Nos. 18-3419 & 18-3434

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MICHAEL VOGT,
Plaintiff-Appellee-Cross-Appellant,
v.

STATE FARM LIFE INSURANCE COMPANY,
Defendant-Appellant-Cross-Appellee.

On Appeal from the United States District Court
for the Western District of Missouri, Central Division, No. 2:16-04170-NKL

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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/s/ Adam G. Unikowsky

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No party opposes the filing of this amicus brief.[1]

STATEMENT OF IDENTITY AND INTEREST

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, and from every region of the country. One of the Chamber's most important responsibilities is to represent 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.

The Chamber's members depend on courts to apply "a rigorous analysis" before certifying a class. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). But instead of closely examining whether Plaintiff and his counsel could fairly and adequately represent their proposed class here, the district court brushed aside glaring conflicts of interest. If the court's erroneous reasoning stands, it will invite similar abuses of the class-action device in the future—enriching class counsel at the expense not only of defendants, but also of absent class members whom those

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *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.

counsel cannot fairly represent. The Chamber has an interest in ensuring that courts in this Circuit honor the procedural protections that Rule 23 affords to defendants and absent class members alike. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809-10 (1985) (observing that absent class members' rights are safeguarded in part because "the class-action defendant itself has a great interest in ensuring that the absent plaintiff's claims are properly before the forum," including by raising the alarm when "the absent plaintiffs would not be adequately represented").

INTRODUCTION AND SUMMARY OF ARGUMENT

Rule 23's adequacy requirement ensures that absent class members will not be represented by a named plaintiff or lawyer whose interests conflict with their own. But rather than "uncover[ing] conflicts of interest between the named parties and the class they seek to represent," *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997), the district court certified a class that included members with directly conflicting interests. And the consequences of that error are apparent from the litigation that then unfolded: Plaintiff and his counsel repeatedly advocated positions materially adverse to numerous members of the class they purported to represent. At a minimum, therefore, the class-certification decision should be reversed.[2]

[2] The merits questions in this case are addressed in detail both by State Farm and by the American Council of Life Insurers. The Chamber has no disagreement with any of their arguments. The Chamber submits this brief to support State Farm's arguments on the class-certification question and offer its perspective based on its members' experience with recurring issues of the same kind.

This case began with Plaintiff's allegation that State Farm violated the terms of his insurance policy when it included costs unrelated to mortality risk in his "cost of insurance" (or "COI") charge. But in order to decide that issue of contract interpretation and determine damages, the court resolved critical questions about State Farm's treatment of *mortality-related* costs as well. Plaintiff and his counsel could not fairly or adequately litigate *those* questions on behalf of all policyholders, because any approach to calculating and distributing the mortality-related costs of insurance necessarily increases costs for some policyholders and decreases them for others. Yet the district court twice brushed aside glaring intra-class conflicts of that kind—first in certifying the class, and then in refusing to decertify it.

As State Farm explains, there are in fact two fundamental and mutually reinforcing conflicts in this case. *See* State Farm Br. 43-44. The first is between *past* policyholders—such as Plaintiff, who surrendered his policy in 2013—and *current* policyholders. Past policyholders have every incentive to interpret State Farm's insurance contract in whatever manner is most conductive to establishing State Farm's liability for past alleged overcharges (and to maximizing their asserted damages from these overcharges). Even if that same interpretation of the contract could actually *increase* mortality-based COI charges going forward, that prospect has no bearing on class members who are no longer policyholders at all. For *current* policyholders, by contrast, the possibility that a proposed contract interpretation would

result in higher COI charges over time is a very serious strike against advocating it—a downside risk that might well outweigh any damages that those class members could hope to recover in this litigation.

The second, related conflict is between policyholders who held or have held their policies only for a brief period, and those who held or have held them for many years. This conflict reflects the undisputed fact that shorter-term policyholders present lower annual mortality risks, and thus are cheaper to insure, than more longstanding policyholders. *See* Class Cert. Order, Dkt. 234 at 7. That disparity arises because newer enrollees were approved for insurance based on health information that is still relatively fresh. By contrast, more longstanding policyholders were approved for insurance based on health information that may have become stale as the policy aged. As such, they may have developed health conditions leading to greater mortality that were undetected at the time they purchased their policy.

As a result of this difference in risk profiles, shorter-term policyholders will pay less if an insurer classifies policyholders by "policy duration" and then apportions the aggregate costs of insurance among those classes—requiring each class to bear only its own share of the total cost. But, for exactly the same reason, apportioning the costs of insurance in that fashion will impose *greater* costs on long-term policyholders, who will then bear alone the extra cost that comes with their own higher mortality risk. This is a zero-sum contest: Either the additional cost that

comes with long policy duration will be "pooled" among all otherwise-similar policyholders, or it will be imposed on longstanding policyholders alone.

These two conflicts—between current and former policyholders, and between short-term and long-term ones—manifested in this case in two ways. First, at the liability stage (resolved on summary judgment), Plaintiff successfully advanced an interpretation of State Farm's insurance contract under which a policyholder's COI *must* be based in part on his or her policy duration. *See* SJ Op., Dkt. 218 at 12. That interpretation had no downside for Plaintiff, because he had long since surrendered his policy and is no longer governed by the contract at all. But the interpretation would result in many current policyholders—especially longstanding policyholders—paying *higher* COI charges. Plaintiff and his counsel were plainly not adequate representatives of those disfavored class members for purposes of litigating this question.

Second, the conflict between shorter- and longer-term policyholders arose in another way in the damages-only trial. Once the court concluded that State Farm had included allegedly improper charges in COI, damages could only be calculated by determining the difference between what State Farm *did* charge and what it *would* have charged if it had calculated COI based on mortality-related grounds alone. But the answer to that counterfactual question depended on whether, in point of fact,

State Farm had or had not classified by policy duration in determining each policyholder's COI. Plaintiff argued successfully (albeit with no evidence, *see* State Farm Br. 36-39) that State Farm *had* differentiated by policy duration in this way. That view of the relevant baseline increased damages for short-term policyholders—and it grew the pie of aggregate damages that will determine class counsel's fee—but it substantially *reduced* damages for longstanding policyholders. Again, there could hardly be a clearer conflict than the choice between two competing damages calculations, each of which will award more money to one group of plaintiffs but less to others. And again, Plaintiff and his counsel resolved the conflict in favor of themselves.

The district court's reasons for dismissing these fundamental conflicts reflect grave misunderstandings of class-action law. Indeed, the court rejected both concerns based on pure legal errors, and thus necessarily abused its discretion. *See Postawko v. Mo. Dep't of Corr.*, 910 F.3d 1030, 1036 (8th Cir. 2018). First, the court disregarded the prospective harm that Plaintiff's contract interpretation could do to many current policyholders on the ground that this harm depends on "what might occur after final judgment." JA5349. In other words, the court apparently concluded that even though class counsel's interpretation may result in longstanding policyholders paying higher premiums *in the future*, this could not create a conflict;

conflicts could only arise if class counsel's interpretation would impose adverse legal consequences on class members based on *past* events. The court cited no authority for this holding, and it is wrong. An attorney zealously advocating for her client must consider the effects of her legal positions, both in the past and in the future. An attorney has an ethical duty not to cause affirmative harm to her client in order to benefit her other clients—regardless of what time that harm manifests.

Second, the court dismissed the conflict regarding retrospective damages because the jury apparently adopted "the Plaintiff's calculation." Class Cert. Order, Dkt. 234 at 11; *see* JA5350. But that blatantly begs the question; the conflict here was precisely about whether "Plaintiff's calculation"—as opposed to one more favorable to long-term policyholders—should have been put forward in this case at all. In fact, long-term policyholders would have been better off if Plaintiff had simply *conceded* the correctness of State Farm's assertion that it did not apportion COI by policy duration.

Because the district court failed to protect current and long-term policyholders from the conflict of interest inherent in their representation by Plaintiff and his counsel, the class-certification decision should be reversed.

ARGUMENT

I. UNDER RULE 23, INTRA-CLASS CONFLICTS OF INTEREST PRECLUDE CLASS CERTIFICATION.

Rule 23 permits class certification "only if" the court finds that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). As the Supreme Court has explained, "[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem*, 521 U.S. at 625.[3] In order to be adequate, the putative class representative "must be part of the class and possess *the same interest*" as those he seeks authority to represent. *Id.* at 625-26 (quotation marks omitted; emphasis added); *see also Paxton v. Union Nat'l Bank*, 688 F.2d 552, 563 (8th Cir. 1982) (inquiring whether the named plaintiffs' "interest in procuring their rightful [relief] will be at the expense of other class members or will, in any other way, be antagonistic to the class' interests"). Thus, "if the representative or counsel have conflicting interests [with those of class members], representation will not be adequate." 3 William B. Rubenstein, *Newberg on Class Actions* § 7:31

[3] "The adequacy-of-representation requirement tends to merge with the ... typicality" requirement of Rule 23(a)(3). *Amchem*, 521 U.S. at 626 n.20 (internal quotation marks and alterations omitted). Here, Plaintiff's conflict of interest (which makes him an inadequate representative) is interwoven with the fact that his situation is not "typical" of many class members. *See* State Farm Br. 43-44. For simplicity, we address the issues under the adequacy rubric here.

(5th ed., 2013). At a minimum, Rule 23 requires "the structural protection of independent representation" for distinct subclasses "with conflicting interests." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855 (1999).

Although the adequacy requirement is codified in Rule 23, it is rooted in the fundamental requirements of due process. "The premise of a class action is that litigation by representative parties adjudicates the rights of all class members, so basic due process requires that named plaintiffs possess undivided loyalties to absent class members." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 338 (4th Cir. 1998). When the class representative is afflicted with a conflict, the litigation "no more satisfies the requirements of due process than a trial by a judicial officer who . . . may have an interest in the outcome of the litigation." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940). Given its due-process roots, Rule 23 demands robust protections against both "inequity and potential inequity," *Ortiz*, 527 U.S. at 858, as a precondition to class certification.

The upshot of these principles is that "disparate groups cannot be mixed together under Rule 23(a) where the economic reality of the situation leads some class members to have economic interests that are significantly different from—and potentially antagonistic to—the named representatives purporting to represent them." *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181, 1195 (11th Cir. 2003).

Courts have recognized and enforced that requirement in a wide variety of circumstances. *See, e.g.*, *Broussard*, 155 F.3d at 338 (some class members' "interests in the long-term financial health of the company were imperiled by plaintiffs' efforts to wring a large damage award out of defendants"); *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170, 188 (3d Cir. 2012) (distinct groups posed an "allocative conflict of interest"); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1280 (11th Cir. 2000) ("a class cannot be certified when its members have opposing interests or when it consists of members who benefit from the same acts alleged to be harmful to other members of the class"). As explained below, the "economic reality" here gave rise to another classic "allocative conflict of interest" that made adequate representation of *all* policyholders, by one plaintiff and his counsel, impossible.

II. INTRA-CLASS CONFLICTS SHOULD HAVE PRECLUDED CLASS CERTIFICATION HERE.

This case presents two clear conflicts between different subgroups of the certified class. The first concerns the interpretation of the State Farm insurance policy that determines the rights of all current policyholders; the second concerns the calculation of damages for State Farm's alleged breach of that contract. Either one of these conflicts should have precluded class certification (or required decertification of the class) under Rule 23, and the district court abused its discretion in holding otherwise.

A. The Contract-Interpretation Conflict Barred Certification.

The basic liability question in this case was whether State Farm complied with the terms of its insurance contract with Plaintiff in setting his COI rate. *See* State Farm Br. 15-33. State Farm argued below (and argues here) that (1) the policy language permitted State Farm to include non-mortality costs in its COI rates, and (2) State Farm satisfied its contractual obligation regardless because it did not charge rates in excess of the specific maximum rates established in the policy. *See id.* at 31. In response to the second point, Plaintiff argued that the contract should not be read to authorize all rates below the specified maximums because—according to Plaintiff—the contract provides that maximum rates and actual monthly rates are "based on" different factors. *See* SJ Op., Dkt. 218 at 12; *see also* Pls. Opp. to SJ, Dkt. 191, at 26. Specifically, Plaintiff argued—and the district court then held—that "[b]y referencing both the 'policy year' and the 'policy anniversary' in describing the monthly COI rates, the Policy incorporates the duration of the policy as a factor affecting those rates." SJ Op., Dkt. 218 at 12. In other words, Plaintiff made a strategic judgment to advance an interpretation of the contract that *requires* that monthly COI rates be determined and apportioned based on (among other things) policy duration. *See* State Farm Br. 43-44 (explaining how "Plaintiff altered his theory to claim that the COI rate provision also required State Farm to consider policy duration"); *see also id.* at 31-32.

As State Farm explains, however, apportioning by policy duration is highly unfavorable to current policyholders who have held their policies for long periods or intend to do so. *See* State Farm Br. 43-44; *see also supra* at 4-5 (explaining zero-sum trade-off). Such policyholders benefited instead from a method of calculating rates which "'pools' all policyholders regardless of the number of years elapsed since they purchased their policy." State Farm Br. 44. Thus, these absent class members would have had very strong reasons *not* to advocate the contract interpretation put forward by Plaintiff. But those reasons did not apply to Plaintiff at all, because he surrendered his policy years before bringing this suit. *Id.* at 4. As a result, Plaintiff and his counsel had—and acted on—"interests that are significantly different from[] and potentially antagonistic to" those of many members of the class. *Valley Drug Co.*, 350 F.3d at 1195.

The district court's response to this concern was wholly inadequate. The court acknowledged that "some long-term policy owners may theoretically benefit from State Farm's [alleged] breach of contract going forward"—in other words, that some current policyholders may well be *worse* off under the contract interpretation advocated by Plaintiff (in their name) and embraced by the court here. JA5349. But the court reasoned that no "intra-class conflict currently exists" because "this lawsuit will not set rates going forward." *Id.* Although the court admittedly "*expected* that

State Farm will comply with its contractual obligations [as defined in this case] going forward," the court dismissed that prospect as "[s]peculation about what might occur after final judgment is entered" and thus as insufficient to establish an intra-class conflict. *Id.* (emphasis added).

This reasoning fails on two levels. First, conflicts routinely arise from the divergent costs and benefits that a given course of action—here, securing a judicial order adopting the contract interpretation urged by Plaintiff—*might* have for differently situated parties. If the *risks* of a given strategy for one party outweigh the expected benefits for that party, that party has an undoubted interest in not pursuing that strategy. Accordingly, a lawyer cannot fairly and adequately represent both a plaintiff who has an interest in not pursuing the strategy—even an interest based on risks rather than certainties—and *also* a plaintiff for whom that same strategy promises only upside. Yet that is exactly what the district court permitted Plaintiff and his counsel to do here.[4]

Second, the risk that Plaintiffs' strategy poses for current, longstanding policyholders here is hardly speculative or insignificant. A final judicial order

[4] Moreover, there is nothing unusual about an intra-class conflicts that depends on "what might occur after final judgment is entered." JA5349. *See, e.g.*, *Gen. Tel. Co. of Nw., Inc. v. EEOC,* 446 U.S. 318, 331 (1980) (explaining that an intra-class conflict would bar "the same [named] plaintiff" from representing both employees and new applicants in an employment discrimination case, because, if the plaintiffs prevail, the applicants might go on to "compete with employees for fringe benefits or seniority" later).

construing the insurance contract has obvious significance for how the contract may be implemented or construed in the future. Even in the absence of injunctive relief *requiring* State Farm to comply with the district court's interpretation going forward, the court's opinion and declaratory judgment (if affirmed by this Court) surely make it *likely* that State Farm will do so. Diverging from that interpretation would invite future lawsuits, while complying with that interpretation would almost certainly ensure that State Farm would avoid future liability—even in a suit by a longstanding policyholder who would be harmed by the district court's interpretation. If a longstanding policyholder were to sue State Farm, alleging that the interpretation adopted by the district court was incorrect, State Farm could argue that the policyholder was estopped from advancing such an argument by virtue of her membership in this plaintiff class. Moreover, any opinion in this case will be on-point precedent for reading the contract to require, or not require, apportioning by policy duration. Courts routinely permit parties to intervene in litigation based on their interest in avoiding the announcement of a legal interpretation that, if adopted by others, could injure the intervenor. *See, e.g.*, *Sierra Club v. Glickman*, 82 F.3d 106, 109-110 (5th Cir. 1996); *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001); *Stone v. First Union Corp.*, 371 F.3d 1305, 1310-11 (11th Cir. 2004). A conflicting interest sufficient to support intervention in court is surely sufficient to require independent representation as well.

The same conclusion follows from considering how the conflict here would be treated *outside* the class-action context. In order to adequately and ethically represent a current policyholder in this matter, a lawyer would doubtless have to advise her of the risk that she will ultimately pay *more* as a result of this suit—or, at least, that she will pay more if she prevails in part by persuading the court to hold that COI must be based on policy duration. And if the client determined that the risks outweighed the benefits—as she quite likely would—the lawyer would have to drop the case. But that policyholder and others like her are not entitled to any less zealous and independent representation just because Plaintiff initiated a class action. A class action, after all, is merely "a species" of "traditional joinder." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010). In fact, if anything, the absence of any affirmative consent by absent class members militates in favor of a *heightened* concern for potential conflicts in the class-action context. In short, because Plaintiff and his counsel lacked "undivided loyalties" to current policyholders—despite litigating the meaning of an insurance contract to which they (but not Plaintiff) are still parties—their representation was inadequate under Rule 23. *Broussard*, 155 F.3d at 338.

B. The Damages Conflict Barred Certification.

Even more clear-cut, however, is the related conflict that arose at the damages stage of this case. Remarkably, it appears undisputed that Plaintiff advocated an

account of the facts that resulted in *lower* damages to many class members than *State Farm's own position* on the same factual issue would have required. Plaintiff and his counsel could not possibly have adequately and fairly represented those class members in deciding to turn down money for them.

Specifically, after the district court held that the contract barred State Farm from including non-mortality costs in COI, Plaintiff sought to establish damages by reconstructing State Farm's COI determination for each class member, factoring out those allegedly impermissible charges. *See* State Farm Br. 10. Each class member's damages thus depended on Plaintiff's estimate of the charges that State Farm had imposed on that policyholder on mortality-related grounds alone, before it added any other costs. Plaintiff and State Farm disagreed about how State Farm had in fact apportioned those mortality-related COI charges among policyholders. As relevant here, State Farm argued that it did *not* apportion the mortality-related costs based on policy duration, and offered testimony and documentary evidence to that effect. *See, e.g.*, JA1325-30; State Farm Br. 36-39. But Plaintiff asserted that State Farm *did* apportion costs by policy duration. *See, e.g.*, JA1317-20. Accordingly, he argued, the damages calculations should assume that baseline. *See id.* And the jury agreed. *See* JA5350 ("[T]he jury found that [State Farm] did not pool its mortality rates.").[5]

[5] As State Farm explains, there was insufficient evidence supporting Plaintiff's position on this issue even to create a jury question, and the district court erred

By successfully contending that damages should be based on the factual assumption that State Farm differentiated and apportioned costs by policy duration, Plaintiff and his counsel substantially increased the aggregate damages in this case. *See* State Farm Br. 41. But they undisputedly *reduced* the damages that will be awarded to long-term policyholders among the certified class. Those policyholders would have fared better under *State Farm*'s answer to the same factual question—according to which mortality-related costs *were* spread among policyholders without regard to policy duration. If the jury had accepted State Farm's position on that issue, the proper estimate of long-term policyholders' mortality-based COI charges would have been lower, and so their damages—the difference between their mortality-based charges and the total charges they actually incurred—would have been higher. *See* State Farm Br. 44; JA1069. Thus, in disputing State Farm's testimony that it "pooled" policyholders without regard to policy duration, Plaintiff made "an allocation decision with results almost certainly different from the results that those with [long policy duration] would have chosen." *Ortiz*, 527 U.S. at 857.

The district court's response to this blatant, dollars-and-cents conflict simply missed the point. According to the district court, "State Farm's argument [based on this intra-class conflict] fails because the jury found that [State Farm] did not pool

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in holding otherwise. *See* State Farm Br. 36-39. But the intra-class conflict does not depend on the resolution of that issue.

its mortality rates." JA5350. In other words, *because* Plaintiff and his counsel successfully persuaded the jury of their favored position—i.e., that State Farm had differentiated based on policy duration—that position somehow ceased to be adverse to long-term policyholders. But that is a complete *non sequitur*. Whether or not the jury could be *convinced* of Plaintiff's position, the long-term policyholders were egregiously disserved by his *advocating* that position at all.

By way of analogy, a lawyer who argues that one of his own clients is guilty obviously has not represented that client adequately; it is irrelevant whether the jury goes on to agree. In fact, had long-term policyholders been represented by conflict-free counsel—one who was not motivated to maximize the *aggregate* damages in the case—they would almost surely have conceded State Farm's contention that it "pooled" its mortality rates without regard to policy duration. And had their claims not been precluded by this class action, they would have been free to make their own arguments in the future—this time seeking to maximize recovery for themselves, rather than for Plaintiff and class counsel. Those future courts, presented with different arguments, might well have resolved the factual dispute underlying the damages question differently (if the question were disputed before them at all). Thus, at a minimum, the damages trial could not be conducted on a classwide basis consistent with Rule 23.

CONCLUSION

This Court should reverse the class-certification decision.

Dated: February 5, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type style requirements of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it is proportionally spaced, has a typeface of 14 point Times New Roman, and contains 4,363 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with Circuit Rule 28A(h) because the files have been scanned for viruses and are virus-free.

/s/ Adam G. Unikowsky
Adam G. Unikowsky

CERTIFICATE OF SERVICE

I, hereby certify that on February 5, 2019, I caused the foregoing **Brief of *Amicus Curiae* The Chamber of Commerce of the United States of America** to be electronically filed with the Clerk of the Court for the United States Court Of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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