# 20-2848

**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

IN RE AXA EQUITABLE LIFE INSURANCE COMPANY COI LITIGATION

On Petition to Appeal from an Order of the United States District Court for the Southern District of New York, No. 16-cv-740 (Furman, J.)

**BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING DEFENDANT-PETITIONER**

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Brian D. Boone
ALSTON & BIRD LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280
(704) 444-1000

D. Andrew Hatchett
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309
(404) 881-7000

*Attorneys for Amicus Curiae*

## RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent company, and no publicly held company holds ten percent or greater ownership in the organization.

/s/ *Brian Boone*

*Counsel for Amicus Curiae The Chamber of Commerce of the United States of America*

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## INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 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 in the country. An important function of the Chamber is to represent the interests of its members and the business community before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases of concern to the nation's business communities, including cases involving the application of Rule 23.[1]

This is one of those cases. The District Court misapplied Rule 23's predominance requirement and, in so doing, deprived AXA of individualized defenses to class members' claims. The District Court also violated state sovereignty principles by certifying a nationwide class of plaintiffs pressing claims under New York law even though many of the class members' life insurance policies were issued outside New York. The District Court's decision effectively enshrines New York law as the law of the Nation—a result that

[1] The Chamber certifies that no party or party's counsel authored this brief in whole or in part and that no person except the Chamber, its members, or its counsel funded the brief. All parties to this appeal have consented to this filing.

conflicts with the presumption against extraterritorial application of state laws, violates constitutional principles of state sovereignty, and threatens to disrupt business communities in New York and nationwide.

This Court should grant the Rule 23(f) petition and reverse the District Court's decision to certify a nationwide class of plaintiffs under New York law.

## INTRODUCTION

Class actions are the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). But the exception comes into play only when rigorous analysis shows that a proposed class satisfies Rule 23's prerequisites. When issues distinct to individual class members predominate over common questions, the benefits of a class trial are lost, and class certification is improper—both under Rule 23 and as a matter of due process. Improperly certified class actions also "pressure defendants into settling large claims, meritorious or not, because of the financial risk of going to trial." *Ark. Teacher Ret. Sys. v. Goldman Sachs Grp., Inc.*, 955 F.3d 254, 269 (2d Cir. 2020); *accord Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting). Consumers ultimately bear the costs of improperly certified class actions, passed on through higher prices.

The District Court acknowledged that the liability issues in this case will require unique proof for hundreds of individual class members. That should have foreclosed class certification. But the court certified the class anyway because, in its view, certain supposedly common elements of the plaintiffs' claim—the materiality of the alleged misrepresentations and AXA's alleged

knowledge at the time—are "more substantial" than the threshold question of whether each putative class member actually became aware of a misrepresentation. That conclusion does not square with Rule 23's predominance requirement because the court ignored the implications of its decision for a "class" trial.

The certification order requires plaintiffs to prove that each member of the putative class became aware of an alleged misrepresentation. The Due Process Clause guarantees AXA the opportunity to contest that fact for each individual class member. But as a practical matter, there could be no "class" trial involving evidence about what hundreds of different class members did or didn't learn. Instead, the "class" proceeding would devolve into a series of individual mini-trials, defeating the purpose of class treatment in the first place. The upshot is that trial in this case may produce one of two unlawful results: Either the case will splinter into hundreds of individual lawsuits (which Rule 23 prohibits) or the Court may, when faced with the prospects of a seemingly never-ending stream of mini-trials, cut off AXA's right to present every available defense (which the Due Process Clause prohibits). It was an error to certify a class presenting that dilemma.

What's more, the District Court flouted fundamental limits on state power by certifying a nationwide class of plaintiffs pressing claims under New York's insurance law. The Court ignored the

universally recognized presumption against extraterritoriality. And it ignored constitutional limits on state regulatory power. The U.S. Constitution recognizes each state as an equal sovereign. *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989). A state may not regulate conduct beyond its borders because doing so intrudes on other states' sovereign prerogatives and interferes with Congress's power to enact uniform laws regulating interstate commerce. Although nothing in New York's insurance law suggests that it covers out-of-state policies, the District Court's certification of a nationwide class effectively dubs New York as insurance regulator for the entire Nation.

## ARGUMENT

### I. RULE 23 AND DUE PROCESS FORBID CLASS CERTIFICATION WHEN THRESHOLD LIABILITY ISSUES AND DEFENSES WOULD REQUIRE HUNDREDS OF MINI TRIALS.

Every defendant has a due-process right to "an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972); *see also In re Asacol Antitrust Litig.*, 907 F.3d 42, 52 (1st Cir. 2018). That right is not diminished in the class context. Indeed, the Rules Enabling Act provides that the Rules of Civil Procedure may not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). "[N]o reading" of Rule 23 "can ignore the [Rules Enabling] Act's mandate" (*Ortiz v. Fibreboard Corp.*, 527 U.S. 815,

845 (1999)), which means that "a class cannot be certified on the premise that [a defendant] will not be entitled to litigate its . . . defenses to individual claims." *Dukes*, 564 U.S. at 367; *see also In re Asacol Antitrust Litig.*, 907 F.3d at 58 ("[A] class cannot be certified based on an expectation that the defendant will have no opportunity to press at trial genuine challenges").

The District Court flouted Rule 23 by depriving AXA of the opportunity to raise a key defense to *every* member of the class. It allowed this case to proceed on a class basis only after concluding that the threshold individualized question of the class's statutory misrepresentation claim (whether each member read, received, or became aware of the alleged misrepresentation) is less "substantial" than other supposedly common elements (for instance, whether the alleged representation was false and material). SPA33. The District Court did not explain whether its decision was based on its finding that there are more common questions than individual ones or if it believes that, as a matter of law, common issues of materiality and falsity *always* predominate over individualized exposure questions. Either way, the district court's arbitrary ranking of the issue conflicts with Rule 23.

Examining predominance is not a "bean counting" exercise. *Brown v. Electrolux Home Prods., Inc.*, 817 F.3d 1225, 1235 (11th Cir. 2016). Instead, Rule 23 required the District Court to take a

"qualitative" look (*In re Petrobras Secs. Litig.*, 862 F.3d 250, 271 (2d Cir. 2017)) at what it would take for AXA to defend itself against hundreds of individuals *each* claiming that she "actually read, received, or became aware of" the alleged misrepresentation. SPA27. The existence of even a single individualized question is enough to preclude class treatment if resolving that issue at trial would overwhelm the proceeding. *See Johnson v. Nextel Commc'ns Inc.,* 780 F.3d 128, 146 (2d Cir. 2015) (single individualized issue that goes to the "heart of defendant's liability" defeats class certification); *Ebert v. Gen. Mills, Inc.,* 823 F.3d 472, 479–80 (8th Cir. 2016) (similar).

The District Court's mistake was that it gave no "meaningful consideration to how this case, with its individualized claims and defenses, would be tried." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1278–79 (11th Cir. 2009); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d. Cir. 2008) (courts "must formulate some prediction as to how specific issues will play out [at trial] in order to determine whether common or individual issues predominate"). The Court acknowledged that AXA may need hundreds of mini trials to challenge plaintiffs' contention that each class member was aware of an alleged misrepresentation. SPA27. But the court dismissed that concern as irrelevant, explaining that its "conclusion would not change even if it were to conclude that

more trial time would be devoted to these individual issues than common ones." SPA33.

Rule 23 does not allow that type of "figure-it-out-as-we-go-along approach." *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 425–26 (5th Cir. 2004). The Rule's drafters instruct that "determin[ing] how the case will be tried" is a "critical need" at the certification stage. Fed. R. Civ. P. 23 comm. note, 2003 amend. The District Court's "failure to force a reckoning with these issues prior to the very precipice of trial" was an abuse of discretion. *Vega*, 564 F.3d at 1279; *Robinson*, 387 F.3d at 425–26 (reversing certification because the district court failed to "seriously consider[]" how case would be tried). Other courts facing similar claims have denied class certification when (as the District Court held below) knowledge of a misrepresentation requires individualized proof. *See, e.g.*, *Marotto v. Kellogg Co.*, 415 F. Supp. 3d 476, 481 (S.D.N.Y. 2019) (certification denied because the plaintiffs could not show on class basis that "all members of the class saw the same advertisements" or that each advertisement "contained the alleged misrepresentations"); *see also* AXA Petition at 12–13 & n.4 (compiling New York misrepresentation cases) & n.5 (compiling cases in other states).

The District Court's misapplication of Rule 23 now has this case barreling toward a "class" trial on the misrepresentation

claims that will function more like hundreds of separate trials than a single cohesive proceeding. That is the opposite of what Rule 23 countenances; the Rule exists "to ensure that the class will be certified only when it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated." *Myers v. Hertz Corp.*, 624 F.3d 537, 547 (2d Cir. 2010) (internal quotation omitted). Worse, by its ruling, the Court may rob AXA of its due-process right to present an awareness defense to every member of the class.

That error is not academic. If left to stand, the certification order in this case will encourage additional Rule 23 mischief in cases involving misrepresentation claims, eroding the standards that heretofore have prevented certification of what are by nature individualized claims. As this Court and the Supreme Court have recognized, this will have real-world impact, depriving defendants of the practical ability to test class members' claims on the merits. In the end, consumers bear the costs of faulty class certifications because companies pass through the costs of abusive class actions by charging higher prices.

## II. APPLYING NEW YORK'S INSURANCE LAW TO A NATIONWIDE CLASS IGNORES THE PRESUMPTION AGAINST EXTRATERRITORIALITY AND EXCEEDS CONSTITUTIONAL LIMITS ON STATE POWER.

Although the plaintiffs press claims under New York law, the certified class is not limited to those injured in New York. Instead, the District Court certified a nationwide class, including many plaintiffs whose life insurance policies were issued in states other than New York. Allowing non-New York residents with life insurance policies issued outside the State to sue under New York's insurance law would offend the sovereignty of New York's sister states. It is also at odds with "the established presumption . . . *against* the extraterritorial operation of New York law." *Global Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 969 N.E.2d 187, 195 (N.Y. 2012) (emphasis added). The District Court ignored that longstanding principle.

The presumption against extraterritorial application of state laws is rooted in the Constitution. In our federal system, the "sovereignty of each state . . . implie[s] a limitation on the sovereignty of all of its sister States." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980). One state may not "impos[e] its regulatory policies on the entire Nation." *BMW of N. Am. v. Gore*, 517 U.S. 559, 571, 585 (1996). The rule that one state may not regulate commerce "that takes place wholly outside of the State's

borders" applies "whether or not the [out-of-state-activity] has effects within the State" and "regardless of whether the statute's extraterritorial reach was intended by the legislature." *Healy*, 491 U.S. at 336. The "critical inquiry is whether the practical effect" of the state law "is to control conduct" beyond the State's boundaries. *Id.*

This Court has applied *Healy*'s practical-effect test to preclude states in this Circuit from "project[ing] [their] legislation into other states, and directly regulat[ing] commerce therein, in violation of the dormant Commerce Clause." *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104 (2d Cir. 2003). The District Court's certification of a nationwide class suffers from the same defect. It "does not recognize geographic boundaries." *Id.* at 103. Instead, in certifying a nationwide class under New York law, the District Court has granted New York the power to dictate what qualifies as lawful commerce in every other State. That "kind of potential regional and even national regulation . . . is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state [laws]." *Healy*, 491 U.S. at 340. It also violates the Due Process Clause, which acts "as an instrument of interstate federalism." *Bristol-Myers Squibb Co. v Sup. Ct. of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1780 (2017).

The District Court's certification of a nationwide class means that insurers must comply not simply with the insurance laws of the state in which they sell a policy, but also New York, or else risk liability in New York. *Am. Booksellers*, 342 F.3d at 103. That unconstitutional rule would create chaos for all American businesses, even those that do not operate in New York. And it would leave New York businesses without clear direction when expanding operations into states whose laws do not mirror New York's laws. That is not the system that the Framers intended. The District Court's order violates the constitutional rule that a state may not seek to control "commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336.

## CONCLUSION

This Court should grant the Petition and reverse the District Court order certifying a nationwide class under New York law.

Dated: September 3, 2020

/s/ *Brian Boone*

Brian D. Boone
ALSTON & BIRD LLP
101 S. Tryon Street, Suite 4000
Charlotte, NC 28280
(704) 444-1000

D. Andrew Hatchett
ALSTON & BIRD LLP
1201 West Peachtree Street

Atlanta, GA 30309
(404) 881-7000

Steven P. Lehotsky
Jonathan D. Urick
U.S. CHAMBER LITIGATION
CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

*Attorneys for Amicus Curiae*

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that this brief:

(i) complies with the type-volume limitation of Rules 5(c)(1) and 29(a)(5) because it contains 2,405 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

/s/ *Andrew Hatchett*

## CERTIFICATE OF SERVICE

I certify that, on September 3, 2020, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit. I filed the brief using the CM/ECF filing system, which will send notification of the filing to counsel of record in the case, all of whom are registered on the CM/ECF system.

/s/ *Andrew Hatchett*