IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

Case No. 20-90029

ANNIE ARNOLD,

Plaintiff-Respondent,
v.

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant-Petitioner.

On Rule 23(f) Petition Challenging Order Granting Class Certification
by the United States District Court for the
Southern District of Alabama, Northern Division
Civil Action No. 2:17-CV-00148-TFM-C

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-PETITIONER'S RULE 23(F) PETITION

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CERTIFICATE OF INTERESTED PARTIES

Amicus curiae certifies that it has no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amicus curiae.*

Amicus curiae is unaware of any other interested persons other than those disclosed in the Rule 23(f) petition.

/s/ Adam G. Unikowsky

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IDENTITY AND INTEREST OF AMICUS AND SUMMARY OF ARGUMENT[1]

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 three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber regularly files *amicus* briefs in cases that raise issues of concern to the Nation's business community, including *amicus* briefs at the Rule 23(f) stage. *See, e.g.*, *Mitchell v. State Farm Fire & Casualty Co.*, No. 18-90043 (5th Cir. Oct. 15, 2018); *McArdle v. AT&T Mobility LLC*, No. 18-80102 (9th Cir. Aug. 27, 2018); *Ferreras v. American Airlines, Inc.*, No. 18-8023 (3d Cir. Mar. 20, 2018).

The District Court certified a class despite the Plaintiff's inability to establish that common questions predominated over individualized ones—or, indeed, that there were any common questions at all. Every class member had an insurance contract obligating State Farm to pay the cost to replace damaged property, with an initial payment of actual cash value. Plaintiff told the District Court that the case

[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.

presented the "common question" of whether State Farm permissibly used a calculation method applying labor depreciation in determining actual cash value. The District Court certified a class, accepting the plaintiff's representation at face value that this was a single question that could be answered classwide and that could determine liability for every class member. The District Court should instead have scrutinized Plaintiff's premise that the case turned on whether State Farm permissibly applied labor depreciation. If it had done so, it would not have certified the class, because the premise is incorrect: whether State Farm calculated a sufficient payment for actual cash value is a question of fact, and whether it was permitted to apply labor depreciation is merely one subsidiary fact that the factfinder must balance alongside other individualized issues. Thus, the class should not have been certified.

The District Court's decision 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 the clear dictates of the Supreme Court.

ARGUMENT

I. The District Court Erred in Holding that Common Questions Predominate, Even Though Those Common Questions Cannot Generate Common Answers.

The Chamber agrees with State Farm that the District Court erred in certifying the class. The Chamber submits this brief to explain why this case presents broader questions concerning class-action practice that warrant the exercise of jurisdiction under Rule 23(f).

This case presents a fundamental question of class-action procedure: whether a District Court can certify a class based merely on the existence of a common *question*, without any showing that a classwide proceeding could generate any common *answers*—let alone common answers that predominate over the multitude of individualized issues.

Plaintiff entered into an insurance contract with State Farm providing that State Farm would pay the cost to replace damaged property, with an initial payment of actual cash value. She filed a claim, and State Farm calculated the actual cash value according to a methodology that involved depreciating all components of estimated replacement cost, including labor. Plaintiff then sued State Farm, claiming that calculating actual cash value using labor depreciation breached the contract.

Plaintiff now seeks to certify a class composed of individuals who filed insurance claims with State Farm, and for whom State Farm calculated actual cash

value using labor depreciation. Plaintiff's theory is that applying labor depreciation is *in and of itself* a breach of contract. Therefore, Plaintiff contends, determining class members is a simple matter of mechanically identifying policyholders for whom the calculation of actual cash value involved labor depreciation. And for each class member, damages is an equally simple matter of mechanically calculating the amount of labor depreciation associated with that class member's claim.

The District Court certified the class based on that premise. It accepted Plaintiff's representation that "the claim pertinent to this class action is the initial amount State Farm owed its insureds, pursuant to its policies, prior to deducting labor depreciation from the [actual cash value]." RE.178:11513. And it found that Plaintiff had shown predominance "because there is a common question to each class member—whether State Farm breached its standard-form insurance policy by withholding labor depreciation when calculating its insureds' [actual cash value] payments." RE.178:11516.

That premise is wrong. The "claim pertinent to this class action" is *not* "the initial amount State Farm owed its insureds, pursuant to its policies, prior to deducting labor depreciation." Rather, the "claim pertinent to this class action" is Plaintiff's claim that State Farm breached the insurance contract. And—regardless of the permissibility of withholding labor depreciation—State Farm does *not* "breach[] its standard-form insurance policy by withholding labor depreciation when

calculating its insureds' [actual cash value] payments." Rather, State Farm breaches its contract if it fails to comply with the terms of the contract, which require State Farm to pay actual cash value, subject to a cap of cost of repair.

This is a crucial distinction. Even assuming the Court holds on a classwide basis that State Farm may not withhold labor depreciation, and even assuming that Plaintiff can identify all class members for whom labor depreciation was withheld, that still would not be enough information to establish that State Farm breached *any*—let alone *all*—of the insurance contracts.

A straightforward hypothetical makes this distinction clear. Suppose Plaintiff is correct that the insurance contract does not permit State Farm to apply labor depreciation to its actual cash value calculations. Further suppose three class members, Anna, Barbara, and Carla, are State Farm policyholders who own homes and sustain roof damage. All three class members have a policy limit of $9,000; for simplicity, all three class members have a deductible of zero. For all three 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.

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 labor depreciation—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," Pet 5, 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 labor depreciation—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 the contractual cap.

Carla elects not to repair her property. Instead, after receiving $8,000, she sues State Farm for breach of the insurance policy. In the litigation, the record establishes that the actual cash value of the property, even without labor depreciation, is $8,000. State Farm's initial estimate of $9,000 (without labor depreciation) was too high, possibly because the insured herself conveyed incomplete information to State Farm. Carla would lose the suit because she received $8,000, which is all she is entitled to under the policy.

Anna, Barbara, and Carla fall within the class definition: all 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 and

Carla are indifferent to whether labor depreciation can be included in actual cash value calculations, because even if it is, Barbara would only be entitled to her actual cost of repair ($8,000), while Carla would only be entitled to the actual cash value as determined in litigation ($8,000), which is what Barbara and Carla already received. For this reason, even if Plaintiff's theory of liability is correct, the class is still composed both of injured class members (like Anna) and uninjured class members (like Barbara and Carla).

Thus, Plaintiff has not proved predominance. 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 and Carla. 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, or whether the plaintiff did or did not in fact receive the actual cash value. 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—because even if State Farm's records state that a class member received an actual cash value payment that was affected by labor depreciation, those records would still not show whether the class member is like Anna or like Barbara or Carla. Thus, an

individualized analysis of a policyholder's repair costs is necessary to determine State Farm's liability to *any* policyholder.

Thus, contrary to the District Court's determination, common questions do not predominate over individualized questions. Indeed, there are no common questions relevant to this case at all. The District Court framed "whether State Farm breached its standard-form insurance policy by withholding labor depreciation when calculating its insureds' ACV payments," RE.178:11516, as a common question that predominates over individualized questions, but it is not a common question in the sense relevant to Rule 23. The answer to that question would not resolve State Farm's liability in *any* case—that "yes" or "no" would have to be weighed alongside other evidence to determine whether State Farm's actual cash value payment was sufficient.

The District Court further asserted that "class certification is not precluded because damages may need to be calculated on an individual basis." RE.178:11515. It relied on the Supreme Court's statement that "at the class-certification stage (as at trial), any model support a plaintiff's damages case must be consistent with its liability case." *Id.* (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013)). This analysis is not persuasive for multiple reasons. First, the problem with class certification here is not merely that "damages may need to be calculated on an individual basis." Rather, individualized *liability* assessments will be necessary—

because without a payment below actual cash value, there is no breach. Indeed, class members who received actual cash value lack standing—and the need to conduct individualized proceedings to identify such class members should preclude class certification. *See, e.g.*, *Cordoba v. DirecTV, LLC*, 92 F.3d 1259, 1274-75 (11th Cir. 2019).

Second, there is no general principle in the law that individualized damages determinations are an insufficient basis to deny class certification. If individualized questions predominate over common questions, class certification should be denied—regardless of whether the individualized questions are on liability or damages issues. *See Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1240 (11th Cir. 2016). *Comcast*'s unremarkable statement that the plaintiff's damages model must be consistent with its liability case does not support the proposition that classes can be certified despite individualized damages questions.

II. This Case Warrants Review Under Rule 23(f).

This case is sufficiently important to warrant review under Rule 23(f). The District Court's error was not merely a fact-bound error limited to this case. Rather, it reflects a fundamental misunderstanding of Rule 23 that, if adopted by other courts, would insert significant mischief into class-action jurisprudence. The District Court accepted Plaintiff's premise that whether "State Farm was entitled to deduct labor depreciation" was the relevant question in the case, and then analyzed

whether *that* issue could be determined on a classwide basis—without undertaking the threshold analysis of whether, in fact, resolving that question would determine State Farm's liability in any particular case. That methodology violated the Supreme Court's command that "[w]hat matters to class certification" is "the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). And, if adopted by other courts, that methodology would open the door to a new, improper avenue to obtain 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.

The Court should additionally grant review in view of the conflict between the decision below and *Brasher v. Allstate Indemnity Co.*, No. 4:18-CV-00576, 2020 WL 4673258 (N.D. Ala. Aug. 12, 2020). The decision below creates the risk that *Brasher* will be nullified. The denial of class certification is not preclusive on unnamed class members. *See Smith v. Bayer Corp.*, 564 U.S. 299 (2011). Hence, counsel for the putative class in *Brasher* may simply find other members of the putative class and file lawsuits in their name until they draw the district judge who decided the case below. That district judge is then likely to certify the class, nullifying the contrary decisions of *Brasher* and other decisions following it. Under

these circumstances, when two district courts within the same state reach opposite conclusions on class certification, this Court should step in.

The Court should grant review under Rule 23 to clarify that district courts must scrutinize a plaintiff's underlying assumption that a supposedly "common question" is actually presented, and determine whether that question has the capacity to yield common answers.

CONCLUSION

The petition for leave to appeal should be granted.

December 14, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December, 2020 a true and correct copy of the foregoing Brief was served via the court's CM/ECF system, and on the following counsel via electronic mail:

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