IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Case No. 18-60776

LORINE MITCHELL,

Plaintiff-Appellee,
v.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant-Appellant.

On Appeal From The Order Granting Class Certification
by the United States District Court for the
Northern District of Mississippi, Oxford Division
Civil Action No. 3:17-CV-00170-MPM-RP

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Lorine Mitchell v. State Farm Fire and Casualty Company, No. 18-60776

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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1. The Chamber of Commerce of the United States of America, *amicus curiae*, has no parent corporations, and no publicly held company has any ownership interest therein.

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STATEMENT REGARDING CONSENT

Defendant-Appellant consents to the filing of this *amicus curiae* brief and Plaintiff-Appellee does not oppose the filing of this *amicus curiae* brief.[1]

IDENTITY AND INTEREST OF AMICUS

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. More than 96% of the Chamber's members are small businesses with 100 or fewer employees. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving class actions.

The District Court certified a class based on a misconception that the common question, which predominated over individualized questions, was "whether State Farm breached its policy contract by depreciating labor costs in calculating actual

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

cash value payments." Order at 10. That question is neither common nor predominant because its answer is irrelevant to many members of the putative class. Those members were fully compensated, and not entitled to any additional compensation, regardless of how State Farm calculated its actual cash value payments. By skirting over that issue at the class certification stage, and certifying a class that included members who have no interest in the common question supposedly at the heart of the litigation, the District Court's order violated Rule 23.

The District Court's certification order contradicts the Supreme Court's decisions establishing rigorous standards for class certification. The Chamber and its members have a strong interest in ensuring that federal district courts comply with those standards, and in encouraging the federal courts of appeals to correct lower court decisions that stray from Rule 23.

SUMMARY OF ARGUMENT

The District Court erred in certifying the class because Plaintiff did not establish commonality, predominance, or superiority.

The District Court concluded that "whether State Farm was entitled to deduct labor depreciation in the first place" was a common question that predominated over individualized questions. Order at 14. The District Court reasoned that "[i]f the policy is held to not have allowed for labor depreciation," then determining the amount of labor depreciation withheld from each class member can be "calculated

through [State Farm's system] (using default settings) and easily ascertainable without particularized inquiry into each class member's claim." *Id.*

But the District Court overlooked that not all class members are affected by that question. "Labor depreciation" is one component of the calculation of "actual cash value" under the policies. But some class members are indifferent to the proper method of calculating "actual cash value" because the payout they receive under the insurance policy does not depend on "actual cash value". And there is no easy way to distinguish class members who care about the method of calculating "actual cash value" from class members who do not. To the contrary, for *every* policyholder, individualized proceedings are necessary to determine whether State Farm is liable and whether the "actual cash value" calculation affects their payout under the policy.

As such, Plaintiff cannot establish commonality, predominance, or superiority. There is no genuinely common question *to the entire class*, because some class members are indifferent to how "actual cash value" is calculated. Even if there was a common question, individualized issues would predominate because class-member-by-class-member adjudications are unavoidable. Finally, the class action is not the superior mechanism of resolving this dispute because it would unfairly prejudice State Farm without promoting efficiency.

The District Court's decision conflicts with not only the text, but also the policy, of Rule 23. Allowing this case to proceed as a class action will harm State

Farm, by forcing State Farm to choose between settling questionable claims or risk the low probability of a massive judgment. It may also harm other business, by paving the way for other plaintiffs to obtain certification of overbroad classes where the answer to the supposedly "common" question is relevant only to a subset of class members. This Court should reverse the District Court's certification order.

ARGUMENT

I. The Certified Class Includes Members Who Were Uninjured by the Alleged Breach and for Whom the Supposedly Common Question of Law Is Irrelevant.

Plaintiff contends that State Farm breached its insurance contracts by applying "labor depreciation" in calculating "actual cash value". She asserts that this issue presents a common question of law that can be adjudicated on a class-wide basis. That contention is incorrect, because many people in the class were unharmed by the alleged breach, and were not affected by the supposedly common question of law that Plaintiff identifies. As such, *this* class should not have been certified.

The State Farm policies are straightforward. The policies provide that "until actual repair or replacement is completed," State Farm will pay the "actual cash value" of the damaged property, "not to exceed the cost to repair or replace" the damaged property. If "the repair and replacement is actually completed," State Farm will pay the "additional amount you actually and necessarily spend." Plaintiff

contends that State Farm impermissibly applies "labor depreciation" to "actual cash value" calculations, and its "actual cash value" calculations are therefore too low.

Plaintiff seeks to certify a class composed of all policyholders who received at least one "actual cash value" payment that was calculated using "labor depreciation." According to Plaintiff, the legality of "labor depreciation" is a common question of law to all class members that predominates over individualized questions, rendering the class action device a superior method of resolving this dispute. That contention is demonstrably wrong, and reflects a fundamental misunderstanding of Rule 23.

State Farm identifies several reasons that Plaintiff has not established predominance and superiority. State Farm Br. 27-49. The Chamber agrees with all of State Farm's points, but will focus on one: that the "Cost to Repair" cap language forecloses any finding of predominance. State Farm Br. 39-43.

A straightforward hypothetical makes clear why insurance disputes involving policies with "Cost to Repair" caps cannot be adjudicated on a class-wide basis. Suppose, for the sake of argument, that Plaintiff is correct that the insurance contract does not permit State Farm to apply "labor depreciation" to its "actual cash value" calculations. Further suppose two class members, Anna and Barbara, are State Farm policyholders who own homes and sustain roof damage. Both class members have a policy limit of $9,000; for simplicity, both class members have a deductible of

zero. For both class members, State Farm calculates an "actual cash value" of $8,000—$10,000, minus $1,000 of "labor depreciation," minus $1,000 of other (undisputedly permissible) depreciation. If Plaintiff's interpretation of the insurance contract is correct, then "actual cash value" should have been $9,000, because "labor depreciation" cannot be deducted.

Anna's contractor quotes a replacement or repair cost of $10,000, which exceeds her policy limit. She decides not to go through with the repairs, and instead keep her "actual cash value" payment. If Plaintiff's theory of the case is correct, Anna has been harmed by the breach—she should have received $9,000, but instead only receives $8,000.

Barbara's contractor quotes a replacement or repair cost of $8,000. Because the policy provides that State Farm will pay actual cash value "not to exceed the cost to repair or replace the damaged part of the property," the maximum amount Barbara is eligible to receive is $8,000. Thus, even if Plaintiff's theory of the case is correct, Barbara has not been harmed by the breach—she received $8,000, which is all she is entitled to. If Barbara sued State Farm in an individual lawsuit, on the theory that she should have received a $9,000 rather than $8,000 "actual cash value" payment, she would lose because of that cap.

Both Anna and Barbara fall within the class definition: both of them received "actual cash value" payments that were calculated based in part on labor

depreciation. But only Anna can be affected by the legal issue that Plaintiff raises. Barbara is indifferent to whether "labor depreciation" can be included in "actual cash value" calculations, because even if it is, she would not be entitled to more than her actual cost of repair—$8,000.

If the District Court finds in favor of the class, then at *some* point, it will have to determine which class members are like Anna and which class members are like Barbara. There is no way to avoid this determination: the District Court will have to determine State Farm's liability and damages with respect to each class member, and that analysis will necessarily turn on whether the "actual cash value" calculation does or does not exceed the actual cost of repair.

Furthermore, this analysis will necessarily have to occur with respect to *all* class members. There are *no* class members for whom State Farm's records can reliably establish whether State Farm is or is not liable. If State Farm's records state that a class member received an "actual cash value" payment and nothing more, there is always the possibility that the class member paid for the repairs and did not submit a follow-up claim because the cost of the repairs was less than the "actual cash value" payment. Thus, an individualized analysis of a policyholder's repair costs is necessary to determine State Farm's liability to *any* policyholder.

The question presented by this case is *when* this policyholder-by-policyholder analysis must occur. State Farm contends that it must occur now, and that class

certification was therefore in error. Until Plaintiff defines a class in which there is a common question for all members—and a way of determining who is in that class—certification is improper. The District Court concluded, however, that these issues could be ironed out later on. In the District Court's view, it could certify the class, determine whether State Farm's application of "labor depreciation" was inconsistent with the definition of "actual cash value", and only then—*after* finding class-wide liability—conduct the policyholder-by-policyholder analysis necessary to establish State Farm's ultimate liability.

As explained below, the District Court's certification order cannot be squared with Rule 23.

II. The District Court's Certification Order Conflicts with the Text and Policy of Rule 23.

Both the text and policy of Rule 23 make clear that the District Court's certify-now, figure-out-individualized-issues-later approach is wrong. The commonality, predominance, and superiority requirements work in tandem to prevent precisely what the District Court did here—an order certifying an overbroad class for purposes of a class-wide adjudication that does not determine *any* class member's liability, and that will later require the determination of liability as to each class member on a member-by-member basis.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*,

569 U.S. 27, 33-34 (2013) (citation omitted). "[P]laintiffs wishing to proceed through a[n opt-out] class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement" of Rule 23(b)(3)—commonality, predominance, and superiority. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied.'" *Comcast*, 569 U.S. at 33 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-52 (2011)); *accord Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 554–55 (5th Cir. 2011) ("Where the plaintiff seeks to certify a class under Rule 23(b)(3), the Rules demand a close look at the case before it is accepted as a class action … Rule 23 requires the court to find, not merely assume, the facts favoring class certification.").

The District Court failed to conduct that rigorous analysis. By defining a class that included policyholders who are indifferent to the supposedly common question, Plaintiff failed to comply with Rule 23's requirements. Plaintiff did not prove commonality, predominance, or superiority, as Rule 23 demands.

***Commonality*.** "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 350-51 (citation omitted). Commonality also requires not just "the raising of common 'questions' - even in droves - but, rather the capacity of a classwide proceeding to generate

common answers apt to drive the resolution of the litigation." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Here, Plaintiff has not shown a common question that can generate a common answer. If the "question" is defined as "whether State Farm is liable," then that is indeed a "common question" for all policyholders. But it is not susceptible to a common answer, because of the intensely individualized nature of a property insurance dispute. If the "question" is defined as "whether ["actual cash value"] be calculated using 'labor depreciation'," then Plaintiff cannot show that this question is *common*—the answer to that question will be irrelevant to many class members' liability. The class is overbroad, thus preventing Plaintiff from proving, as required at the class certification stage, that there is a common question *for the class*.

***Predominance*.** Even if there was a common question, it would not "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The predominance inquiry "helps prevent the class from degenerating into a series of individual trials" by requiring a practical analysis of whether "the substance and structure" of plaintiffs' claims lends itself to class-wide adjudication. *Robinson v. Texas Auto. Dealers Ass'n*, 387 F.3d 416, 421-22 (5th Cir. 2004) (internal quotation marks and alteration omitted).

The Court need go no further than to apply the narrow rule established by its precedent: When it is *inevitable* that there will be individual liability trials with respect to *every single* class member, common questions do not predominate over individualized questions. That well-settled rule would resolve this appeal in State Farm's favor. The District Court asserted that "labor depreciation" was "calculated through [State Farm's system] (using default setting)" and thus "the amount of labor depreciation withheld by State Farm" is "easily ascertainable without particularized inquiry into each class member's claim." Order at 14. But even assuming that is true (*but see* Appellant's Br. 8-14), the District Court overlooked a critical problem: for every single class member, the Court will need to decide whether "actual cash value" exceeded actual cost to repair. If it did not, "actual cash value" is irrelevant and State Farm is not liable, regardless of whether labor depreciation was calculated in accordance with the contract. And there is no way to conduct that analysis without an analysis of every class member's repair costs. Thus, class members "'will need to present evidence that varies from member to member,'" and "'the same evidence will [not] suffice for each member'" to prove her claim. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted). That is litigation where individual questions predominate. *Id.*; *see also Robinson*, 387 F.3d at 423 ("By including in the plaintiff class every purchaser who paid a VIT, plaintiffs grouped consumers with divergent negotiating histories and removed the

predominant factors needed to support this particular horizontal price-fixing claim.").

Superiority. For similar reasons, a class adjudication is not superior to individualized adjudications. Certifying an overbroad class does not promote efficiency—to the contrary, it merely defers, rather than avoids, the individualized trials that Rule 23 was meant to prevent. At the same time, certifying an overbroad class results in many of the pathologies common to improperly-certified classes.

First and most obviously, the District Court has subjected State Farm to settlement pressures that are both intense and unfair. "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Nagareda, *supra*, at 99. In the typical case, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, Inc.*, 552 U.S. 148, 163 (2008). "Certification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *accord AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured

into settling questionable claims."). This is why "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010).

It is unfair to subject defendants to the intense settlement pressure effect of class certification without applying Rule 23's procedural protections, including the requirement that the plaintiff "must actually *prove*—not simply plead"—all of Rule 23's elements, *see Halliburton*, 573 U.S. at 275. Further, certification of a class that is over-inclusive—as in this case—exposes defendants to a second type of unfairness. The bigger the class, the bigger the damages exposure. And it is not very comforting to the defendant that it may eventually have the chance to prove that some class members were not damaged. The outcome of such individualized proceedings may be in doubt, and defendants faced with excessively broad classes must, as a matter of risk management, assume the worst. Thus, when overbroad classes are certified, the coercive effect of class certification on defendants is magnified precisely *because* the District Court failed to adhere to Rule 23's procedural requirements.

Finally, if allowed to stand, the District Court's flawed certification order could also cause mischief in other class action cases. The District Court certified the class on the theory that the "common question" was the permissibility of

applying "labor depreciation." That question can undoubtedly be answered without individualized proceedings, but it is not a common question in the sense relevant to Rule 23 because it is not a common liability question for the *entire class*. The District Court's order, if upheld on appeal, points the way to a new, improper avenue for obtaining class certification: plaintiffs could proffer a supposedly "common question" distinct from the actual questions presented in the case, and obtain certification without any scrutiny as to whether answering that question will resolve the defendant's liability to *any* class members without further proceedings. The Court should reject that maneuver and hold that Plaintiff has not shown any common questions predominating over individualized issues within the meaning of Rule 23.

CONCLUSION

The District Court's class certification order should be reversed and the case remanded for further proceedings.

Dated: February 19, 2019

Respectfully submitted,

/s/ Adam G. Unikowsky

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 3,199 words, excluding the parts of the brief exempted by Rule 32(f).

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman Font.

/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2019 a true and correct copy of the foregoing Brief was served via the court's CM/ECF system.

/s/ Adam G. Unikowsky