No. 13-16816

---

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

RICHARD CHEN and FLORENCIO PACLEB,
on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellees*,

v.

ALLSTATE INSURANCE COMPANY,

*Defendant-Appellant*.

---

On Appeal from the U.S. District Court for the Northern District of California
Civil Case No. 4:13-cv-00685-PJH

---

# APPELLEES' REPLY IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION

---

Abbas Kazerounian, Esq.
KAZEROUNI LAW GROUP, APC
245 Fischer Avenue, Suite D1
Costa Mesa, CA 92626
(800) 400-6808

Joshua B. Swigart
HYDE & SWIGART
2221 Camino Del Rio South, Suite 101
San Diego, CA 92108
(619) 233-7770

Todd M. Friedman
LAW OFFICES OF TODD FRIEDMAN, P.C.
369 South Doheny Drive # 415
Beverly Hills, CA 90211
(877) 206-4741

F. Paul Bland, Jr.
Karla Gilbride
PUBLIC JUSTICE, P.C.
1825 K Street NW, Suite 200
Washington, DC 20006
(202) 797-8600

*Counsel for Plaintiffs-Appellees*

## I. INTRODUCTION

By emphasizing a distinction between lapsed and unlapsed offers that has no place in either Rule 68 or the doctrine of mootness, Allstate's opposition brief seeks to distinguish this case from the two circuit precedents that clearly control it. However, it is the fact that the Rule 68 offers in *Diaz v. First Am. Home Buyers Prot. Corp.* and *Gomez v. Campbell-Ewald Co.* were unaccepted—not that they had lapsed—that led this Court to conclude that they did not moot those plaintiffs' claims. Like the plaintiffs in *Diaz* and *Gomez*, Florencio Pacleb never accepted Allstate's offer. Allstate's attempt to keep its offer open indefinitely (while retaining the right to revoke it at any time) is not consistent with either the plain language or purpose of Rule 68. Thus, Allstate's insistence that its offer to Pacleb had not lapsed is irrelevant to the Rule 68 analysis; no valid Rule 68 offer remained in effect for Pacleb to accept, and more important, even if there had been such an offer, Pacleb did not accept it. Under *Diaz*, this is the end of the inquiry.

Allstate's attempt to dismiss as dicta the language in *Gomez* identifying both *Diaz* and *Pitts v. Terrible Herbts* as binding precedents in the wake of *Genesis Healthcare Corp. v. Symczyk* is similarly unavailing. Reconciling these two precedents with *Genesis* was necessary to the Court's holding in *Gomez*, which was that neither Gomez's individual nor putative class claims were mooted by the Rule 68 offer he did not accept. 768 F.3d 871, 874-75 (9th Cir. 2014). Now that *Gomez* has clarified the law in this circuit by confirming the continued validity of *Pitts* and *Diaz*, all of Allstate's efforts to inject complexity into the straightforward issues presented by this appeal amount to so much "sound and fury, signifying

nothing."[1] Pacleb's claims are not moot. The question is foreclosed by circuit precedent and is no longer appropriate for interlocutory appeal. The district court opinion denying Allstate's motion to dismiss should be summarily affirmed.

## II. ARGUMENT

### A. Allstate's Distinction Between Lapsed and Unlapsed Offers Is of No Moment.

Allstate suggests that its Rule 68 offer differed from those in *Diaz* and *Gomez* because its April 24, 2013 letter purported to extend the offer until it was accepted by Pacleb or withdrawn in writing. Opposition at 8. However, both *Diaz* and *Gomez* premised their holdings on the fact that the Rule 68 offers in those cases were unaccepted, not on whether or not they had lapsed. *Diaz*, 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 that claim moot."); *Gomez*, 768 F.3d 871, 875 (9th Cir. 2014) ("Because the unaccepted offer alone is 'insufficient' to moot Gomez's claim, . . . the claim is still a live controversy." (quoting *Diaz*, 732 F.3d at 950)). As explained in greater depth at pages 16-18 of Appellees' merits brief, *Diaz*'s holding is grounded in the fact that an unaccepted Rule 68 offer affords no relief and no enforceable right to relief, a fact that is in turn grounded in black-letter contract law principles. See, *e.g.*, *Minneapolis & St. Louis Ry. Co. v. Columbus Rolling-Mill Co.*, 119 U.S. 149, 151 (1886) ("[A]n offer . . . imposes no obligation until it is accepted according to its terms."); *Grimes v. New Century Mortg. Corp.*, 340 F.3d 1007, 1011 (9th Cir. 2013) (no contract is formed

[1] Shakespeare, W. MACBETH, act V, Scene V.

without "mutual consent"). An unaccepted offer "is a legal nullity, with no operative effect." *Diaz*, 732 F.3d at 954 (quoting *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting)).[2]

Whether a particular Rule 68 offer has lapsed or not has no bearing on this analysis; instead, whether the offer is legally enforceable, and thus whether it can moot a plaintiff's claims, turns entirely on whether it is accepted. The text of Rule 68 supports this conclusion. Rule 68 provides that a district court may enter judgment only on the basis of an *accepted* offer, not on the basis of an unaccepted offer like Allstate's. Fed. R. Civ. P. 68(a); *Diaz*, 732 F.3d at 954 ("'Rule 68 precludes a court from imposing judgment for a plaintiff . . . based on an unaccepted settlement offer made pursuant to its terms.'" (quoting *Genesis*, 133 S. Ct. at 1536 (Kagan, J., dissenting))). And Rule 68(b) provides that an unaccepted offer "is considered withdrawn" and makes "[e]vidence of an unaccepted offer" inadmissible "except in a proceeding to determine costs." Fed. R. Civ. P. 68(b).

The text of Rule 68 is important in another respect pertaining to Allstate's much-vaunted distinction between lapsed and unlapsed offers. Allstate contends that its offer did not lapse because its letter of April 24, 2013 stated that the offer would remain open until it was accepted or until Allstate withdrew it. Opposition at 8. However, Rule 68 specifies that for an offer to be the basis of an entry of

[2] *See also, e.g.*, *Blossom v. R.R. Co.*, 70 U.S. 196, 205–06 (1865) ("[u]naccepted offers to enter into a contract bind neither party, and can give rise to no cause of action [for breach]"); *Donovan v. RRL Corp.*, 27 P.3d 702, 709 (Cal. 2001) (no contract without consent); Cal. Civ. Code § 1550 (same); Restatement (Second) of Contracts § 3 (same).

judgment, it must be accepted in writing within fourteen days of being made. Fed. R. Civ. P. 68(a). Thus, the sort of open-ended but revocable offer contemplated by Allstate's April 24, 2013 letter is not permitted by Rule 68. *See Richardson v. Nat'l R.R. Passenger Corp.*, 49 F.3d 760, 764 (D.C. Cir. 1995) (holding that a Rule 68 offer is irrevocable while it remains in effect). Allstate can of course make settlement offers at any point in litigation on whatever terms it chooses, but Allstate could not prevent its Rule 68 offer from lapsing after fourteen days when Mr. Pacleb did not accept it. Rule 68 itself would not have allowed that.

Allstate makes much of some references in *Diaz* to the fact that the offer in that case had lapsed by its terms. However, this is a distinction without a difference. For one thing, Allstate's offer to Mr. Pacleb also lapsed after fourteen days when he did not accept it—if not under the terms of the offer itself, then under the terms of Rule 68 as described above. Moreover, the way in which the *Diaz* opinion discussed lapsing does not support Allstate's position that an offer's lapse carries any legal significance. See *Diaz*, 732 F.3d at 955 ("After the offer lapsed, *just as before*, [Ms. Diaz] possessed an unsatisfied claim which the court could redress by awarding her damages." (emphasis added) (quoting *Genesis*, 133 S. Ct. at 1534 (Kagan, J., dissenting))).[3]

Finally, as discussed at pages 24-25 of Appellees 'merits brief, the distinction Allstate seeks to draw between lapsed and unlapsed offers, with the

[3] Allstate is also incorrect that *Diaz* conflicts with prior Ninth Circuit precedents, requiring an immediate *en banc* call. Opposition at 8-12. All of the previous Ninth Circuit cases cited by Allstate are distinguishable from *Diaz* or did not involve Rule 68 at all. *See* Appellees 'Brief at 28-29.

latter purportedly having the power to moot a plaintiff's claims, would lead to absurd and unjust results. If an open but unaccepted offer could render a case moot, then cases around the country are being mooted whenever defendants send Rule 68 offers, are becoming un-moot when the offers lapse, and are then being re-mooted when new or extended offers are made—an absurd cycling between justiciability and non-justiciability that could go on forever and, if defendants send new offers every fifteenth day, prevent any judicial intervention on the merits of unresolved cases. Perhaps even worse, Allstate's view is that a defendant may go into court and have a case dismissed merely by making a settlement offer and then sending a letter stating that the offer will remain open until accepted or withdrawn (making rejection impossible). Accepting that view would allow defendants unilaterally to put plaintiffs with meritorious claims out of court. Because such perverse results could not have been what the drafters of Rule 68 intended, the only logical conclusion is that the holdings of *Diaz* and *Gomez* mean what they say and apply to all unaccepted Rule 68 offers, not just those unaccepted offers that have also lapsed.

### B. *Gomez's* Recognition of *Pitts* and *Diaz* as Good Law and Binding Precedent Was Not Mere Dicta.

Allstate suggests that *Gomez* does not support summary affirmance here because it first held that the plaintiff's individual claims were not mooted by an unaccepted Rule 68 offer before reaching the same conclusion with respect to his putative class claims. Opposition at 14-15. Because the conclusion that Mr. Gomez's individual claims were not moot disposed of the appeal, according to

Allstate, there was no reason to reach the issue of the putative class claims, and anything that the *Gomez* court said about the class claims was dicta. As a preliminary matter, the same can be said of this appeal: even though interlocutory review was sought, and granted, to determine whether *Pitts v. Terrible Herbst* remained good law after the Supreme Court's decision in *Genesis Healthcare*, this Court's intervening opinion in *Diaz* is a sufficient basis for summarily affirming the trial court's order here, without even reaching the *Pitts* issue.

Moreover, the holding in *Gomez*—and more important to the question certified for interlocutory appeal, the statements in *Gomez* about pre-*Genesis* Ninth Circuit precedents—cannot be neatly severed in the way Allstate proposes. *Gomez* relied on *Diaz* in reaching its conclusion that the defendant's unaccepted Rule 68 offer in that case did not moot the plaintiff's individual claims, and it relied on *Pitts* to reach the same conclusion regarding his *putative class claim*s. 768 F.3d at 875. It then addressed the defendant's argument that both of these precedents were clearly irreconcilable with the Supreme Court's opinion in *Genesis Healthcare Corp. v. Symczyk.* Emphasizing the distinction the *Genesis* Court itself made between Rule 23 class actions and the Fair Labor standards Act ("FLSA") context in which that case arose, 133 S. Ct. 1523, 1529 (2013) and noting that the opinion in *Genesis* did not reach the question of whether the class representative's individual claims were moot because that question was not presented on appeal, *id.*, the court in *Gomez* concluded that "because *Genesis* is not 'clearly irreconcilable' with *Pitts* or *Diaz*, this panel remains bound by circuit precedent, and [the defendant's] mootness arguments must be rejected." 768 F.3d at 876.

In other words, *Gomez* has a single holding on the mootness question, that the unaccepted Rule 68 offer mooted none of the plaintiff's claims, and its analysis of *Genesis* and its consistency with previous Ninth Circuit precedents is essential to that holding. Rather than a stray piece of dicta, *Gomez's* discussion of *Pitts* and *Diaz* and their continuing viability is the precise basis on which that case was decided. And because that discussion provides a definitive answer to the question that prompted immediate appeal last July of the district court order denying Allstate's motion to dismiss, such interlocutory review is no longer appropriate and that order should be summarily affirmed.

## III. CONCLUSION

For the foregoing reasons and the reasons outlined in Appellees' Motion for Summary Disposition, Pacleb respectfully requests that this Court summarily affirm the district court's order, or alternatively vacate the order permitting this interlocutory appeal.

Date: November 7, 2014

Respectfully submitted,

s/F. Paul Bland, Jr.

F. Paul Bland, Jr.
KARLA GILBRIDE
PUBLIC JUSTICE, P.C.
1825 K Street NW, Suite 200
Washington, DC 20006
(202) 797-8600

Abbas Kazerounian, Esq.
KAZEROUNI LAW GROUP, APC
245 Fischer Avenue, Suite D1
Costa Mesa, CA 92626
(800) 400-6808

Joshua B. Swigart
Hyde & Swigart
2221 Camino Del Rio South,
Suite 101
San Diego, CA 92108
(619) 233-7770

Todd M. Friedman
LAW OFFICES OF
TODD FRIEDMAN, P.C.
369 South Doheny Drive # 415
Beverly Hills, CA 90211
(877) 206-4741

9th Circuit Case Number(s) 13-16816

**NOTE:** To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

**********

## CERTIFICATE OF SERVICE
## When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) 11/07/2014 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/Karla Gilbride

**********

## CERTIFICATE OF SERVICE
## When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)