CIVIL PROCEDURE — RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE — NINTH CIRCUIT HOLDS THAT UNACCEPTED RULE 68 OFFER DOES NOT MOOT PLAINTIFF'S INDIVIDUAL CLAIMS. — *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013).

Rule 68 of the Federal Rules of Civil Procedure permits a defendant to make an "offer of judgment" to a plaintiff.[1] If the plaintiff accepts the defendant's proposed relief, the court will enter judgment for the plaintiff on the terms of that offer.[2] A difficult situation arises when a defendant offers a plaintiff all she could individually obtain through litigation, yet she does not accept that offer: Why permit continued, costly litigation if the plaintiff will, at best, get what the defendant is already willing to pay? More fundamentally, is there really a case or controversy, as required by Article III,[3] if all parties "agree entirely on what should happen in [the] lawsuit"?[4] Lower federal courts have generally given short shrift to this issue, hastily noting that a full offer would moot a plaintiff's individual claims[5] and instead focusing significant attention on the impact of such an offer in cases where the plaintiff seeks to represent a class.[6] Recently, in *Diaz v. First American Home Buyers Protection Corp.*,[7] the Ninth Circuit bucked that trend, holding that an unaccepted offer for complete relief would not moot a case even when a plaintiff sues only on her own behalf.[8] The Ninth Circuit's analysis, relying almost entirely on Justice Kagan's stinging dissent last Term in *Genesis Healthcare Corp. v. Symczyk*,[9] offered a sharp contrast to the Ninth Circuit's — and other circuits' — prior cursory treatment of the question. *Diaz* may be the first of many cases responding to *Genesis* by directly confronting the question of whether a rejected Rule 68 offer can ever moot an individual claim — a question that courts will perhaps come to see as a preliminary, and even dispositive, issue.

Emily Diaz thought she was getting "relief from hassle" when she purchased home warranty plans from First American Home Buyers

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[1] FED. R. CIV. P. 68.

[2] FED. R. CIV. P. 68(a).

[3] U.S. CONST. art. III, § 2, cl. 1.

[4] United States v. Windsor, 133 S. Ct. 2675, 2698 (2013) (Scalia, J., dissenting) (discussing standing).

[5] *See, e.g.*, Clausen Law Firm, PLLC v. Nat'l Acad. of Continuing Legal Educ., 827 F. Supp. 2d 1262, 1267–68 (W.D. Wash. 2010).

[6] *See, e.g.*, *id.* at 1267–75; *see also* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 2:15 (5th ed. Supp. II 2013).

[7] 732 F.3d 948 (9th Cir. 2013).

[8] *Id.* at 954–55.

[9] 133 S. Ct. 1523 (2013).

Protection Corporation (First American), but instead found herself trapped in an alleged "[n]ightmare" of customer service[10]: when she called the company to fix her backed-up shower and her leaking water heater, First American purportedly refused to cover the cost of repairs, performed shoddy work, and engaged in unscrupulous business practices.[11] Rather than voice her complaints on the pages of Epinions.com as others had done,[12] Diaz brought suit on behalf of a nationwide class asserting various contract law breaches and state consumer protection law violations.[13] After two years and a series of motions to dismiss,[14] Diaz moved to certify the class.[15] Finding that Diaz had failed to present sufficient evidence of a common scheme by First American to defraud consumers or to delegate claims adjustment in breach of contract, the district court denied the motion.[16]

With class certification denied, First American attempted to satisfy Diaz's individual claims and end the matter by serving Diaz with an offer of judgment under Rule 68.[17] Diaz did not accept the offer, and it expired.[18] Arguing that the nonacceptance — an implicit rejection — rendered Diaz's claims moot, First American filed a motion to dismiss for lack of subject matter jurisdiction.[19] The court determined that First American's offer of $7019.32, plus costs, was in "full satisfaction of the amount [Diaz] could possibly recover at trial."[20] As such, there was "no case or controversy on which federal jurisdiction [could] be based," and the court dismissed Diaz's remaining claims.[21]

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[10] Second Amended Class Action Complaint at 2, Diaz v. First Am. Home Buyers Prot. Corp., No. 09-CV-0775 H (S.D. Cal. May 17, 2010) (internal quotation marks omitted).

[11] *Id.* at 8–15 (alleging, inter alia, that First American established a payment structure with strong incentives for its contractors "to deny legitimate warranty claims . . . , refuse to work on expensive jobs, perform substandard repairs and gouge customers," *id.* at 9).

[12] *See* Defendant First American Homebuyers Protection Corporation's Notice of Removal Under CAFA, 28 U.S.C. § 1332, 28 U.S.C. § 1441, and 28 U.S.C. § 1453 at 51–65, Diaz v. First Am. Home Buyers Prot. Corp., No. 09-CV-0775 H (S.D. Cal. Mar. 6, 2009) (Epinions.com reviews of First American).

[13] *See id.* at 10–18 (including original complaint as exhibit). Though Diaz brought suit in state court, First American removed the case to federal court under the Class Action Fairness Act of 2005. *Id.* at 1–3.

[14] Docket, nos. 6, 17, 42, Diaz v. First Am. Home Buyers Prot. Corp., No. 09-CV-0775 H (S.D. Cal.).

[15] *See* Diaz v. First Am. Home Buyers Prot. Corp., No. 09-CV-0775 H, slip op. at 1 (S.D. Cal. Sept. 8, 2011) (order denying motion for class certification).

[16] *See id.*, slip op. at 8–15.

[17] Diaz v. First Am. Home Buyers Prot. Corp., No. 09-CV-0775 H, slip op. at 2 (S.D. Cal. Nov. 29, 2011) (order granting motion to dismiss for lack of subject matter jurisdiction).

[18] *Id.*

[19] *Id.*, slip op. at 1–2, 7.

[20] *Id.*, slip op. at 7; *see id.*, slip op. at 2.

[21] *Id.*, slip op. at 7; *see also* Replacement Answering Brief of Defendant-Appellee First American Home Buyers Protection Corp. at 6, 8, *Diaz*, 732 F.3d 948 (No. 11-57239) (indicating that

The Ninth Circuit vacated the dismissal.[22] Writing for a unanimous panel, Judge Fisher[23] explained that the case required the court to decide "an open question in [the] circuit": "whether an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim is sufficient to render the claim moot."[24] The court began by surveying the approaches of other circuits. First, it noted that the Sixth and Seventh Circuits agree that a Rule 68 offer can moot a case but diverge regarding whether to enter judgment for the plaintiff on the terms of that offer or to dismiss the suit.[25] It then identified a third approach advanced by the Second Circuit, which, on the *Diaz* panel's view, holds that an offer is insufficient to moot the claim but that a court should enter judgment for the plaintiff on the terms of the offer.[26]

The Ninth Circuit then broke with "the majority of courts and commentators"[27] and held that an unaccepted offer for complete relief does not moot a case.[28] In reaching this holding, the Ninth Circuit leaned heavily on Justice Kagan's dissent in *Genesis*, which had argued vehemently that a Rule 68 offer could never render a case moot.[29] Quoting Justice Kagan, *Diaz* explained that a rejected offer "is a legal nullity": rejecting an offer leaves a plaintiff's "interest in the lawsuit . . . just what it was before" the offer was made.[30] A case is moot only when a court can grant no "effectual relief," and since Diaz's rejection of the offer left her with "an unsatisfied claim," the "claim was not moot, and the District Court could not send her away empty-handed" through dismissal.[31] Entering judgment would also be inappropriate, the Ninth Circuit explained, because Rule 68 explicitly prohibits using "[e]vidence of an unaccepted offer . . . except in a pro-

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claims dismissed for mootness were Diaz's claims for breach of contract, breach of implied covenant of good faith and fair dealing, intentional and negligent misrepresentation, and false promise).

[22] *Diaz*, 732 F.3d at 955. In a separate memorandum opinion, the court vacated the district court's dismissal of Diaz's claims for concealment and unfair competition, and determined that Diaz's failure to file a timely notice of appeal on the district court's denial of her motion to correct or modify the record rendered the Ninth Circuit without jurisdiction to consider the argument. *See* Diaz v. First Am. Home Buyers Prot. Corp., No. 11-57239, 2013 WL 5496762, at *1–2 (9th Cir. Oct. 4, 2013).

[23] Judge Fisher was joined by Judge Pregerson and Judge Gwin, who was sitting by designation from the Northern District of Ohio.

[24] *Diaz*, 732 F.3d at 952.

[25] *Id.* (citing O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 574–75 (6th Cir. 2009); Rand v. Monsanto Co., 926 F.2d 596, 598 (7th Cir. 1991)).

[26] *Id.* (citing McCauley v. Trans Union, L.L.C., 402 F.3d 340, 342 (2d Cir. 2005)).

[27] *Id.* at 953.

[28] *Id.* at 955.

[29] Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532–37 (2013) (Kagan, J., dissenting). Finding the issue "not properly before [the Court]," *id.* at 1529 (majority opinion), the majority did not decide this question, *see id.* at 1528–29.

[30] *Diaz*, 732 F.3d at 954 (quoting *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting)).

[31] *Id.* at 955 (quoting *Genesis*, 133 S. Ct. at 1534 (Kagan, J., dissenting)).

ceeding to determine costs."[32] Again relying on Justice Kagan's dissent, the court added that it "recognize[d] that a court may have 'discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders.'"[33] Since the court below had instead dismissed, the Ninth Circuit remanded.[34]

Diaz's extensive engagement with the individual-claim question — that is, whether an unaccepted offer can moot the claims of a plaintiff bringing suit on her own behalf — may indicate a shift in the focus of Rule 68 mootness doctrine as courts grapple with *Genesis*. The present body of case law on mootness and Rule 68 offers is contradictory, internally inconsistent, and incomplete, revealing a lack of attention to the individual-claim question. Prior to *Genesis*, courts belabored how the aggregate nature of a suit might impact mootness, as they feared that a defendant could "pick off" a putative representative by mooting her claims with a Rule 68 offer and thereby thwart class or collective actions.[35] Courts rarely questioned whether there was any mootness issue in the first place, generally assuming that an unaccepted full offer would moot the claims of a plaintiff who brought suit alone.[36] Both opinions in *Genesis* drew attention to that assumption — the majority by exposing the importance of the individual-claim question, and the dissent by offering a potentially novel explanation for why a rejected offer does not moot individual claims. *Diaz* — the first circuit court opinion using *Genesis* to wrestle with whether an offer can moot — may be the start of a broader trend toward treating the individual-claim question as a preliminary, and possibly dispositive, issue.

The decisions emerging from several circuits demonstrate the minimal focus paid to the individual-claim question. For example, the Second Circuit has produced several opinions addressing this question;[37] other courts interpreting these opinions have come to opposite views about the Second Circuit's position without ever acknowledging these divergent interpretations. Some, like the Supreme Court and the Ninth Circuit, think it quite obvious that the Second Circuit deems a Rule 68

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[32] *Id.* (quoting FED. R. CIV. P. 68(b)) (internal quotation marks omitted).

[33] *Id.* at 955 (quoting *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting)).

[34] *Id.*

[35] *See, e.g.*, Weiss v. Regal Collections, 385 F.3d 337, 342–49 (3d Cir. 2004).

[36] 1 RUBENSTEIN, *supra* note 6, § 2:15; *see also, e.g.*, *Weiss*, 385 F.3d at 340, 342–49 (including one sentence of explanation, supported only by an out-of-circuit case and an ambiguous treatise section, for its statement that a Rule 68 offer could moot an individual's claim, then spending over seven pages dealing with the question of mootness in the class context).

[37] *Compare* Doyle v. Midland Credit Mgmt., Inc., 722 F.3d 78, 81 (2d Cir. 2013) (holding that an offer moots an individual claim), *and* Abrams v. Interco Inc., 719 F.2d 23, 25, 32–33 (2d Cir. 1983) (same), *with* McCauley v. Trans Union, L.L.C., 402 F.3d 340, 342 (2d Cir. 2005) (holding that a rejected offer did not moot an individual claim). Though the offer in *Doyle v. Midland Credit Management, Inc.*, 722 F.3d 78, did not comply with Rule 68, the Second Circuit did not indicate that such noncompliance affected its mootness analysis. *See id.* at 79, 81.

offer alone insufficient to moot individual claims.[38] Others — mainly district courts in the Second Circuit — have instead noted that "[w]hen a defendant offers the maximum recovery available to a plaintiff, the Second Circuit has held that the case is moot."[39] And, while courts in both groups sometimes indicate that entry of judgment following such an offer is appropriate in the Second Circuit,[40] such superficial agreement still leaves much space between the two understandings.[41]

It is, of course, possible that the Second Circuit's precedent is ambiguous, but what is noteworthy about these contrary interpretations of Second Circuit precedent is not that they are diametrically opposed, but that they do not engage with each other. With striking uniformity, courts reading Second Circuit precedent as holding that an offer moots do not entertain the possibility that the Second Circuit could hold that an offer does not moot, and vice versa.[42] Similarly, in the Second Circuit's 2013 decision holding that a rejected settlement offer *had* mooted the plaintiff's claims, the court never acknowledged that the Supreme Court thought the opposite of its precedent, much less cited *McCauley v. Trans Union L.L.C.*[43] — the case upon which the Court had relied for this characterization.[44] The lack of analysis of the potentially opposing decisions in the circuit suggests that courts have not thought that this issue warrants extensive review of past decisions — perhaps because it has been an issue thought to be of relatively little importance.

In a more constitutionally troubling example, the Sixth Circuit's approach seems to ignore the jurisdictional consequences of its mootness doctrine. The Constitution limits a federal court's jurisdiction to

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[38] *See Genesis*, 133 S. Ct. at 1528–29, 1528 n.3; *Diaz*, 732 F.3d at 952.

[39] Ward v. Bank of N.Y., 455 F. Supp. 2d 262, 267 (S.D.N.Y. 2006); *accord, e.g.*, Velasquez v. Digital Page, Inc., 842 F. Supp. 2d 486, 488 (E.D.N.Y. 2012); Milton v. Rosicki, Rosicki & Assocs., P.C., No. 02 CV 3052(NG), 2007 WL 2262893, at *2 (E.D.N.Y. Aug. 3, 2007).

[40] *See, e.g.*, *Diaz*, 732 F.3d at 952–53; *Milton*, 2007 WL 2262893, at *8.

[41] First, courts that find that an offer moots may not be constitutionally competent to enter judgment. *See* ABN Amro Verzekeringen BV v. Geologistics Americas, Inc., 485 F.3d 85, 89, 94 (2d Cir. 2007) ("If the case had truly become moot [following defendants' unaccepted offer] and the court had lacked subject matter jurisdiction, the court would have been without power to enter a judgment . . . ." *Id.* at 94.). Second, courts that find that an offer does not moot may not be *required* to clear post-offer cases from their dockets by entering judgment. *See Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting) ("[A] court has *discretion* to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders . . . ." (emphasis added)).

[42] *See* cases cited *supra* notes 38–39. One district court has noted the tension between the Supreme Court's characterization of Second Circuit precedent and the weight of circuit authority. *See* Pla v. Renaissance Equity Holdings LLC, No. 12 CIV. 5268(JMF), 2013 WL 3185560, at *4 (S.D.N.Y. June 24, 2013) (citing *Genesis*, 133 S. Ct. at 1528–29, 1528 n.3).

[43] 402 F.3d 340 (2d Cir. 2005).

[44] *Compare* Doyle v. Midland Credit Mgmt., Inc., 722 F.3d 78 (2d Cir. 2013), *with Genesis*, 133 S. Ct. at 1528 n.3 (citing McCauley v. Trans Union, L.L.C., 402 F.3d 340, 342 (2d Cir. 2005)). Five months after issuing *Doyle*, the Second Circuit pointedly declined to address the potential inconsistency between *Doyle* and *McCauley*. *See* Cabala v. Crowley, No. 12-3757-CV, 2013 WL 6066412, at *4 n.4 (2d Cir. Nov. 19, 2013).

"[c]ases" and "[c]ontroversies."[45] When there is no longer a case or controversy, the case becomes moot,[46] such that a federal court lacks jurisdiction.[47] If, as the Sixth Circuit holds, "an *offer* of judgment that satisfies a plaintiff's entire demand moots the case,"[48] such an offer would immediately strip a court of its jurisdiction to decide the suit, requiring the court immediately to *dismiss* the suit.[49] Instead, however, the Sixth Circuit has insisted that courts should enter judgment for the plaintiff following such an offer.[50] The Sixth Circuit's approach thus seemingly demands that a district court exceed its constitutionally circumscribed jurisdiction.[51] It may be that the Sixth Circuit simply deems dismissal without judgment for the plaintiff "too harsh"[52] and is willing to blur the edges of mootness doctrine to avoid kicking a plaintiff out of the courthouse with nothing. But, given the ferocity with which federal courts are required to scrutinize their jurisdiction,[53] it seems equally plausible that the Sixth Circuit simply has not given much thought to the nuances of its holding on the individual-claim mootness question and, thus, potentially, to the question itself.

This same lack of attention characterized the Ninth Circuit's pre-*Diaz* treatment of Rule 68 offers. In its 2011 opinion in *Pitts v. Terrible Herbst, Inc.*,[54] the Ninth Circuit held that a rejected Rule 68 offer made while a putative representative could still timely file for class

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45 U.S. CONST. art. III, § 2, cl. 1.

46 *See* Chafin v. Chafin, 133 S. Ct. 1017, 1023 (2013).

47 Iron Arrow Honor Soc'y v. Heckler, 464 U.S. 67, 70 (1983) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."). Mootness was not always tied to Article III, *see* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-11, at 344 n.1 (3d ed. 2000), and some have argued that mootness doctrine ought to be freed from Article III constraints, *see, e.g.*, Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 612–36 (1992). However, the doctrine is, at least for "now[,] firmly rooted in art. III." 1 TRIBE, *supra*, § 3-11, at 344 n.1.

48 O'Brien v. Ed Donnelly Enters., Inc., 575 F.3d 567, 574 (6th Cir. 2009) (emphasis added).

49 *See* FED. R. CIV. P. 12(h)(3); Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 514 (1869)) (internal quotation mark omitted)).

50 *O'Brien*, 575 F.3d at 575.

51 *See* Bradford v. HSBC Mortg. Corp., 280 F.R.D. 257, 263 (E.D. Va. 2012) (calling *O'Brien* "unpersuasive" as "a federal court has no power to enter judgment on a moot claim absent a stipulation to entry of judgment"); *id.* at 264 ("[B]ecause subject-matter jurisdiction over [the plaintiff's] claim has been extinguished, judgment on the claim cannot now be entered."); Lucero v. Bureau of Collection Recovery, Inc., 716 F. Supp. 2d 1085, 1100 (D.N.M. 2010) ("For the Court to start entering merits orders — such as entering a judgment for the plaintiff — when it does not have jurisdiction over the case lacks a sound basis in Article III or in federal jurisprudence regarding federal jurisdiction. . . . [This] Court cannot square the Sixth Circuit's actions with its jurisdiction."), *rev'd on other grounds*, 639 F.3d 1239 (10th Cir. 2011).

52 Dieske v. CCS Commercial, LLC, No. 3:10-CV-28 JVB, 2010 WL 3909868, at *1 n.1 (N.D. Ind. Oct. 1, 2010).

53 *See* Capron v. Van Noorden, 6 U.S. (2 Cranch) 126 (1804).

54 653 F.3d 1081 (9th Cir. 2011).

certification did not moot the case.[55] The court thus decided a narrower question than the one it answered in *Diaz* — an outcome potentially defensible on judicial minimalism grounds. But the court did not stop with its holding on the class question. Rather, the court went on to say that "[o]nly once the denial of class certification is final does the defendant's [unaccepted Rule 68] offer — if still available — moot the merits of the case."[56] *Diaz* may be correct in quickly pointing out that this statement is dictum.[57] Yet, while *Pitts* did not bind *Diaz*, the Ninth Circuit did show its hand: If the court were striving for a minimalist approach, it likely would not have issued a statement on precisely the issue it sought to avoid deciding. Rather, the language of *Pitts* suggests either that the Ninth Circuit did not think the individual-claim question very important — as the aggregate posture of a case would usually prevent mootness — or that the circuit could not possibly explain how an unaccepted full offer would not moot.

The *Genesis* majority and dissent, respectively, responded to these possible views. First, Justice Thomas's majority opinion in *Genesis* provided the impetus to consider the individual-claim question rather than simply focus on the class-claim question. Before *Genesis*, the Court had issued three canonical decisions on mootness in class actions, and in each of them the Court had rejected an argument that the mooting or potential mooting of the representative's or putative representative's claims mooted the class action.[58] Relying on these decisions, many lower federal courts read the Supreme Court's mootness doctrine as "flexibl[e]";[59] recognizing the threat that Rule 68 offers pose to aggregate litigation, these courts developed a variety of approaches to explain why an unaccepted Rule 68 offer that would otherwise moot an individual's claims would not moot a class or collective action.[60] If these decisions stand, the question *Diaz* answers may be of relatively little importance. But the *Genesis* majority departed from the "flexible" view of mootness upon which these decisions were formed: Justice Thomas "assume[d], without deciding" that the plaintiff's "individual claim was moot," finding that the issue "was not properly before [the Court]."[61] Starting from that premise and considering "well-settled mootness principles," the Court was "compel[led]" to hold that the

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[55] *Id.* at 1084.

[56] *Id.* at 1092.

[57] *Diaz*, 732 F.3d at 952 ("In *Pitts* . . . [w]e *assumed* that an unaccepted offer for complete relief will moot a claim, but we neither held that to be the case nor analyzed the issue.").

[58] *See* U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 404 (1980); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 340 (1980); Sosna v. Iowa, 419 U.S. 393, 399 (1975).

[59] *E.g.*, *Pitts*, 653 F.3d at 1087.

[60] *See* Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1243 & n.2 (10th Cir. 2011) (collecting cases).

[61] Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1529 (2013).

plaintiff's filing of the suit as a collective action could not "save the suit from mootness."[62] And, in reversing a single decision from the Third Circuit, Justice Thomas used logic[63] and language[64] suggesting that other decisions preventing strategic "picking off" might be in danger.[65] *Genesis* signaled that if courts want to prevent defendants' use of Rule 68 offers to "opt-out"[66] of aggregate litigation, these courts must consider the individual-claim question.

Second, Justice Kagan's dissent may have provided the first palatable explanation for why a Rule 68 offer would have no mooting effect on individual claims. Justice Kagan's opinion relied, at its core, on pure logic: though citing other cases on mootness and quoting the text of Rule 68, the dissent never once identified an opinion *explaining why* a rejected Rule 68 offer would not moot an individual's claims. Quite simply, Justice Kagan's reasoning may have been novel.[67] *Diaz* represents a dramatic change of heart from *Pitts*'s dictum — a change that may be the direct progeny of the *Genesis* dissent.

Though the individual-claim question of mootness was one of first impression in the Ninth Circuit, considering the analysis of the issue — and the problems stemming from that analysis — in those circuits that *had* addressed the question, the Ninth Circuit's "assum[ption]" in *Pitts* that an offer would moot[68] seems fairly characteristic of most circuits' treatment of this question. Recognizing the importance of the individual-claim question, *Diaz* took up Justice Kagan's "friendly suggestion" to "[r]ethink [a] mootness-by-unaccepted offer theory."[69] Other circuits may follow suit.

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[62] *Id.*

[63] *See* Chen v. Allstate Ins. Co., No. C 13-0685 PJH, 2013 WL 2558012, at *9 (N.D. Cal. June 10, 2013) (acknowledging that the *Genesis* "Court did reject the reasoning the Ninth Circuit in *Pitts* used (based on *Sosna*, *Geraghty*, and *Roper*)" and recognizing that "the Supreme Court might at some future date actually overrule *Pitts* and decisions from other Circuits"), *motion to certify appeal granted*, No. C 13-0685 PJH, 2013 WL 3973798 (N.D. Cal. July 31, 2013).

[64] *See* Singer v. Ill. State Petrol. Corp., No. 12 C 9109, 2013 WL 2384314, at *1 (N.D. Ill. May 24, 2013) (noting that "[i]t is not entirely clear whether some things said [by] . . . the *Genesis* majority sound any ominous overtones" for decisions of the Seventh and other Circuits); *see also, e.g.*, *Genesis*, 133 S. Ct. at 1532 n.5 (calling into question the "continuing validity" of *Roper*).

[65] More broadly, any precedent that rests on the aggregate feature of a suit may be in danger given the Supreme Court's string of recent decisions weakening much of the class action mechanism. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

[66] Schaake v. Risk Mgmt. Alts., Inc., 203 F.R.D. 108, 112 (S.D.N.Y. 2001).

[67] *McCauley*, the decision most frequently cited as holding that a Rule 68 offer does not moot individual claims, does not contain a comparably persuasive explanation or clear holding, as is perhaps best demonstrated by those opinions that cite *McCauley* for the proposition that a Rule 68 offer *does* moot. *E.g.*, Gildor v. U.S. Postal Serv., 491 F. Supp. 2d 305, 308 (N.D.N.Y.), *reconsidered in part*, 510 F. Supp. 2d 181 (N.D.N.Y. 2007).

[68] *Diaz*, 732 F.3d at 952 (emphasis omitted).

[69] *Genesis*, 133 S. Ct. at 1534 (Kagan, J., dissenting).