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The new Rules of Federal Procedure—They're here

BY JOHN J. HOLEVAS

Effective December 1, 2015, the Federal Rules of Civil Procedure were amended. Most commentators have suggested that these amendments contain the most significant alterations to the discovery rules in more than two decades. The new rules will "govern in all proceedings in civil cases hereafter commenced and, insofar as practical, all proceedings then pending." With the stated goal of moving cases along more quickly and making discovery, particularly electronic discovery, more effective, eleven of the rules have been modified. While some of the changes sought to clarify or simplify the rules, other changes were promulgated to address day-to-day discovery issues which most agree tend to make civil litigation extremely expensive. This article will attempt to highlight five of what this author considers to be the most significant changes in those discovery rules. However, every federal practitioner should become acquainted with each new

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Summary judgment motion practice in the Central and Southern districts

BY AMBROSE V. MCCALL

Local court rules always matter, especially when preparing summary judgment motions and briefs. The Seventh Circuit enforces local U.S. District Court rules as part of a broad public policy to promote litigation efficiency. *See Stevo v. Frasor,* 662 F.3d 880, 886-87 (7th Cir. 2011) ("Because of the high volume of summary judgment motions and the benefits of clear presentation of relevant evidence and law, we have repeatedly held that district judges are entitled to insist on strict compliance with local rules designed to promote the clarity of summary judgment filings."); *see also Chelios v. Heavener,* 520 F.3d 678, 687 (7th Cir. 2008) ("[L]ocal rules streamline litigation and save litigants, lawyers and

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The new Rules of Federal Procedure

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and/or modified rule.

1. Proportionality in Discovery Under Rule 26

While the courts for several years have referred to a "proportionality test" when addressing discovery issues, prior to the 2015 amendments, the actual phrase "proportionality" appeared nowhere in the federal rules. With the amendment to Federal Rule of Civil Procedure 26(b)(2)(C)(iii), proportionality is now made part of the definition concerning the scope of discovery. As amended Rule 26(b) states:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Prior to this amendment, any argument that the proposed discovery request "outweighed its likely benefits" had to be made by motion of the party or the court's own motion. As modified, the rule now makes it the obligation of the parties to consider proportionality factors in making discovery requests, responses or objections.

2. Modifications to Rule 34(b)(2) Concerning Responses to Document Requests

Under the amended Federal Rule of Civil Procedure 34(b)(2)(B), any party objecting to a document request will be required to state the objection with specificity. While previously Rule 33(b)(4) had required such specific objections in reference to interrogatories, there was no such parallel requirement in Rule 34 concerning document requests.

Quite often a responding party would produce certain requested documents, but then provide a statement indicating "investigation continues as to other documents." This often led to discovery disputes and discovery motions being filed. The revised Rule 34(b)(2)(B) requires that the "production must then be completed no later than the time for inspection specified in the request or another reasonably time specified in the response."

Another common production request response would be where a party objects to a request, but then indicates without waiving the objection identified above, plaintiff/defendant agrees to produce certain documents. Such a response leaves open whether there were other documents which were being withheld from production. The revisions to Rule 34(b)(2)(C) now require that the responding party state whether documents are being withheld on the basis of an objection.

3. The Time Period for Serving Document Requests Pursuant to Rule 26(d)

Under the new rules, document requests can be served 22 days after the Complaint and Summons are served, but before any party has answered. Under the previous version of Rule 26(d), the party could not serve discovery requests until after the Rule 26(f) conference had been completed. Many practitioners are concerned that this amendment will allow discovery to commence prior to the parties being at issue on the pleadings.

4. Modifications to Rule 26 Relating to the Shifting of Expenses and the Costs of Complying with Discovery

While courts had routinely interpreted

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITOR
Patricia S. Smart

MANAGING EDITOR / PRODUCTION
Katie Underwood
kunderwood@isba.org

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the prior Rule 26(c)(1) to provide implicit authority to shift expenses to protect a party from "undue burden or expense" in responding to discovery, Rule 26(c)(1) (B) now includes express authority to condition discovery through an order "specifying terms, including time and place or the allocation of expenses, for the disclosure of discovery."

5. Standardized Sanctions for Failure to Preserve Electronically Stored Information

Prior to the modifications in Rule 37(e), federal courts throughout the country had established significantly varying standards in sanctioning parties who failed to preserve discoverable electronically stored information. For example, the Seventh Circuit ruled in *Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008) that an adverse inference instruction could be imposed only when a party intentionally destroyed documents in bad faith for the purpose of hiding adverse information. On the other end of the spectrum, the Second Circuit in *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99 (2d Cir. 2002), has ruled that discovery sanctions, including an adverse inference instruction, could be imposed on a party who breached discovery obligations through ordinary negligence.

Many practitioners concerned with the varying standards often times cause their clients to spend excessive time, money and resources on ESI preservation to avoid the risk of severe sanctions.

The newly revised Federal Rule of Civil Procedure 37(e) appears to follow the Seventh Circuit less onerous approach which states, in part:

> "If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Of particular importance is the fact that this revised new rule applies only to electronically stored information. The circuits are free to follow their own standards regarding preservation of other types of evidence.

In Conclusion

While change is never easy, hopefully the New Rules which address discovery issues can allow the parties to expedite the resolution of their cases. ■

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Summary judgment motion practice...

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courts time and effort."). Indeed, even pro se litigants may be required to comply with the local court rules. *Coleman v. Goodwill Indus. of Se. Wis., Inc.,* 423 Fed.Appx. 642, 643 (7th Cir. 2011)("Though courts are solicitous of pro se litigants, they may nonetheless require strict compliance with local rules[.]"); *Bordelon v. Chicago Sch. Reform Bd. of Trustees,* 233 F.3d 524, 527 (7th Cir. 2000).

The case law and practice in the Central and Southern District suggest being mindful of all the local rules, including the following specific rules when preparing summary judgment motions and response briefs.

1. The failure of a nonmovant to respond to a FRCP 56 summary judgment motion. The Seventh Circuit enforces compliance with local rules that require a nonmovant to respond or risk admitting the motion. *Smith v. Lamz,* 321 F.3d 680, 683 (7th Cir. 2003).

A. SDIL-LR 7.1(c)(2) - a failure to timely respond to a dispositive motion "may, in the Court's discretion, be considered an admission of the motion."

Dorko v. Hodge, 2013 WL 4495668 *5 (S.D.Ill. Aug. 21, 2013)("As discussed above, pursuant to local rule and Federal Rule of Civil Procedure 56(e), the undersigned considers Plaintiff's failure to respond to Defendant Kimmel's June summary judgment motion as an admission to the facts presented therein. SDIL-LR 7.1(c)).").

B. CDIL-LR 7.1(D)(2) – "A failure to respond will be deemed an admission of the motion."

Jackson v. Vaughan & Bushnell Mfg. Co., 2015 WL 4637386 *2 (C.D. Ill. Aug. 4, 2015)("As indicated above, there is no response to the Motion for Summary Judgment. Therefore, Plaintiff is deemed to have admitted the contents of Defendant's Motion for Summary Judgment, pursuant to Local Rule 7.1(D)(2)."); *compare with Hunter v. Rock Island Housing Authority,* 2015 WL 1850693 *3 (C.D.Ill. Apr. 21, 2015)(citing rule to explain that while motion is deemed admitted, the court will not "automatically" grant it); *Mintz v. Caterpillar, Inc.,* 2014 WL 1457826 *1 (Apr. 14, 2014), *aff'd*, 788 F.3d 673 (75th Cir. 2015)(citing rule but explaining that court would still consider the merits of the plaintiff's claims).

2. The Local Rules that flow from FRCP 56(e)(2)("If a party fails to … properly address another party's assertion of fact…the court may consider the fact undisputed for purposes of the motion.").

A. SDIL-LR 7.1(d)("Allegations of fact not supported by citation may, in the Court's discretion, not be considered."); 7.1(e)(requiring brief of movant and non-movant to contain "citation to relevant legal authority and to the record,…).

Unlike the Central District, the Southern District does not impose specific pleading requirements for asserting or disputing material facts, or additional material facts, paragraph by paragraph.

B. CDIL-LR 7.1(D)(2)(b)(6)("A failure [by nonmovant] to respond to any numbered fact will be deemed an admission of the fact."); 7.1(D)(3)(a)(5)("A failure [by movant] to respond to any numbered [additional material facts raised by nonmovant] will be deemed an admission of that fact."). Both movant and non-movant must cite documentary evidence in support of each numbered fact, and cite the supporting exhibit and page, and include the relevant documentary evidence as exhibits. CDIL-LR 7.1(D)(1)(b); 7.1(D)(2)(b)(2),(3),(5).

Kibler v. United States, 46 F.Supp.3d 844, 848-49 (C.D. Ill. 2014)("Again, Plaintiffs do not cite to evidentiary documentation referenced by specific page to dispute Defendant's material fact. Plaintiffs' responses read more like an argument, or a flat denial that one would find in an answer or complaint. Plaintiffs have not contradicted Defendant's asserted facts in the manner specified by local rule, and thus those facts must be deemed admitted."); *Kremer v. City of Decatur,* 2014 WL 793465 *2 (C.D. Ill. Feb. 26, 2014)(explaining that defendant failed to meet initial burden of showing undisputed material facts by not citing evidence in support of each numbered fact); *Williams v. Smalls,* 2013 WL 5229999 *1 (C.D. Ill. 2013)("Pursuant to Local Rule 7.1(D)(2)(b)(6), '[a] failure to respond to any numbered fact will be deemed an admission of the fact."); *Gilles v. Pleasant Hill Elementary School Dist. No. 69,* 2011 WL 5005995 *2 (C.D. Ill. Oct. 20, 2011)(striking material fact response of plaintiff which lacked any citation to the record); *Allen v. Potter,* 2009 WL 4048106 *4 (Nov. 17, 2009)("Although Allen does go through each of Defendant's statements and responds to each of them, she provides no citation whatsoever to the records for those statements she 'disputes.'"); *Sokoya v. Downey,* 2009 WL 773523 *3 (C.D. Ill. March 20, 2009)("[Plaintiff] does not respond particularly to each numbered paragraph nor does he identify each fact from Defendants' statement and clarify whether it is conceded to be undisputed and material, disputed and material or immaterial.").

BB. Any additional facts that the non-movant wishes to raise must appear in a separate subsection of the response. CDIL-LR 7.1(D)(2)(b); *see Moralis v. Flageole,* 2007 WL 2893652 *3 (C.D. Ill. Sept. 28, 2007)("[A]additional facts beyond the movant's statement must be submitted in a separate subsection").

3. Page Limitations

A. SDIL-LR 7.1(d) limits briefs to "20 double-spaced typewritten pages in 12 point font."

B. CDIL-LR 7.1(B)(4) and 7.1(D)(5) require the movant to use no more than 15 double-spaced pages, or volume type compliant pages for the argument sections of the motion for summary judgment, or the response to the motion for summary judgment. The page limitations do not apply to the sections asserting or disputing material facts.

Browning v. GCA Service Group, 2014 WL 65798 *3 (C.D. Ill. Jan. 8, 2014) (denying defendant's motion for leave to file separate summary judgment motions for each plaintiff and denying motion for leave to file brief in excess of page limitations set forth in CDIL-LR 7.1(B)(4)).

4. Legal Argument Sections

A. SDIL-LR 7.1(e) requires summary judgment motion movants and non-movants to cite "relevant legal authority and to the record."

B. CDIL-LR 7.1(D)(1)(c) requires the movant to use subheadings for each separate point of law raised, followed by explanations of each legal point, using cites to authorities with explanations of how the points of law, when applied to the undisputed material facts, support granting movant the requested relief. CDIL-LR 7.1(D)(2)(c) requires non-movant to respond to the movant's argument "by explaining any disagreement with the movant's explanation of each point of law, why a point of law does not apply to the undisputed material facts, why its application does not entitle movant to relief or why, for other reasons, summary judgment should not be granted."

Moralis v. Flageole, 2007 WL 2893652 *5 (C.D. Ill. Sept. 28, 2007)(citing rule and non-compliance by pro se plaintiff while striking several summary judgment motion filings).

5. Summary Judgment Motion Reply Briefs

A. SDIL-LR 7.1(c) stresses that reply briefs are not favored and should only be filed under exceptional circumstances. Moreover, if a party finds it is necessary to supplement its brief with new authority due to a change in the law arising after its original brief, leave of court must be obtained to file a supplemental brief. The format of any allowed supplemental brief must comply with Federal Rule of Appellate Procedure 28(j). Any reply brief must be filed within 14 days of a response.

Jackson v. Holten Meat, Inc., 2015 WL 3462894 *1-2 (S.D. Ill. May 29, 2015) (striking summary judgment reply brief where exceptional circumstances were not demonstrated); *Duncan v. Hagene,* 2015 WL 4978693 *2 (S.D.Ill. Aug. 20, 2015) (striking plaintiff's motion to dismiss summary judgment motion as prohibited sur-reply brief).

B. CDIL-LR 7.1(D)(3) and (5) specify that the time to file a summary judgment reply brief is 14 days after service of the response. If the non-movant lists additional material facts, the movant must reply to such asserted facts by conceding or denying their status of being disputed and material, or risk that such additional facts be admitted. The arguments section of the reply brief is limited to the new matters raised in the response, and the movant is prohibited from restating arguments raised in the original motion. The argument section of a summary judgment reply brief is limited to 5 double-spaced pages.

Commonwealth Ins. Co. v. Titan Tire Corp., 2005 WL 3299405 *1-2 (C.D. Ill. 2005)(denying motion to strike summary judgment reply brief where argument section exceeded 5 page limit by two lines and argument limitation violations were minor in nature).

6. Privacy

With exhibits often consisting of public records from other courts, or administrative agencies, you or your paralegal will still need to review such documents in order to file redacted public versions that exclude the following data categories in the respective districts:

A. Social Security Numbers, names of minor children, dates of birth, drivers' license numbers, financial account numbers, and home addresses, among other potential personal identifiers under SDIL-LR 5.1(d).

B. Addresses other than City and State; signatures to be replaced by s/name where possible or otherwise redacted; and drivers' license numbers amongst other possible items qualifying as personal identifiers. CDIL-LR 5.11(A).

7. Extensions

A. The Southern District does not have a local rule, which means that a good cause motion filed before the original due date expires would need to be prepared and filed in compliance with FRCP 6(b).

B. The Central District requires the movant for an extension do so in a timely fashion before the original deadline expires, and to inform the Court of the amount of additional time sought and whether opposing counsel objects. CDIL-LR 6.1.

8. Oral Argument

A. A party may file a formal motion that asks for oral argument. The movant must explain the grounds for the request to be considered by the Court. SDIL-LR 7.1(h).

B. A party may file a request for oral argument when the summary judgment motion or the response is filed. CDIL-LR 7.1(D)(4).

Tracking your ongoing drafts of summary judgment motions and responses with the local rules will help you structure your filings. In addition, keeping your personal checklist handy will help you anticipate some of the challenges all counsel face on the days you file your summary judgment motions and responses with the U.S. District Courts in the Central and Southern Districts. ■

The summary judgment motion—The strategic decisions you need to make

BY JO ANNA POLLOCK

As all litigators know, summary judgment is appropriate if no issue of material fact exists, and the moving party is entitled to judgment based on the law. The mechanics of Federal Rule 56 and the Local Rules, albeit important, are not the only important matters to consider. Summary judgment motions are paper trials and, as such, several strategic decisions need to be made before you decide whether to file the motion or how to oppose one.

While the benefits of early dismissal, if successful, are obvious, one should also weigh the cons in filing a motion for summary judgment. From your client's perspective, the expense incurred in filing coupled with a low success rate, dependent on the area of law at issue, should not be taken lightly. Summary judgment briefing, and a hearing where appropriate, necessitate a large amount of attorney time, which translates to expensive legal fees for your client. The expenses can easily add up sometimes to entire litigation budget. If a summary judgment motion is in your future, consider whether you can obtain the necessary facts via requests for admission.

Beyond this, a win at the summary judgment stage may set you up for a difficult appeal whereas a trial may be preferable. On appeal, a grant of summary judgment is reviewed de novo; accordingly, the appellate court does not owe any deference to the trial court. On the other hand, a win at trial is easier to sustain on appeal given the typical deference to the trial process.

Moreover, you could create bad law if you lose summary judgment either at the trial court or appellate court (or both!). For instance, an overreaching appellate court could address damages (even though that issue would not be on appeal). If detrimental to you, you can bet the opposing side will ring that bell throughout the rest of the case including during settlement negotiations. For this reason, mediations and settlement conferences are best scheduled while the summary judgment motions are pending.

Once you have decided that the benefits of summary judgment outweigh the risks, consider the timing for when you want to file the motion. The scheduling order entered in your case will no doubt provide a deadline by which you must file the motion. However, there may be reasons to file the motion early. For instance, filing the motion in advance of a mediation or settlement conference may frame the settlement discussions. The judge or mediator would love to be able to point to dispositive motion when pounding on the other side during negotiations. In addition, filing before fact discovery is complete may require the opposing party to file a Rule 56(d) motion for extension to oppose the summary judgment motion. In that motion, the opposing party is required to set forth what facts are needed in discovery and why those facts will make a difference. In essence, an early summary judgement can be a tool to draw out the other side's discovery goals and strategy.

If you are inclined to move for summary judgement or opposing one, consider these tips. First, consider whether running a focus group or working with trial consultants would be beneficial. While summary judgement evaluation rests in the court's hands, as opposed to the jury at trial, deciding how to frame your message and present it may be worthwhile, especially for a large and/or complicated case. After all, human decision-making is driven in large part by emotions regardless of whether the decider is a judge or a jury. Jury consultants can offer valuable perspective on first impressions,

Second, take the briefing beyond the mechanics of complying with the Rule 56 and the Local Rules and identify how to give the court a reason it should want to rule in your client's favor. Present your case theme in one sentence relying on your central facts and discrediting the opponents' central facts. Often, lawyers do not engage in this step, if at all, until they are preparing for trial. However, the summary judgment phase is even more important given the dispositive nature of the motion. Short, plain concepts increase the judge's understanding and persuasiveness of your argument. Besides, short statements are more difficult to dispute.

Third, given the visual culture in which we live, consider adding graphics to your brief. The combination of verbal and visual information leads to greater retention and understanding of material. In addition, visual information can convey content more persuasively than even the best written argument.

Fourth, if you find yourself opposing a summary judgment motion grounded on witness testimony, evaluate ways in which you can impeach the witness' credibility. Prior inconsistent statements, criminal convictions or inability to testify to basic facts could be grounds for the court to question the movant's witness.

Finally, because summary judgment motions are paper trials, be aware of evidentiary objections. If you are opposing a summary judgment, raise evidentiary objections in the brief and via a motion to strike.

There is much to consider in deciding whether to file a summary judgment motion, how to present the motion and how to oppose the motion. Treating summary judgment motions with the same strategy considerations as you would at trial will serve you well and will increase the likelihood you prevail, thus making you shine to your client. ■

Mooting ahead of class certification after *Campbell-Ewald Co. v. Gomez*

BY KEN STALKFLEET

The Supreme Court's decision in *Campbell-Ewald Co. v. Gomez* may be a short-lived victory for potential class action plaintiffs.[1] In May 2006, Campbell-Ewald, a contractor for the United States Navy, sent a recruiting message on behalf of the Navy and through a subcontractor to over 100,000 recipients. The list of recipients was supposed to have only included individuals who had "opted in" to such solicitations. Jose Gomez received one of the messages and, alleging that he did not consent to the message, brought suit under the Telephone Consumer Protection Act (TCPA). The TCPA allows for recovery of the greater of $500 or actual monetary loss and allows for treble damages in cases of willful or knowing violations.

Gomez brought a class-action complaint alleging the campaign violated the TCPA. His request under his individual claim was for $1,500 for each text message he received (later determined to be one text message). Before Gomez motioned for class certification, Campbell made an offer of judgment under Federal Rule of Civil Procedure 68, offering $1,500 per text message, plus court costs. When Gomez failed to accept the offer within 14 days, Campbell moved to dismiss the action as moot. The motion was denied, but Campbell was later granted summary judgment on other grounds. On appeal, the Ninth Circuit reversed summary judgment but upheld the finding that the case was not moot. Campbell appealed to the Supreme Court, which granted certiorari on, *inter alia*, the question of whether the offer of judgment for the maximum amount recoverable mooted plaintiff's individual claim.

In holding for Gomez, the Supreme Court adopted the position of Justice Kagan's dissent in the earlier *Genesis HealthCare* case.[2] To wit, the court held that "an unaccepted offer of judgment cannot moot a case." The basis of the court's holding is that, as a matter of contract law, an unaccepted offer is a "legal nullity" with "no operative effect." This position is bolstered by the language of FRCP 68 which, congruent with the aforementioned rule of contract law, provides that an offer not accepted is considered "withdrawn" if not accepted within 14 days. After *Campbell-Ewald*, it is clear that, in the federal system, a case is not mooted by an unaccepted offer to pay damages.

Equally clear after *Campbell-Ewald*, however, is that some unilateral actions *can* moot the proper cause. In particular, certain unilateral promises still can moot certain declaratory judgment actions. As is so often the case, crucial explication can be found in the footnotes of *Cambell-Ewald*. In particular, footnote five distinguishes *Already, LLC v. Nike, Inc.* from the case at bar and provides key insight into how cases are mooted.[3]

In *Already*, the plaintiff sought a declaratory judgment against Nike, Inc. invalidating a trademark held by Nike. The injury asserted by the plaintiff was that Nike might sue it at any time for trademark infringement. To assuage these concerns, Nike filed a "Covenant Not to Sue"—a common tactic in IP cases—which the lower courts and the Supreme Court considered broad enough to shield Already from future suit. The effectiveness of such covenants can be traced to the 1995 Federal Circuit decision *Super Sack v. Chase,* which established that declaratory judgment actions in patent cases could be mooted where estoppel based on a promise not to sue would preclude future suit.[4]

In *Already* and *Super Sack*, the asserted injury was an ongoing risk of future litigation. By promising not to sue, Nike and Super Sack relieved Already and Chase, respectively, of that injury by estoppel-barring any suits they might bring in the future. Once the promise was made, the injury was cured. This is in clear contrast to the situation in *Campbell-Ewald*, however. The design of the TCPA is such that an injury under that statute is cured by paying damages. An offer to pay those damages, indeed even a promise to pay those damages, does not cure the injury because the plaintiff still has not actually been paid the damages. To put it simply, even with the offer having been made, he is still (by measure of the statute) $1,500 worse off than before Campbell's alleged violation of the statute. Already and Chase, by contrast, were placed fully in the position in which they sought to be placed – shielded from future IP litigation.

The dissent's attempt to resolve this conflict is unconvincing but enlightening as to the line drawn by the majority. The dissent points repeatedly to the fact that the covenant in *Already*, like the offer of judgment here, was unilateral. Distinguishing a unilateral offer of judgment from a unilateral covenant not to sue is simple, however. A unilateral offer of judgment does not make a plaintiff whole; it merely creates an *option* for a plaintiff to accept the offer terms *during* a set period of time. Once that time period lapses, moreover, if the plaintiff has not accepted he clearly remains injured. A unilateral covenant not to sue, by contrast, estops the possibility of future litigation against a plaintiff as effectively as would a declaration of invalidity of a trademark. The dissent is likely correct that "when a defendant unilaterally remedies the injuries of the plaintiff, the case is moot—even if the plaintiff disagrees and refuses to settle the dispute, and even if the defendant continues to deny liability."[5] In this case, however, the plaintiff was not remedied, as is made plain by his not having the $1,500 in treble damages to which he was allegedly entitled.

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Mooting ahead of class certification after *Campbell-Ewald Co. v. Gomez*

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However clear one thinks the distinction is in this case, hypotheticals abound that complicate the issue. The majority closes this part of its opinion, for example, by noting it leaves for another day whether depositing the full amount of a claim into an account payable to the plaintiff would be sufficient.[6]

For some cases, the risk of placing money in an account payable to an opposing party might be too great. With a more modest individual claim, however, such as this one, the small amount at risk coupled with the high likelihood of recovering the money one way or another (if the case is not mooted) and further bolstered by the specter of class action litigation may justify an attempt.

For practitioners, *Campbell-Ewald* compels two considerations when trying to moot a case. First, is the action of a sort where the injury can be remedied by some sort of offer or promise? Most commonly, this will be the case where a promise not to sue estops future litigation. Note that this is different from a promise *not to do* something, which will still be evaluated (as is technically the promise not to sue) under the voluntary cessation doctrine.[7] Second, can you in some other way make the plaintiff whole? If the plaintiff wants damages, trying to put those in an account payable to the plaintiff may be worth a try. If the plaintiff wants a piece of property, leaving the piece of property on his doorstep or (in the case of real property) quitclaiming the property to him may work.

For many clients, it will simply be worth it to make as strong as possible a relinquishment in order to avoid class action litigation. Whatever might be lost attempting to secure mootness will pale in comparison to what is at risk in the case of class action. ■

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1. *Campbell-Ewald Co. v. Jose Gomez*, 577 U.S. ____ (2016)
2. *Genesis HealthCare Corp. v. Symczyk*, 569 U. S. ___ (2013)
3. *Already, LLC v. Nike, Inc.*, 568 U. S. ___ (2013)
4. *Super Sack Manufacturing Corp. v. Chase Packaging Corp.*, 57 F.3d 1054 (Fed. Cir. 1995)
5. *Campbell-Ewald*, 577 U.S. at ____ (2016) (Roberts, C.J. dissenting) (slip op. at 6)
6. *Campbell-Ewald*, 577 U.S. at ____ (2016) (slip op. at 11)
7. See, e.g., *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 190 (2000) (a defendant claiming that voluntary compliance moots a case “bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur”).