IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Case No. 18-60776
Consolidated with No. 19-60201

LORINE MITCHELL,

Plaintiff-Appellee,
v.

STATE FARM FIRE & 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 PETITION FOR REHEARING EN BANC

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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.

Plaintiff-Appellee and related counsel

1. Lorine Mitchell
2. Barrett Law Group, P.A. (David McMullan, Jr., Sterling Starns)
3. Larson King, LLP (T. Joseph Snodgrass)
4. Gilbert McWherter Scott Bobbitt PLC (J. Brandon McWherter)

Defendant-Appellant and related counsel

1. State Farm Fire and Casualty Company, a wholly owned subsidiary of State Farm Mutual Automobile Insurance Company
2. Riley Safer Holmes & Cancila, LLP (Joseph A. Cancila, Jr., Jacob L. Kahn, Mariangela M. Seale, Matthew Crowl)
3. Hickman Goza & Spragins, PPLC (H. Scot Spragins)

Amicus Curiae and related counsel

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.

2. Jenner & Block LLP (Adam G. Unikowsky)

3. U.S. Chamber Litigation Center (Steven P. Lehotsky and Jonathan C. Urick)

/s/ Adam G. Unikowsky
Counsel of Record for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

No party opposes the filing of this *amicus* 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 approximately 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 cash value payments." D. Ct. Order 10-11 (ROA.3719-20). This Court affirmed certification of the class, similarly reasoning that "[t]he calculation of damages

[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.

relating to this claim is properly constrained to the amount of labor depreciation withheld from each class member's … payment." Op. 17. But this question is not 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. The Court should not have upheld the certification of a class that includes uninjured members having no interest in the common question supposedly at the heart of the litigation.

Neither the District Court nor the panel opinion applied the rigorous standards governing class certification under Rule 23. The Chamber and its members have a strong interest in ensuring that federal courts comply with those standards.

SUMMARY OF ARGUMENT

This Court erred in upholding the District Court's decision certifying the class. Even if labor could not be depreciated, the class would still be composed of a mix of policyholders who were injured and policyholders who were not. Identifying injured class members will require the adjudication of individualized issues that predominate over any common issues. En banc review is warranted because the panel's decision conflicts with circuit precedent and will unsettle circuit law governing class certification.

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. D. Ct. Order 14 (ROA.3723). 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.* This Court affirmed, reasoning: "Here, we are addressing the claim that State Farm breached its contracts by depreciating labor costs. The calculation of damages relating to this claim is properly constrained to the amount of labor depreciation withheld from each class member's … payment." Op. 17.

Both the District Court and this 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 may be sufficient notwithstanding labor depreciation. 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. Because those individualized proceedings predominate over any common questions on policy interpretation, the class should not have been certified.

This case warrants en banc review. The panel decision is irreconcilable with *Cruson v. Jackson National Life Insurance Co.*, 954 F.3d 240, 256-57 (5th Cir. 2020), a decision issued only five days earlier. This inconsistency in circuit precedent will cause confusion on the appropriate standard for determining whether a class should be certified under Rule 23. In addition, the Court's decision will harm businesses across this circuit, by paving the way for other plaintiffs to obtain certification of overbroad classes that include uninjured plaintiffs.

ARGUMENT

I. The Panel Decision is Wrong.

The panel framed this case as presenting a single question of contract law that could be resolved for all class members without individualized proceedings. This framing was incorrect. Under the District Court's class certification order, it will be impossible to resolve State Farm's alleged liability to *any* class member without addressing State Farm's individualized defenses.

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. D. Ct. Order 1 (ROA.3710) (quoting policy). If "the repair and replacement is actually completed," State Farm will pay the "additional amount you actually and necessarily spend." D. Ct. Order 2 (ROA.3711) (quoting policy).

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.

The District Court certified a class on this theory, and a panel of this Court affirmed. Accepting Plaintiff's framing of the issue, the panel stated that it was "addressing the claim that State Farm breached its contracts by depreciating labor costs." Op. 17. In the panel's view, "[t]he calculation of damages relating to this claim is properly constrained to the amount of labor depreciation withheld from each class member's ACV payment." *Id.* As the panel understood the case, individualized questions could arise in the "two situations in which State Farm may dispute or adjust its initial estimate of the cost of replacement," but "[t]he defined class as certified by the district court excludes insureds who are in either of those situations." Op. 16-17.

The panel's analysis is incorrect. The "claim" at issue is *not* whether "State Farm breached its contracts by depreciating labor costs," and individualized issues are *not* limited to situations where "State Farm may dispute or adjust its initial estimate of the cost of replacement." Op. 16-17. A straightforward hypothetical makes the panel's error 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 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 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 or replace the damaged part of the property," the maximum amount Barbara is eligible to receive is $8,000. D. Ct. Order 1 (ROA.3710) (quoting policy); *see* Op. 8 n.6 (noting that the actual cash value payment "is capped" such that total payments to the policyholder "do not exceed the amount the homeowner actually spent on repairs"). 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.

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. 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).

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. 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. That is the paradigmatic example of a situation where individualized questions predominate over common questions.

For this reason, the panel's framing of this case was simply wrong. Contrary to the panel's reasoning, Plaintiff's claim is *not* that "State Farm breached its contracts by depreciated labor costs" *in vacuo*. Op. 17. Rather, Plaintiff's claim is that State Farm breached its contract by paying less than it was contractually obliged

to pay. And, contrary to the panel's reasoning, "[t]he calculation of damages relating to this claim" is *not* "properly constrained to the amount of labor depreciation withheld from each class member's ACV payment." *Id.* Rather, the "calculation of damages relating to this claim" will *sometimes* be "the amount of labor depreciation withheld" from the class member (as in Anna's case), and *sometimes* less—or even zero—regardless of whether labor depreciation was withheld from the class member (as in Barbara's case). *Id.*

Finally, contrary to the panel's reasoning, individualized issues are *not* limited to the situations in which "State Farm may dispute or adjust its initial estimate of the cost of replacement." Op. 16. The distinction between Anna and Barbara has nothing to do with State Farm disputing or adjusting its initial estimate of the cost of replacement. Rather, it reflects the fact that the *actual* cost of repair is a cap on State Farm's liability in *every* case, regardless of whether State Farm's estimate of the cost of replacement is right or wrong. The panel simply overlooked this issue, which should have been dispositive on class certification.

II. En Banc Review is Warranted.

The Court should rehear this case en banc. In addition to being wrong, the panel's decision unsettles circuit precedent and will afford class-action lawyers a means to evade Rule 23's rigorous class certification requirements.

The panel decision cannot be reconciled with a decision issued by a different panel of this Court five days earlier. *See Cruson v. Jackson Nat'l Life Ins. Co.*, 954 F.3d 240 (5th Cir. 2020). *Cruson*, like this case, involved a putative class action brought by policyholders against their insurer, Jackson. As here, the allegedly common question was whether a particular type of computation performed by the insurer (the calculation of "surrender charges") violated the insurance policy. *Id.* at 246. The panel concluded, *inter alia*, that the class should not have been certified because the plaintiffs could not show predominance. The panel agreed with the plaintiffs that the allegedly "excessive charges" could be "reckoned by fairly straightforward math from Jackson's files." *Id.* at 258. Nevertheless, class certification was still unwarranted because that "fairly straightforward math" would not resolve the insurer's liability to any class member, in view of Jackson's "defense … that individual class members waived any objection to the calculation of surrender charges by knowingly accepting charges calculated according to Jackson's formula." *Id.* at 256, 258.

If the panel in this case had adopted *Cruson*'s reasoning, State Farm would have prevailed. The panel in this case upheld class certification based on its view that for every class member, the amount of labor depreciation could be calculated by straightforward math. But under *Cruson*'s reasoning, that is *not* enough to uphold class certification: if insurers have other defenses that require individualized

adjudications, class certification is still unwarranted. Here, as explained above, State Farm has an individualized defense as to every class member—which means that, under *Cruson*'s reasoning, individualized questions predominate.

If district courts in this circuit adopt the reasoning of the panel decision rather than *Cruson*, considerable harm will result. The panel upheld class certification on the theory that the common question, which allegedly predominated over individualized questions, was whether State Farm correctly applied labor depreciation. That question can undoubtedly be answered without individualized proceedings, but it is not a common question that predominates over individualized questions in the sense relevant to Rule 23 because it is not a common liability question for the *entire class*. The panel decision 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 predominate and resolve the defendant's liability to *any* class members without further proceedings.

The Court should rehear this case en banc to harmonize circuit precedent and make clear that the presence of individualized defenses forecloses class certification, even in cases involving the interpretation of standardized insurance policies.

CONCLUSION

The petition for rehearing en banc should be granted.

Dated: May 4, 2020

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 2,561 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 4th day of May, 2020 a true and correct copy of the foregoing Brief was served via the court's CM/ECF system.

/s/ Adam G. Unikowsky