IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

JEMIL D. AZAR, RONALD J. SOLIMON, and RE/MAX ADVANTAGE, LTD., a New Mexico limited partnership, for themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

No. 22133
(Valencia County District Court
No. D-1314-CV-99-613)

Appeal from the Thirteenth Judicial District Court
Honorable John W. Pope, District Judge

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

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Pursuant to Rule 12-215 of the New Mexico Rules of Appellate Procedure, the Chamber of Commerce of the United States respectfully submits this brief as *amicus curiae* in support of Defendant-Appellant The Prudential Insurance Company of America ("Prudential").

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States (the "Chamber") is the world's largest business federation. With a substantial presence in all fifty States and the District of Columbia, the Chamber represents an underlying membership of more than three million businesses and organizations of every size and kind. As the principal voice of American businesses, the Chamber regularly advocates the interests of its members in state and federal courts throughout the country on issues of national concern.

This appeal involves issues of pivotal importance to the Chamber's members. Like Prudential here, the Chamber's members are the primary targets of multi-state class actions of all types and often face potentially crushing liability in such actions. As a result, the Chamber and its members have a strong interest in ensuring that state and federal courts adhere rigorously to the rules and procedures governing class actions, and that courts grant class certification only when doing so is both fair and consistent with the dictates of the U.S. Constitution. This case, moreover, highlights a disturbing trend: unfounded class actions that allege consumer fraud, but are actually "lawyer-driven" actions meant to generate fees for plaintiffs' lawyers, rather than substantive relief for putative class members. These baseless claims damage the business environment nationally, and especially the environment in the forum in which the class actions are brought, discouraging new-

business enterprise and stunting job growth and consumer choices. The Chamber has a strong interest in helping curb litigation that threatens the vitality of American businesses – not least in New Mexico.

SUMMARY OF PROCEEDINGS

This action is one of twenty-one copycat class actions brought in this State's courts against virtually every major insurance company in the nation.[1] The named plaintiffs in all of the cases bought life or disability insurance – in this case, from Prudential. The language of each of the insurance policies issued to plaintiffs was approved by the New Mexico Superintendent of Insurance. The policy forms were also approved by the insurance commissioner in every other State in the country in which Prudential used them. Pursuant to the policies, plaintiffs were given a choice between paying the full amount of their annual premiums in advance, or paying them in a series of smaller monthly, quarterly, or semi-annual payments (*i.e.*, on a "modal" basis). Rather than pay the

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[1] *Atencio* v. *Manhattan Mutual Nat'l Life Ins. Co.*, No. D-101-cv-20002817; *Wilson* v. *Massachusetts Mutual Life Ins. Co.*, No. D-101-98-02814; *Buscema* v. *Allstate Ins. Co.*, No. D-101-cv-99-2618; *Berry* v. *Federal Kemper*, No. D-101-cv-2000-2602; *Rivera-Platte* v. *First Colony Life Ins. Co.*, No. D-101-cv-2000-2654; *Woody* v. *General Electric Capital*, No. D-101-cv-2001-1318; *Romero* v. *J.C. Penney Life*, No. D-101-cv-2001-270; *Berry* v. *Jackson National*, No. D-101-cv-2000-2603; *Lovato* v. *John Hancock Fin. Servs.*, No. D-101-cv-2000-2818; *Chavez* v. *Lincoln Heritage*, No. D-202-cv-2001-2494; *McNabb* v. *New York Life Ins. Co.*, No. D-101-cv-99-2640; *Friesner* v. *North American*, No. D-101-cv-99-2849; *Enfield* v. *Old Line Life*, No. D-202-cv-2001-1367; *Wodzinski* v. *Peoples Benefit Life Ins. Group*, No. D-101-cv-2000-2816; *Smoot* v. *Physicians Life Ins. Co.*, No. D-101-cv-2001-1207; *Miera* v. *Primerica Life Ins. Co.*, No. D-202-cv-99-5595; *Kollecas* v. *State Farm Ins. Cos.*, No. D-101-cv-99-2620; *Cadigan* v. *Transamerica Life Cos.*, No. D-101-cv-99-2619; *Campbell* v. *Travelers Ins. Co.*, No. D-101-cv-2000-175; *Sanchez* v. *Woodmen of the World*, No. D-725-cv-2001-18.

full annual premiums in advance, plaintiffs chose to pay them either monthly (plaintiffs Jemil Azar and Ronald Solimon) or semi-annually (plaintiff Re/Max).

Each of the policies issued to plaintiffs contained a "Change of Frequency" clause. That clause read: "The more often premiums are due, the larger the total amount that will have to be paid for a contract year." Am. Compl. exs. A, C, D. Each policy and attachment also stated plainly the amount of an insured's required payment if he paid his premium annually or if he chose a modal option; plaintiff Azar, for instance, was informed that his premium would be $675 if he paid once a year, or $63.50 each month if he chose to pay monthly, for a total of $762. As plaintiffs' counsel acknowledged before the District Court (Tr. of Aug. 1, 2000 Hearing, Official Log, Tape 916:351-383), "most people" could easily use the information that Prudential provided them to calculate the difference between annual payments and more frequent payments. In plaintiff Azar's case: $762 - $675 = $87.

Without ever having submitted claims under their policies, plaintiffs sued Prudential in the Thirteenth Judicial District Court, seeking declaratory and injunctive relief as well as compensatory and punitive damages and interest that could well total billions of dollars. Plaintiffs alleged that Prudential had "knowingly failed to state or disclose material facts" to each of them (Am. Compl. ¶¶ 5, 22, 39): not the annual premium, which Prudential had disclosed; not the modal premiums, which Prudential had disclosed; not the fact that the modal premiums would amount to more money in total than the annual premium, which Prudential had disclosed; but the absolute dollar difference

between the annual payment and the total of the modal payments, as well as what plaintiffs called the "annual percentage rate," although that term is lifted from the federal Truth in Lending Act, 15 U.S.C. § 1601 *et seq.*, which preempts any state law that might require disclosure of modal charges as an "annual percentage rate" of interest. Plaintiffs brought their claims on behalf of a putative class that they defined as "*all persons who reside in the United States*" who "at any time between January 1, 1985 and the date of class certification have made premium payments to Prudential with respect to an individual insurance policy, on a monthly, quarterly or semi-annual basis." Am. Compl. ¶ 53(a) (emphasis added).

The District Court granted plaintiffs' motion for summary judgment on liability, holding that Prudential had violated the New Mexico Unfair Practices Act, N.M. Stat. Ann. §§ 57-12-1 *et seq.*, the New Mexico Unfair Insurance Practices Act, N.M. Stat. Ann. §§ 59A-16-1 *et seq.*, and state common law duties to disclose in full material facts. Dist. Ct. Order of Mar. 9, 2001, ¶¶ 3, 5, 7-8. The District Court also certified its order for interlocutory appeal in this Court. It held in abeyance plaintiffs' motion for class certification, pending this Court's review of the decision on liability. On May 10, 2001, this Court agreed to hear Prudential's appeal.

ARGUMENT

The stakes in this litigation and this appeal cannot be understood, or appreciated, by reference to the liability issue alone. Although this Court will consider – and should reverse – the District Court's summary determination of liability, the Court also should recognize the Pandora's Box that

the District Court threatens to open by potentially applying its idiosyncratic view of New Mexico law extraterritorially to persons who live, and transactions that occurred, throughout the United States. Not only does the District Court's odd liability determination deserve this Court's disapprobation on this interlocutory appeal, but so too does any hint that the courts of this State should countenance the unconstitutional application of New Mexico law to persons and transactions with no connection to New Mexico.

Plaintiffs in this case have asked the District Court to certify a class made up, literally, of millions of members located in all fifty States, the District of Columbia, and U.S. territories: *every single person living anywhere in the United States who in the last sixteen years has paid Prudential for insurance on a modal basis.* The certification of so numerically and geographically enormous a class would mean that the District Court's decision to hold Prudential liable in this case would make it liable under New Mexico law, not simply to the small number of Prudential insureds in New Mexico proper, but to millions of insureds dispersed throughout the country. This imposition of New Mexico law on transactions and persons outside New Mexico – indeed, on transactions and persons having nothing to do with New Mexico – would violate settled principles of constitutional law. It would also make New Mexico a haven for plaintiffs' lawyers and abusive class actions, and, concomitantly, discourage and hinder the further development of business in the State.

I. The Application of New Mexico Law to a Nationwide Class Would Be Unconstitutional.

In a wide range of contexts and under various provisions of the United States Constitution, the U.S. Supreme Court has repeatedly rejected attempts by state courts, juries, and legislatures to apply local law extraterritorially, to transactions with little or no connection to the forum State.[2] Several cases are particularly illustrative.

In *New York Life Insurance Co.* v. *Head*, 234 U.S. 149 (1914), for instance, a New Mexican bought life insurance in Missouri from a New York insurer under a policy that provided that New York law would govern it. A beneficiary, who would not have recovered under New York law, brought suit in Missouri for the proceeds of the policy. The Missouri Supreme Court decided that the case was governed by Missouri law. The U.S. Supreme Court reversed, holding that the application of Missouri law would violate due process, as Missouri could not extend its own laws

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[2] See, *e.g.*, *Healy* v. *Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (holding that the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders"); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (rejecting New York's attempt to "project its legislation" into other States); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality opinion) (Illinois statute could not constitutionally regulate transactions occurring outside Illinois); *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302 (1981) (plurality opinion) (majority of Court recognizing that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair"); *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975) (holding that "[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction.").

extraterritorially to govern a contract between a citizen of New Mexico and a citizen of New York – even one entered into in Missouri. "[I]t would be impossible," the Court explained, "to permit the statutes of Missouri to operate beyond the jurisdiction of that state * * * without throwing down the constitutional barriers by which all states are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends." *Id.* at 161. Needless to say, New Mexico has no power to do to Missourians what Missouri could not do to New Mexicans.

In *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1982), a Kansas trial court applied Kansas law to every claim in a class action in which 97% of the class members, and 99% of the transactions at issue, had no connection to Kansas except the lawsuit itself. See *id.* at 815. The Supreme Court held that the application of Kansas law violated the both Due Process Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, and the Full Faith and Credit Clause, *id.* art. IV, § 1. See 472 U.S. at 819-20. Like the out-of-state class members in *Shutts*, the putative class members in this case could not have "had any idea that [New Mexico] law would control" (*id.* at 822) the contracts of insurance that they entered into outside New Mexico. Given New Mexico's complete lack of "a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class," *id.* at 821, the "application of [New Mexico] law to every claim in this case" would be "sufficiently arbitrary and unfair as to exceed constitutional limits," *id.* at 822.

In *BMW of North America* v. *Gore*, 517 U.S. 559 (1996), finally, the Supreme Court held that an Alabama jury could not apply Alabama law to punish a defendant for activity outside Alabama that did not violate the other states' laws. "[A] State may not impose economic sanctions on violators of its own laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572; see also *Huntington* v. *Attrill*, 146 U.S. 657, 699 (1892) ("Laws have no force of themselves beyond the jurisdiction of the state which enacts them, and can have extraterritorial effect only by the comity of other states."). So too in this case: a New Mexico court cannot apply New Mexico law to out-of-state members of the putative class without running afoul of the Constitution.

Given these constitutional limits on choice of law, and the principles of state sovereignty and federalism that animate them, a court should be especially careful not to exceed those limits in cases such as this one. In the McCarran-Ferguson Act, 15 U.S.C. § 1011, Congress reserved the "business of insurance" to "the several States." Consistent with Congress's expressed policy, every State in the nation has an administrative agency that regulates the business of insurance within that State. As a result, in many facets of insurance regulation different states take different approaches. The certification of a nationwide class, and the resulting application of New Mexico law to insurers and insureds having no connection to New Mexico, should not be permitted to undermine Congress's intent that each State be entitled to regulate insurance transactions within its own borders. Cf. *Brown-Forman*, 476 U.S. at 585 (power reserved to the States by the Twenty-first Amendment is eroded, not furthered, by New York law that could "force other States * * * to abandon regulatory

goals"). This is especially true, where, as here, *every state insurance regulator in the nation* has independently considered, and *rejected*, disclosure requirements like that imposed by the District Court on Prudential.

Finally, it bears mention that this due regard for sovereignty and federalism would be just as appropriate if a court outside New Mexico purported to apply its own laws to New Mexicans who contract for insurance in New Mexico. Consider the views of the Commissioner of the District of Columbia Department of Insurance and Securities Regulation, whose comments would surely reflect those of his New Mexico counterpart if the tables were turned.

> Every time a nationwide class action suit involving a regulated industry is won, the authority of the elected or appointed regulator is diminished. As Insurance Commissioner for the District of Columbia, I am charged by law with protecting the citizens of the District against unfair treatment by insurance companies. My office cannot do that job if our authority is subject to challenge by a trial judge in a remote jurisdiction.

Lawrence H. Mirel, *Plaintiffs' Lawyers Have No Business Regulating Insurance*, Wash. Legal Found. Legal Backgrounder vol. 16, no. 12 (Apr. 6, 2001). Speaking specifically of the allegations made in this and the related cases, the D.C. Commissioner continued:

> In fact, no District resident has ever challenged the charges made for modal payments. We have never received a single complaint on that issue. Why, then, should my rulings on policy forms be subject to attack in a New Mexico trial court?

Just as New Mexico's rulings on insurance policies should not be governed by District of Columbia or any other State's laws, so too another State's rulings on insurance policies should not

– and under the Constitution, cannot – be subject to attack in a New Mexico trial court applying New Mexico law. The application of New Mexico law to out-of-state members of the putative class in this action would be unconstitutional. This Court should make that clear.

II. The Application of New Mexico Law to a Nationwide Class Would Make New Mexico a Sanctuary for Abusive Class Actions and Class Action Plaintiffs' Lawyers.

Class actions can serve, and have served, important and positive roles in the legal system. But make no mistake: today, many class actions are not so much vehicles for recovering damages for those who have no incentive to sue on their own, or for effecting wide-ranging societal change, as they are vehicles for generating healthy common-fund fee awards for plaintiffs' lawyers who gin up dubious suits addressing trivial "problems" – quite often, with the putative "clients" receiving little or nothing.[3] Plaintiffs' lawyers regularly troll for individuals to serve as named plaintiffs by scanning news reports or actions by regulatory agencies; they then find a plaintiff-friendly

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[3] See, *e.g.*, Mike France, *On the Prowl for Victims*, BUS. WEEK, Jan. 29, 2001, at 122 (discussing, among other cases, a class action against computer makers for supposedly exaggerating the size of their monitor screens; members of the class received coupons for $13 for future purchases, and the plaintiffs' lawyers split $6.1 million); Bill McClellan, *You Won't Hear Any Snide Comments About This Lawsuit*, ST. LOUIS POST DISP., Dec. 8, 2000, at D1 (credit card holders in a class received credit for 75¢ each; lawyers received $3 million); Ralph T. King, *Princely Fees, Paltry Damages Set Off Protest*, WALL ST. J., Mar. 13, 1998, at B1 (tentative approval of a settlement in a class action against a pharmaceutical company led to sharp criticism; the settlement offered plaintiffs $14 each and plaintiffs' lawyers $28 million); Marc Fisher, *Class Actions' Big Winners: The Lawyers; Huge Fees Contrasted with Plaintiff Benefits*, WASH. POST, May 25, 1997, at A1 (settlement of a class action price-fixing case against airlines; plaintiffs received discount coupons worth up to $25; lawyers received $16 million); Saundra Torry, *Going to the Head of the Class Action Settlement*, WASH. POST, Apr. 8, 1996, at F7 (class action against General Mills resulted in $1.75 million for plaintiffs' lawyers and coupons for the plaintiffs for cereal).

jurisdiction and file a lawsuit.[4] Once they obtain class certification – many times without meeting their burden to show that class status is warranted – the plaintiffs' lawyers use the threat of a massive verdict to procure a quick settlement with provisions for generous fees.

Because judgments in multi-state class actions can be staggeringly large,[5] and adverse publicity raises the stakes still higher, the certification of a large class puts a defendant "under intense pressure to settle" even a meritless case for large amounts. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).[6] Class action litigation has thus become much like shooting fish in a barrel: Once class action lawyers find a forum willing to certify a class, they face almost certain

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[4] See Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998) ("Class Action Hearings"), 1998 WL 122552 (testimony of former Attorney General Dick Thornburgh); *id.* at <http://www.house.gov./judiciary/41158.htm> (statement of John P. Frank); Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts*, WALL ST. J., Oct. 10, 1996, at B1.

[5] See, *e.g.*, Ronald D. Rotunda, *The Long Gavel: In Class Actions, State Judges Are Trumping Other Jurisdictions' Laws*, LEGAL TIMES, May 15, 2000, at 67 (pointing to $1.2 billion multi-state class action judgment in *Avery* v. *State Farm Mut. Auto. Ins. Co.*, No. 97-L-114 (Ill. Cir. Ct., Williamson Cty.), as subverting state sovereignty).

[6] Accord *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) ("[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere."); *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting that there is an "insurmountable pressure on defendants to settle" because the "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

prospects for substantial fees without the risk of a trial. As a result, class actions have increased exponentially over the last several years.[7]

The class action brought against Prudential and the ones similar to it (see *supra* note 1) exemplify these disturbing trends. For example, in settling *Miera* v. *Primerica Life Insurance Co.*, No. D-202-cv-99-5595, Primerica agreed to make certain *future* disclosures in its policies (though not to the extent ordered by the District Court here). The plaintiffs' lawyers received $7.5 million in fees. The members of the class received nothing. In a proposed settlement in *Wilson* v. *Massachusetts Mutual Life Insurance Co.*, No. D-101-98-02814, MassMutual also agreed to make certain disclosures going forward. The plaintiffs' lawyer was to receive $5 million in cash, a $3 million universal life insurance policy with premiums paid by MassMutual, and annuity payments of $250,000 annually for life. One class representative (himself a plaintiffs' lawyer) was to receive

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[7] The Federal Judicial Conference's Advisory Committee on Civil Rules has reported, for example, that during a three-year period U.S. companies experienced a 300% to 1000% increase in the number of putative class actions filed against them. See 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, at ix-x; see also Class Action Hearings, *supra* note 4, 1998 WL 122553 (statement of John W. Martin, Jr.). The Institute for Civil Justice has similarly found that many corporations in the last few years have experienced a doubling or tripling of the number of putative class actions against them. See Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation* 15 (RAND 1997). Moreover, it is clear that much of this increase has been concentrated in the state courts. See *id.* at 15; see also The Interstate Class Action Jurisdiction Act of 1999: Hearings Before the House Judiciary Comm., 106th Cong. (July 21, 1999), 1999 WL 528443 (statement of former Acting Solicitor General Walter E. Dellinger); Elizabeth J. Cabraser, *Life After* Amchem*: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998) (statement by leading class action attorney that "[i]t is no secret that class actions – formerly the province of federal diversity jurisdiction – are being brought increasingly in the state courts").

$250,000, and another $100,000. The 6.5 million members of the class were to receive nothing. So extraordinary was this latter proposed settlement that it drew criticism across the political spectrum, including the charge from the Trial Lawyers for Public Justice, a plaintiffs' lawyers trade association, that the settlement was "an abuse of both the class-action device and class members." (In the face of these charges, the plaintiffs' lawyer ultimately dropped his demands.) See *MassMutual Class Action Settlement Withdrawn*, BEST'S INS. NEWS, Feb. 27, 2001; *Insurance Class Deal Criticized: Lawyer Gets Millions; Policyholders Get New Disclosures*, NAT'L L.J., Feb. 19, 2001, at A4.

These New Mexico settlements were undoubtedly good news for the plaintiffs' lawyers. But they were bad news for the members of the classes, including citizens of New Mexico. And the settlements are ominous warnings for insurers – and other companies – trying to do business in New Mexico. In making clear that a nationwide class should not be certified here, this Court can help restore the class action mechanism to its proper focus and function.

CONCLUSION

The decision of the District Court should be reversed.

Dated: July 9, 2001

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2001, I caused the foregoing Brief of the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Defendant-Appellant to be served by first-class mail, postage prepaid, on the following counsel at the addresses stated:

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