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SUPREME COURT OF TEXAS
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No. 13-0849

IN THE SUPREME COURT OF TEXAS

IN RE TRAVELERS LLOYDS OF TEXAS INSURANCE COMPANY,
Relator.

On Petition for Writ of Mandamus
To the 11th District Court, Harris County, Texas
Cause No. 2009-33090

BRIEF OF AMICI CURIAE AMERICAN INSURANCE ASSOCIATION AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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INTEREST OF AMICI CURIAE

The American Insurance Association (AIA) is a leading national trade association representing over 300 major property and casualty insurance companies based in Texas and most other states.[1] AIA members collectively underwrote more than $108 billion in direct property and casualty premiums in 2013, including over 34 percent of the commercial insurance market in Texas. Members range in size from small companies to the largest insurers with global operations. They underwrite virtually all lines of property and casualty insurance.

AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory fora nationwide. AIA also files amicus curiae briefs in significant cases before federal and state courts, including this Court, on issues of importance to the insurance industry and marketplace. AIA has a strong interest here because its members have been sued in putative class actions this one in which the insurance policy provides for appraisal. As an advocate for its members and the insurance

[1] AIA and the Chamber of Commerce of the United States of America submit this brief on their own behalf. This brief is not filed on behalf of Relator Travelers Lloyds of Texas Insurance Company. The fees and costs for this brief were paid entirely by AIA and the Chamber of Commerce of the United States of America. *See* Tex. R. App. P. 11(c).

industry, AIA respectfully submits that its participation in this original proceeding may aid the Court in resolving the issues presented.

The Chamber of Commerce of the United States of America is the world's leading business federation, representing 300,000 direct members and representing indirectly the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every geographic region of the United States. An important function of the Chamber is to represent the interests of its members by participating as amicus curiae in cases involving issues of national concern to American business.

Cases raising significant questions for businesses subject to potential class actions are of particular concern to the Chamber and its members. Accordingly, the Chamber has previously submitted amicus briefs in cases addressing the effect of a mooted named plaintiff on putative class action and collective action claims. *See, e.g.*, *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). The Chamber respectfully submits that its participation in this original proceeding may aid the Court in resolving the issues presented.

SUMMARY OF ARGUMENT

This case involves an important question of law that warrants this Court's mandamus review. The issues presented by Relator Travelers Lloyds of Texas Insurance Company will affect every putative class action in Texas that is subject to out-of-court resolution—whether by appraisal (under many insurance policies), arbitration (under many consumer and employment contracts), or otherwise. Amici's members are frequently sued in putative class actions of this type. They have an abiding interest in ensuring that some form of appellate review is swiftly available when, by ignoring settled law, trial courts force businesses to incur excessive litigation costs, pressuring many into unfair class settlements.

A simple rule should govern the outcome of this case: when a plaintiff receives complete satisfaction of his claim, his case becomes moot and the trial court must render judgment dismissing the case. The trial court failed to follow this rule here, and has kept alive a case in which plaintiff Samuel Guerra no longer has any stake.

Travelers demonstrates convincingly that the trial court misapplied settled Texas law. While we acknowledge that misapplying settled law may not justify mandamus in the ordinary case, this is not the ordinary

case. As we explain in detail below, the trial court's error is one of constitutional magnitude because allowing a named plaintiff whose claim is moot to persist with a putative class action violates the due process rights of Travelers. If for no other reason than avoiding having to resolve this constitutional issue, this Court's immediate intervention through mandamus is warranted. *See Zanchi v. Lane*, 408 S.W.3d 373, 383 n.13 (Tex. 2013) ("'[W]e are obligated to avoid constitutional problems if possible'"). Moreover, allowing putative class litigation to proceed when the named plaintiff's claim is moot imposes inflated costs and unfair settlement pressure on defendants. For this reason, too, this Court's prompt action is necessary.

The trial court contravened due process by refusing to render judgment when there is nothing in the case left to resolve. As we explain below, longstanding common-law principles backed by due process require a court to render judgment when a case is over. Here, Travelers fully satisfied Guerra's claim, yet the trial court refused to render judgment dismissing the case, deviating from settled law and infringing Travelers' constitutional rights.

Further, it is a basic precept of due process that litigants have the right to present every available defense against the claims they face. One such defense is mootness, and when one party shows that an opposing party's claim is moot, the claim must be dismissed. The result cannot be different when a named plaintiff's claim becomes moot in a putative class action. *See Stonebridge Life Ins. Co. v. Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) ("[D]ue process requires that class actions not be used to diminish the substantive rights of any party to the litigation"). Here, however, the trial court refused to dismiss Guerra's putative class action in circumstances where an individual action must be dismissed. By allowing the class action device to modify substantive law, the trial court violated Travelers' due process rights. Guerra cannot insulate his case from dismissal simply by seeking class treatment in his complaint.

While these serious constitutional concerns are reason enough to grant rehearing and mandamus, there is another important reason for doing so. The practical consequences of allowing a plaintiff with moot claims to proceed with class litigation are severe. The mere pendency of a class action "allow[s] plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-*

Atlanta, Inc., 552 U.S. 148, 163 (2008). Class action plaintiffs often seek extensive and costly discovery well before a class is certified, in many cases dissuading defendants from mounting a defense at all. And given the high stakes of class litigation, erroneous rulings can result in devastating liability. For these reasons, the ruling below imposes fundamentally unfair settlement pressure.

This Court should grant rehearing and mandamus and direct the trial court to enter a take-nothing judgment in favor of Travelers.[2]

ARGUMENT

I. THE TRIAL COURT ERRED IN REFUSING TO DISMISS GUERRA'S PUTATIVE CLASS ACTION AFTER HIS CLAIM BECAME MOOT.

A plaintiff's claim for money damages is satisfied when the defendant tenders the entire sum awarded by a tribunal. *See Toonen v. United Services Auto. Ass'n*, 935 S.W.2d 937, 940 (Tex. App.–San Antonio 1996, no writ). Here, as Travelers explains, Guerra's claim for breach of contract

[2] Another Motion for Rehearing pending before this Court—*In re Loya Insurance Co.*, No. 13-0855—presents the same issues. For the reasons provided here, in addition to those set forth by Travelers, this Court should also grant rehearing and mandamus in the *Loya* case.

was adjudicated by a panel of appraisers that made an award in his favor. Relator's Br. on the Merits (Relator's Br.) at 4-5. Travelers then tendered to Guerra a check in the amount of that award, *id.* at 5, thereby satisfying Guerra's claim. Guerra's complaint sought class treatment, *id.* at 4, but since no class has been certified, there is nothing left to resolve, and any decision would be an impermissible advisory opinion. *See Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (explaining that courts may not resolve moot controversies because "courts have no jurisdiction to issue advisory opinions"). (Guerra's belated claim for attorney fees has been waived and is meritless in any event. *See* Relator's Reply Br. on the Merits at 4-7.) Because Guerra's claim has been fully satisfied, his action is moot; indeed, Guerra properly conceded the mootness of his individual claim below. *See* Relator's Br. at 12.

Following "the weight of federal authority," this Court applies a "very bright line rule: If the named plaintiff's individual claims become moot *after* the trial court rules on certification, the suit will usually survive automatically, while if this happens *before*, the suit can survive only if another exception to mootness applies." *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 163 n.135 (Tex. 2012). Travelers has convincingly

demonstrated that the mootness exception for "inherently transitory" claims does not apply here, *see* Relator's Br. at 19-26. No other mootness exception arguably applies, and Guerra does not contend otherwise. Thus, the trial court should have granted Travelers' motion for summary judgment dismissing this case.

On all of these points, we join with Travelers in asking this Court to grant rehearing and mandamus. We write separately to alert this Court to the serious consequences—both constitutional and economic—that would result from failing to dismiss this case now.

II. THE CONSEQUENCES OF FAILING TO GRANT MANDAMUS ARE GRAVE.

A. Under the Due Process Clauses of the Federal and Texas Constitutions, a putative class action must be dismissed when the named plaintiff has obtained all of the relief he requests.

1. When the parties haven nothing more to litigate, due process requires that judgment be rendered.

As the United States Supreme "Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). "Of course, not all deviations from established [common-law] procedures result

in constitutional infirmity." *Id.* But when a state court refuses to follow "the basic procedural protections of the common law [that] have been regarded as so fundamental," the high "Court has not hesitated to find the proceedings violative of due process." *Id.*; *see also id.* at 431-32 (holding that precluding judicial review of the amount of a punitive damages verdict violated due process).

In addition to the due process rights discussed above, Travelers' request for mandamus in this action implicates two of the "basic procedural protections of the common law." *Id.* at 430. First, it is well established that a trial court must render judgment when there are no further disputes to resolve. *See, e.g.*, *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379, 382 (1953) ("nothing remains to be done but the mechanical entry of judgment by the trial court"); *Wabash R.R. Co. v. Tourville*, 179 U.S. 322, 327 (1900) (explaining that a "court had no option or jurisdiction to do anything" "but to enter judgment for Tourville" on the heels of various rulings that "completed the litigation"); *In re Franceschi*, 43 F. App'x 87, 89 (9th Cir. 2002) (per curiam) ("The bankruptcy court's order dismissing Franceschi's complaint was final because it terminated the litigation and left nothing for the court to do but enter judgment");

Justice v. Dubois, No. D045911, 2006 WL 2024395, at *6 (Cal. Ct. App. July 20, 2006) ("To the extent the trial court concludes that no further issues remain to be adjudicated, the court shall enter a judgment").

Second, if a trial court does not render judgment when there is nothing left to resolve, common-law procedures require an appellate court to grant mandamus compelling the trial court to render judgment. "Should it be possible, that in a case ripe for judgment, the court before whom it was depending, could, perseveringly, refuse to terminate the cause; this court, without indicating the character of the judgment, would be required by its duty to order the rendition of some judgment . . . ." *Life & Fire Ins. Co. v. Adams*, 34 U.S. (9 Pet.) 573, 604 (1835); *see also Ex parte Newman*, 81 U.S. 152, 165-166 (1871) ("Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, . . . having heard the cause, refuses to render judgment or enter a decree in the case . . . ."); *In re State ex rel. Rodriguez*, 196 S.W.3d 454, 458 (Tex. App.–El Paso 2006, orig. proceeding) ("Mandamus may . . . be appropriate to impel . . . an entry of a judgment or other act, the doing of which is not discretionary"); *accord, e.g.*, *In re Hood*, 135 F. App'x 709 (5th Cir. 2005) (per curiam) (granting mandamus and

directing a trial court to enter judgment, after many months' delay, because nothing remained to be litigated); *Steccone v. Morse-Starrett Prods. Co.*, 191 F.2d 197, 199 (9th Cir. 1951) ("Under the Judicial Code, and the relevant decisions, mandamus is the appropriate remedy to compel action in the event of failure or refusal of a court to enter judgment when the situation of a case requires").

While these familiar and fundamental features of common-law procedure impose jurisdictional obligations on courts, they are so well-established that their deprivation violates the due process rights and expectations of litigants (or, at minimum, raises grave concern about a constitutional violation). The authorities cited above indicate that judgment must be rendered when no issues remain to be litigated. The obligation to render judgment is stronger still when—as in this case—a defendant has fully satisfied a plaintiff's claim by tendering all relief to which he is entitled. Refusing to render judgment in that instance deprives a defendant of important rights that would vest upon rendition, including property rights (since a judgment is property), *see Tonya K. by Diane K. v. Bd. of Educ. of City of Chi.*, 847 F.2d 1243, 1247 (7th Cir. 1988) (Easterbrook, J.), and the right to bar or preclude future litigation, *see*

Restatement (Second) of Judgments § 13 (1982). Because the fundamental common-law procedures we have described guard against frustrating or eliminating these important rights, those procedures should be considered to be grounded in due process. It follows that the trial court's order refusing to render a judgment of dismissal for Travelers after it satisfied Guerra's claim offends due process. This Court should therefore grant rehearing and grant Travelers' petition for writ of mandamus.

2. Due process is violated when class action procedures deprive a defendant of otherwise available defenses, like Travelers' mootness defense in this case.

A civil defendant's right to present every available defense is among the essential guarantees of due process. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). A plaintiff cannot eliminate that right by pursuing classwide relief. *See* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. Chi. Legal F. 475, 490 (2003) ("[W]e should hold the substantive law constant regardless of whether the plaintiffs proceed by individual action, permissive joinder, or class action"). As this Court has recognized, "due process requires that class actions not be used to diminish the substantive rights of any party to the litigation." *Stonebridge Life Ins. Co.*, 236 S.W.3d at 205; *see also In re Ethyl Corp.*, 975 S.W.2d 606,

613 (Tex. 1998) ("'The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice'" (quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992))).

This means that a plaintiff cannot—by electing to file a putative class action—preclude a defendant from asserting a defense that could be raised in an individual action. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) ("[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its . . . defenses to individual claims"); *see also Stonebridge Life Ins. Co.*, 236 S.W.3d at 205 ("The opportunity to adequately and vigorously present material defenses lies at the very core of the adversarial process and the right to a fair trial, and may not be disregarded for reasons of convenience or economy"); *cf. Citizens Ins. Co. v. Daccach*, 217 S.W.3d 430, 450 (Tex. 2007) ("'[T]here is no right to litigate a claim as a class action'" (quoting *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444, 452-53 (Tex. 2000))).

One such defense is mootness, which defendants are entitled to raise when a trial court loses jurisdiction because of changed circumstances (such as the satisfaction of a plaintiff's claim). *See, e.g.*, *Dear v. City of Irving*, 902 S.W.2d 731, 737 (Tex. App.–Austin 1995, writ denied) (ruling

in appellees' favor on their "affirmative defense[ ] of mootness"); *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 794 (7th Cir. 2013) (discussing the "mootness defense"); *Ramirez v. Sanchez Ramos*, 438 F.3d 92, 100 (1st Cir. 2006) (describing the requirements for "raising a mootness defense").

In light of this authority, the trial court committed an error of constitutional dimensions in refusing to dismiss this case as moot. Guerra's individual claim was mooted by satisfaction when Travelers tendered the appraisal award, and "a court cannot [ ] decide a case that has become moot during the pendency of the litigation." *Heckman*, 369 S.W.3d at 162. "If a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction." *Id.* Travelers therefore had a meritorious mootness defense. *See Dear*, 902 S.W.2d at 737. Travelers would unquestionably have had the right to pursue that defense and obtain a dismissal in an *individual* action; due process commands the same result in a putative *class* action like this one.

The trial court effectively ruled against Travelers on its mootness defense because Guerra pursued class treatment. Since Travelers would

have prevailed on that defense if Guerra had pursued individual relief only, the trial court's ruling contravenes the rule that "class actions not be used to diminish the substantive rights of any party to the litigation." *Stonebridge Life Ins. Co.*, 236 S.W.3d at 205. This Court's action is needed not only to correct the trial court's plainly erroneous application of Texas law, but also to vindicate Travelers' constitutional rights.

B. Exposing a defendant to putative class litigation after satisfying the named plaintiff's claim pressures defendants to settle meritless cases and burdens the economy.

Courts and commentators have long "noted the risk of 'in terrorem' settlements that class actions entail." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (citing *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 677-78 (7th Cir. 2009)); *see also Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 969 (9th Cir. 2014) (describing Congressional efforts "to prevent discovery abuses such as the 'unnecessary imposition of discovery costs on defendants,' particularly as a means to coerce settlement" (quoting *SG Cowen Sec. Corp. v. U.S. Dist. Court*, 189 F.3d 909, 911 (9th Cir. 1999)); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009) ("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"). Defendants are often compelled to settle class actions because the aggregation of "tens of thousands of potential claimants" makes "the risk of an error . . . unacceptable." *AT&T Mobility*, 131 S. Ct. at 1752. "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *Id.*

But the risk of devastating liability is not the only reason that class action defendants face intense pressures to settle. The cost of merely litigating such cases is so great that settlement is often the only economically sensible decision. As the United States Supreme Court recently observed, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge*, 552 U.S. at 163.

This concern is real, not hypothetical. "Generally, prior to the class certification decision, plaintiffs seek expansive general discovery into the class claims, including discovery relating to the merits of the class claims." Linda S. Mullenix, *Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification*, 43 Akron L. Rev. 1197, 1236 (2010). Take, for example, the United States Supreme Court's recent decision in

Standard Fire Insurance Co. v. Knowles, which (just as in Guerra's case) involved claims against an insurer for general contractor overhead and profit. 133 S. Ct. 1345, 1347 (2013). In a similar case brought in the same venue by the same attorneys, the trial court permitted plaintiffs to pursue discovery potentially costing tens of millions of dollars before class certification. Michelle Massey, Failure to Communicate Could Lead to $45 M in Discovery Costs, Southeast Texas Record, Aug. 8, 2007. In another such case, class counsel served 131 interrogatories and 189 document requests with the class action complaint, seeking information going back 20 years. *Basham v. Am. Nat'l Cnty. Mut. Ins. Co.*, No. 2011-0623-3 (Ark. Cir. Ct. Miller Cnty.). Indeed, in this very case, Guerra has already propounded extensive discovery requests, seeking 14 years' worth of information about Travelers' practices. Relator's Br. at 12.

In view of the onerous discovery obligations that class action defendants face even before class certification, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559-60 (2007). This case is therefore particularly appropriate for mandamus review, as the settlement pressure on Travelers will continue

to mount if the case proceeds. This Court may well be deprived of the opportunity to rule on the important issues presented by Travelers if appellate review must await a final judgment.

Finally, the costs of settling in terrorem class actions do not fall exclusively on individual defendants; the costs necessarily drag down the state's economy. "No one sophisticated about markets believes that multiplying liability is free of cost." *SEC v. Tambone*, 597 F.3d 436, 452 (1st Cir. 2010) (en banc) (Boudin, J., concurring). Here, the decision below multiplies potential liability by allowing a plaintiff whose claim is moot to assert claims on behalf of absent claimants. For many companies in many industries, the inflated costs of settling such claims would "get passed along to the public." *Id.* at 453. Thus, this Court should not labor under the impression that the public interest favors maintaining class actions that impose expenses disproportionate to (or even irrespective of) a defendant's fault or responsibility.

These serious policy implications flow from allowing a plaintiff whose claim is moot to conduct litigation on behalf of a putative class. They underscore the importance of ensuring that every defendant is afforded due process.

CONCLUSION

For the foregoing reasons, and those set forth separately by Travelers, this Court should grant rehearing and mandamus.

November 12, 2014

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Tex. R. App. P. 9.4(9)(2)(B) because it contains 3,753 words, excluding the parts of the brief exempted by Tex. R. App. P. 9.4(i)(1).

s/ *Peder K. Batalden*
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served in accordance with the Texas Rules of Appellate Procedure to the following parties via e-service or facsimile on November 12, 2014:

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