No. 14-910

IN THE

Supreme Court of the United States

ALLSTATE INSURANCE COMPANY,

Petitioner,

v.

JACK JIMENEZ, individually and on behalf of other members of the general public similarly situated,

Respondent.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

MOTION OF THE RETAIL LITIGATION CENTER, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to this Court's Rule 37.2(b), the Retail Litigation Center, Inc. ("RLC") respectfully moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has declined to consent.

The RLC is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

The question presented in this case is of crucial importance to the retail industry, which stands on the front line of class-action litigation in jurisdictions nationwide. Major retailers are subject to a steady barrage of cases that seek to achieve class-action status but that seek—as this one does—to avoid confronting difficult issues that, under a proper Rule 23 analysis, are required for certification. The Ninth Circuit's permissive approach to class certification invites plaintiffs to file prospective class actions that are not, in fact, suited to resolution in that form. The RLC and its members have a significant interest in ensuring that the standards of Rule 23 and the

fundamental due-process protections owed to class-action defendants are protected. *Amicus* should therefore be granted leave to file the attached brief.

Respectfully submitted.

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INTEREST OF *AMICUS CURIAE*[1]

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

"Certify first, ask questions later." That's the lesson the decision below offers would-be class plaintiffs. Indeed, the Ninth Circuit's holding provides a road map for packaging certification requests in such a way to defer the resolution of virtually every issue of consequence until after the certification threshold has been crossed. That is welcome news to plaintiffs (and their lawyers), for the simple reason that class actions almost always settle before they are subject to adversarial testing in the courtroom or in subsequent "damages" phases. Modern class actions are large, expensive, and unpredictable—so much so that, once a class has been certified, rational corporate decisionmakers can seldom afford to do anything but resolve the case before judgment. As a practical matter, then, the various legal and factual cans kicked down the road in the name of certification are seldom addressed in

[1] As required by this Court's Rule 37.2(a), the parties received timely notice of *amicus*'s intent to file this brief. No counsel for a party has authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to this brief's preparation or submission. See S. Ct. Rule 37.6.

the end. Class certification, simply put, is the ballgame.

This case warrants review. Rather than evaluating whether the legal and factual issues on which the case turns were suited for resolution on a classwide basis, the lower courts accepted respondent's promises to deal with thorny issues down the line. In particular:

1. The courts below held that Rule 23's commonality and predominance requirements were satisfied because respondent identified purportedly common questions that bore a "close connection" to the elements of the plaintiffs' claims. In so holding, those courts brushed aside the extensive individualized proceedings that would be required to determine whether Allstate was, in fact, liable to any individual class member. Instead, those issues were deferred to the "damages phase" of the litigation. A putative class cannot, however, simply recast an individualized element of liability as a deferred "damages issue" in order to obtain certification.

2. The courts below also improperly accepted respondent's assurances regarding a statistical sampling method for proving liability and damages. When the district court certified the class, respondent's expert had not even developed a methodology; his expert report simply laid out ways in which one *could potentially* conduct the general category of analysis he envisioned. This conflicts with *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), where the Court carefully evaluated—and ultimately rejected—the specific damages model a class had proposed. Accepting a vague promise that plaintiffs will someday, somehow, establish their claims through common proof falls far short of the

"rigorous analysis" that is required for class certification.

Serious practical consequences would flow from accepting the lower courts' assurances that these and other issues could be satisfactorily addressed later in the litigation. In the real world, there seldom is a "later." It is widely recognized that most class actions settle shortly after certification. The risks of trying hundreds of claims in a single lawsuit, subject to one jury verdict, are often too great for rational defendants to bear. That is true even where the merits of the underlying case are weak, since a single error in determining liability can have huge consequences. For this reason, plaintiffs who succeed in certifying a class are almost always able to extract what Judge Friendly aptly called a "blackmail settlement."

The standards adopted below would only heighten the pressure to settle. By permitting plaintiffs to defer confrontation of thorny issues until after certification, the lower courts would leave defendants with little idea how their opponents intended to prove their claims. Such uncertainty would make it even more difficult for defendants to evaluate the strength of their cases and would permit plaintiffs to extract unwarranted and unfair settlements. For all of these reasons, this case is exceedingly important and warrants this Court's review.

ARGUMENT

I. The Decision Below Improperly Invites Courts To Certify Classes While Letting Plaintiffs Defer Fundamental Issues To Later Stages Of The Litigation

"Rule 23 does not set forth a mere pleading standard." *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011). In *Wal-Mart* and *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), this Court reemphasized that a court may not certify a class without rigorously analyzing whether the requirements of Rule 23 are satisfied. See *Wal-Mart*, 131 S. Ct. at 2551 ("A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."); *Comcast*, 133 S. Ct. at 1432 (observing that, in deciding whether to certify a class under Rule 23(b)(3), a court has a "duty to take a close look at whether common questions predominate over individual ones") (internal quotation marks omitted). That is true even if the Rule 23 analysis "entail[s] some overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 131 S. Ct. at 2551.

While paying lip service to *Wal-Mart* and *Comcast*, the decision below invites plaintiffs to defer, delay, and dissemble difficult issues until sometime—any time—after they have obtained class certification. The panel's ruling necessarily implies that, to obtain certification, a putative class need only identify a few common questions—even if it leaves hanging acutely individualized issues that are essential to resolution of liability. Likewise, the decision below invites plaintiffs to engage an expert

to testify to the general "propriety" and "feasibility" of the hypothetical analysis he *might* conduct if the case were, someday, to progress to the merits. Rule 23, however, demands much more than certification-by-expectation.

If left undisturbed, the decision below would seriously harm companies that deal with class-action litigation. It invites plaintiffs to achieve certification by characterizing individualized liability issues as "damages" questions or offering only *possible* methods for proving classwide issues, leaving such (potentially dispositive) issues to be addressed only down the line. Plaintiffs then stand to extract massive settlements from defendants, all without ever having to show that their claims could actually be *resolved*—and not merely *initiated*—on a collective basis.

1. *Deferring Individualized Liability Issues to the Damages Stage.* To obtain certification under Federal Rule 23(b)(3), a putative class must demonstrate that there are "questions of law or fact common to the class" that "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(a), 23(b)(3); see also *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 623 (1997) (explaining that the Rule 23(b)(3) predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation").[2] The Ninth Circuit held that the

[2] The Ninth Circuit dismissed Rule 23(b)(3), stating in a footnote that Allstate had waived its predominance argument and that, even if it had not, the panel would affirm the district court's finding of predominance "for many of the same reasons that [it] affirm[ed] the result of its commonality analysis." Pet. App. 7a n.4. The court of appeals' casual disregard for this

Rule 23 requirements were satisfied in this case because there was a "close connection" between the elements of respondent's claim and three purportedly common questions: whether Allstate had unofficial policies that would tend to cause employees to work overtime without pay, whether Allstate generally knew or should have known that employees were working unpaid overtime, and whether Allstate "stood idly by" as all of this occurred. Pet. App. 10a-11a (internal quotation marks omitted).

But the three "common" questions the Ninth Circuit identified say nothing about a critical element of respondent's cause of action: whether the alleged policies in fact caused any individual plaintiff to perform work off the clock. See *Adoma* v. *Univ. of Phoenix, Inc.*, 270 F.R.D. 543, 548 (E.D. Cal. 2010) (explaining that a plaintiff may establish liability only if, *inter alia*, he is able to prove that "he performed work for which he did not receive compensation"). The court below held that resolution of the common questions would "drive the answer to the plaintiffs' claims on [each] of the[] three elements of their claim," Pet. App. 9a, but it ignored that

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issue is surprising, given this Court's recent reaffirmation that Rule 23(b)(3) provides crucial procedural safeguards. See *Comcast*, 133 S. Ct. at 1432 ("Rule 23(b)(3), as an adventuresome innovation, is designed for situations in which class-action treatment is not as clearly called for. That explains Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (*e.g.*, an opportunity to opt out), and the court's duty to take a close look at whether common questions predominate over individual ones.") (internal citations and quotation marks omitted). In any event, Allstate raised its predominance argument below, and the court of appeals addressed the merits of the issue in detail, either of which is sufficient to permit this Court's review. See Pet. 12-13 & n.1.

answering its "common" questions would actually *beg* the essential questions whether there was any unpaid work and whether it was actually caused by these purported unstated policies. In effect, the "common questions" were lauded as a good place to start, with little regard to whether answering them actually moved the case closer to a meaningful determination of liability.

As a result, even after completing the hypothesized classwide proceedings, the district court would still be forced to engage the intensely individualized question of whether Allstate's alleged policies in fact caused each of the many hundreds of individual class members to perform any work off the clock. The plaintiffs could not short-circuit that analysis, since the Due Process Clause entitles a class-action defendant to litigate its defenses against each individual claimant. See *Wal-Mart*, 131 S. Ct. at 2560-61; see also *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007) (holding that the Due Process Clause "prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense'") (quoting *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972)). It seems unavoidable, then, that even after common questions were "resolved" on a collective basis, each class member would have to present individualized evidence regarding his or her claim.

The Ninth Circuit brushed this problem aside, reasoning that Allstate could raise those individualized arguments "at the damages phase of the proceedings." Pet. App. 15a. But—even putting aside the extent to which *Comcast*'s predominance requirement applies at the damages stage, a

question that itself warrants review, see Pet. 29-31—this is not a damages issue. Whether Allstate's alleged policy in fact caused each plaintiff to work overtime without pay is at the core of liability; it is an essential element of respondent's claim. It would be nonsensical to "decide" class liability and only afterward, at the damages stage, decide whether Allstate was in fact liable to each member of the class. Even assuming that the Ninth Circuit was correct that individualized damages issues do not always preclude certification, that does not mean that a court can take an essential question bearing on liability, relabel it a "damages issue," and then ignore it at the certification stage. See, *e.g.*, *Comcast*, 133 S. Ct. at 1437 (Ginsburg, J., dissenting) ("[A] class may obtain certification under Rule 23(b)(3) when *liability* questions common to the class predominate over *damages* questions unique to class members.") (emphases added); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (observing that, to satisfy the Rule 23(b)(3) predominance requirement, plaintiffs "must * * * show that they can prove, through common evidence," the elements of liability); *Butler* v. *Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) ("If the issues of *liability* are genuinely common issues, * * * the fact that damages are not identical across all class members should not preclude class certification.") (emphasis added); *Hohider* v. *United Parcel Serv., Inc.*, 574 F.3d 169, 185-86 (3d Cir. 2009) (holding that certification was unwarranted where resolution of liability would require "individualized" and "divergent" inquiries regarding each class member).[3]

[3] See also Fed. R. Civ. P. 23(b)(3) Advisory Committee's Notes

The decision below invites plaintiffs to identify whatever common threads they can find among a putative class—even if those common threads are as simple as which corporation employs them or what type of remedy they are seeking, see *Wal-Mart*, 131 S. Ct. at 2551—and to defer everything else until sometime after certification. But even "[h]eaps of similarities," much less the mere facts that plaintiffs share a common employer and hold (somewhat) similar job duties, "do not overcome dissimilarities that would prevent common resolution." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009). To allow plaintiffs to punt the issues that individualize their claims, including core liability issues, violates Rule 23 and this Court's precedent. It also harms class-action defendants, like RLC's members, who face improperly certified class actions that effectively foreclose them from presenting their defenses until some undefined "damages" phase.

2. *Deferring the Identification of a Methodology.* The decision below also invites would-be class plaintiffs to defer their identification of the specific methodology by which they will actually try to prove their claims. Respondent advised the district court

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to 1966 Amendments ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of *liability and defenses to liability*, would be present. * * * In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.") (emphases added); *Newberg on Class Actions* § 4:54 (5th ed.) (noting that, "in the qualitative terms that characterize the predominance inquiry, common liability issues are typically far more important and contested" than individualized damages issues).

that the class might rely on statistical sampling and representative testimony to help prove liability and damages. See Pet. App. 15a. In accepting this assurance, the Ninth Circuit panel claimed that the district court had "carefully analyzed the specific statistical methods" respondent proposed to employ. *Ibid.*

But respondent's proposed expert had not, in fact, even taken steps to begin collecting data at the time of certification, much less settled on "specific statistical methods." As the district court acknowledged, the expert report merely discussed the general "propriety of survey research methods," "the feasibility of making class-wide determinations of liability and damages" through those means, and "the specific nature of the questions that *could* be posed to a representative sample of the class members." *Id.* at 46a (emphasis added). The expert report sets forth various options for conducting a survey (in person, by telephone, by mail, etc.); it says nothing about the actual survey design or about the specific statistical model the expert will use to analyze the survey results. In short, the courts below had no specific methodology before them to "analyze[]." They simply accepted respondent's assertion that his expert could envision conducting an analysis of one kind or another, on some future day.

But the law does not permit would-be class plaintiffs to defer identifying the specific methods by which they will prove their claims. In *Comcast*, this Court held that, although "[c]alculations need not be exact," courts must conduct a "rigorous analysis" of plaintiffs' models at the class-certification stage. *Comcast*, 133 S. Ct. at 1433; see also, *e.g.*, *In re Rail*

Freight Fuel, 725 F.3d at 253; *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2008) ("A party's assurance to the court that it intends or plans to meet the [Rule 23] requirements is insufficient.").

Indeed, *Comcast* held certification to be improper where the putative class's proposed regression analysis for measuring damages did not match the class's theories of liability. 133 S. Ct. at 1434; see also *Wal-Mart*, 131 S. Ct. at 2553-54 (scrutinizing plaintiffs' expert testimony and rejecting it because it did not adequately support plaintiffs' case). If class certification did not require plaintiffs to offer any details *whatsoever* regarding their methodology, *Comcast* would establish a toothless standard—the putative class in *Comcast* would have been able to avoid the Court's rigorous analysis of its damages model simply by assuring the district court that "our expert will be able to design a regression model later that will fit our theories of liability perfectly."

Respondent has not offered a methodology that will allow the class to establish liability through common proof; at present, in fact, there is no methodology at all. This is inadequate: "[A]ctual, not presumed, conformance" with Rule 23 is "indispensable" to class certification. *Gen. Tel. Co. of Sw.* v. *Falcon*, 457 U.S. 147, 160 (1982). As the D.C. Circuit put it, if a model is necessary to prove an element of the plaintiffs' claim, "No damages model, no predominance, no class certification." *In re Rail Freight Fuel*, 725 F.3d at 253. Here, too, then, the courts below improperly permitted plaintiffs to put off until tomorrow what they were not prepared to do today, saddling class-action defendants with the risk of massive liability in cases where plaintiffs may not

even be able to prove their claims on a collective basis.

II. Allowing Plaintiffs To Defer Difficult Issues Exacerbates The Coercion Of Unwarranted Settlements

The courts below accepted respondent's assurance that he would address various fundamental issues sometime later, after certification. But that promise rests on a false premise. The vast majority of class actions settle long before trial. As a result, the Ninth Circuit's ruling would invite plaintiffs to extract massive sums from defendants in cases that have no business proceeding as class actions.

A. Certification Coerces Settlement

Despite the Ninth Circuit's assurances that Allstate could raise its defenses and test respondent's methods later in the proceedings, most class actions never see a courtroom. "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." Nagareda, *supra*, at 99. This is because certified class actions are simply too risky to try. When thousands of claims are combined into a single lawsuit—and become subject to a single jury verdict—otherwise ordinary lawsuits transform into bet-the-company litigation. See *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

This Court has recently acknowledged the class-action-settlement phenomenon. In *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2424 n.7 (2014), for example, the Court noted "the substantial *in terrorem* settlement pressures brought to bear by certification." Likewise the Court recently observed

that "[a]n order granting class certification * * * can exert substantial pressure on a defendant 'to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.'" *Amgen Inc.* v. *Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1199-1200 (2013) (quoting Fed. R. Civ. P. 23(f) Advisory Committee's Notes to 1998 Amendments). This is not a new phenomenon. See, *e.g.*, Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1875 (2006) ("Whatever their partisan stakes in a given litigation, all sides recognize that the overwhelming majority of actions certified to proceed on a class-wide basis (and not otherwise resolved by dispositive motion) result in settlements."); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 545 (1997) ("[C]lass certification confers extraordinary power, in many instances irrespective of any substantive merit to the underlying claim.").

The "hydraulic pressure" to settle class actions is present even where the merits of plaintiffs' claims are weak. *Sullivan* v. *DB Invs., Inc.*, 667 F.3d 273, 335 n.4 (3d Cir. 2011). "Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740, 1752 (2011). Simply put, a remote chance of a severely unfavorable outcome is untenable; "defendants would rather settle large class actions than face the risk, even if it be small, of crushing liability from an adverse judgment on the merits." Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under*

Rule 23(f), 41 WM. & MARY L. REV. 1531, 1546-47 n.74 (2000); see also Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 532 (1991) (finding, in an empirical study, that securities class actions tended to settle for similar amounts regardless of the strength of the plaintiffs' claims; this occurred because, among other things, "[t]he stakes in many securities class actions are high enough to threaten the continued existence of the company"). Judge Friendly aptly labeled "settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *Rhone-Poulenc*, 51 F.3d at 1298 (quoting Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973)).

The possibility of error if the case proceeds to trial exacerbates that pressure. Suppose, for example, that a defendant faces lawsuits by several thousand plaintiffs claiming a combined $100 million in damages, but the defendant believes those claims are worth no more than $10 million. Were the lawsuits tried individually, errors in determining liability would tend to cancel each other out; the defendant would win some and lose some and eventually something approaching the expected aggregate liability would result. See *Thorogood* v. *Sears, Roebuck & Co.*, 547 F.3d 742, 745 (7th Cir. 2008). When liability to the class turns on a single jury verdict, however, the defendant has just one "roll of the dice" to decide the fate of the claims: "a single throw will determine the outcome of a large number of separate claims." *Ibid.* That remains true even where, as here, a defendant is assured that it can raise individualized defenses at some later "damages" stage. Before that stage comes, the

defendant might be adjudged liable to all members of the class, based on the testimony of a few representative plaintiffs and a single jury verdict, and without having had a chance to present its individualized defenses. The promise of an as-yet-undefined "damages" proceeding, through which the defendant might someday be able to undo some of that liability, is cold comfort. In short, one error or misstep becomes so costly that the only rational strategy is often to settle.

The out-of-pocket costs of litigating class actions also exert pressure on defendants to settle. See, *e.g.*, Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 15 LAB. LAW. 415, 415-17 (2000) (discussing the high cost of litigating class actions). Pretrial discovery, for example, is especially costly in class actions, and tends to cost defendants far more than plaintiffs. See *Thorogood* v. *Sears, Roebuck & Co.*, 624 F.3d 842, 850 (7th Cir. 2010) ("[T]he pressure on [the defendant] to settle on terms advantageous to its opponent will mount up if class counsel's ambitious program of discovery is allowed to continue.").

All of these pressures explain why plaintiffs fight so hard to certify the biggest class possible. They also have a predictable effect on the quality of class actions: "[T]he ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions." S. REP. NO. 109-14, at 21 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 21; see also *id.* at 20 ("[A] class attorney * * * can essentially force corporate defendants to pay ransom to class attorneys by settling—rather than litigating—

frivolous lawsuits."). Unfortunately, the prophecy that even a meritless class action will settle if certified only makes matters worse: Each large award extracted from a deep-pocketed defendant encourages the filing of still more frivolous lawsuits, especially since class plaintiffs and their attorneys know they will almost surely never have to defend the merits of the suits they have brought. See Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1302 (2002).

There is therefore great danger in the Ninth Circuit's willingness to let plaintiffs avoid confronting the important challenges that defendants could raise against their claims—challenges that, under this Court's case law, bear on the propriety of certification. There is often no "later" when a class is certified. Certification of a dubious class action not only results in a settlement far greater than the plaintiffs deserve on the merits, but it ensures that many more such actions will be filed in the future.

B. The Uncertainty Invited By The Ninth Circuit's Approach Magnifies The Pressure To Settle Even Unmeritorious Class Actions

The rule adopted below would only increase the pressure to settle class actions, even where they lack merit. As explained above, the panel invited would-be class plaintiffs to put off the most difficult issues they face until a later stage of the proceedings. Most notably, whether a particular plaintiff actually worked unpaid hours due to an employer policy is relabeled a "damages" question and deferred. Likewise, respondent was not required to

demonstrate how the putative class would prove liability on a collective basis or even to reveal the specific methods by which the contemplated class would make its case. When a class is certified but such fundamental questions are left unanswered, a defendant faces massive uncertainty. What individualized proof will actually be adduced at the "damages" phase? How would the putative class purport to prove even the "common threads" at the liability phase? What methodology would plaintiffs' expert actually employ? When would these answers be known?

This uncertainty dramatically limits a defendant's ability to evaluate the strength or weakness of the plaintiffs' case. The plaintiffs' superior information about their methods of proof (and about those methods' merit, or lack thereof) gives them an advantage in settlement negotiations. See, *e.g.*, Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404, 406 (1984) (noting that a party with private information "can * * * make a better assessment of the trial's expected outcome"); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 174 (2000) (explaining that, in many models of settlement behavior, it is assumed that "a rational plaintiff with a frivolous claim files suit because she knows defendant does not know whether her claim is frivolous or genuine"). The defendant has only the vaguest notion of what type of evidence it will face on the merits or what kind of opportunity it will have to defend itself. A risk-averse defendant facing so much uncertainty may see no option other than to settle.

When hard questions are neither asked nor answered, defendants cannot meaningfully assess the risk of waiting for future proceedings in which these issues would be resolved. And in such circumstances a defendant has reason to assume the worst, since the consequences of facing classwide liability and damages are massive.

Delaying the day of reckoning serves no legitimate purpose. Courts should make plaintiffs resolve the tough questions that bear on certification up front, rather than allowing the questions to linger unanswered—particularly when the practical consequence of allowing questions to linger is that plaintiffs will extract even more unwarranted and unfair settlements from defendants, at great cost.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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