss the case on mootness grounds.

This view was adopted by the Ninth Circuit in *Chen v. Allstate Insurance Co.*, where the court held that a plaintiff in a purported class action "must be accorded a fair opportunity to show that certification is warranted" before a mootness claim is even entertained on the plaintiff's individual claim based on an offer of complete relief.

However, over the past several months, the Second Circuit has been at the forefront of interpreting the *Campbell-Ewald* hypothetical as it pertains to offers of judgment. Recent developments out of the Second Circuit show that it may be taking a slightly different approach from other circuits regarding the impact of an offer of judgment that includes the deposit of funds directly with the court.

ANALYZING THE HYPOTHETICAL

On Feb. 15, 2017, in *Leyse v. Lifetime Entertainment Services, LLC*, the Second Circuit upheld entry of judgment in a putative class action alleging violations under the Telephone Consumer Protection Act.

After Leyse's motion for class certification was denied, Lifetime made a Rule 68 offer of judgment and deposited into court the full amount of damages, including costs, recoverable by Leyse under the TCPA. Despite Leyse's rejection of the offer, the district court granted Lifetime's motion to enter judgment. Leyse appealed, arguing that *Campbell-Ewald* expressly prohibits such a dismissal.

The Second Circuit affirmed, holding that *Campbell-Ewald* did not extend to cases where a defendant "deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." The court reasoned that *Leyse* presented the precise hypothetical scenario discussed in *Campbell-Ewald* and did not otherwise overrule controlling Second Circuit precedent.

It should be noted that *Leyse* is distinct from *Chen* in that the plaintiff's motion for class certification already had been denied. The Second Circuit went so far as to state that "[w]hile an unaccepted Fed. R. Civ. P. 68 offer for complete relief does not *moot* a case—that is, it does not strip the district court of jurisdiction over the case—such an offer, if rejected, may nonetheless permit a court to enter a judgment in the plaintiff's favor."

Just a few weeks later on March 9, 2017, the Second Circuit issued another opinion addressing the applicability of the *Campbell-Ewald* hypothetical. In *Geismann v. ZocDoc Inc.*, the Second Circuit vacated and remanded an order dismissing a putative TCPA class action based on an unaccepted Rule 68 offer of judgment.

While the class certification motion was pending, ZocDoc made a Rule 68 offer of judgment, which Geismann rejected. ZocDoc then moved to dismiss the complaint, arguing that its offer of judgment mooted the action. The district court granted the motion and dismissed the action for lack of subject matter jurisdiction. Geismann appealed, arguing that the district court erred under *Campbell-Ewald*. While the appeal was pending, ZocDoc deposited the funds with the court.

The Second Circuit vacated the district court's order, reasoning that when Geismann rejected the Rule 68 offer, he had not been compensated in satisfaction of its claim. The Second Circuit refused to decide whether a different outcome would result if the defendant had deposited the full amount of the plaintiff's claim into an account payable before the court entered judgment, thus duplicating the *Campbell-Ewald* hypothetical.

In the most recent decision to address this topic, the Second Circuit again declined to find that a Rule 68 offer mooted a claim where the defendant did not attempt to deposit the funds into court. In *Lary v. Rexall Sundown, Inc.*, Lary filed suit against Rexall Sundown, alleging TCPA violations. Rexall responded with a Rule 68 offer of judgment. After the offer was made, Lary countered by moving for class certification to attempt to prevent the defendants from mooting his class claims.

Even though Lary did not accept the offer, Rexall moved to dismiss the complaint, arguing that all of Lary's claims had been mooted by the offer of judgment, leaving the district court without subject matter jurisdiction. The district court granted the motion to dismiss, denied the motion for class certification and entered judgment in Lary's favor based on the Rule 68 offer.

In a summary order, the Second Circuit found the facts of *Lary* "largely indistinguishable" from *Geismann*. "The District Court's order dismissing Lary's putative TCPA class action was premised on [the defendant's] Rule 68 offer mooting his claim," the panel wrote. "Pursuant to the holdings of *Campbell-Ewald* and *Geismann*, the District Court's dismissal was based on an error of law since Lary's claim was not mooted by [the defendant's] offer of

judgment. Accordingly, judgment should not have been entered in his favor."

The Second Circuit further stated that because "Lary did not accept the check, nor did [the defendants] seek leave to deposit the amount of its offer with the District Court. The hypothetical posed by *Campbell-Ewald* is thus not present here. As such, we need not, and do not, decide whether a different outcome would result if the facts here matched this hypothetical."

LOOKING AHEAD

Although the ability to moot a class-action lawsuit with a pre-motion for class certification offer of judgment appears to have long passed, Justice Ginsberg's undecided hypothetical continues to cause a wrinkle in the Second Circuit and likely other courts.

One thing does remain clear though: If a defendant is going to try to fit within the *Campbell-Ewald* hypothetical, it must carefully follow the appropriate steps in tendering the offer to the plaintiff and payment into the court. A failure to "match" the precise hypothetical from *Campbell-Ewald* will likely continue to land defendants in similar situations as those in *Gesimann* and *Lary*.

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KEYNOTES

1 *The purpose of Rule 68 is to encourage settlement and avoid unnecessary litigation.*

2 *A 2016 Supreme Court ruling left district courts to decide what happens when a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff.*

3 *Recent developments out of the Second Circuit show that it may be taking a slightly different approach to interpreting this, though questions still remain.*