IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

Case No. 18-90043

LORINE MITCHELL,

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
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 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

STATEMENT REGARDING CONSENT

Defendant consents to this filing. Plaintiff does not consent to this filing.[1]

IDENTITY AND INTEREST OF AMICUS AND SUMMARY OF ARGUMENT

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.*, *Ferreras v. American Airlines, Inc.*, No. 18-8023 (3d Cir. Mar. 20, 2018); *McArdle v. AT&T Mobility LLC*, No. 18-80102 (9th Cir. Aug. 27, 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

[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.

property, with an initial payment of "actual cash value." Plaintiff told the District Court that the case presented the "common question" of whether State Farm permissibly used a calculation method applying "labor cost 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 cost appreciation." 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 cost 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 Accepting Plaintiff's Representation That The Case Turned On A Common Issue Of Law, And Should Instead Have Scrutinized That Representation.

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 plaintiff's representation that liability turns on a common issue of law, or must instead scrutinize the plaintiff's theory to make sure that is actually true.

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 found that Plaintiff had shown predominance, "agree[ing] with Plaintiff that the issue is not whether the actual cash value payments paid by State Farm were reasonable or sufficient, but rather whether State Farm was entitled to deduct labor depreciation in the first place." Order at 14. It also accepted Plaintiff's theory that "[i]f the policy is held to not have allowed for labor depreciation then the inquiry will be the amount of labor depreciation withheld by State Farm—amounts calculated through [State Farm's system] (using default settings) and easily ascertainable without particularized inquiry into each class member's claim." *Id.*

The District Court erred. It improperly accepted, at face value, Plaintiff's theory that the "issue is not whether the actual cash value payments paid by State Farm were reasonable or sufficient, but rather whether State Farm was entitled to deduct labor depreciation in the first place." *id.* And it improperly relied on that

premise in determining that damages can be determined on a classwide basis. The District Court overlooked that at the class certification stage, district courts must scrutinize the legal assumptions underlying the plaintiff's allegations of commonality and predominance. Thus, the District Court should have scrutinized Plaintiff's legal theory—and if it had done so, it would have found Plaintiff's case wanting.

The issue in this case is plainly *not* "whether State Farm was entitled to deduct labor depreciation in the first place." Order at 14. This is a breach of contract case, and the applicable contractual term is "actual cash value." Thus, the issue in this case is whether State Farm paid "actual cash value," regardless of how "actual cash value" was computed.

Plaintiff did not *show*, and the District Court did not *find*, that determining whether "State Farm was entitled to deduct labor depreciation" will necessarily resolve the actual question on which State Farm's liability turns—whether State Farm's payment was sufficient to cover the "actual cash value" of damaged property. Nor is there any plausible reason to believe this would be true. As the Eighth Circuit explained in *In re State Farm Fire & Casualty Co.*, 872 F.3d 567 (8th Cir. 2017) ("*LaBrier*"), whether State Farm sufficiently paid "actual cash value" to any particular policyholder is a question of fact—and State Farm's application of labor depreciation is simply one factor the factfinder could consider

in deciding that question of fact. *LaBrier* correctly held that "embedded-labor-cost depreciation is one factor that the trier of fact may *consider* and weigh among other factors to determine the actual cash value of the damaged property … Thus, arguments about whether labor-cost depreciation is 'logical' according to accepted methods of appraisal in a given case are best presented to an appraisal panel or via expert testimony before a jury." *Id.* at 576-77 (quotation marks omitted).

Thus, contrary to the District Court's determination, common issues 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 was entitled to deduct labor depreciation", Order at 14, 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'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's error was its willingness to accept Plaintiff's assertion of a "common question" at face value. 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 plaintiffs must not only *plead*, but also *prove*, that Rule 23's requirements were satisfied. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). 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 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.

II. The Court Should Grant Review To Resolve the Conflict With The Eighth Circuit.

As State Farm accurately points out, the District Court's decision directly conflicts with the Eighth Circuit's *LaBrier* case, in which the Eighth Circuit reversed a materially similar class certification order. This conflict of authority provides a powerful basis to grant review under Rule 23(f), for two reasons.

First, conflicts of authority over class-certification issues are unusually difficult for courts of appeals to resolve in the ordinary course. After a class is certified, cases usually settle, regardless of the merits of the plaintiff's claim. This is because "[c]ertification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), *superseded by rule as stated in, Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017). In view of the strong interest in uniformity across the federal judiciary, the Court should hear this appeal now. Of course, the Court would be entitled to disagree with the Eighth Circuit and create a circuit split. But conflicts of authority should be avoided when possible, and if the Court denies review, a conflict is virtually guaranteed.

Second, conflicts of authority in class-certification cases create an unusual risk of forum-shopping, because plaintiffs can define classes to include individuals residing outside the circuit. In this case, the plaintiff class is limited to Mississippi policyholders. But the District Court's reasoning is likely to influence future plaintiffs to file broad class action suits in the Northern District of Mississippi and rely on the District Court's lenient approach to class certification. That result would create friction with the Eighth Circuit. Plaintiffs could seek to override the Eighth Circuit's ruling in *LaBrier* by filing class actions in Mississippi in reliance

on the District Court's plaintiff-friendly reasoning—and define the plaintiff classes to include residents of states within the Eighth Circuit.

In sum, conflicts of authority in class-action cases are unusually pernicious, and granting review under Rule 23(f) may be the only way to avoid one here. The Court should therefore grant review.

CONCLUSION

The petition for leave to appeal should be granted.

October 15, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(b)(4) because it contains 1,914 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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/s/ Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2018 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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