No. 13-16816

IN THE 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 Interlocutory Appeal under 28 U.S.C. § 1292(b) from the
United States District Court for the Northern District of California
Civil Case No. 4:13-cv-00685-PJH

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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February 19, 2016

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. No publicly traded corporation has an ownership interest in it of any kind.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a consumer-advocacy organization with members and supporters nationwide, appears before Congress, administrative agencies, and courts to work for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer interests in litigation, including as amicus curiae in the United States Supreme Court and federal courts of appeals.

Public Citizen has a longstanding interest in protecting the right of access to the civil justice system and the use of class actions in appropriate cases to facilitate such access. Those interests are threatened by overbroad arguments that courts lack subject-matter jurisdiction over plaintiffs' claims. As a result, Public Citizen and its attorneys have participated, either as amicus curiae or as counsel for parties, in many cases involving attempts by defendants to avoid class actions by taking unilateral actions that purportedly moot the individual claims of named

[1] Public Citizen has moved for leave to file this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

plaintiffs in those cases. Those cases include both *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), and *Genesis Healthcare Corp. v. Symczyk,* 133 S. Ct. 1523 (2013).

Public Citizen submits this brief because defendant-appellant Allstate's argument that its "tender" of payment into an escrow account payable to the plaintiff only upon entry of a judgment by the court is sufficient to moot this case fundamentally misunderstands the mootness principles applied in *Gomez*. Public Citizen believes that this short brief, which avoids repetition of the arguments made by plaintiff-appellee Pacleb, will be of assistance to this Court as it seeks to apply, for the first time, the teachings of *Gomez* in this case.

ARGUMENT

Allstate's escrow arrangement does not moot the plaintiff's individual claims because it depends on the district court's ability to grant effectual relief.

1. *Gomez* holds that a case is moot only if it is impossible for the court to grant relief.

Gomez holds that an unaccepted offer of judgment that would have provided individual relief to the named plaintiff in an uncertified class action does not moot the named plaintiff's individual claims and, accordingly, does not prevent him from seeking to represent a class

asserting common claims. *See* 136 S. Ct. at 666, 669–72. *Gomez* rests on the fundamental principle that a case is moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id*. at 669 (quoting *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012)). An unaccepted offer of judgment, the Court held, does not make it impossible for a court to grant effectual relief because it is has "no continuing efficacy" and thus provides a plaintiff with "no entitlement to … relief." *Id*. at 670. The claim of a plaintiff who has rejected such an offer stands "wholly unsatisfied," *id*. at 672, and the offer accordingly neither deprives him of his "stake in the litigation," *id*. at 671, nor impairs "the court's ability to grant … relief." *Id*. at 670 (quoting *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting)). Thus, the Court held, "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case." *Id*. at 672. And such an offer has no effect on a plaintiff's ability to seek to certify a class, because "a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id*.

2. Allstate's escrow arrangement depends on the court's continuing ability to grant relief.

Allstate asserts that *Gomez*'s holding does not apply in this case because Allstate thinks it has gone the defendant in *Gomez* one better by not only offering judgment, but also paying money it claims is sufficient to satisfy the plaintiff's claims into an "escrow" account. Allstate seizes on *Gomez*'s statement that "[w]e need not, and do not, now decide whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." *Id*. at 672. Based on that statement, and on suggestions in the *Gomez* dissents that actual payment might moot a plaintiff's claims, *see id*. at 683 (Roberts, C.J., dissenting); *id*. at 684–85 (Alito, J., dissenting), Allstate contends that its "tender" of payment into an escrow account has succeeded in accomplishing what the offer in *Gomez* failed to do: beheading a proposed class action by depriving the individual plaintiff of a live claim for relief.

Allstate's arguments, however, fail to establish that its actions have met what *Gomez* held to be the essential precondition for mooting a claim—namely, that it has become "impossible for a court to grant any

effectual relief whatever to the prevailing party." *Id.* at 669 (citation omitted). Indeed, Allstate's own description of what it has done makes clear that the court not only retains the ability to grant the plaintiff effectual relief, but that Allstate's attempt to terminate the case *depends upon* the court's granting such relief. Although Allstate asserts that it has tendered payment "*to Pacleb*," Allstate Supp. Br. 4 (emphasis added), its complete description of what it has done is quite different: "The tendered funds have been deposited in an escrow account at the Bank, pending entry of a final District Court order or judgment directing the escrow agent to pay the tendered funds to Pacleb, requiring Allstate to stop sending non-emergency telephone calls and short message service messages to Pacleb in the future and dismissing this action as moot." *Id.* at 4–5. Moreover, Allstate's tender is anything but unconditional, as Allstate reserves the right to seek return of the funds if the court's disposition of the action is different from the orders and judgment it requests. *Id.* at 5.

Allstate's scheme no more moots the plaintiff's claims than did the offer in *Gomez*. Like the plaintiff in *Gomez*, the plaintiff here "remain[s] emptyhanded," and his claims stand "wholly unsatisfied." *Gomez*, 136 S.

Ct. at 672. Moreover, far from *preventing* the court from granting effectual relief, Allstate's stratagem guarantees that the plaintiff will receive no monetary recovery *unless and until the court takes action*. Allstate's proposed course of action depends on the court granting effectual relief and allows the plaintiff no monetary recovery absent a court order. That a live case remains in such circumstances follows both from *Gomez*'s reasoning and also from the Supreme Court's holding in *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013), that parties have a concrete stake in a dispute where the defendant will "not disburse [payment] but for the court's order."

3. The district court also retains the ability to grant effective injunctive relief.

Moreover, Pacleb's injunctive claims can be satisfied *only* through a court order. Allstate does not suggest otherwise. Absent such an order, Allstate has no enforceable obligation to refrain from repeating its allegedly unlawful conduct. Thus, Allstate itself depends on the *court* to grant the plaintiff effectual relief by entering an order "requiring Allstate to stop" calling and sending messages. Allstate Supp. Br. 4. Until such an order has been entered, the parties "retain[] the same stake in the litigation they had at the outset" as to the request for injunctive

relief. *Gomez*, 136 S. Ct. at 671. Thus, even if the injunctive relief that Allstate proposes were sufficient to satisfy the plaintiff's individual claims (*but see* Pacleb Supp. Br. 4–7), the plaintiff's claims remain alive because the court still has the power to grant relief.

4. Allstate's proposal that the district court enter judgment presupposes that the court still has subject-matter jurisdiction.

Allstate tellingly requests that this Court direct "the entry of judgment in favor of Pacleb" as a prerequisite to its request for the "dismissal of this action as moot." Allstate Supp. Br. 16. Those two dispositions are logically inconsistent. What is critical, though, is that Allstate itself acknowledges that entry of judgment will be necessary to satisfy the plaintiff's claims. Yet a court cannot enter judgment in favor of a party in the absence of jurisdiction over the action. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998); *Clapp v. Comm'r of Internal Rev.*, 875 F.2d 1396, 1398 (9th Cir. 1989); Fed. R. Civ. P. 12(h)(3). Allstate's course of action thus presupposes that the court maintains jurisdiction, and thus effectively acknowledges that the claims are not moot. *See Gomez*, 136 S. Ct. at 669; *Knox v. Serv. Employees Int'l Union*, 132 S. Ct. at 2287.

Under these circumstances, Allstate can find no support in the Supreme Court's statement in *Gomez* that the Court was not deciding "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." 136 S. Ct. at 672. The Court's recognition that it was not deciding an issue not before it does not diminish the application of *Gomez*'s reasoning to this case. The Supreme Court often stops short of formally deciding a question not before it even when its reasoning would, in a case actually presenting that question, determine the answer to that question. Moreover, this case does not present the "hypothetical" (*id.*) posed by the *Gomez* Court, for two reasons. First, Allstate has not deposited funds into an account that is actually *payable* to the plaintiff: Only if the court orders the funds paid to the plaintiff will he have any entitlement to them, and otherwise Allstate will try to get them back. Second, no judgment has yet been entered for the plaintiff, and *Gomez*'s reference to judgment in its statement of the hypothetical indicates that a plaintiff's claims remain alive until a judgment has satisfied them.

5. A plaintiff with live claims is entitled to a fair opportunity to seek class certification.

That the named plaintiff's individual claims in this case are still live means that the district court may not, without first considering the propriety of class certification, seek to satisfy them and terminate the action by entering judgment in the plaintiff's favor, even if the judgment would offer complete individual relief. As *Gomez* holds, a plaintiff whose own claims are live is entitled to "a fair opportunity to show that certification is warranted." 136 S. Ct. at 672. Until the plaintiff has been afforded that opportunity, the district court should not enter a judgment in the individual plaintiff's favor—even if the entry of such a judgment, with the defendant's consent, might be a permissible way to resolve a case or controversy involving only individual claims.

Notwithstanding Allstate's assertion, there has been no "unconditional surrender" by the defendant here. Allstate Supp. Br. 11. A very real dispute remains to be adjudicated. Not only does Allstate continue to deny liability and vigorously contest the class relief sought in the action, but even its proposed "surrender" as to the plaintiff's individual claims is not unconditional. On the contrary, it is *expressly* conditioned on the case being resolved by the court on Allstate's terms.

Only if the district court enters the exact judgment Allstate seeks, and dismisses the class claims, will the plaintiff receive anything. A defendant that insists that the court *exercise* its jurisdiction to *grant relief* to a plaintiff to satisfy his claims has not mooted anything, and is not entitled to prevent the plaintiff from seeking to proceed with a class action.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word 2010), contains 1,918 words, less than half the number of words permitted by the Court for the parties' supplemental briefs.

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on February 19, 2016.

/s/ Adina H. Rosenbaum
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