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## Changing the Rule Changes the Game: A Rule 68 Offer for Complete Relief Should Never Moot an Individual's Claim

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## **CHANGING THE RULE CHANGES THE GAME: A RULE 68 OFFER FOR COMPLETE RELIEF SHOULD NEVER MOOT AN INDIVIDUAL'S CLAIM**

### **ABSTRACT**

*Rule 68 of the Federal Rules of Civil Procedure was enacted to encourage settlement and avoid litigation. Rule 68 works in the following way: defendant makes a “Rule 68 offer” to plaintiff for a settlement, plaintiff rejects this offer, wins the case, but is awarded less monetary compensation than was offered in the settlement. In this scenario, plaintiff must pay both his and defendant’s post-offer litigation costs. Although Rule 68 was designed to facilitate settlements, defendants have attempted to use Rule 68 offers to moot individuals’ claims. These defendants argue that by offering their understanding of complete relief to a plaintiff, the claim should be mooted. In the past four decades, a circuit split has arisen over whether Rule 68 offers can moot claims and whether judgment should be entered for the plaintiff or the defendant.*

*This Comment advocates for the adoption of the Ninth Circuit’s holding in Diaz v. First American Home Buyers Protection Corp.—referred to in this Comment as the Diaz approach—which states that a Rule 68 offer never moots an individual’s claim. This Comment explores relevant historical jurisprudence that has led to the various legal theories involving mootness in Rule 68 offers. Recent decisions highlight the rise in use of the Diaz approach, and this Comment describes the benefits of the Ninth Circuit’s holding. The four primary benefits of the Diaz approach are that it (1) satisfies both textualist and purposivist ideologies regarding Rule 68, (2) upholds fundamental aspects of contract theory, (3) resolves the mootness jurisdictional issue by creating a bright-line test, and (4) deters negative behavior. Although this approach has two potential drawbacks—namely, excessive litigation and non-mutual offensive issue preclusion—the alternative approaches suffer from flaws that Diaz solves. Ultimately, this Comment concludes that by applying the Diaz approach to Rule 68 offers, courts will return Rule 68 to its intended goal: incentivizing settlements without burdening the courts.*

## INTRODUCTION

Rule 68 of the Federal Rules of Civil Procedure<sup>1</sup> encourages parties to reach a settlement with limited judicial involvement.<sup>2</sup> While one would think that a plaintiff should be free to accept or reject a settlement offer, defendants have attempted to prove otherwise. Rule 68 has become a tool used by defendants to convince judges to moot plaintiffs' claims.<sup>3</sup> The circuit courts are currently divided over whether a Rule 68 offer can moot a claim and which party should receive the judgment.<sup>4</sup> This year, the Supreme Court granted certiorari in *Campbell-Ewald Co. v. Gomez*,<sup>5</sup> which should firmly decide this issue.<sup>6</sup> This Comment urges the Court to resolve this circuit split because

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<sup>1</sup> FED. R. CIV. P. 68; see *infra* Part I.A for a description of the procedure for using Rule 68.

<sup>2</sup> See STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 1268 (2010) (explaining that Rule 68 encourages settlement through cost-shifting); see also *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

<sup>3</sup> See *infra* Part II.B–E (exploring cases where defendants attempted to moot claims using Rule 68).

<sup>4</sup> See *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528–29 (2013); see also *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 951–53 (9th Cir. 2013).

<sup>5</sup> See 135 S. Ct. 2311 (2015) (mem.). In *Gomez*, the plaintiff brought personal and putative class action claims against the defendant, a marketing company, for sending unsolicited text messages on behalf of the U.S. Navy. *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 873 (9th Cir. 2014), cert. granted, 135 S. Ct. 2311 (2015) (mem.). The district court granted the defendant's summary judgment motion, holding that the defendant was immune from liability under the doctrine of derivative sovereign immunity. *Id.* at 874. In addition to disagreeing with the district court's derivative sovereign immunity holding, the Ninth Circuit held that a Rule 68 offer for complete relief does not moot a claim. *Id.* at 874–75. The court applied the precedent established by *Diaz*. *Id.* This Comment supports the *Diaz* decision and recommends that the Supreme Court adopt this position.

<sup>6</sup> See *Gomez*, 768 F.3d 871; Petition for Writ of Certiorari at i, *Campbell-Ewald*, 135 S. Ct. 2311 (2015) (No. 14-857), 2015 WL 241891, at \*i (requesting certiorari by the Supreme Court for three questions, including “[w]hether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim”). However, *Campbell-Ewald* might not resolve the Rule 68 question because the Court could decide the case based on the third question presented: “Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damaged by public works projects.” *Id.* If the Court rules on derivative sovereign immunity grounds, then it will not need to answer the mootness question. The Court will likely resolve the mootness dispute, however, because of the three-way circuit split that currently exists. See *infra* Part II.B–E. Granting certiorari for this issue has also led to a significant flurry of articles about the circuit split. See, e.g., BuckleySandler LLP, *Supreme Court Grants Cert. to Decide if Offer of Complete Relief Moots Case*, JD SUPRA BUS. ADVISOR (May 26, 2015), <http://www.jdsupra.com/legalnews/supreme-court-grants-cert-to-decide-if-46489/>; Michael F. Dolan et al., *Supreme Court Grants Certiorari in TCPA Case that May Determine Whether an Offer of Complete Relief Moots a Class Action*, JONES DAY (May 2015), <http://www.jonesday.com/supreme-court-grants-certiorari-in-tcpa-case-that-may-determine-whether-an-offer-of-complete-relief-moots-a-class-action-05-22-2015/>; Richard B. Katskee & Brian D. Netter, *Supreme Court Docket Report—May 18, 2015*, MONDAQ (May 19, 2015), <http://www.mondaq.com/unitedstates/x/398416/trials+appeals+compensation/upreme+Court+Docket+Report+May+18+2015>; Lawrence I. Weinstein & James Unger, *Clarification for Class Action Settlements May Be on the Line as*

anyone with a phone, insurance plan, or credit score will be affected by the outcome of the *Campbell-Ewald* case.

Take this situation for example: Congratulations, you graduated from law school! Getting into law school required sacrificing time and money for the prospect of a more lucrative profession. You always paid your bills on time because you never wanted a blot on your record. Now that you have received your cushy salary at a top law firm, you put a deposit on your dream home. You go to the bank to get a loan, and the loan officer tells you that two out of your three credit scores are excellent. However, TransUnion, a credit reporting agency, gave you a poor credit rating. You are furious—someone else’s error has ruined your credit score. While you are attempting to correct this error, your dream home has been purchased, and you are stuck in your parents’ basement.

TransUnion considers these careless errors to be a regular part of the business. You sue TransUnion to recover the lost deposit on your dream home and loan fees, and you discover that credit reporting agencies commonly misreport individuals’ credit scores. TransUnion offers you monetary damages in a confidential settlement. If you accept the confidential settlement, TransUnion will likely continue its methods without addressing the need to reduce these errors. Although you are unable to certify a class action, you want a judgment—on the record—that will incentivize TransUnion to reduce these mistakes that carelessly ruin peoples’ credit scores.<sup>7</sup>

Instead of suffering the embarrassment of an adverse judgment that could be used as precedent in future cases, TransUnion offers you monetary damages for the costs you incurred. TransUnion makes this offer using Rule 68.<sup>8</sup> You reject the offer. TransUnion argues that because it made an offer for “complete relief,” this case should be mooted. Should your claim be mooted? Besides credit report agencies, this scenario involving Rule 68 offers has applied to

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*Supreme Court Grants Cert in TCPA Case*, NAT’L L. REV. (July 16, 2015), <http://www.natlawreview.com/article/clarification-class-action-settlements-may-be-line-supreme-court-grants-cert-tcpa-ca>.

<sup>7</sup> *Cf. McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 340–41 (2d Cir. 2005) (involving a plaintiff who wanted a precedent, in addition to the monetary relief, for the defendant’s negligent reporting of his credit score). This Comment recognizes that the case refers to the party as “Trans Union L.L.C.”; however, the company currently identifies itself online as “TransUnion.”

<sup>8</sup> *See* FED. R. CIV. P. 68.

cases with debt collectors,<sup>9</sup> insurance agencies,<sup>10</sup> corporations,<sup>11</sup> telemarketers,<sup>12</sup> and even an NFL team that sent over 100,000 unsolicited faxes.<sup>13</sup>

While these defendants argue that Rule 68 offers for complete relief should moot a plaintiff's claims, this Comment will show that these tactics encourage continuous litigation and frustrate settlements. Several circuit courts accept the premise that a Rule 68 offer can moot a claim, but other circuit courts have dismissed the idea.<sup>14</sup> Moreover, circuit courts that have accepted the idea that a Rule 68 offer can moot a claim disagree over whether judgment should be rendered on behalf of the plaintiff or the defendant.<sup>15</sup>

This Comment addresses this circuit split and answers two questions:<sup>16</sup> (1) whether an unaccepted Rule 68 offer for complete relief moots an

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<sup>9</sup> See *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365 (4th Cir. 2012); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004).

<sup>10</sup> See *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948 (9th Cir. 2013).

<sup>11</sup> See *Rand v. Monsanto Co.*, 926 F.2d 596 (7th Cir. 1991), *overruled by* *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015).

<sup>12</sup> See *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015) (mem.).

<sup>13</sup> See *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698 (11th Cir. 2014).

<sup>14</sup> See *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 14-1789, 2015 WL 4979406, at \*5 (1st Cir. Aug. 21, 2015) ("Six other circuit courts have either held, assumed, or expressly avoided deciding that a Rule 68 offer of all requested relief can, at least sometimes, moot an individual claim. . . . we agree with the Second, Fifth, Seventh, Ninth, and Eleventh Circuits that an unaccepted Rule 68 offer cannot, by itself, moot a plaintiff's claim."); *Tanasi v. New All. Bank*, 786 F.3d 195, 199 (2d Cir. 2015) ("The federal courts of appeals are split on this question. The Third, Fourth, Fifth, Seventh, Tenth, and Federal Circuits have all concluded that a Rule 68 offer of complete relief to an individual renders his case moot for purposes of Article III, regardless of whether judgment is entered against the defendant. On the other hand, the Ninth and Eleventh Circuits, the two courts of appeals that have considered this question most recently, have reached the opposite conclusion."); *Diaz*, 732 F.3d at 952–54.

<sup>15</sup> See *infra* Part II.B–C (detailing the circuit split over whether the judgment should be entered for the defendant or the plaintiff once the claim is rendered moot by a Rule 68 offer).

<sup>16</sup> This Comment does not address the issue of using Rule 68 offers to "pick off" individual claimants prior to class certification. See, e.g., *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Sandoz v. Cingular Wireless L.L.C.*, 553 F.3d 913 (5th Cir. 2008); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004). Even if a Rule 68 offer can moot an individual's claim, the pick-off strategy with Rule 68 offers is likely over. See *Bais Yaakov*, 2015 WL 4979406, at \*5 ("Six other circuit courts have either held, assumed, or expressly avoided deciding that a Rule 68 offer of all requested relief can, at least sometimes, moot an individual claim. In none of those circuits, however, did such a holding result in a putative class action being mooted."). Further, while this Comment discusses cases with class certification—and while the *Diaz* approach would effectively end the pick-off strategy in Rule 68 offers—this strategy has received greater attention. See, e.g., M. Andrew Campanelli, Note, *You Can Pick Your Friends, but You Cannot Pick Off the Named Plaintiff of a Class Action: Mootness and Offers of Judgment Before Class Certification*,

individual's claim; and if so, (2) whether the judgment should be entered for the plaintiff or defendant.<sup>17</sup>

This Comment advocates for the adoption of the Ninth Circuit's holding in *Diaz v. First American Home Buyers Protection Corp.*, which this Comment refers to as the *Diaz* approach.<sup>18</sup> In *Diaz*, the court adopted the reasoning espoused in Justice Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*<sup>19</sup> and held that an unaccepted Rule 68 offer *never* moots an individual's claim.<sup>20</sup>

Part I of this Comment introduces Rule 68 and the basic concept of mootness. Part II then explores decisions in the Supreme Court and several circuit courts that influenced the debate over mootness in Rule 68 offers. This Part also explains the developments that ultimately led to the *Diaz* approach. With the different approaches provided, Part III surveys the benefits of applying the *Diaz* approach. By applying the *Diaz* approach, rather than the two alternatives, this Comment shows that courts will adhere to the following four principles: (1) textualist and purposivist ideals,<sup>21</sup> (2) fundamental contract theory concepts,<sup>22</sup> (3) bright-line jurisdictional rules,<sup>23</sup> and (4) deterrence against negative behavior.<sup>24</sup> Next, Part IV responds to two central criticisms of the *Diaz* approach: excessive litigation and non-mutual offensive issue preclusion. Part V then evaluates the two alternative approaches and describes their shortcomings. Finally, this Comment concludes that the Supreme Court should adopt the *Diaz* approach in its upcoming *Campbell-Ewald* case<sup>25</sup> because it provides the most beneficial solution.<sup>26</sup>

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4 DREXEL L. REV. 523 (2012); David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781 (2003). More importantly, the Supreme Court recently held that when an individual's claim is mooted in connection to a class action in a Rule 68 offer, the claim must be dismissed for lack of subject-matter jurisdiction. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 (2013). In *Genesis*, the Supreme Court explicitly left open the question that this Comment wishes to resolve: whether a Rule 68 offer can moot an individual's claim. *Id.* at 1528–29.

<sup>17</sup> See *Genesis*, 133 S. Ct. at 1528–29; see also *Diaz*, 732 F.3d at 951–53.

<sup>18</sup> 732 F.3d at 954–55.

<sup>19</sup> 133 S. Ct. at 1535 (Kagan, J., dissenting).

<sup>20</sup> *Diaz*, 732 F.3d at 954–55.

<sup>21</sup> See *infra* Part III.A.

<sup>22</sup> See *infra* Part III.B.

<sup>23</sup> See *infra* Part III.C.

<sup>24</sup> See *infra* Part III.D.

<sup>25</sup> See *supra* note 6 and accompanying text.

<sup>26</sup> See *infra* Conclusion.

## I. BACKGROUND

### A. Rule 68

Rule 68 of the Federal Rules of Civil Procedure was enacted “to encourage settlement and avoid litigation.”<sup>27</sup> At its inception, Rule 68 provided a mechanism to achieve this purportedly simple result.<sup>28</sup> Using Rule 68, a defendant can offer a specified amount directly to the plaintiff in order to settle a claim.<sup>29</sup> The plaintiff may accept or reject the offer.<sup>30</sup> If the plaintiff accepts the offer, judgment is entered for the plaintiff.<sup>31</sup>

Not all Rule 68 offers are accepted. How Rule 68 “encourage[s] settlement” is demonstrated when a plaintiff rejects a Rule 68 offer and then wins the case, but the final judgment is less than the amount offered by the defendant.<sup>32</sup> If that happens, the plaintiff must (1) pay his post-offer costs and (2) pay the defendant’s post-offer costs.<sup>33</sup> The following example illustrates this situation: Paul sues David for \$500, and David makes a Rule 68 offer to Paul for \$300. Paul declines the offer and wins the lawsuit, but he is only awarded \$200. In this scenario, Paul must pay David’s filing and court reporter

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<sup>27</sup> *Marek v. Chesny*, 473 U.S. 1, 5 (1985); *see also* 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3001 (3d ed. 2014) (describing the history and purpose of Rule 68).

<sup>28</sup> *See* FED. R. CIV. P. 68.

<sup>29</sup> GENSLER, *supra* note 2, at 1269–70. The amount offered does not need to be a dollar figure. *Id.* at 1271. However, the offer must be specific enough that the “plaintiff can calculate the actual benefit.” *Id.* Further, the offer may include terms of declaratory or injunctive relief. *Id.*

<sup>30</sup> *Id.* at 1269.

<sup>31</sup> *Id.* at 1270. Rule 68(a) describes the appropriate procedures for making and accepting a Rule 68 offer:

*Making an Offer; Judgment on an Accepted Offer.* At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

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

<sup>32</sup> *Id.* at 1267 (practice commentary). Rule 68 is inapplicable when the defendant wins. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981) (“[Rule 68] is simply inapplicable to this case because it was the defendant that obtained the judgment.”).

<sup>33</sup> GENSLER, *supra* note 2, at 1267. Post-offer costs always include statutory costs, like filing fees and court reporter fees. *Id.* They can include attorneys’ fees when the relevant statute defines them as “costs.” *Id.* Rule 68(d) describes these costs’ consequences for the plaintiff: “*Paying Costs After an Unaccepted Offer.* If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.” FED. R. CIV. P. 68(d).

fees in addition to his own, and Paul may have to pay David's attorneys' fees as well.

While accepted offers allow a clerk to enter the agreed-upon judgment for the claimant, Rule 68(b) provides that any unaccepted offers are considered withdrawn.<sup>34</sup> Rule 68(b) continues by stating that the offering party may make additional offers, but all Rule 68 offers are inadmissible as evidence except to determine costs.<sup>35</sup>

The drafters created Rule 68 with the intention of reducing courthouse clutter.<sup>36</sup> Although nothing in Rule 68 discusses mootness, defendants make Rule 68 offers for small individual claims to halt them before they become bigger monetary cases, such as in class actions.<sup>37</sup> These defendants argue that Rule 68 offers for complete monetary relief moot individuals' claims because such offers encourage settlement and avoid litigation.<sup>38</sup> On the contrary, this Comment will demonstrate that by allowing defendants to moot claims using Rule 68 as a shield, courts frustrate the simple mechanical formula of Rule 68.<sup>39</sup>

### B. Basic Mootness Doctrine

As discussed in section A, Rule 68 offers for complete relief raise questions involving mootness.<sup>40</sup> Mootness occurs when there is no longer a live controversy between two parties.<sup>41</sup> The mootness doctrine arises from the

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<sup>34</sup> GENSLER, *supra* note 2, at 1267 (“An unaccepted offer is considered withdrawn, but it does not preclude a later offer.”).

<sup>35</sup> *Id.* Rule 68(b) states that “[a]n unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.” *Id.* This language is glossed over by the circuit courts that accept Rule 68 offers can moot claims. *See infra* Part II.B–C. The plain language in Rule 68 should preclude a defendant from contending that an offer can be considered in judicial rulings.

<sup>36</sup> *See* *Marek v. Chesny*, 473 U.S. 1, 23 (1985) (Brennan, J., dissenting). Just like all of the other Federal Rules of Civil Procedure, the drafters wanted Rule 68 to have a “uniform, consistent application in all proceedings in federal court.” *Id.* The drafters favored rules that simplified the proceedings. *See id.*

<sup>37</sup> *Cf.* *Stein v. Buccaneers Ltd. P’ship*, 772 F.3d 698, 700–01 (11th Cir. 2014); Peter Jamison, *Unwanted Faxes Could Create \$270M Headache for Tampa Bay Bucs*, TAMPA BAY TIMES (June 21, 2013, 4:54 PM), <http://www.tampabay.com/news/courts/civil/unwanted-faxes-could-create-270-million-headache-for-tampa-bay-buccaneers/2127955>; *see also supra* note 16.

<sup>38</sup> *See* GENSLER, *supra* note 2, at 1278–81.

<sup>39</sup> FED. R. CIV. P. 68. The *Diaz* approach corrects this inflated interpretation.

<sup>40</sup> *See supra* Part I.A.

<sup>41</sup> *See* *Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am., Div. 998 v. Wis. Emp’t Relations Bd.*, 340 U.S. 416, 418 (1951) (“A federal court is without power to decide moot questions . . .

Constitution,<sup>42</sup> and its flexibility lends itself to considerable debate about its reach.<sup>43</sup> The Constitution restricts the federal courts' jurisdiction to "cases and controversies."<sup>44</sup> Once a case is rendered moot, federal courts no longer have jurisdiction over it.<sup>45</sup>

Mootness differs from the doctrine of standing. At the onset of a lawsuit, a litigant must have standing prior to bringing the claim.<sup>46</sup> While courts, usually implicitly, determine standing at the outset of a trial, mootness requires that "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed."<sup>47</sup>

Using Rule 68, defendants have argued that they can moot plaintiffs' claims because their offers constitute complete relief.<sup>48</sup> Since no more relief can be offered, the controversy ceases to exist and therefore becomes moot. However, this Comment will reveal that, among other problems, "complete relief" depends on one's perspective.

## II. MAJOR COURT DECISIONS BY THE SUPREME AND CIRCUIT COURTS

This Part details several relevant Supreme and circuit court decisions about mootness arising out of Rule 68 offers. The Supreme Court has briefly explored this area of law<sup>49</sup> but should resolve this issue in the October Term

which cannot affect the rights of the litigants in the case before it." (quoting *St. Pierre v. United States*, 319 U.S. 41, 42 (1943)).

<sup>42</sup> "The judicial Power shall extend to all Cases . . . [and] Controversies." U.S. CONST. art. III, § 2, cl. 1.

<sup>43</sup> See, e.g., 13B WRIGHT ET AL., *supra* note 27, § 3533.1 ("There is reason to wonder whether much reliance should be placed on constitutional concepts of mootness when these concepts are as flexible as they are."); Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373 (1974) ("The broadly phrased case or controversy requirement leaves the Court with substantial discretion to determine whether a case is justiciable in borderline situations."); Corey C. Watson, Comment, *Mootness and the Constitution*, 86 NW. U. L. REV. 143, 143 (1991) ("The Supreme Court's decision in *Honig v. Doe* is a recent reminder of the confusion and disagreement surrounding the doctrine of mootness.");

<sup>44</sup> *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013).

<sup>45</sup> See *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726–27 (2013) ("A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" (quoting *Murphy v. Hunt*, 455 U.S. 478, 481 (1982) (per curiam))); *Honig v. Doe*, 484 U.S. 305, 317 (1988) ("Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies.").

<sup>46</sup> Note, *supra* note 43, at 376.

<sup>47</sup> *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974) (citing *Roe v. Wade*, 410 U.S. 113, 125 (1973)).

<sup>48</sup> See GENSLE, *supra* note 2, at 1278–81.

<sup>49</sup> See *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 340 (1980); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980).

2015.<sup>50</sup> However, to date, the Court explicitly declined to answer this Comment's inquiry of whether a Rule 68 offer can moot an individual's claim.<sup>51</sup> Rather, the circuit courts have debated the merits of this argument. Initially, circuit courts favored the notion that once a defendant made a Rule 68 offer for complete relief, the claim became moot.<sup>52</sup> These circuit courts primarily concerned themselves with what constituted complete relief and whether judgment should be entered for the plaintiff or defendant.<sup>53</sup> This subsidiary problem of which party should receive the judgment led to three circuit court approaches. Two such approaches determined that a Rule 68 offer for complete relief could moot a claim,<sup>54</sup> however, these circuit courts disagree over which party should receive a judgment in its favor.<sup>55</sup> The third approach—*Diaz*—resolved this conflict by holding that a Rule 68 offer never moots a claim.<sup>56</sup> This split will likely be resolved soon when the Supreme Court decides *Campbell-Ewald*, a case in which the Ninth Circuit applied the *Diaz* approach and held that the defendant's Rule 68 offer did not moot the plaintiff's claim.<sup>57</sup>

In this Part, section A describes two Supreme Court decisions that were relied on by the circuit courts in developing their discrete approaches. Then, sections B and C demonstrate that circuit courts initially favored defendants, but as time progressed, circuit courts made it increasingly more difficult for defendants to satisfy the notion of complete relief. Lastly, sections D and E highlight the shift in judicial thought in 2013, where courts applied the reasoning of *Diaz*. These sections show that courts are increasingly unlikely to render an individual's claim moot under Rule 68, even though the defendant offers the maximum monetary relief to the plaintiff. This chronology reveals an ongoing trend towards courts limiting their involvement in Rule 68 offers—and, therefore, the Supreme Court will encounter a growing number of courts applying the *Diaz* approach when it hears oral arguments in October.

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<sup>50</sup> See *supra* note 6 and accompanying text.

<sup>51</sup> See *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528–29 (2013).

<sup>52</sup> See *infra* Part II.B–C.

<sup>53</sup> See *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 952–53 (9th Cir. 2013).

<sup>54</sup> See *infra* Part II.B–C.

<sup>55</sup> See *infra* Part II.B–C.

<sup>56</sup> See *infra* Part II.E.

<sup>57</sup> See *supra* notes 5–6 and accompanying text.

### A. *Setting the Stage: Roper and Geraghty*

On March 19, 1980, the Supreme Court decided two cases, *Deposit Guaranty National Bank v. Roper*<sup>58</sup> and *U.S. Parole Commission v. Geraghty*.<sup>59</sup> Both cases involved possibly mooted claims.<sup>60</sup> These early opinions involved questions of class certification for plaintiffs.<sup>61</sup> In these cases, the defendants argued that the representatives' claims in the class were moot.<sup>62</sup> This argument became the initial basis for determining whether a plaintiff's individual claim was moot.<sup>63</sup> In both *Roper* and *Geraghty*, however, the Supreme Court rejected the defendants' mootness arguments.<sup>64</sup>

In *Roper*, the plaintiffs brought a class action against the defendant, a bank, for various credit card grievances.<sup>65</sup> The district court initially denied the plaintiffs' motion to certify the class.<sup>66</sup> After the district court's denial of class certification, the defendant offered the maximum monetary amount to the plaintiffs.<sup>67</sup> Specifically, the defendant's offer included entering judgment by consent without waiving its defenses or admitting liability.<sup>68</sup> However, the plaintiffs declined this offer.<sup>69</sup> Nonetheless, the district court entered judgment in their favor for the amount offered and dismissed the case.<sup>70</sup>

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<sup>58</sup> 445 U.S. 326 (1980).

<sup>59</sup> 445 U.S. 388 (1980).

<sup>60</sup> *Geraghty*, 445 U.S. at 404; *Roper*, 445 U.S. at 340. Neither case involved a defendant making a Rule 68 offer. However, these decisions demonstrate the conflict in interpreting the mootness doctrine. Mootness is the central issue in Rule 68 offers for complete relief. *See Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 702–04 (11th Cir. 2014).

<sup>61</sup> *Geraghty*, 445 U.S. at 404; *Roper*, 445 U.S. at 330.

<sup>62</sup> *See Geraghty*, 445 U.S. at 404; *Roper*, 445 U.S. at 330.

<sup>63</sup> *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529–32 (2013).

<sup>64</sup> *Geraghty*, 445 U.S. at 404; *Roper*, 445 U.S. at 340.

<sup>65</sup> *Roper*, 445 U.S. at 327–28.

<sup>66</sup> *Id.* at 329.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* The Court never addressed whether this offer mooted the plaintiff's claim even though it was offered with the conditions that the defendant was neither waiving his defenses nor admitting his liability. *See id.* However, a similar conditional settlement was given in the Second Circuit's *McCauley* case, which did impact the court's holding. *See McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 341–42 (2d Cir. 2005). In *McCauley*, the court held that the defendant did not offer complete relief because the settlement offer included conditions that the offer “not be construed as an admission of liability and that it remain confidential and filed under seal.” *Id.*

<sup>69</sup> *Roper*, 445 U.S. at 329.

<sup>70</sup> *Id.* at 330.

On appeal, the plaintiffs sought review for the denial of class certification.<sup>71</sup> Because the plaintiffs received their maximum monetary relief as individuals, the defendant argued that the plaintiffs' claims were moot.<sup>72</sup> Therefore, the defendant reasoned that the plaintiffs should no longer have an interest in the class certification.<sup>73</sup> The plaintiffs responded, alleging a continued interest as individuals in the class certification because of their desire to shift their litigation costs.<sup>74</sup> The plaintiffs' response was well received by the Supreme Court,<sup>75</sup> which held that the plaintiffs' individual interest in shifting litigation costs prevented mootness of their claims.<sup>76</sup>

The second case, *Geraghty*, also concerned a defendant arguing that the plaintiff's claim was moot.<sup>77</sup> In *Geraghty*, the plaintiff, a prisoner, brought a class action suit against the U.S. Parole Commission, challenging the validity of the defendant's Parole Release Guidelines.<sup>78</sup> After the district court denied plaintiff's motion to certify the class, the plaintiff appealed this denial.<sup>79</sup> Prior to filing his appeal, however, the prison released the plaintiff.<sup>80</sup> Because the plaintiff no longer had an individual interest in the case, the defendant moved to dismiss the appeal as moot.<sup>81</sup>

In deciding this case, the Court relied upon *Roper*—which held that “an individual controversy is rendered moot, in the strict Art[icle] III sense, by payment and *satisfaction* of a final judgment”—and asserted that the mootness doctrine is, in fact, flexible.<sup>82</sup> The Court ultimately held that a class action claim does not become moot upon the expiration of an individual plaintiff's substantive claim, even though class certification was denied.<sup>83</sup> The holding in *Roper* helped clarify one of the issues of mootness. Although the Parole Release Guidelines no longer directly affected this particular plaintiff, his

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* As shown, defendants' efforts to pick off individual claimants in a class action are not limited to Rule 68 offers. *See supra* note 16.

<sup>73</sup> *See Roper*, 445 U.S. at 330.

<sup>74</sup> *Id.* at 336.

<sup>75</sup> *See id.* at 340.

<sup>76</sup> *Id.*

<sup>77</sup> U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 394 (1980).

<sup>78</sup> *Id.* at 390.

<sup>79</sup> *Id.* at 393–94.

<sup>80</sup> *Id.* at 394.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 400 (emphasis added).

<sup>83</sup> *Id.* at 404.

claim was not moot because flexibility is needed in situations with expiration dates, such as prison terms.<sup>84</sup>

In both *Roper* and *Geraghty*, the Court rejected the mootness arguments by the defendants.<sup>85</sup> In addition, neither decision determined whether an offer for complete relief would have mooted the claims.<sup>86</sup> In *Roper*, the Court held that the plaintiffs' interest in shifting litigation costs sufficed to combat the defendant's argument that the plaintiffs' claim was moot.<sup>87</sup> This holding demonstrated a minimal interest that a plaintiff needed to defeat a mootness argument. The Court did not address, however, the precise threshold required to defeat a mootness argument.<sup>88</sup>

Although the Supreme Court rejected both mootness arguments when the plaintiffs had minimal interests in their respective cases, sections B and C will show that several circuit courts addressed mootness and held that a Rule 68 offer of complete relief moots the plaintiffs' claims.<sup>89</sup>

#### *B. The Rand Approach: A Rule 68 Offer Can Moot a Claim, and Judgment is Entered for the Defendant*

In 1991, the Seventh Circuit in *Rand v. Monsanto Co.* held that when the defendant offers to satisfy the plaintiff's entire demand, (a) the claim is moot, and (b) the court should enter judgment for the defendant when the plaintiff refuses to accept the offer (the *Rand* approach).<sup>90</sup> The Seventh Circuit

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*; *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 340 (1980). However, the Seventh Circuit, the first court to address the issue of mootness in Rule 68 offers, accepted the mootness-by-unaccepted-offer theory. See *Rand v. Monsanto Co.*, 926 F.2d 596, 597–98 (7th Cir. 1991), *overruled by* *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015).

<sup>86</sup> See *Geraghty*, 445 U.S. at 404; *Roper*, 445 U.S. at 340.

<sup>87</sup> *Roper*, 445 U.S. at 336–40.

<sup>88</sup> See *All. to End Repression v. City of Chicago*, 820 F.3d 873, 878 (7th Cir. 1987) (“Our conclusion that this case is not justiciable answers a question raised in [*Roper*]: whether a plaintiff who is offered all the relief he demands may refuse the offer and go to trial. The answer is no.”).

<sup>89</sup> See *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 368 (4th Cir. 2012); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567 (6th Cir. 2009); *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340 (2d Cir. 2005); *Rand*, 926 F.2d 596.

<sup>90</sup> 926 F.2d at 598 (“Once the defendant offers to satisfy the plaintiff's entire demand, there is no dispute over which to litigate . . . and a plaintiff who refuses to acknowledge this loses outright.” (citing *All. to End Repression*, 820 F.3d 873)). By the time the Seventh Circuit ruled in *Rand*, the Seventh Circuit had already interpreted *Roper*. See *All. to End Repression*, 820 F.3d at 878. The Seventh Circuit overruled *Rand* and adopted the *Diaz* approach on August 6, 2015. See *infra* note 98 and accompanying text.

determined that *Roper* introduced the principle that a plaintiff cannot have his day in court when offered all the relief he demands.<sup>91</sup>

In *Rand*, the plaintiff, a shareholder, brought a class action suit against the defendant, a corporation, for committing fraud by not disclosing potential liabilities.<sup>92</sup> When the plaintiff moved to certify the class, the district court denied the motion.<sup>93</sup> After the motion was denied, the defendant offered the plaintiff the full amount of monetary relief that he could receive from a court judgment.<sup>94</sup> However, when the plaintiff refused the defendant's offer, the district court entered judgment for the defendant.<sup>95</sup> On appeal, the Seventh Circuit agreed with the district court's ruling.<sup>96</sup> The Seventh Circuit held that if a defendant offers to satisfy a plaintiff's entire demand, and the plaintiff refuses, judgment must be entered for the defendant.<sup>97</sup>

Although the Seventh Circuit established the *Rand* approach, the court recently overruled *Rand* and instead embraced the reasoning of Justice Kagan's dissent—the same dissent that the Ninth Circuit endorsed in *Diaz*.<sup>98</sup> However, the basic premise of the *Rand* approach is still applied by the following five circuit courts<sup>99</sup>: the Third Circuit,<sup>100</sup> the Fourth Circuit,<sup>101</sup> the Tenth Circuit,<sup>102</sup> the Federal Circuit,<sup>103</sup> and (arguably) the Fifth Circuit.<sup>104</sup>

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<sup>91</sup> *All. to End Repression*, 820 F.3d at 878 (holding that a plaintiff who is offered all the relief he demands may not refuse the offer and go to trial).

<sup>92</sup> *Rand*, 926 F.2d at 597–98.

<sup>93</sup> *Id.* at 597.

<sup>94</sup> *Id.* The defendant attempted to pick off the plaintiff to end the possibility of a class action early. *See id.* at 597–98.

<sup>95</sup> *Id.* at 597–98.

<sup>96</sup> *Id.* at 598.

<sup>97</sup> *Id.* at 597–98. In 2011, the Seventh Circuit reaffirmed this holding. *Damasco v. Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011) (“[O]nce the defendant offers to satisfy the plaintiff’s entire demand, there is no dispute over which to litigate, and the plaintiff who refuses to acknowledge this loses outright . . . because he has no remaining stake.” (quoting *Rand*, 926 F.2d at 598)).

<sup>98</sup> *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at \*3 (7th Cir. Aug. 6, 2015) (“We overrule *Damasco*, *Thorogood*, *Rand*, and similar decisions to the extent they hold that a defendant’s offer of full compensation moots the litigation or otherwise ends the Article III case or controversy.”). In *Chapman*, the plaintiff brought a putative class action under the Telephone Consumer Protection Act against the defendant for sending solicited or unsolicited facsimiles without instructions on how to opt out of receiving them. *Id.* at \*1. When the plaintiff’s motion to represent a class of non-consenting recipients was pending, the defendant made a Rule 68 offer to moot the plaintiff’s individual claims. *See id.* at \*2. The Seventh Circuit thought “it best to clean up the law of this circuit promptly,” which led to its acceptance of the *Diaz* approach. *Id.* at \*3.

<sup>99</sup> *See Tanasi v. New All. Bank*, 786 F.3d 195, 199 (2d Cir. 2015) (“The Third, Fourth, Fifth, . . . Tenth, and Federal Circuits have all concluded that a Rule 68 offer of complete relief to an individual renders his case moot for purposes of Article III, regardless of whether judgment is entered against the defendant.”). Instead of

entering judgment for the defendants, courts might dismiss the mooted claim for lack of subject-matter jurisdiction. Although this distinction exists, this outcome still favors defendants to the greatest extent, which is the focus of the *Rand* approach.

<sup>100</sup> *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004). In *Weiss*, the plaintiff brought a putative class action under the Fair Debt Collection Practices Act against the defendants for mailing a letter that demanded an alleged debt owed. *Id.* at 339. Before the plaintiff moved to certify a class, the defendant made a Rule 68 offer for complete relief to moot the plaintiff's individual claim. *Id.* at 339–40. The district court found that this offer mooted the plaintiff's claim and dismissed the case for lack of subject-matter jurisdiction. *Id.* at 340. On appeal, the Third Circuit held that the claim was not moot because it was in the context of a defendant attempting to pick off the representative plaintiff in a class action. *Id.* at 345, 349–50. However, the court also cited to *Rand* for the proposition that “[a]n offer of complete relief will generally moot the plaintiff's claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.” *Id.* at 340.

<sup>101</sup> *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 371–72 (4th Cir. 2012).

<sup>102</sup> *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011). In *Lucero*, the plaintiff brought a putative class action under the Fair Debt Collection Practices Act and New Mexico Collection Agency Regulatory Act. *Id.* at 1241. Alongside its answer to plaintiff's complaint, the defendant made a Rule 68 offer of judgment, including damages, reasonable attorneys' fees and costs. *Id.* Several months later, the plaintiff moved for class certification, and the defendant moved to dismiss the claim. The district court granted the motion and dismissed the claim as moot. *Id.* On appeal, the plaintiff argued that the defendant's offer was an attempt to pick off (or “buy off”) the representative plaintiff early in a class action. *Id.* The Tenth Circuit reversed this decision because the district court did not consider the “undoubtedly timely motion for certification.” *Id.* The court focused on the pick-off strategy of the Rule 68 offer in a class action. *Id.* at 1248–49. In its discussion of Rule 68, the court noted that “[a]s Rule 68 operates, if an offer is made for a plaintiff's maximum recovery, his action may be rendered moot.” *Id.* at 1243 (citing 13B WRIGHT ET AL., *supra* note 27, § 3533.2, at 800 (3d ed. 2008)). Before turning to a discussion about the effect of Rule 68 offers on class certification, the court noted that “[w]hile we have yet to address the question squarely, other circuits have concluded that if a defendant makes an offer of judgment in complete satisfaction of a plaintiff's claims in a non-class action, the plaintiff's claims are rendered moot because he lacks a remaining interest in the outcome of the case.” *Id.*; see *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 953 & n.5 (9th Cir. 2013) (discussing the Tenth Circuit and the *Lucero* case).

<sup>103</sup> *Samsung Elecs. Co. Ltd. v. Rambus, Inc.*, 523 F.3d 1374 (Fed. Cir. 2008). In previous litigation, the plaintiff Rambus filed a complaint in the Northern District of California against the defendant Samsung for alleged infringement of four of its patents. *Id.* at 1376. The next day, Samsung filed for a declaratory judgment in the Eastern District of Virginia seeking a ruling that the same patents were “invalid, unenforceable, and not infringed.” *Id.* In prior litigation concerning the same patents, Rambus had filed a complaint in the Eastern District of Virginia against another defendant, Infineon. *Id.* In the Infineon litigation, the court ruled from the bench that Rambus had unclean hands due to the spoliation of evidence. *Id.* at 1377. Rambus quickly settled that litigation, and the adverse ruling became an unpublished finding. *Id.* However, Samsung wanted to invoke collateral estoppel based on the Infineon spoliation finding in Samsung's own motion for attorneys' fees. *Id.* Instead, Rambus made a Rule 68 offer to compensate Samsung for the full amount of its requested attorney fees. *Id.* Samsung rejected this offer and argued for its attorney fees motion. *Id.* Citing to *Rand*, the Federal Circuit found that “[a]n offer for full relief moots a claim for attorney fees.” *Id.* at 1379. According to the Federal Circuit, “the offer of the full amount in dispute brought an end to the case and controversy between Rambus and Samsung. At that point the district court also lacked subject-matter jurisdiction to rule on the attorney fees motion. The case became moot.” *Id.* at 1381. Therefore, Samsung's motion was mooted by Rambus's Rule 68 offer. *Id.*

<sup>104</sup> *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008). In *Sandoz*, the plaintiff brought an opt-in class action under the Fair Labor Standards Act against the defendant for violating the law's minimum

For example, in 2012, the Fourth Circuit in *Warren v. Sessoms & Rogers, P.A.* applied the *Rand* approach.<sup>105</sup> However, the court in *Warren* required language that was more absolute in order to moot a claim.<sup>106</sup> The court held that when the defendant makes a Rule 68 offer that unconditionally and unequivocally satisfies all of the relief that the plaintiff sought to obtain from the claim, the claim is moot, and the court should enter judgment for the plaintiff.<sup>107</sup> In *Warren*, the plaintiff brought a suit against the defendant, a debt collection agency, for statutory violations.<sup>108</sup> The plaintiff sought the maximum statutory damages, costs, reasonable attorney fees, and unspecified actual damages.<sup>109</sup> The defendant made a Rule 68 offer for the maximum statutory damages, costs, reasonable attorney fees, and actual damages of \$250

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wage provisions. *Id.* at 914. The defendant made a Rule 68 offer for complete relief to moot the plaintiff's individual claim. *Id.* Like the plaintiff in *Weiss*, the court noted that the plaintiff's individual claim was not moot because the defendant attempted to pick off the representative plaintiff in a potential class action. *Id.* at 920. The Fifth Circuit remanded the case to the district court to determine whether the plaintiff made a timely motion to certify a class action. *Id.* at 921–22. This ruling would determine whether the court should moot the claim: “If the [district] court ultimately grants the certification motion, then [defendant’s] Rule 68 offer of judgment only to [plaintiff] did not moot the case. Conversely, if the court denies the certification motion, then [plaintiff] still represents only herself, and [defendant’s] Rule 68 offer of judgment rendered the case moot.” *Id.* at 921. However, the Fifth Circuit’s recent decision in *Hooks v. Landmark Industry, Inc.* may have changed its position. *See Hooks v. Landmark Indus., Inc.*, No. 14-20496, 2015 WL 4760253, at \*3–4 (5th Cir. Aug. 12, 2015) (“Our circuit has not finally resolved whether a complete Rule 68 offer of judgment moots an individual’s claim . . . We conclude that the reasoning of the Ninth and Eleventh Circuits is more persuasive and therefore hold that an unaccepted offer of judgment to a named plaintiff in a class action ‘is a legal nullity, with no operative effect.’” (quoting *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting))). Because the Fifth Circuit included the language “in a class action,” the court may not be ready to concede that a Rule 68 offer for complete relief should never moot an individual’s claim when a class action is not involved. However, this opinion also gives the Fifth Circuit an easy transition from the *Rand* approach to adopt the *Diaz* approach. The First Circuit’s recent opinion has already aligned the Fifth Circuit with the *Diaz* approach. *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 14-1789, 2015 WL 4979406, at \*5 (1st Cir. Aug. 21, 2015) (“[W]e agree with the Second, Fifth, Seventh, Ninth, and Eleventh Circuits that an unaccepted Rule 68 offer cannot, by itself, moot a plaintiff’s claim.” (emphasis added)); *but see Tanasi v. New All. Bank*, 786 F.3d 195, 199 (2d Cir. 2015) (“The federal courts of appeals are split on this question. The Third, Fourth, Fifth, Seventh, Tenth, and Federal Circuits have all concluded that a Rule 68 offer of complete relief to an individual renders his case moot for purposes of Article III, regardless of whether judgment is entered against the defendant.” (emphasis added)).

<sup>105</sup> 676 F.3d at 371–72 (“When a Rule 68 offer unequivocally offers a plaintiff all of the relief ‘she sought to obtain,’ the offer renders the plaintiff’s action moot.” (quoting *Friedman’s, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002))).

<sup>106</sup> *Id.* at 370–71.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 368–69.

<sup>109</sup> *Id.* at 369, 371; *see* 15 U.S.C.A. § 1692k(a)(2)(A) (2009) (allowing statutory damages up to \$1000).

or actual damages as determined by the court.<sup>110</sup> The plaintiff refused the offer, and the defendant moved to dismiss the claim as moot.<sup>111</sup> The district court granted the defendant's motion to dismiss.<sup>112</sup>

On appeal, the Fourth Circuit determined that a Rule 68 offer only moots a plaintiff's claim when the offer unequivocally and unconditionally offers the plaintiff all she sought to obtain through her claim.<sup>113</sup> An unequivocal and unconditional offer specifies a definite sum or other relief and must have no conditions attached.<sup>114</sup> Because the actual damages were not yet known or were conditional to the court's finding, the Fourth Circuit reversed the district court's dismissal for mootness.<sup>115</sup>

The Fourth Circuit's *Warren* decision provided more concrete language than the earlier *Rand* decision.<sup>116</sup> By requiring an unequivocal and unconditional Rule 68 offer, the Fourth Circuit's ruling made it very difficult to moot a claim using Rule 68. However, like the Third, Fifth, Tenth, and Federal Circuits, the Fourth Circuit would not provide relief for the plaintiff once the claim is mooted.<sup>117</sup>

### C. *The McCauley–O'Brien Approach: A Rule 68 Offer Can Moot a Claim, but Judgment is Entered for the Plaintiff*

Although the *Rand* approach mandates entry of judgment for defendants in mooted claims, the *McCauley–O'Brien* approach provides a more favorable ruling for such plaintiffs.<sup>118</sup> Courts applying *McCauley–O'Brien* find that when a defendant offers complete relief under Rule 68, (a) the claims are moot,

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<sup>110</sup> *Warren*, 676 F.3d at 369. The defendant also offered to pay damages in “an amount determined by the Court upon Plaintiff’s submission of affidavits or other evidence of actual damage.” *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 370.

<sup>113</sup> *Id.* at 370–71.

<sup>114</sup> *Id.* (“[T]o effectuate the purposes of Rule 68, an offer of judgment ‘must specify a definite sum or other relief for which judgment may be entered and must be unconditional.’” (quoting *Simmons v. United Mortg. & Loan Inv.*, 634 F.3d 754, 764 (4th Cir. 2011))).

<sup>115</sup> *Id.* at 372, 375.

<sup>116</sup> Compare *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) (“Once the defendant offers to satisfy the plaintiff’s entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright.” (citation omitted)), with *Warren*, 676 F.3d at 371 (“When a Rule 68 offer unequivocally offers a plaintiff all of the relief ‘she sought to obtain,’ the offer renders the plaintiff’s action moot.” (quoting *Friedman’s, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002))).

<sup>117</sup> *Warren*, 676 F.3d at 371; *supra* notes 99–103 and accompanying text.

<sup>118</sup> See *infra* Part II.C.

but (b) the court should enter judgment for the plaintiff.<sup>119</sup> Unlike in *Rand*, which held that a plaintiff that refuses to accept the offer must lose it, the *McCauley–O’Brien* approach provides a more sympathetic holding for these litigants—giving the settlement offer to the plaintiffs.<sup>120</sup>

While the Second Circuit in *McCauley v. Trans Union, L.L.C.* established the approach giving mooted Rule 68 settlement offers to the plaintiffs,<sup>121</sup> the Sixth Circuit in *O’Brien v. Ed Donnelly Enterprises* reinforced this reasoning with firmer language.<sup>122</sup>

In *McCauley*, the plaintiff brought suit against the defendant, a consumer reporting agency, for negligently misreporting the plaintiff’s credit score.<sup>123</sup> Subsequently, the defendant made a Rule 68 settlement offer to the plaintiff for the maximum monetary damages and reasonable costs.<sup>124</sup> The Rule 68 settlement offer specified that this offer was not an admission of liability and must remain confidential.<sup>125</sup> The plaintiff rejected the offer.<sup>126</sup> However, the district court found the case moot, granting summary judgment in favor of the defendant.<sup>127</sup> But, on appeal, the Second Circuit held that the defendant’s Rule 68 offer did not moot the claim.<sup>128</sup>

According to the circuit court, when the defendant made the monetary offer “with the requirement that the settlement be confidential, [the defendant] made a conditional offer that [the plaintiff] was not obligated to take.”<sup>129</sup> The plaintiff wanted not only the monetary relief, but also the precedential value of

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<sup>119</sup> *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005).

<sup>120</sup> *Id.*

<sup>121</sup> *See id.*

<sup>122</sup> 575 F.3d 567, 574–75 (6th Cir. 2009) (“We agree with the Seventh Circuit’s [*Rand* approach] that an offer of judgment that satisfies a plaintiff’s entire demand moots the case . . . . We disagree, however, with the Seventh Circuit’s view that a plaintiff loses outright . . . . Instead, we believe the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants’ Rule 68 offer of judgment.”).

<sup>123</sup> *Id.* at 340.

<sup>124</sup> *Id.* at 341.

<sup>125</sup> *Id.* This offer is similar to the defendant’s offer in *Roper*, in which the defendant made an “Offer of Defendants to Enter Judgment as by Consent and Without Waiver of Defenses or Admission of Liability.” *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 329 (1980). The Supreme Court did not address whether the form of the offer mattered. *See id.* Further, the offer itself was not questioned as complete relief. *See id.* Instead, the decision turned on the plaintiff’s desire to shift litigation costs. *Id.* at 336, 340.

<sup>126</sup> *McCauley*, 402 F.3d at 341.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 342.

<sup>129</sup> *Id.*

a judgment.<sup>130</sup> Because a default judgment is public record, the case would become precedent.<sup>131</sup> Therefore, the Second Circuit vacated the district court's judgment and remanded the case back to the district court to enter a default judgment for the plaintiff for the same amount offered in the settlement.<sup>132</sup>

In contrast to the *Rand* approach and its own district court's ruling,<sup>133</sup> the Second Circuit's *McCauley* decision determined that full monetary relief alone does not automatically constitute complete relief.<sup>134</sup> Further, once complete relief was given, the court entered judgment for the plaintiff.<sup>135</sup>

Because the Second Circuit used equivocal language in its application of the *McCauley–O'Brien* approach, the court recently “clarif[ie]d” and reiterate[d]” its interpretation of the mootness-by-unaccepted-offer theory.<sup>136</sup> However, this clarification has led to its adoption of Justice Kagan's dissent in *Genesis* and adherence to the *Diaz* approach.<sup>137</sup> With this recent development, the Sixth Circuit<sup>138</sup>—and arguably the Eighth Circuit<sup>139</sup>—have adopted the *McCauley–O'Brien* approach.

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<sup>130</sup> *Id.* at 341; *see also* *Cabala v. Crowley*, 736 F.3d 226, 231 (2d Cir. 2013) (holding that an offer that does not include an offer of judgment does not moot the claim).

<sup>131</sup> *McCauley*, 402 F.3d at 342.

<sup>132</sup> *Id.*

<sup>133</sup> The *McCauley* case was appealed from the Southern District of New York. *See* *McCauley v. Trans Union, L.L.C.*, 2003 U.S. Dist. LEXIS 22713, at \*1–2 (S.D.N.Y. Dec. 16, 2003).

<sup>134</sup> *McCauley*, 402 F.3d at 342.

<sup>135</sup> *Id.*

<sup>136</sup> *See* *Tanasi v. New All. Bank*, 786 F.3d 195, 199–200 (2d Cir. 2015) (“The district courts within our Circuit have not deduced a single rule from our prior jurisprudence on the issue.”). In *Tanasi*, the plaintiff brought a putative class action against defendants for alleged improper assessment of overdraft fees. *Id.* at 197. The defendants made a Rule 68 offer for complete relief to moot the plaintiff's individual claims. *Id.* The district court found that the plaintiff's individual claims were mooted by the Rule 68 offer, but that its putative class action claims were not. *Id.* at 196. On appeal, the Second Circuit affirmed the holding, but on different grounds—the court held “an unaccepted Rule 68 offer alone does not render a plaintiff's individual claims moot before the entry of judgment against the defendants.” *Id.* at 197.

<sup>137</sup> *Id.* at 200 (“In light of this confusion, we find it necessary to the resolution of this case to clarify and reiterate that it remains the established law of this Circuit that a ‘rejected settlement [under Rule 68], by itself, [cannot] moot[] [a] case.’” (quoting *McCauley*, 402 F.3d at 342)). Although the Second Circuit considers *Tanasi* to simply clarify its previous *McCauley* holding, the case actually changes *McCauley* to follow the recent opinions that cite to Justice Kagan's dissenting opinion in *Genesis*.

<sup>138</sup> *See infra* notes 142–48 and accompanying text.

<sup>139</sup> *Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935 (8th Cir. 2012). In *Hartis*, the plaintiffs brought a putative class action against the defendant, a title insurance company, for allegedly retaining excessive fees. *Id.* at 939. The district court denied the plaintiffs' class certification, and subsequently, the defendant made a Rule 68 offer of complete relief in order to moot the plaintiffs' claims. *Id.* at 942. The district court found that the offer mooted the claims and determined that judgment should be entered for the plaintiff in accordance with the defendant's offer. *Id.* at 949. However, due to a clerical error, the judgment entered dismissed the case for lack

The Sixth Circuit fortified the *McCauley–O’Brien* approach in *O’Brien v. Ed Donnelly Enterprises* with its steadfast language.<sup>140</sup> Because of the court’s explicit validation, the Eighth Circuit cited to *O’Brien* for its reasoning in *Hartis v. Chicago Title Insurance Co.*<sup>141</sup>

In *O’Brien*, the court held that a plaintiff’s claims are moot when a defendant makes a Rule 68 offer that satisfies a plaintiff’s entire demand, and the court should then enter judgment for the plaintiff.<sup>142</sup> The *O’Brien* plaintiffs brought three claims against the defendant, a storeowner, for statutory violations.<sup>143</sup> The defendant made a Rule 68 offer for two of the claims, offering the full amount for the claimed damages, costs, and reasonable attorneys’ fees as determined by the district court.<sup>144</sup> The plaintiffs rejected the offer.<sup>145</sup> However, the district court found the claims to be mooted and entered judgment for the plaintiffs.<sup>146</sup> On appeal, the plaintiffs argued that their claims

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of subject-matter jurisdiction instead of entering judgment for the plaintiffs. *Id.* The Eighth Circuit cited to the Sixth Circuit’s *O’Brien* decision for the proposition that the court should give the amount of the mooted Rule 68 offer to the plaintiff—the *McCauley–O’Brien* approach. *Id.* Nonetheless, the Eighth Circuit never actually entered a judgment because the parties did not make the proper motion. *Id.* at 950. Instead, the court instructed the plaintiffs to make the proper motion to correct the district court’s clerical error when the case was sent back to the district court. *Id.* This tacit endorsement of the *McCauley–O’Brien* approach has led to varying results for the district courts within the Eighth Circuit. *Compare* *Hendricks v. Inergy, L.P.*, No. 4:12CV00069 JLH, 2013 WL 6984634, at \*6 (E.D. Ark. July 18, 2013) (“The Eighth Circuit has indicated that when an offer of judgment moots an action, the proper procedure is to enter judgment for the plaintiff in accordance with the Rule 68 offer of judgment.”), *and* *Campbell v. Accounts Receivable Mgmt., Inc.*, No. 4:14-CV-00793-W-DGK, 2015 WL 4425823, at \*3 (W.D. Mo. July 20, 2015) (stating that the Eighth Circuit has approved the *McCauley–O’Brien* approach, so a mooted Rule 68 offer should result in a district court entering “judgment in the amount offer by the defendant and then dismiss[ing] the case”), *with* *Claxton v. Kum & Go, L.C.*, No. 6:14-cv-03385-MDH, 2014 WL 4854692, at \*3 (W.D. Mo. Sept. 30, 2014) (“The Eighth Circuit has endorsed this principle in the context of class actions, holding that ‘[j]udgment should be entered against a putative class representative on a defendant’s offer of payment . . . where class certification has been properly denied and the offer satisfies the representative’s entire demand for injuries and costs of the suit.’” But the district courts within the Eighth Circuit even disagree on “whether a tender and rejection of an offer of judgment prior to a request for class certification will moot a class action suit.” (alterations and ellipsis in original) (quoting *Alpern v. UtiliCorp. United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996))).

<sup>140</sup> See *supra* notes 121–22 and accompanying text.

<sup>141</sup> 694 F.3d at 949.

<sup>142</sup> *O’Brien v. Ed Donnelly Enters.*, 575 F.3d 567, 574–75 (6th Cir. 2009) (“We agree with the Seventh Circuit’s view that an offer of judgment that satisfies a plaintiff’s entire demand moots the case . . . . We disagree, however, with the Seventh Circuit’s view that a plaintiff loses outright . . . . Instead, we believe the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants’ Rule 68 offer of judgment.”).

<sup>143</sup> *Id.* at 572.

<sup>144</sup> *Id.* at 573.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

were not moot because the court had failed to determine reasonable attorneys' fees.<sup>147</sup> Because full relief had been offered and only reasonable attorneys' fees by the court had to be determined, the Sixth Circuit found the claims moot.<sup>148</sup>

As these cases show, the *McCauley–O'Brien* approach allows defendants to use Rule 68 to moot individuals' claims, but the court will enter judgment for the plaintiff.

#### *D. A Turning Tide in Rule 68 Offers and Mootness: Genesis*

Prior to *Genesis*, circuit courts applied two approaches—*Rand* and *McCauley–O'Brien*.<sup>149</sup> Both approaches accepted the argument that a Rule 68 offer for complete relief mooted an individual's claim but disagreed over which party should receive the judgment.<sup>150</sup>

Justice Kagan's dissent in the Supreme Court's *Genesis* opinion changed the mootness discussion.<sup>151</sup> In *Genesis*, the majority assumed, without deciding, that the Third Circuit correctly mooted the individual's claim.<sup>152</sup> In her dissent, Justice Kagan dismissed the foundation of both the *Rand* and *McCauley–O'Brien* approaches.<sup>153</sup> She disagreed with the majority opinion's assumption<sup>154</sup>—that the Third Circuit correctly mooted the individual's claim.<sup>155</sup> In fact, Justice Kagan refuted the possibility that a Rule 68 offer

<sup>147</sup> *Id.* at 575.

<sup>148</sup> *Id.* at 575–76. Interestingly, the Sixth Circuit did not discuss the Supreme Court's holding in *Roper* that a personal interest in shifting litigation costs prevented mootness of the claim. *Id.*; see *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 340 (1980).

<sup>149</sup> See *supra* Part II.B–E.

<sup>150</sup> See *supra* Part II.B–E.

<sup>151</sup> See *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1534 (2013) (Kagan, J., dissenting) (stating that the Third Circuit should “rethink [its] mootness-by-unaccepted-offer theory” and suggesting other circuits courts “[d]on’t try this at home”).

<sup>152</sup> *Id.* at 1528–29 (majority opinion).

<sup>153</sup> See *id.* at 1534 (Kagan, J., dissenting).

<sup>154</sup> The Court also stated that the plaintiff's waiver of the issue and failure to raise the argument in the petition for certiorari require the Court to accept that the plaintiff's individual claim was moot. *Id.* at 1529 (majority opinion). The Court specified that it was not answering the question addressed by this Comment: “While the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot, we do not reach this question, or resolve the split, because the issue is not properly before us.” *Id.* at 1528–29.

<sup>155</sup> *Id.* at 1533, 1535 (Kagan, J., dissenting) (“[T]he individual claims in such cases will never become moot, and a court will therefore never need to reach the issue the majority resolves. The majority's decision is fit for nothing: Aside from getting this case wrong, it serves only to address a make-believe problem.”).

could ever moot an individual's claim.<sup>156</sup> Joined by three other justices, her dissent became the catalyst for the *Diaz* approach.<sup>157</sup> Instead of citing to case law for this proposition,<sup>158</sup> Justice Kagan primarily relied on contract theory to bolster her dissent:

[A]n unaccepted offer of judgment cannot moot a case. When a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief. An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient's rejection of an offer “leaves the matter as if no offer had ever been made.”<sup>159</sup>

Not only did Justice Kagan dissent from the majority's holding, she dissented with its underlying assumption—she found that an accepted offer never moots an individual's claim.<sup>160</sup>

#### *E. The Diaz Approach: A Rule 68 Offer Never Moots a Claim*

Justice Kagan's “friendly suggestion” to the Third Circuit and other circuit courts to reconsider their mootness-by-unaccepted-offer theory<sup>161</sup> was taken to heart. Later that same year, the Ninth Circuit in *Diaz* took Justice Kagan's advice.<sup>162</sup> Although the circuit courts prior to *Genesis* had ruled that an

<sup>156</sup> *Id.*

<sup>157</sup> See *infra* Part II.E.

<sup>158</sup> See Recent Case, *Rule 68 of the Federal Rules of Civil Procedure—Ninth Circuit Holds that Unaccepted Rule 68 Offer Does Not Moot Plaintiff's Individual Claims*, 127 HARV. L. REV. 1260, 1267 (2014) (“Justice Kagan's opinion relied, at its core, on pure logic . . . [her] reasoning may have been novel.”); 1 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 2:15 (5th ed. Supp. 2014) (“[T]he effect of Justice Kagan's dissent has been to breathe life into the threshold question of mootness, creating a flurry of opinions on a question once deemed settled.”).

<sup>159</sup> *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting).

<sup>160</sup> *Id.* at 1534, 1537. Although the majority holding in *Genesis* is somewhat irrelevant for this Comment, the Court held that when a plaintiff's individual claim is moot, the fact that the plaintiff is pursuing a class action has no bearing, and the plaintiff's claim must be dismissed for lack of subject-matter jurisdiction. *Id.* at 1532 (majority opinion).

<sup>161</sup> *Id.* at 1534 (Kagan, J., dissenting). Justice Kagan's dissent provided “a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home.” *Id.*

<sup>162</sup> *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013) (“We hold that an unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot.”).

unaccepted Rule 68 offer could moot a claim, the Ninth Circuit rejected that conclusion.<sup>163</sup>

In 2013, the Ninth Circuit in *Diaz* held that when the defendant makes a Rule 68 offer to satisfy the plaintiff's entire demand, (a) the claim is *never* moot, so (b) the Ninth Circuit did not need to determine which party a judgment would favor.<sup>164</sup> In *Diaz*, the plaintiff brought a class action suit against the defendant, a warranty plan corporation.<sup>165</sup> The district court denied the plaintiff's motion to certify the class.<sup>166</sup> Subsequently, the defendant made a Rule 68 offer to the plaintiff for all of her remaining individual claims.<sup>167</sup> The plaintiff rejected the offer because it did not satisfy her prayer for injunctive and declaratory relief.<sup>168</sup> The defendant then moved to dismiss the claim as moot.<sup>169</sup> The district court granted the defendant's motion and declined to enter judgment or award costs to either party.<sup>170</sup>

On appeal, the Ninth Circuit refuted the preexisting mootness-by-unaccepted-offer theory.<sup>171</sup> The Ninth Circuit's distinction from the other circuit courts was premised almost entirely on Justice Kagan's persuasive *Genesis* dissent.<sup>172</sup> The court held that an unaccepted Rule 68 offer never<sup>173</sup> moots the claim, even if it would have fully satisfied it.<sup>174</sup>

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<sup>163</sup> These other circuit courts accepted that an individual's claim can be mooted, but they argued over their understanding of complete relief and which party should receive the judgment. *Compare* *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 370–71 (4th Cir. 2012) (allowing Rule 68 offers to moot an individual's claim and entering judgment for the defendant), *and* *Rand v. Monsanto Co.*, 926 F.2d 596, 597–98 (7th Cir. 1991) (same), *overruled by* *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015), *with* *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575–76 (6th Cir. 2009) (allowing Rule 68 offers to moot an individual's claim but entering judgment for the plaintiff), *and* *Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 949 (8th Cir. 2012).

<sup>164</sup> *Diaz*, 732 F.3d at 950, 952 (“We hold that an unaccepted Rule 68 offer that would fully satisfy a plaintiff's claim is insufficient to render the claim moot.”).

<sup>165</sup> *Id.* at 950.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 951. The district court found both injunctive and declaratory relief to be inappropriate forms of relief for the plaintiff. *Id.*

<sup>169</sup> *Id.* at 950.

<sup>170</sup> *Id.* at 951.

<sup>171</sup> *Id.* at 955.

<sup>172</sup> *See id.* at 953–55 (quoting several paragraphs of Justice Kagan's dissent, then specifying that the Ninth Circuit is “persuaded that Justice Kagan has articulated the correct approach”). Besides Justice Kagan's dissent, the Ninth Circuit discussed several other circuit court holdings, all of which found that a case could be rendered moot through a Rule 68 offer. *Id.* at 952–53.

<sup>173</sup> *Id.* at 955. However, the Ninth Circuit does allow courts “to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents

The use of the *Diaz* approach has received additional support from four more circuit courts, beginning with the Eleventh Circuit in *Stein v. Buccaneers Ltd. Partnership*.<sup>175</sup> In December 2014, the Eleventh Circuit stated that finding a case moot using Rule 68 “is flatly inconsistent with the rule.”<sup>176</sup> Just like the Ninth Circuit in *Diaz*, the Eleventh Circuit in *Stein* agreed with Justice Kagan’s *Genesis* dissent.<sup>177</sup> By rejecting the mootness-by-unaccepted-offer theory, the Ninth and Eleventh Circuit judges aligned with the *Genesis* dissent and tacitly acknowledged that the *Diaz* approach is superior to the *Rand* and *McCauley–O’Brien* approaches. Furthermore, the First,<sup>178</sup> Second,<sup>179</sup> and Seventh<sup>180</sup> Circuit Courts have approved the application of the *Diaz* approach in opinions published in the summer of 2015.<sup>181</sup> However, even with these three new opinions, only five of the twelve circuits (counting the Federal Circuit) currently follow this approach.<sup>182</sup>

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her from accepting total victory.” *Id.* (citing *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting)).

<sup>174</sup> *Id.* at 954–55. This holding does not answer the larger question of whether an accepted offer of judgment moots a claim. *Id.* at 953 n.4.

<sup>175</sup> 772 F.3d 698, 702–03 (11th Cir. 2014).

<sup>176</sup> *Id.* at 702.

<sup>177</sup> *Id.* at 703 (stating that similar to the Ninth Circuit that “has explicitly adopted the position set out in the [*Genesis*] dissent . . . we agree with the [*Genesis*] dissent”).

<sup>178</sup> *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 14-1789, 2015 WL 4979406 (1st Cir. Aug. 21, 2015). In *Bais Yaakov*, the plaintiff, a private religious high school, filed putative class action claims against the defendant under the Telephone Consumer Protection Act for sending it unsolicited facsimiles. *Id.* at \*1. Prior to class certification, the defendant made a Rule 68 offer to the plaintiff, and argued that this offer mooted the plaintiff’s claims. *Id.* The district court rejected this motion to moot the claims. *Id.* On interlocutory review, the First Circuit affirmed the district court’s ruling. *Id.* The First Circuit agreed with the post-*Genesis* decisions that “a Rule 68 offer cannot, by itself, moot a plaintiff’s claim” and noted that nothing in Rule 68 allows rejected offers to moot a plaintiff’s claims. *Id.* at \*5. The court rendered this decision on interlocutory review and it involved a class action, but its dicta strongly favors its application of the *Diaz* approach in individual claims. *Id.* at \*1, \*8. Additionally, the First Circuit also agreed with its district court’s ruling, which has “looked to the reasoning expressed by other courts on this issue, and [was] persuaded by that expressed the Ninth Circuit in *Diaz* and by Justice Kagan’s dissent in *Genesis Healthcare*.” *Yaakov v. ACT, Inc.*, 987 F. Supp. 2d 124, 128 (D. Mass. 2013) (order amending decision signed on Jan. 22, 2014).

<sup>179</sup> *See supra* notes 137–38.

<sup>180</sup> *See supra* note 99 and accompanying text.

<sup>181</sup> *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at \*3 (7th Cir. Aug. 6, 2015) (“We overrule *Damasaco*, *Thorogood*, *Rand*, and similar decisions to the extent they hold a defendant’s offer of full compensation moots the litigation or otherwise ends the Article III case or controversy.”); *Tanasi v. New All. Bank*, 786 F.3d 195, 197 (2d Cir. 2015) (“[U]nder the law of our Circuit, an unaccepted Rule 68 offer alone does not render a plaintiff’s individual claims moot before the entry of judgment against the defendants.”).

<sup>182</sup> To summarize the circuit court approaches, five circuit courts follow the *Rand* approach: Third, Fourth, Fifth, Tenth, and Federal Circuit; two circuit courts follow the *McCauley–O’Brien* approach: Sixth and

As previously discussed, the Supreme Court recently granted certiorari in *Campbell-Ewald Co. v. Gomez*.<sup>183</sup> In *Gomez v. Campbell-Ewald Co.*, the Ninth Circuit followed its precedent, the *Diaz* approach.<sup>184</sup> This Comment advocates for the Supreme Court to recognize these benefits and use *Campbell-Ewald* to create a uniform rule—the *Diaz* approach.

### III. BENEFITS OF THE *DIAS* APPROACH

The *Diaz* approach provides the most appealing result. Although *Diaz* still creates certain issues to be addressed in Part IV, it provides four principal benefits for Rule 68 offers. First, section A of this Part describes how the *Diaz* approach conforms to Rule 68's text and purpose. Section B then explains that the *Diaz* approach upholds fundamental contract theory concepts. Afterwards, section C demonstrates how the *Diaz* approach creates a bright-line jurisdictional rule that definitively resolves the circuit split. Finally, section D shows that the *Diaz* approach, unlike the alternative options, provides the strongest deterrent against negative behavior.

#### A. *The Diaz Approach Accomplishes the Goals of Textualists and Purposivists*

Rule 68 was not designed to provide evidence for judges, but rather to encourage opposing parties to settle cases outside the courtroom.<sup>185</sup> According

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Eighth; and five circuit courts follow the *Diaz* approach: First, Second, Seventh, Ninth, and Eleventh. Additionally, it is worth keeping a watchful eye on the Fifth Circuit because its recent opinion, *Hooks v. Landmark Industries, Inc.*, suggests that the court will adopt the *Diaz* approach. No. 14-20496, 2015 WL 4760253, at \*3–4 (5th Cir. Aug. 12, 2015) (“We conclude that the reasoning of the Ninth and Eleventh Circuits is more persuasive and therefore hold that an unaccepted offer of judgment to a named plaintiff *in a class action* ‘is a legal nullity, with no operative effect.’” (quoting *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting) (emphasis added))). The First Circuit’s recent opinion likely aligns the Fifth Circuit with the *Diaz* approach. *Bais Yaakov*, 2015 WL 4979406, at \*5 (“[W]e agree with the Second, Fifth, Seventh, Ninth, and Eleventh Circuits that an unaccepted Rule 68 offer cannot, by itself, moot a plaintiff’s claim.”). Even with these decisions, the court specified that, at this point in time, “[s]ix other circuits have either held, assumed, or expressly avoided deciding that a Rule 68 offer of all relief requested can, at least sometimes, moot an individual claim.” *Id.* (citing to several cases including the Third Circuit in *Weiss*, the Fourth Circuit in *Warren*, the Sixth Circuit in *O’Brien*, the Eighth Circuit in *Hartis*, the Tenth Circuit in *Lucero*, and the Federal Circuit in *Samsung*, all of which are discussed in Part II.B–C of this Comment).

<sup>183</sup> 135 S. Ct. 2311 (2015) (mem.); see *supra* note 6 and accompanying text.

<sup>184</sup> *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 875 (9th Cir. 2014). In *Gomez*, the plaintiff sued a marketing company that sent unsolicited text messages on behalf of the U.S. Navy. *Id.* at 873. Although the Ninth Circuit applied the *Diaz* approach, the court vacated and remanded the decision on other grounds. *Id.* at 882. Instead of going back to the district court, the Supreme Court has granted certiorari for the October Term 2015. See *supra* note 6 and accompanying text.

<sup>185</sup> See GENSLER, *supra* note 2, at 1267.

to the Eleventh Circuit, “That is the whole point of Rule 68: a party who rejects an offer, litigates and does not get a better result must pay the other side’s costs . . . [the mootness-by-unaccepted-offer theory] is flatly inconsistent with the rule.”<sup>186</sup>

Both the text and advisory committee’s notes verify this position.<sup>187</sup> First, the plain language of Rule 68 states that “[e]vidence of an unaccepted Rule 68 offer is not admissible except in a proceeding to determine costs.”<sup>188</sup> Second, the advisory committee noted this exact purpose.<sup>189</sup> Both the plain language and the drafter’s purpose demonstrate that Rule 68 is solely a defendant’s tool to negotiate a settlement. “Judicial negotiation”<sup>190</sup> through mootness was never an intended result.<sup>191</sup>

While forced judicial intervention may never have been envisioned, several circuit courts have found cases moot using the defendant’s Rule 68 offer.<sup>192</sup> Although Rule 68’s lack of explicit judicial authority to moot claims does not necessarily translate to no authority, Justice Kagan and three other justices found this to be true—there was no judicial authority to moot claims under Rule 68.<sup>193</sup> In *Genesis*, Justice Kagan recognized that courts were overstepping “Rule 68’s exclusive purpose: to promote *voluntary* cessation of litigation by

<sup>186</sup> *Stein v. Buccaneers Ltd. P’ship*, 772 F.3d 698, 702 (11th Cir. 2014); *see also Bais Yaakov*, 2015 WL 4979406, at \*5 (“[A]n unaccepted Rule 68 offer is a red herring: it does not, in itself, provide any relief. And nothing in Rule 68—or any other rule—contemplates use of a *rejected* offer to secure dismissal of a case. To the contrary, Rule 68 expressly specifies what happens to a rejected offer: it is deemed to be ‘withdrawn,’ and it is ‘not admissible except in a proceeding to determine costs.’” (quoting FED. R. CIV. P. 68(b))).

<sup>187</sup> *See infra* notes 188–89 and accompanying text.

<sup>188</sup> FED. R. CIV. P. 68(b).

<sup>189</sup> *See* FED. R. CIV. P. 68 advisory committee’s note to 1946 amendment (noting that Congress altered Rule 68 “to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible”).

<sup>190</sup> Rather than referencing a term of art, judicial negotiation is meant to emphasize the problem of the *Rand* and *McCauley–O’Brien* approaches, which cause judges to actively participate in Rule 68 offers.

<sup>191</sup> The notion of mootness and judicial authority is nowhere to be found in either the language or congressional history of Rule 68. *See* FED. R. CIV. P. 68; FED. R. CIV. P. 68 advisory committee’s note to 2009 amendment; *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954–55 (9th Cir. 2013) (stating that the *Diaz* approach “is consistent with the language, structure, and purposes of Rule 68 and with fundamental principles governing mootness”).

<sup>192</sup> *See supra* Part II.B–C.

<sup>193</sup> *See supra* notes 150–60 and accompanying text. There is even a strong argument that Rule 68 and its advisory committee notes did explicitly reject this mootness argument. *See* FED. R. CIV. P. 68; FED. R. CIV. P. 68 advisory committee’s note (2009).

imposing costs on plaintiffs who spurn certain settlement offers.”<sup>194</sup> Indeed, several circuit courts transformed the voluntary cessation of the parties into judicial authority to dismiss the case.<sup>195</sup>

Both the Ninth Circuit in *Diaz* and the Eleventh Circuit in *Stein* have followed Justice Kagan’s lead, quoting several sections of Justice Kagan’s dissent.<sup>196</sup> Further, leading up to the Supreme Court’s *Campbell-Ewald* decision on the matter, the Second and Seventh Circuits have changed their approaches to conform to the *Diaz* approach.<sup>197</sup> Rather than imposing judicial authority to find a claim moot, the *Diaz* approach adheres to Rule 68’s text and purpose—a Rule 68 offer should never moot a plaintiff’s claim.<sup>198</sup>

Just as Rule 68 required a focus on its text and purpose, section B explores how Rule 68 likely presumed acceptance of contract terms.

### *B. The Diaz Approach Upholds Fundamental Aspects of Contract Theory*

Contracts are based on several foundational concepts.<sup>199</sup> An offer must be made, and such offer must be accepted.<sup>200</sup> Without an acceptance or intention to accept an offer, a contract is never formed.<sup>201</sup> While the idea of acceptance—whether by action, silence, or words—has been debated, all contracts require some form of an acceptance.<sup>202</sup> Declining an offer, whether by explicit rejection or the lapse of time,<sup>203</sup> terminates the offer.<sup>204</sup>

<sup>194</sup> *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting) (emphasis added).

<sup>195</sup> See *supra* Part II.B–C (describing case law of the *Rand* and *McCauley–O’Brien* approaches, two standards that accept the premise that a Rule 68 offer can moot an individual’s claim).

<sup>196</sup> *Stein v. Buccaneers Ltd. P’ship*, 772 F.3d 698, 702–03 (11th Cir. 2014); *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 953–55 (9th Cir. 2013).

<sup>197</sup> See *supra* notes 98, 136–37 and accompanying text. In addition, the First and Fifth Circuits have published opinions that likely align their circuits with the *Diaz* approach. See *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 14-1789, 2015 WL 4979406, at \*5 (1st Cir. Aug. 21, 2015); *Hooks v. Landmark Indus., Inc.*, No. 14-20496, 2015 WL 4760253, at \*3 (5th Cir. Aug. 12, 2015).

<sup>198</sup> *Diaz*, 732 F.3d at 950.

<sup>199</sup> As simple as this statement may be, the importance can be lost when courts and litigants are immersed in complicated legal matters. As Justice Kagan suggested in *Genesis*, reviewing a first-year contract’s book is a benefit for all court officers. See *Genesis*, 133 S. Ct. at 1533–34 (Kagan, J., dissenting).

<sup>200</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. LAW INST. 1981).

<sup>201</sup> See *id.* § 38(2) (“A manifestation of intention not to accept an offer is a rejection.”).

<sup>202</sup> See 1 RICHARD LORD, WILLISTON ON CONTRACTS § 4:3 (4th ed. 1990) (“[C]ases where offer and acceptance are lacking are so rare that for purposes of general discussion they may be disregarded.”).

<sup>203</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 36 (AM. LAW INST. 1981) (stating that an offer may be terminated by the offeree’s rejection or lapse of time).

In her dissenting opinion in *Genesis*, Justice Kagan reiterated this fundamental aspect of contract theory: “An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect. As every first-year law student learns, the recipient’s rejection of an offer ‘leaves the matter as if no offer had ever been made.’”<sup>205</sup> However, this notion of acceptance for Rule 68 settlement offers had been largely ignored by the lower courts.<sup>206</sup> Almost routinely, lower courts had determined that a plaintiff’s individual claim was moot when complete relief was offered.<sup>207</sup>

These courts either accepted offers for the plaintiffs or entered judgments for the defendants because the plaintiffs refused to accept them.<sup>208</sup> Justice Kagan gave notice to all courts to reconsider the mootness-by-unaccepted-offer theory in light of basic contract principles.<sup>209</sup> Using contract theory concepts promulgated by Justice Kagan in *Genesis*, the Ninth Circuit in *Diaz* echoed her sentiment.<sup>210</sup> The Eleventh Circuit recently accepted this theory<sup>211</sup>: once an offer was considered “withdrawn” under Rule 68,<sup>212</sup> “the plaintiffs still had their claims, and [the defendant] still had its defenses.”<sup>213</sup> By allowing unaccepted Rule 68 offers to moot claims, courts are rejecting the underlying contract concepts that Rule 68 needs.

Just as Rule 68 requires following the contract concepts of “offer and acceptance,” section C demonstrates that the *Diaz* approach satisfies any jurisdictional issues because it has a bright-line test that gives courts the necessary jurisdiction.

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<sup>204</sup> See *id.* § 38(1) (“An offeree’s power of acceptance is terminated by his rejection of the offer.”); see also *Hooks v. Landmark Indus., Inc.*, No. 14-20496, 2015 WL 4760253, at \*3 (5th Cir. Aug. 12, 2015) (“It is hornbook law that rejection of an offer nullifies the offer.”).

<sup>205</sup> *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting) (quoting *Minneapolis & St. Louis Ry. Co. v. Columbus Rolling Mill*, 119 U.S. 149, 151 (1886)).

<sup>206</sup> Recent Case, *supra* note 158, at 1260.

<sup>207</sup> *Id.*

<sup>208</sup> See *supra* Part II.B–C.

<sup>209</sup> Recent Case, *supra* note 158, at 1267.

<sup>210</sup> *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954–55 (9th Cir. 2013).

<sup>211</sup> *Stein v. Buccaneers Ltd. P’ship*, 772 F.3d 698, 709 (11th Cir. 2014).

<sup>212</sup> FED. R. CIV. P. 68(b) (“An unaccepted offer is considered withdrawn.”).

<sup>213</sup> *Stein*, 772 F.3d at 702.

C. *The Diaz Approach Resolves the Mootness Jurisdictional Issue by Creating a Bright-Line Test*

The judiciary only has authority over issues within its jurisdiction.<sup>214</sup> Constitutional limits on jurisdiction prohibit the judicial branch from performing a variety of duties, for example, providing advisory opinions, answering political questions, or deciding issues that are moot.<sup>215</sup> When a case is moot, courts are powerless to render judgment.<sup>216</sup> However, various circuit courts have held claims to be moot, but then entered a judgment.<sup>217</sup> By following the *Diaz* approach, circuit courts will have a bright-line jurisdictional rule that solves this problem. On the other hand, the *Rand* and *McCauley–O’Brien* approaches create standards that allow for unnecessary, meritless litigation over the antecedent question of whether the claim is moot.<sup>218</sup>

While flexible standards might be acceptable in a variety of judicial contexts, bright-line rules are the preferred choice when determining the existence of federal jurisdiction.<sup>219</sup> The *Diaz* approach concretely clarifies any jurisdictional issues regarding Rule 68—none exist. By allowing courts to ponder over issues of mootness within Rule 68, different standards will continue to arise. The debate over the proper mootness standard will continue to conflict with Rule 68’s goal of avoiding litigation.

Further, by finding a case moot, circuit courts might be lacking the requisite federal jurisdiction to enter judgment for the plaintiffs.<sup>220</sup> However,

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<sup>214</sup> See *supra* notes 44–45 and accompanying text.

<sup>215</sup> 13 WRIGHT ET AL., *supra* note 27, § 3529 (describing the various limits placed on the judicial branch through concepts of justiciability).

<sup>216</sup> See *Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am., Div. 998 v. Wis. Emp’t Relations Bd.*, 340 U.S. 416, 418 (1951) (“A federal court is without power to decide moot questions . . . which cannot affect the rights of the litigants in the case before it.” (quoting *St. Pierre v. United States*, 319 U.S. 41, 42 (1943))).

<sup>217</sup> See *supra* Part II.B–C (describing the *Rand* approach and *McCauley–O’Brien* approach, which enters judgment for the defendant or plaintiff, respectively, once a Rule 68 offer moots the claim).

<sup>218</sup> See *infra* Part V.

<sup>219</sup> Jonathan Remy Nash, *On the Efficient Deployment of Rules and Standards to Define Federal Jurisdiction*, 65 VAND. L. REV. 509, 560 (2012) (“[This article] has shown, as a normative matter, that rules are preferable to standards along the boundary of federal court jurisdiction.”); see also Scott Dodson & Elizabeth McCuskey, *Structuring Jurisdictional Rules and Standards*, 65 VAND. L. REV. EN BANC 31, 31–32 (2012) (expressing approval for the argument of applying rules to threshold requirements).

<sup>220</sup> The *Rand* approach might not suffer from the possibility of lacking jurisdiction to enter judgment for plaintiffs (and some circuit courts following the *Rand* approach do dismiss the claim for lack of subject-matter

the *McCauley–O’Brien* approach does exactly that.<sup>221</sup> Circuit courts applying *McCauley–O’Brien* attempted to satisfy plaintiffs’ needs, but these courts had already taken away their own authority.<sup>222</sup> In *McCauley*, the circuit court rendered judgment over-and-above the district court’s favorable judgment for the plaintiff.<sup>223</sup> Instead of simply mooting the claim based on an offer of complete relief, the court created a precedent, as desired by the plaintiff, and provided all the monetary relief that the plaintiff had requested.<sup>224</sup> In *O’Brien*, the circuit court mooted the claim but still entered judgment for the plaintiff equal to defendant’s offer.<sup>225</sup>

Although circuits applying the *Rand* approach enter judgment for the defendant, the courts’ reasoning in these cases follows the contract requirement of offer and acceptance.<sup>226</sup> When *Rand* was decided, the Seventh Circuit only entered judgment for the defendant because the plaintiff *refused to accept* the offer.<sup>227</sup> In addition to following contract theory, the Seventh Circuit may have stayed within the bounds of its jurisdiction.<sup>228</sup> Subsequently, the Fourth Circuit

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jurisdiction). In *Rand*, the Seventh Circuit would not find for the plaintiff because the plaintiff refused to accept the offer. *Rand v. Monsanto Co.*, 926 F.2d 596, 597–98 (7th Cir. 1991), *overruled by* *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015). The Seventh Circuit did not explicitly state that jurisdictional restrictions forced it to hold for the defendant; however, it did state that when a plaintiff refuses the offer, the plaintiff must lose. *Id.* However, the Seventh Circuit’s recent *Chapman* case sheds additional light on the possibility of the *Rand* approach causing this jurisdictional dilemma. *See* *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at \*3 (7th Cir. Aug. 6, 2015) (“If an offer to satisfy all of the plaintiff’s demands really moots a case, then it self-destructs. Rule 68 is captioned ‘Offer of Judgment’. But a district court cannot enter judgment in a moot case. All it can do is dismiss for lack of a case or controversy. . . . As soon as the offer was made, the case would have gone up in smoke, and the court would have lost the power to enter the decree.”); *see also* *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 371–72 (4th Cir. 2012) (“[W]hen a Rule 68 offer unequivocally offers a plaintiff all of the relief ‘she sought to obtain’ the offer renders the plaintiff’s action moot.” (quoting *Friedman’s, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002))).

<sup>221</sup> *See supra* Part II.C.

<sup>222</sup> *See supra* Part II.C.

<sup>223</sup> *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005).

<sup>224</sup> *Id.*

<sup>225</sup> *O’Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575–76 (6th Cir. 2009).

<sup>226</sup> *See* *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991) (stating that a plaintiff that refuses to accept complete relief must lose outright), *overruled by* *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015).

<sup>227</sup> *Id.*

<sup>228</sup> *See id.* Entering judgment for the defendant may also violate mootness doctrine. Rather, the case would need to be dismissed. *See* *Chapman*, 2015 WL 4652878, at \*3 (“If an offer to satisfy all of the plaintiff’s demands really moots a case, then it self-destructs. Rule 68 is captioned ‘Offer of Judgment’. But a district court cannot enter judgment in a moot case. All it can do is dismiss for lack of a case or controversy.”).

in *Warren* abided by the same jurisdictional boundary.<sup>229</sup> However, the court in *Warren* found that the plaintiff's claim was not moot.<sup>230</sup> The court held that a court's later determination of actual damages did not satisfy complete relief, even though the defendant agreed to pay any amount as determined by the court.<sup>231</sup> Whether by entering judgment for the plaintiff or entering judgment for the defendant because the plaintiff refuses the settlement offer, these cases reflect the courts' desire to do justice. The bright-line test of the *Diaz* approach does justice.

Lastly, a clear jurisdictional rule for this reoccurring issue, rather than a loose standard, promotes judicial efficiency.<sup>232</sup> As previously discussed, Rule 68's purpose is to encourage settlement and avoid litigation.<sup>233</sup> By allowing parties to argue excessively over whether an offer for complete relief moots a claim, the non-*Diaz* applications of Rule 68 encourage animosity and prolong litigation.<sup>234</sup> The *Diaz* approach effectively ends this jurisdictional challenge.

In addition to its jurisdictional benefits, section D explains that the *Diaz* approach benefits society by deterring negative behavior in a more efficient and effective manner.

#### *D. The Diaz Approach Deters Negative Behavior*

The *Diaz* approach deters society as a whole from repeating a defendant's wrongful behavior. General deterrence occurs in a lawsuit by signaling to other prospective litigants that society will not tolerate certain activities.<sup>235</sup>

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<sup>229</sup> See *supra* notes 105–16 and accompanying text.

<sup>230</sup> *Id.*

<sup>231</sup> *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 369, 373 (4th Cir. 2012).

<sup>232</sup> See *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (“[A]dministrative simplicity is a major virtue in a jurisdictional statute.”); see also Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621 (1992) (concluding that frequent undesirable behavior is less costly with a rule rather than a standard); Nash, *supra* note 219, at 522 (“Rules are easier and less costly to apply; they thus conserve judicial and general legal resources.”).

<sup>233</sup> *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

<sup>234</sup> See Kaplow, *supra* note 232, at 571 (arguing that, in contrast to a rule, it is more expensive to gain advice under a standard).

<sup>235</sup> Dan B. Dobbs, *Ending Punishment in “Punitive” Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 845–46 (1989) (stating that general deterrence is used “not to deter the defendant himself, but to set an example to deter others who are not parties and who may have done nothing wrongful”).

Companies do not want bad publicity.<sup>236</sup> A company often lives or dies by its reputation.<sup>237</sup> When companies know that certain business practices weaken its reputation, they often act in a more socially responsible manner.<sup>238</sup> In addition to conforming to social norms, these companies will also be conducting their business in a preferable risk-averse setting.<sup>239</sup>

The *Diaz* approach influences entities, particularly those that care about their reputation, to change their methods.<sup>240</sup> If they do not, they risk either paying too much to silence a claim or having a judgment that publicizes their actions.<sup>241</sup> This judgment signals to other potential defendants that such

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<sup>236</sup> Leon Bracey, *The Importance of Business Reputation*, BUS. IN FOCUS, Oct. 2012, at 123, <http://www.businessinfocusmagazine.com/2012/10/the-importance-of-business-reputation/>.

<sup>237</sup> *Id.*; see also Dylan Minor & John Morgan, *CSR as Reputation Insurance: Primum Non Nocere*, 53 CAL. MGMT. REV., Spring 2011, at 40, 40 (“For many firms, the most precious asset lies not on the balance sheet, nor in the human capital of the workforce, but rather in its reputation. For instance, IBM’s reputation for being an enterprise-friendly and efficient solutions provider has enabled it to beat rivals for business over many years. McDonald’s reputation for being a family-friendly and economical place to eat has sustained its market share in the face of fierce competition from other chains. However, reputation can be a fragile thing. Consider British Petroleum (BP) and its recent oil spill in the Gulf of Mexico. While BP had for years invested in its sunburst logo and various ‘do good’ and ‘be green’ campaigns, its reputation quickly slipped away in the midst of tragedy: its firm value was decimated by some \$100 billion. Another example is Toyota, which became the largest automobile manufacturer through its reputation for reliability and value but has suffered as allegations of faulty accelerators and cover-ups of these problems have come to light. This can be seen vividly in the resale market where even Toyota vehicles unaffected by the recalls declined in value by an estimated 4–5%. Likewise Dell, which became the leading PC manufacturer largely on the basis of quality and low price, has suffered reverses in recent years owing to laptop batteries catching fire and other quality control problems. This has contributed to a cumulative loss of a third of its market value.”); Bruce Rogers, *The #1 Asset for Growth in New Markets: Your Reputation*, FORBES (Nov. 27, 2012, 10:38 AM), <http://www.forbes.com/sites/forbesinsights/2012/11/27/the-1-asset-for-growth-in-new-markets-your-reputation> (explaining how leveraging a good reputation can greatly increase sales).

<sup>238</sup> Eric A. Posner, *Standards, Rules, and Social Norms*, 21 HARV. J.L. & PUB. POL’Y 101, 116 (1997) (“When reputation matters a lot, people will conform to whatever pattern of behavior they believe that everyone else approves.”); see also Paul Herbig & John Milewicz, *The Relationship of Reputation and Credibility to Brand Success*, 12 J. CONSUMER MARKETING, 1995, at 5, 10 (“Equity once destroyed is difficult to replenish. Repeated mixed (false) signals will destroy reputation, not just of one product but of all members of the brand family. As reputation goes, profits follow.”); Minor & Morgan, *supra* note 237, at 43, 55 (explaining how “avoiding harm” compared to “doing good” is a powerful form of reputation insurance for companies); Bert van de Ven & Ronald Jeurissen, *Competing Responsibly*, 15 BUS. ETHICS Q. 299, 309 (2005) (“Company policies, even when they do not affect the quality of products, can cause negative reputational effects among customers, when they perceive the policy as immoral or indecent.”).

<sup>239</sup> Kaplow, *supra* note 232, at 605 (stating that individuals prefer risk-averse choices, especially when given to them as legal advice).

<sup>240</sup> See Posner, *supra* note 238.

<sup>241</sup> See *supra* Part II.E.

behavior is not tolerated.<sup>242</sup> For example, in *McCauley*, the plaintiff insisted on a judgment against the defendant, not simply the monetary damages listed in his demand.<sup>243</sup> This plaintiff's precedent provides additional pressure to cease these wrongful actions from the outset.<sup>244</sup> Although the *McCauley–O'Brien* approach allows a Rule 68 offer to moot a claim, the ruling in the *McCauley* case<sup>245</sup> embodied the spirit of the *Diaz* approach—it satisfied the plaintiff's demand for a judgment.<sup>246</sup> In *Diaz*, the plaintiff refused the defendant's offer even though it likely would have fully satisfied her monetary claims.<sup>247</sup> Like the plaintiff in *McCauley*, the plaintiff in *Diaz* wanted a precedent to show that the defendant's actions were wrong.<sup>248</sup> These plaintiffs determined that a precedent would be better, even at the risk of losing their compensation.<sup>249</sup>

Although defendants have argued that monetary relief meets the standard of complete relief, plaintiffs should have the freedom to choose whether that form of compensation satisfies their entire demand.<sup>250</sup> Instead of relying on the procedural schemes of mootness, the *Diaz* approach serves as the strongest deterrent because it is an exact rule.<sup>251</sup> Circuits applying the *Rand* and *McCauley–O'Brien* approaches create standards for what constitutes complete relief; the *Diaz* approach provides the benefit of a bright-line rule between the prohibited and permissible conduct.<sup>252</sup>

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<sup>242</sup> Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 588 (1987) (explaining how precedent guides current judges to follow decisions in previous similar cases).

<sup>243</sup> *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 341 (2d Cir. 2005) (stating that the plaintiff “is seeking not just actual damages of \$240, but more importantly, the precedential value of a judgment”).

<sup>244</sup> Kaplow, *supra* note 232, at 611 (stating that predictability of standards is enhanced through precedent).

<sup>245</sup> *McCauley*, 402 F.3d at 341 (stating that the plaintiff wants “the precedential value of a judgment”).

<sup>246</sup> See Brief of Plaintiff-Appellant at 45, *Diaz v. First Am. Home Buyer's Prot. Corp.*, 732 F.3d 948 (9th Cir. 2013) (No. 11-57239), 2012 WL 3781507, at \*45 (specifying that the plaintiff's complaint “requested declaratory relief, and this Court's cases applying the Declaratory Judgment Act required that Diaz's claim for declaratory relief be included in the trial”).

<sup>247</sup> See *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 951 (9th Cir. 2013).

<sup>248</sup> See Brief of Plaintiff-Appellant, *supra* note 246, at 45.

<sup>249</sup> See *Diaz*, 732 F.3d at 950–51; *McCauley*, 402 F.3d at 341–42.

<sup>250</sup> The contract concept of “freedom of choice” lends itself to efficient results. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 20 (8th ed. 2011) (determining that unlike involuntary transactions, it is “only when resources are shifted pursuant to a voluntary transaction that we can be confident that the shift involves an increase in efficiency”).

<sup>251</sup> See Kaplow, *supra* note 232, at 605 (stating that individuals are more risk-averse when rules apply, rather than standards).

<sup>252</sup> Pierre J. Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 384–89 (1985) (discussing the benefits of using rules versus standards); see also van de Ven & Jeurissen, *supra* note 238, at 307 (“[A] firm is

Part III explored the primary benefits of the *Diaz* approach. Part IV details two potential complications with this holding.

#### IV. IMPLICATIONS OF THE *DIAS* APPROACH

This Part evaluates two potential pitfalls of the *Diaz* approach. Section A describes the issue of excessive litigation.<sup>253</sup> This issue is likely the strongest counterargument against the application of the *Diaz* approach because these cases often involve small monetary claims.<sup>254</sup> Section B then describes the concern over non-mutual offensive issue preclusion.<sup>255</sup> As daunting as that legal doctrine may be as a potential weakness to the application of the *Diaz* approach, its use would never be warranted in practice.

##### A. *Excessive Litigation*

If both parties agree that the defendant's offer satisfies all that the plaintiff sought, then finding the case moot could satisfy Rule 68's twin goals of encouraging settlement and avoiding litigation.<sup>256</sup> However, this result, which

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pressured to break the law when the law is not enforced effectively enough to create a satisfactorily level playing field among the competition.”).

<sup>253</sup> Both the *Rand* and *McCauley–O'Brien* approaches would solve this problem because they moot the claim. *See supra* Part II.B–C.

<sup>254</sup> In *Stein*, the Rule 68 offer for complete relief amounted to \$16,500 plus costs. *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 700–01 (11th Cir. 2014). This offer was greater than other Rule 68 offers for complete relief based on this author's research. *See, e.g., Hooks v. Landmark Indus., Inc.*, No. 14-20496, 2015 WL 4760253, at \*1 (5th Cir. Aug. 12, 2015) (\$1,000 plus costs and reasonable attorney fees); *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at \*2 (7th Cir. Aug. 6, 2015) (awarding \$3,002, an injunction, plus costs); *Tanasi v. New All. Bank*, 786 F.3d 195, 197 (2d Cir. 2015) (awarding \$10,000 plus interest, costs, reasonable attorneys' fees, and any other damages sought for the individual's claims); *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013) (awarding \$7,019.32 plus costs); *Hartis v. Chi. Title Ins. Co.*, 694 F.3d 935, 942 (8th Cir. 2012) (awarding \$181.20 plus costs); *Warren v. Sessoms & Rogers, P.A.*, 676 F.3d 365, 369 (4th Cir. 2012) (awarding \$1,251 plus costs and reasonable attorney's fees); *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 340 (2d Cir. 2005) (awarding \$240 plus costs); *Rand v. Monsanto Co.*, 926 F.2d 596, 597 (7th Cir. 1991) (awarding \$1,135 plus costs).

<sup>255</sup> The *Rand* approach solves this problem because the court enters judgment for the defendant. *See supra* Part II.B. The *McCauley–O'Brien* approach would allow this issue to linger because the court enters judgment for the plaintiff. *See supra* Part II.C. The *McCauley–O'Brien* approach may also solve this problem because mooted claims might not be valid judgments. *See supra* Part II.C.

<sup>256</sup> *See* *Marek v. Chesny*, 473 U.S. 1, 5 (1985) (stating the purpose of Rule 68); *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at \*4 (7th Cir. Aug. 6, 2015) (“If there is only one plaintiff, however, why should a court supply a subsidized dispute-resolution service when the defendant's offer means that there's no need for judicial assistance, and when other litigants, who do need the court's aid, are waiting in a queue? Ordering a defendant to do what it is willing to do has no legitimate claim on judicial time. Why

expedites the case, suffers a practical flaw. In reality, plaintiffs that accept Rule 68 offers for complete relief never create the judicial work in the first place. Further, plaintiffs who agree that their claims have been completely satisfied, but refuse to accept the defendant's offers, continue to clog the judicial branch with legal work.<sup>257</sup> Likewise, plaintiffs could just as easily argue that complete relief is not satisfied through monetary compensation.<sup>258</sup> For all these reasons, and as existing jurisprudence has already shown, "complete relief" is a litigious idea.<sup>259</sup> Instead of the parties digging into the case itself, they spend countless hours arguing over whether the defendant offered complete relief to the plaintiff.<sup>260</sup> In an ideal society, in which complete relief had a single meaning, mootness might go hand-in-hand with Rule 68.<sup>261</sup> However, this single meaning does not exist in the practical legal world.<sup>262</sup>

Another latent argument against the application of the *Diaz* approach is that it allows obstinate plaintiffs to employ wasteful litigation tactics.<sup>263</sup> Although this argument has merit, Justice Kagan noted that courts still have discretion to enter "judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory."<sup>264</sup> This means that in certain instances, a court may force the plaintiff to accept the judgment.<sup>265</sup> However, this result sacrifices freedom of choice and should only be implemented when the court recognizes that no benefit can result from continuing the litigation.<sup>266</sup> Cases in which a

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should a judge do legal research and write an opinion on what may be a complex issue when the plaintiff can have relief for the asking? Opinions are supposed to be the byproducts of real disputes.").

<sup>257</sup> See *Doyle v. Midlands Credit Mgmt., Inc.*, 722 F.3d 78, 80 (2d Cir. 2013) (showing that the plaintiff's counsel agreed that the defendant's offer provided all the relief that the plaintiff sought, but still refused the offer and appealed the case, which led to the Second Circuit's decision).

<sup>258</sup> See *supra* notes 243–48 and accompanying text.

<sup>259</sup> See *supra* Part II (describing the jurisprudence of Rule 68 and mootness, which also shows the significant litigation that has arisen from this contested idea).

<sup>260</sup> See *supra* Part II.

<sup>261</sup> See *supra* Part II.

<sup>262</sup> See *supra* Part II.

<sup>263</sup> See *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting).

<sup>264</sup> *Id.*

<sup>265</sup> See *id.*

<sup>266</sup> See *id.*

plaintiff desires a precedent for societal benefits would likely counter any perceived “madness.”<sup>267</sup>

### B. Mistaken Creation of Non-Mutual Offensive Issue Preclusion

Another weakness of the *Diaz* approach is the possibility of defendants suffering from non-mutual offensive issue preclusion.<sup>268</sup> Non-mutual offensive issue preclusion<sup>269</sup> occurs when a defendant, who has lost a legal issue that would be determinative in future cases, automatically becomes liable for the harms suffered by future claimants.<sup>270</sup> Because such issue had already received a valid judgment, the defendant would not be allowed to re-litigate the issue in such instances.<sup>271</sup> Instead, a later court would adopt the previous judgment as having conclusively resolved the legal issue.<sup>272</sup> The benefits of issue preclusion include preventing courts and litigants from wasting time and money, as well as avoiding inconsistent verdicts, by considering already litigated issues.<sup>273</sup>

Opponents of the *Diaz* approach have argued that by requiring defendants to admit liability, defendants open themselves to future attacks of non-mutual offensive issue preclusion.<sup>274</sup> For example, a credit reporting agency commonly misreports individuals’ credit scores. Rather than waste excessive time and money litigating the cases, the credit reporting agency settles with the individuals who bring claims.<sup>275</sup> If an individual demands a precedent be

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<sup>267</sup> Judges would still have discretion to determine when a plaintiff is acting out of completely irrational madness. *Id.*

<sup>268</sup> See Diane M. Saunders, *To Be Or Not To Be: Mooting Rule 23 Class Actions Through Rule 68 Offers of Judgment*, OGLETREE DEAKINS: OUR INSIGHTS (Nov. 25, 2014), <http://www.ogletreedeakins.com/shared-content/content/blog/2014/november/to-be-or-not-to-be-mooting-rule-23-class-actions-through-rule-68-offers-of-judgment> (noting that non-mutual offensive issue preclusion “could present complications for defendants focused only on the case at hand”).

<sup>269</sup> See generally 18A WRIGHT ET AL., *supra* note 27, § 4465.1 (2d ed. 2002) (providing background information on non-mutual preclusion).

<sup>270</sup> Richard Hynes, *Inconsistent Verdicts, Issue Preclusion, and Settlement in the Presence of Judicial Bias*, 2 U. CHI. L. SCH. ROUNDTABLE 663, 664 (1995) (explaining the basic mechanisms of non-mutual offensive issue preclusion).

<sup>271</sup> *Id.* at 663.

<sup>272</sup> *Id.* at 664.

<sup>273</sup> *Id.* at 663. Issue preclusion has a similar goal to Rule 68: conserving time and resources. See, e.g., Jim Essig, Comment, *Preclusion: Procedural Efficiency and the Right to Defend*, 27 HOUSTON L. REV., March 1990, at 327, 336–37.

<sup>274</sup> See Saunders, *supra* note 268.

<sup>275</sup> Cf. *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 340–41 (2d Cir. 2005) (involving a plaintiff who wanted a precedent, in addition to the monetary relief, for the defendant’s negligent reporting of his credit score).

established, the issue of whether the credit reporting agency commonly misreports credit scores might become a determined legal issue.<sup>276</sup> This fear of non-mutual offensive issue preclusion would likely require the agency to spend excessive amounts of money to fight minor monetary claims. Although forcing the credit reporting agency to change its methods may benefit society, the excessive litigation would be contrary to Rule 68's goal of reducing litigation.<sup>277</sup> Additionally, the credit reporting agency may not contemplate that future plaintiffs would assert non-mutual offensive issue preclusion against it. The agency, unwittingly, might admit liability without realizing the future harms that it caused itself.

Although this fear over non-mutual offensive issue preclusion is understandable, judges would rarely allow its use in small monetary claims for the following two reasons. First, non-mutual offensive issue preclusion has the fewest benefits of all the preclusion doctrines, so its judicial use is the most scrutinized.<sup>278</sup> Second, and more importantly, the Supreme Court has provided several factors that limit the use of non-mutual offensive issue preclusion.<sup>279</sup> Specifically, the Court determined that a defendant that is being sued for small or nominal damages should not be exposed to non-mutual offensive issue preclusion.<sup>280</sup> Therefore, the scrutiny and strict requirements that accompany judicial use of non-mutual offensive issue preclusion protect defendants from this preclusion doctrine.<sup>281</sup>

Having surveyed the benefits and drawbacks of the *Diaz* approach, Part V explores the inadequacies of the alternatives: the *Rand* and *McCauley–O'Brien* approaches.

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<sup>276</sup> See Hynes, *supra* note 270, at 663–64.

<sup>277</sup> A compelling argument can be made that this outcome would save judicial resources in the long run because the agency and other wrongdoers could change their methods quickly to conform to the law.

<sup>278</sup> See *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329–31 (1979) (stating that several motivations exist for the avoidance of non-mutual offensive issue preclusion, which do not occur for defensive issue preclusion).

<sup>279</sup> *Id.* at 329–31.

<sup>280</sup> See *id.* at 330 (supporting the denial of non-mutual offensive collateral estoppel where the defendant did not appeal an adverse judgment of \$35,000 in damages and was later sued for over \$7 million).

<sup>281</sup> Ian H. Fisher, *Federal Rule 68, A Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 DEPAUL BUS. L.J. 89, 92 (2001) (“[T]he elements necessary for collateral estoppel do not exist where a plaintiff accepts a Rule 68 offer of judgment.”). While researching for this Comment, no cases were found in which non-mutual offensive issue preclusion was successfully used.

## V. PROBLEMS WITH THE *RAND* AND *MCCAULEY–O’BRIEN* APPROACHES

Besides the *Diaz* approach, which dictates that a Rule 68 offer never moots an individual’s claim, two other procedural approaches exist.<sup>282</sup> The *Rand* approach holds that a Rule 68 offer can moot a claim and judgment is entered for the *defendant* because the plaintiff will not accept it.<sup>283</sup> The *McCauley–O’Brien* approach finds that a Rule 68 offer can moot a claim, but judgment is entered for the *plaintiff*.<sup>284</sup> As promising as the *Rand* and *McCauley–O’Brien* approaches may appear, both frustrate principles described in Part III.<sup>285</sup> This Part reiterates their weaknesses. Section A explains how both approaches contradict the principles of textualism, purposivism, and jurisdictional clarity. Then, section B describes the *Rand* approach’s minimal deterrence, and how the *McCauley–O’Brien* approach ignores the requisite contract terms of agreement.<sup>286</sup>

### A. *Both the Rand and McCauley–O’Brien Approaches Contradict Textualism, Purposivism, and Jurisdictional Clarity*

Both the *Rand* and *McCauley–O’Brien* approaches ignore principles of textualism, purposivism, and jurisdictional clarity.

Section A of Part III explored the text and purpose of Rule 68, particularly the language in the rule that states that unaccepted offers are not admissible as evidence, except to determine the cost of the action.<sup>287</sup> Both the *Rand* and *McCauley–O’Brien* approaches, however, allow judges to evaluate the merits of an unaccepted offer with the ability to moot the claim.<sup>288</sup> The *Diaz* approach returns Rule 68 to its original goal by incentivizing voluntary settlements without judicial authority to dismiss.<sup>289</sup>

<sup>282</sup> See *supra* Part II.B–C.

<sup>283</sup> See *supra* Part II.B.

<sup>284</sup> See *supra* Part II.C.

<sup>285</sup> See *supra* Part III.

<sup>286</sup> Section A focuses on sections A and C of Part III, while section B corresponds to sections B and D of Part III. Part V follows this order to group the *Rand* approach and the *McCauley–O’Brien* approach in a more intelligible manner.

<sup>287</sup> See *supra* notes 188–89 and accompanying text.

<sup>288</sup> See *supra* Part II.B–C (detailing the case law and application of the *Rand* and *McCauley–O’Brien* approaches).

<sup>289</sup> *Id.* at 1536 (“Rule 68’s exclusive purpose [is] to promote voluntary cessation of litigation.”).

Section C of Part III detailed the benefits of using rules over standards, specifically for the clarity that rules provide for threshold jurisdictional requirements.<sup>290</sup> Both the *Rand* and *McCauley–O’Brien* approaches create standards.<sup>291</sup> These standards allow defendants to argue about the required jurisdiction, encouraging unwarranted litigation about mootness and jurisdictional requirements.<sup>292</sup> Mootness doctrine states that once a case is moot, courts no longer have jurisdiction over it.<sup>293</sup> The *McCauley–O’Brien* approach allows a court to find a case moot, but then enter judgment for the plaintiff.<sup>294</sup> These judgments go beyond the boundaries of the courts’ jurisdiction.<sup>295</sup> By entering these judgments, courts overstepped their judicial authority.<sup>296</sup> The creation of a concrete, bright-line jurisdictional rule—specifically, that Rule 68 offers can never moot an individual’s claim—ends such jurisdictional litigation and confusion.

While the *Rand* and *McCauley–O’Brien* approaches have similar defects, their split as to which party receives the judgment creates additional problems.

#### *B. The Rand Approach Has Minimal Deterrence and the McCauley–O’Brien Approach Ignores Fundamental Contract Concepts*

The *Rand* approach is the least effective deterrent to the defendant’s negative behavior, and the *McCauley–O’Brien* approach is contrary to principles of contract theory.<sup>297</sup>

<sup>290</sup> See *supra* Part III.C.

<sup>291</sup> See *supra* Part II.B–C.

<sup>292</sup> By allowing these standards to exist, courts have created varying jurisdictional standards. This initial jurisdiction requirement may even lead to defendant’s attempting to transfer venues, which would cause forum shopping, see *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677, 1684 (1990) (stating that litigants forum shop for the most favorable forum, rather than the simplest or closest one).

<sup>293</sup> See *Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am., Div. 998 v. Wis. Emp’t Relations Bd.*, 340 U.S. 416, 418 (1951) (“A federal court is without power to decide moot questions . . . which cannot affect the rights of the litigants in the case before it.” (quoting *St. Pierre v. United States*, 319 U.S. 41, 42 (1943))).

<sup>294</sup> See *supra* Part II.C. The *Rand* approach might also be violating this principle of mootness by entering judgment for the defendant. The court may not have jurisdiction to enter any judgment at all, but must rather dismiss the case. See *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at \*3 (7th Cir. Aug. 6, 2015) (“If an offer to satisfy all of the plaintiff’s demands really moots a case, then it self-destructs. Rule 68 is captioned ‘Offer of Judgment’. But a district court cannot enter judgment in a moot case. All it can do is dismiss for lack of a case or controversy.”).

<sup>295</sup> See *supra* Part III.C.

<sup>296</sup> See *supra* Part III.C (explaining the jurisdictional issue where courts cannot adjudicate decisions that are moot, and explaining how the *Diaz* approach overcomes this dilemma).

<sup>297</sup> See *supra* Parts II–III.

Section D of Part III explained how society benefits from rules that deter wrongful behavior.<sup>298</sup> Out of the three options outlined herein, the *Rand* approach provides the least effective deterrent because the court moots the claim and enters judgment for the defendant.<sup>299</sup> Although this deterrence issue exists, it has minimal importance because the claims often involve small monetary compensation.<sup>300</sup> Even so, the precedent established by either the *Diaz* approach or the *McCauley–O’Brien* approach still allows some forcefulness behind their judgments. As previously discussed, companies will change their methods when they are publicly shamed and subject to litigation.<sup>301</sup>

Section B of Part III evaluated how Rule 68 offers require an offer by the defendant and an acceptance by the plaintiff.<sup>302</sup> Declining an offer by rejection or lapse of time terminates the offer.<sup>303</sup> The *McCauley–O’Brien* approach ignores this fundamental contract concept.<sup>304</sup> It allows courts to moot the claim, and then accept the offer for the plaintiff, even though the plaintiff rejected it.<sup>305</sup> Although courts that follow *McCauley–O’Brien* take no issue with this proposition, Justice Kagan refused to accept this notion: “An unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect.”<sup>306</sup> Once Justice Kagan’s dissent was published, five circuit courts followed her lead. In chronological order, the Ninth, Eleventh, Second, Seventh, and First Circuits recognized the importance of rejecting the mootness-by-unaccepted-offer theory.<sup>307</sup> The Ninth Circuit recently relied on its precedent set by *Diaz* to decide *Gomez*.<sup>308</sup> The Supreme

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<sup>298</sup> See *supra* Part III.D.

<sup>299</sup> *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991), *overruled by* *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015).

<sup>300</sup> See *supra* note 254 and accompanying text.

<sup>301</sup> See *supra* notes 235–39 and accompanying text.

<sup>302</sup> See *supra* Part III.B.

<sup>303</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 36 (AM. LAW INST. 1981) (stating that an offer may be terminated by the offeree’s rejection or lapse of time).

<sup>304</sup> See *supra* Part III.B. The *Rand* approach also arguably ignores this fundamental contract concept, but this Comment does not make this claim. This question exists because the *Rand* approach does not force acceptance of an offer that has already been rejected, but rather enters judgment for the defendant.

<sup>305</sup> See *supra* Part II.C.

<sup>306</sup> *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1533 (2013) (Kagan, J., dissenting).

<sup>307</sup> *Bais Yaakov of Spring Valley v. ACT, Inc.*, No. 14-1789, 2015 WL 4979406, at \*5 (1st Cir. Aug. 21, 2015); *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at \*3 (7th Cir. Aug. 6, 2015); *Tanasi v. New All. Bank*, 786 F.3d 195, 197 (2d Cir. 2015); *Stein v. Buccaneers Ltd. P’ship*, 772 F.3d 698, 702–03 (11th Cir. 2014); *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 953–55 (9th Cir. 2013).

<sup>308</sup> *Gomez v. Campbell-Ewald Co.*, 768 F. 3d 871, 875 (9th Cir. 2014).

Court has granted certiorari<sup>309</sup> to address this case involving a marketing company that sent unsolicited text messages on behalf of the U.S. Navy to a middle-aged man.<sup>310</sup> If the Court reverses the *Diaz* approach, consumers will have fewer safeguards against the continuously unwanted and unwelcomed messages and mistakes.

### CONCLUSION

This Comment does not just resolve a circuit split. Rather, it addresses an issue that can affect anyone going about his or her daily routine. Whether you need a loan for your home, insurance for your health, or are just sick of a harassing telemarketer, the *Diaz* approach helps you. While academic in nature, this Comment seeks to fix a problem that everyday people inadvertently face. Can companies create harm and simply throw a few dollars your way to make it disappear? This Comment answers this question in the negative.

Let us return to the Introduction's hypothetical: As a recent law school graduate disregarded by TransUnion, you want justice. TransUnion haphazardly ruined your credit score. Instead of fixing its practices, TransUnion attempts to silence you with a Rule 68 settlement offer. By applying the *Diaz* approach, you witness its four key benefits happen firsthand.<sup>311</sup> First, Rule 68's text and committee notes never discussed the possibility of mootness, so your claim will not be moot.<sup>312</sup> Second, as illustrated by the basic principles of contract law, rejecting the settlement offer is as if the offer had never been made.<sup>313</sup> While contracts may have been taught separately from civil procedure, the law does not distinguish. Third, because your claim is not moot, the trial court will have the necessary jurisdiction.<sup>314</sup> Although the *Rand* and *McCauley–O'Brien* approaches raise questionable jurisdiction issues involving mootness, the *Diaz* approach allows you to directly litigate the merits of your claim. Fourth, and most important to you, since you have decided not to succumb to the pressures of a settlement from

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<sup>309</sup> See *Campbell-Ewald Co. v. Gomez*, 135 S. Ct. 2311 (2015) (mem.).

<sup>310</sup> *Gomez*, 768 F. 3d at 874–75.

<sup>311</sup> See *supra* Part III.A–D (assessing how the *Diaz* approach (a) satisfies both textualist and purposivist principles, (b) upholds fundamental contract theory concepts, (c) resolves the jurisdictional issue, and (d) deters negative behavior).

<sup>312</sup> See *supra* Part III.A.

<sup>313</sup> See *supra* Part III.B.

<sup>314</sup> See *supra* Part III.C.

TransUnion’s attorneys, your decision will become a public judgment.<sup>315</sup> It warns companies that these actions are not tolerated. Companies cannot mysteriously make such individuals’ claims disappear.

While your claim may not send waves through these companies’ methods, it will send ripples. You chose to bring a lawsuit that serves society’s best interests. The *Diaz* approach allows you to have your day in court. Since Justice Kagan’s dissent in *Genesis*, the *Diaz* approach has gained traction.<sup>316</sup> This Comment supports its application and advocates for the Supreme Court to resolve this circuit split by adopting the *Diaz* approach in its upcoming decision in *Campbell-Ewald Co. v. Gomez*.<sup>317</sup>

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<sup>315</sup> See *supra* Part III.D.

<sup>316</sup> See *supra* notes 174–81 and accompanying text.

<sup>317</sup> See *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015) (mem.); Petition for Writ of Certiorari, *supra* note 6, at \*i (requesting certiorari by the Supreme Court for three questions, including “[w]hether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim”).

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