17-798-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BETTY HARKEY, individually and on behalf of herself and all others similarly situated,

Plaintiff,

GLEN GRAYSON, DOREEN MAZZANTI, DANIEL LEVY, DAVID MEQUET, and LAUREN HARRIS, individually and on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

v.

GENERAL ELECTRIC COMPANY,

Defendant-Petitioner.

On appeal from the United States District Court for the District of Connecticut, No. 3:13-cv-1799, Hon. Warren W. Eginton

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

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber 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, and from every region of the country.

The Chamber represents the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing the requirements for class certification. *See* http://www.chamberlitigation.com/cases/issue/class-actions.

Many of the Chamber's members and affiliates are defendants in cases filed as putative class actions. They therefore have a keen interest in ensuring that courts properly analyze, consistent with the text of Federal Rule of Civil Procedure 23, whether a plaintiff has satisfied the prerequisites for class certification.

While the Chamber agrees with petitioner on all of the issues it has raised, the Chamber believes it is particularly important for the Court to address a recurring issue affecting class action litigation: whether authorization of issue

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

classes contained in Rule 23(c)(4) may be used as an end-run around the critical safeguards provided by Rule 23(b). The answer is "no," and the result of a contrary conclusion would be a flood of time-consuming, expensive, and abusive litigation that would benefit only the lawyers who bring and defend class actions in which only issue certification is proposed. The Chamber therefore has a strong interest in this Court's review of the District Court's erroneous certification of liability-only issue classes in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Supreme Court has repeatedly recognized that abuse of the class action device imposes deeply unfair burdens on both absent class members and defendants, and the Court has held that Rule 23 therefore must be construed in a manner that protects against these abuses. *E.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 629 (1997). Because class actions are an "'exception to the usual rule'" that cases are litigated individually, it is essential that courts apply a "rigorous analysis" to the requirements governing class certification before a lawsuit is approved for class treatment. *Dukes*, 564 U.S. at 349, 351 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)).

Those principles require review and reversal of the District Court's grant of class certification here. Despite acknowledging that the putative class claims

required "individualized inquir[ies] based on the remedial scheme of each state statute and the varying degrees of harm at issue" (Order 12), the District Court certified two liability-only issue classes. As explained by defendant's petition, this decision ignored the numerous remaining individualized issues relating to both liability *and* damages, which render the class claims unmanageable and therefore not appropriate for class treatment.

But the District Court's approach would invite problems far beyond the clear error in this case. Under the approach adopted by the District Court, certification of an issue class action would become almost trivially easy and render the limits imposed by Rule 23(b)(3) meaningless. Would-be class counsel need only identify a single issue of law or fact that is common to the class—a standard that even the most diffuse, unmanageable class claims are likely to satisfy.

This Court should therefore grant the petition and reverse the District Court's order.

ARGUMENT

I. Review Is Warranted Because The District Court Improperly Granted Plaintiffs' Request To Certify Liability-Only Issue Classes Under Rule 23(c)(4).

The District Court stated that selected liability issues can be walled off and accorded class treatment under Rule 23(c)(4), even when the putative class claims fail the predominance requirement of Rule 23(b)(3). *See* Order 10. It therefore

certified an issue class on the question of liability under the consumer protection laws of ***nineteen*** different states as well as a claim for breach of implied warranty under Texas law.

Those liability-only certifications cannot be squared with the law in this Circuit. In *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008), this Court held that an issue class may be certified ***only*** if it will "materially advance the litigation." *Id.* at 234. But the District Court addressed that standard only in passing (Order 6), and proceeded to certify issue classes without meaningfully considering whether an issue class would advance the litigation. If it had done so, the answer was inevitable that issue classes could not "materially advance the litigation," because a "number of questions . . . remain for individual adjudication." *McLaughlin*, 522 F.3d at 234. Accordingly, review is warranted to address the conflict between the District Court's order and this Court's precedent.

Moreover, this Court's review is essential to clarify the limitations that *McLaughlin* imposes on the certification of issue classes under Rule 23(c)(4). Strict adherence to those limitations—rather than the freewheeling approach to certification of issue classes employed by the District Court—is critically important. Unless the limitations on issue classes prescribed by *McLaughlin* are rigorously followed, issue certification will nullify the essential protections that

Rule 23(b) secures. That loose approach would lead to inappropriate class certifications, inviting a flood of nuisance lawsuits and coerced settlements.

A. The District Court's Erroneous Application Of Second Circuit Precedent Conflicts With The Class Certification Test Utilized By Other District Courts Within This Circuit.

The District Court stated that Rule 23(c)(4) allows certification of an issue class "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirements." Order 10. That conclusion has its origins in *In re Nassau County Strip Search Cases*, where this Court held that "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in ***appropriate cases*** to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues." 461 F.3d 219, 226 (2d Cir. 2006) (quotation marks omitted; emphasis added).[2] But the Court in *Nassau* did

[2] The Chamber respectfully submits that the Fifth Circuit's approach to issue certification—that "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, ***as a whole***, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial"—better accords with the text, structure, and history of Rule 23. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) (emphasis added). In an appropriate case, the *en banc* Court should adopt *Castano*'s reasoning and result. But the need for review here does not turn on revisiting *In re Nassau* and subsequent cases; as we explain below, the District Court's order, if left to stand, would undermine this Court's ***existing*** limitations on the use of issue certification.

not specify the categories of cases in which certification of an issue class could qualify as "appropriate."

This Court's subsequent decision in *McLaughlin* filled that gap. The *McLaughlin* plaintiffs brought a RICO class action claiming that they were deceived by the defendant's marketing and branding of "light" cigarettes. 522 F.3d at 220. "The gravamen of plaintiffs' complaint [was] that defendants' implicit representation that Lights were healthier led them to buy Lights in greater quantity than they otherwise would have and at an artificially high price, resulting in plaintiffs' overpayment for cigarettes." *Id.* This Court observed that a RICO violation requires proof of but-for causation, which in turn requires "[i]ndividualized proof . . . to overcome the possibility that a member of the purported class purchased Lights for some reason other than the belief that Lights were a healthier alternative." *Id.* at 223. Similar individualized issues would arise in considering whether the alleged misrepresentation caused economic loss. *Id.* at 226.

Because of "the number of questions that would remain for individual adjudication," such as "reliance, injury, and damages," this Court rejected the plaintiffs' request for issue certification. *McLaughlin*, 522 F.3d at 234. The Court made clear that Rule 23(c)(4) certification is only "appropriate" in cases where an issue class would "materially advance the litigation." *Id.* An issue class also

should not be certified if it "would not reduce the range of issues in dispute and promote judicial economy." *Id.*

Here, the District Court failed to consider seriously whether issue certification in this case would be "appropriate" under the approach set forth in *McLaughlin*. It clearly is not. As the petition explains (at 15-16), the issue classes certified will not dispose of larger issues of causation, injury, and damages—all of which require individualized proof. The District Court incorrectly downplayed these inquiries as mere "damages issues." Order 12. But the glass doors on over 99% of the microwaves at issue have not broken, and the parties' experts ***agreed*** that only 1-2% of the microwaves' doors will ***ever*** break (Pet. 4), meaning that the vast majority of putative class members will not be able to show the injury, causation, and reliance needed to establish ***liability*** under any of the nineteen consumer-protection laws at issue or under Texas implied warranty law (*id.* at 15-16)—much less do so on a class-wide basis.

The need for this Court's review is all the more pressing because other district courts in this Circuit *deny* issue certification in similar circumstances. In *Chen-Oster v. Goldman, Sachs & Co.*, the district court denied a request for issue certification because individualized questions of causation "would effectively swamp" any common questions. 2015 WL 1566722, at *17 (S.D.N.Y. 2015). As the court noted, "the possibility of [issue] certification must be weighed with an

eye toward the end game." *Id.* at *18. Likewise, in *Dungan v. The Academy at Ivy Ridge*, the district court denied issue certification because the individualized issues of reliance and causation were "substantially intertwined with the claims as a whole and predominate over any other common issues." 249 F.R.D. 413, 417 (N.D.N.Y. 2008), *aff'd*, 344 F. App'x 645 (2d Cir. 2009).

Similarly, courts have denied issue certification when, as here, determining liability requires navigating a thicket of varying state laws. In *Rodriguez v. It's Just Lunch, International*, for example, the "variations in state laws" for the plaintiffs' unjust enrichment claims rendered issue certification inappropriate. 300 F.R.D. 125, 143 & n.4 (S.D.N.Y. 2014) (citing *McLaughlin*, 522 F.3d at 234); *accord Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (vacating certification of a nationwide class because "variances in state [consumer-protection] law overwhelm common issues and preclude predominance").

Review is therefore critical to remedy the division among the district courts in this Circuit created by the decision below.

B. Review Is Warranted To Clarify The Limits On Rule 23(c)(4) Certification.

1. Proper Adherence To *McLaughlin* Reduces The Chances That Rule 23(b)(3) Will Become A Nullity In Damages Class Actions.

Review is also imperative to ensure that issue classes under Rule 23(c)(4) do not become an exception that swallows Rule 23(b)(3)'s predominance requirement.

It is well established that, ordinarily, a putative class representative must demonstrate that common issues predominate to obtain certification of a damages class action. As the Supreme Court explained in *Amchem*, the "mission" of the predominance requirement is to "assure the class cohesion that legitimizes representative action in the first place." 521 U.S. at 623. The requirement accomplishes that mission by winnowing out proposed class actions in which the members' claims are riddled with factual and legal differences.

The predominance requirement is for that reason a "demanding" one. *Id.* at 623. Yet that requirement loses all force where, as here, liability-only issue classes are certified without regard to whether certification would meaningfully advance the litigation. Unless that inquiry is conducted, issue certification under Rule 23(c)(4) threatens to become a standardless end-run around Rule 23(b)(3)'s predominance requirement. After all, as long as the defendant has multiple customers or many employees, a creative lawyer almost invariably will be able to identify at least one common legal issue and/or some factual issue that may be subject to common proof.

Even proponents of issue class actions acknowledge that such an approach "fundamentally revamp[s] the nature of class actions." Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 Utah L. Rev. 249, 263 (2002). And not for the

better. Absent strict adherence to the limitations setting forth the narrow category of cases "appropriate" for issue-class certification, certification of issue classes will become routine, and the number of abusive class actions filed will increase.

2. The District Court's Approach To Issue Certification Would Invite A Flood Of Nuisance Lawsuits.

Construing Rule 23(c)(4) to allow routine certification of issue classes inevitably would result in a flood of abusive class actions designed only to coerce unjustified settlements. The consequences for businesses; their owners, customers, and employees; and the judicial system as a whole will be troubling and far-reaching.

Defendants in class actions already face tremendous pressure to capitulate to what Judge Friendly termed "blackmail settlements." Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). The stakes of a class action, once it has been certified, immediately become so great that "even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740 (1975); *accord, e.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("A court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims."); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical

Legal Stud. 811, 812 (Dec. 2010) ("virtually all cases certified as class actions and not dismissed before trial end in settlement").

Allowing easy certification of issue classes will encourage plaintiffs' counsel to file abusive class actions rife with individualized inquiries that would ordinarily flunk Rule 23(b)(3)'s predominance requirement. Those lawyers will reason that, so long as they can carve out discrete issues for certification under Rule 23(c)(4), they can impose massive risks on defendants that force lucrative settlements. *See, e.g.*, Laura J. Hines, *The Unruly Class Action*, 82 Geo. Wash. L. Rev. 718, 764 (2014) ("The pressure to settle may increase because plaintiffs could achieve issue class certification in cases that would otherwise have been rejected for failure to satisfy Rule 23(b)(3)'s predominance test.").

Moreover, the ripple effects of these lawsuits will be felt throughout the economy. Defending and settling the lawsuits—and all the cases in which absent class members may collaterally attack the judgments—would require defendants to expend enormous resources. These costs would not, however, be borne by business and governmental defendants alone. Rather, the vast majority of the expenses would likely be passed along to innocent customers and employees (or to taxpayers) in the form of higher prices and lower wages and benefits; and much of the remainder of the burden would fall on innocent investors.

CONCLUSION

The petition should be granted and the District Court's order reversed.

Dated: March 28, 2017

Respectfully submitted,

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