Case No. 02-30540

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MATTIE BRATCHER, ET AL.

Plaintiffs-Appellants,

v.

MONUMENTAL LIFE INSURANCE COMPANY, ET AL.

Defendants - Appellees

On Petitions for Rehearing and Rehearing *En Banc*

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONS FOR PANEL REHEARING AND REHEARING *EN BANC*

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No. 02-30540

In re Monumental Life Ins. Co.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, the Chamber of Commerce of the United States states that the following persons and entities have an interest in the outcome of this matter, in addition to the parties and entities identified in the Certificate of Interested Persons and Corporate Disclosure Statement of the Defendants/Appellees, which is hereby incorporated by reference into this Certificate:

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INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* Chamber of Commerce of the United States (the Chamber) is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Panel Decision in this case, though purporting to *apply* the Fifth Circuit's standard for deciding when monetary claims may be pursued in a class action under Rule 23(b)(2), in fact *rewrites* that standard. Rule 23(b)(2) was intended for cases in which injunctive relief predominates over monetary relief, *i.e.*, cases in which (1) an injunction is the appropriate relief for the class as a whole, and (2) monetary remedies are incidental to that injunction and properly may be granted without individualized determinations of factual or legal issues. The Panel Decision, however, authorized a (b)(2) certification even though a large portion – likely even a great majority (Slip Op. 10) – of the putative class would receive no benefit from the plaintiffs' proposed injunction, and even though the request for monetary damages will require thousands of individualized determinations. This ruling undermines *Allison v. Citgo Petroleum Co.*, 151 F.3d 402 (5th Cir. 1998), and other of this Circuit's authorities, calling for rehearing by the Panel, or rehearing *en banc*. See Fed. R. App. P. 35(a)(1).

By rewriting the standard for (b)(2) class certification, the Panel Decision permits certification under (b)(2) of classes that properly should be subject to the

distinct standards and procedures of Rule 23(b)(3) – or even worse, of classes that properly could not be certified under either (b)(2) or (b)(3). This is a prescription for larger and more complex class action litigation, in which litigants and district courts will face unrelenting pressure to sacrifice precision and fairness in an effort to cope as best they can with unmanageable litigation problems. It is a prescription, as well, for more class actions in which defendants are forced to pay large sums of money to settle cases that lack merit, simply because they cannot afford the cost and risk of litigation. This unwarranted expansion of the grounds for (b)(2) class certification is an issue of exceptional importance that calls for panel rehearing, or for rehearing *en banc*, under Fed. R. App. P. 35(a)(2).

ARGUMENT

In three separate cases in the past five years – *Allison v. Citgo Petroleum Co*., 151 F.3d 402 (5th Cir. 1998), *Bolin v. Sears, Roebuck & Co*., 231 F.3d 970 (5th Cir. 2000), and *McManus v. Fleetwood Enterprises, Inc*., 320 F.3d 545 (5th Cir. 2003) – this Court has acted to preserve the "careful interplay between Rules 23(b)(2) and (b)(3)." *McManus*, 320 F.3d at 554. "The (b)(2) class action . . . was intended to focus on cases where broad, class-wide injunctive or declaratory relief is necessary," *not* on "large-scale, complex litigation for money damages" for which Fed. R. Civ. P. 23(b)(3) was designed. *Allison*, 151 F.3d at 412.

The District Court in this case properly denied plaintiffs' motion for class certification under (b)(2), recognizing that "this is a case in which individuality

overrides any bland group-think, and money becomes the prime goal . . . not injunctive relief." *In re Industrial Life Ins. Litig.*, 208 F.R.D. 571, 573 (E.D. La. 2002) (ellipses in original). Monetary damages for past injury, *i.e.*, repayment of alleged premium overcharges and inferior benefits payments, is the "true central relief," indeed is "the only meaningful relief" for the plaintiffs, largely because "the defendants no longer sell so-called industrial life insurance and have not done so since the mid-1980s." *Id*. at 573-74. But the Panel Decision, reversing the District Court, eviscerates the distinction between certification under (b)(2) and under (b)(3). Its standard for certifying (b)(2) classes will permit class certification for damage claims under (b)(2) that properly should be pursued only under (b)(3), with its distinct standards and procedures for certification – or, as in this case, for damage claims that are not properly certifiable under *either* provision.

I. THE PANEL ERRONEOUSLY PERMITS (b)(2) CERTIFICATION FOR MONETARY CLAIMS EVEN IF THERE IS NO BASIS FOR INJUNCTIVE RELIEF THAT WOULD BENEFIT THE CLASS AS A WHOLE AND DESPITE THE NEED FOR INDIVIDUALIZED DETERMINATIONS ABOUT LIABILITY AND DAMAGES.

The Supreme Court has expressed doubt that Rule 23(b)(2) permits class actions seeking monetary damages under any circumstances. *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994). In the absence of a more definitive ruling from the Supreme Court, this Court has permitted some (b)(2) class actions seeking monetary damages in conjunction with non-monetary equitable remedies – albeit cautiously. See *Allison*, 151 F.3d at 411 & n.3 ("Were we writing on a clean slate,

we might give further consideration to the extent to which monetary relief is available at all in 23(b)(2) class actions."). Mindful of the Advisory Committee's comment that (b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages," this Circuit and others have sharply limited the circumstances in which plaintiffs may seek monetary relief through a (b)(2) class action.

In *Allison*, this Court held that monetary relief predominates, and therefore (b)(2) certification is improper, unless the monetary relief is "incidental to" the requested non-monetary relief.[1] 151 F.3d at 415. The essential characteristic of "incidental" (and thus, under this Court's cases, permissible) monetary claims under (b)(2) is that those claims must seek "*a group remedy*, consistent with the forms of relief intended for (b)(2) class actions." *Ibid*. (emphasis added); see also *McManus*, 320 F.3d at 554 ((b)(2) (class inappropriate because the defendant

[1] The Third, Sixth, Seventh, and Eleventh Circuits have adopted similar standards, all in reliance on *Allison*. *See Barabin v. Aramark Corp*., No. 02-8057, 2003 WL 355417, at *1-2 (3d Cir. Jan. 24, 2003) (citing *James v. City of Dallas*, 254 F.3d 551, 571 (5th Cir. 2001), and *Allison*, 151 F.3d at 415) (attached as Appx. A); *Coleman v. General Motors Acceptance Corp*. 296 F.3d 443, 449 (6th Cir. 2002) (citing *Allison*, 151 F.3d at 415); *Butler v. Sterling, Inc*., No. 98-3223, 2000 WL 353502, at *6 (6th Cir. Mar. 31, 2000) (citing *Allison*, 151 F.3d at 410) (attached as Appx. B); *Lemon v. International Union of Operating Eng'rs*, 216 F.3d 577, 580 (7th Cir. 2000) ("[W]e adopted the Fifth Circuit's reasoning from *Allison*[.]"); *Murray v. Auslander*, 244 F.3d 807, 812 (11th Cir. 2001) (relying on *Allison*, 151 F.3d at 411, 415). The Second Circuit permits (b)(2) certification only if "reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought" and "the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits." *Robinson v. Metro-North Commuter R.R*., 267 F.3d 147, 164 (2d Cir. 2001). The Ninth Circuit also focuses on the "intent of the plaintiffs in bringing the suit." *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003).

"would have to provide *individual* relief * * * as opposed to a 'uniform group remedy'"). Thus, to be permissible under this Court's interpretation of (b)(2), monetary damages – like the injunctive or declaratory relief explicitly addressed by (b)(2) – must flow "to the class as a whole." *Allison*, 151 F.3d at 411. Where, as here, only a portion of the class stands to benefit from the requested non-monetary injunction, monetary relief for the entire class cannot be "incidental to" the injunction. *Bolin*, 231 F.3d at 978-79.

Moreover, consideration of "incidental" damages "should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations." *Allison*, 151 F.3d at 415. Therefore, in this respect also, this Court requires monetary damages to reflect the characteristics of permissible injunctive or declaratory relief under (b)(2), because "sharp differences [among class members] make the class-wide injunctive relief contemplated under Rule 23(b)(2) inappropriate." *McManus*, 320 F.3d at 554. The Panel Decision represents a drastic departure from this standard, and thereby conflicts with prior decisions of this Court.

1. First, as the District Court observed (208 F.R.D. at 573), "many of plaintiffs' proposed class members, such as those who have already had their policies adjusted by the defendants, or those whose policies have lapsed, or those on which death benefits have been paid, would not benefit in any way from the

injunctive relief requested." Compare *McManus*, 320 F.3d at 554 ("[D]amages would be the superior remedy, especially considering that some class members may already own, or have no need for, supplemental brakes."). In light of this undisputed fact, even the *injunctive* relief sought by plaintiffs cannot be said to be a remedy for "the class as a whole," Fed. R. Civ. P. 23(b)(2), which is the type of remedy required in (b)(2) actions. Compare *McManus*, 320 F.3d at 553-54 ("We emphasize that otherwise inappropriate injunctive relief does not become appropriate for class treatment merely because the more permissive Rule 23(b)(2), as opposed to (b)(3), contemplates injunctive relief."). For the large portion of the purported class that would receive no benefit from the injunction, monetary relief can hardly be considered "incidental to" an injunction. Rather, as the District Court found (208 F.R.D. at 574), monetary relief "is the only meaningful relief that could be given." The *Bolin* Court reversed (b)(2) certification under similar facts (231 F.3d at 978): "Most of the class consists of individuals who do not face further harm from Sears's actions. These plaintiffs have nothing to gain from an injunction, and the declaratory relief they seek serves only to facilitate the award of damages. Thus, the definition of the class shows that most of the plaintiffs are seeking only damages."

Disregarding *Bolin* (see Slip Op. 10 ("To the extent that *Bolin* misinterprets *Allison* by conditioning certification on the number of class members that will "truly benefit' from injunctive relief . . ."")), the Panel Decision turned this

requirement on its head, and held that a (b)(2) class may be certified if more than a "*de minimis*" fraction of its members would benefit from injunctive relief.[2] It dismissed the District Court's factual finding that most of the class could not conceivably benefit from the injunction by referring to *Allison*'s observation that some commentators believed it would be wasteful and impossible to determine "in a quantifiable sense" whether injunctive or monetary remedies are predominant. Slip Op. 9 (citing *Allison*, 151 F.3d at 412). But that response utterly misses the point. Of course, it is by definition impossible quantitatively to compare the benefits of monetary relief to the benefits of an injunction – because injunctions address harms that "cannot be undone through monetary remedies." *City of Meridian v. Algernon Blair, Inc.*, 721 F.2d 525, 529 (5th Cir. 1983) (internal quotation omitted). But quantifying whether an injunction would benefit only a small percentage – or a larger percentage, or all – of a purported class is neither

[2] It is far from clear, as a factual matter, that plaintiffs have satisfied even the Panel's misguided "*de minimis*" test. *See* Pet. for Panel Reh. 7-10. The Panel concluded that "[t]he exact number of class members continuing to pay discriminatory premiums is unknown, but we are willing to assume – without contrary evidence from defendants – that the number exceeds the *de minimis* standard set by *Bolin*." Slip Op. 10. The burden is on plaintiffs to prove that they have satisfied the requirements for class certification (see *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, at *4 (5th Cir. 2003)), and the District Court found that monetary relief "is the *only* meaningful relief that could be given." 208 F.R.D. at 574 (emphasis added). The Panel did not explain how it could conclude that certification was appropriate, based on its *own* assumption and in the absence of evidence from the plaintiffs, in disregard of the District Court's finding of fact and the plaintiff's burden of proof – especially in light of this Circuit's deferential review of factual findings under the "clear error" standard. See *Payne v. United States*, 289 F.3d 377, 381 (5th Cir. 2002). The Panel points to nothing about the District Court's well-analyzed order that provides a basis for reaching a "definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

impossible nor wasteful; indeed, it is precisely the exercise that *Allison* compels a court to undertake, essential to deciding whether the injunction would benefit "the class as a whole" – as *Bolin* (231 F.3d at 976), *McManus* (320 F.3d at 554), and the District Court (208 F.R.D. at 573-74) recognized.

2. Second, the Panel brushed aside *Allison's* holding that a (b)(2) class action may not entail "complex, individualized determinations," 151 F.3d at 415. The District Court found, and the Panel acknowledged, that "[t]his is not a case in which class members are entitled to a one-size-fits-all refund" and that the litigation of this action would require examination of a host of characteristics of individual class members and of the particular insurance policy that a specific member may have purchased. Slip Op. 12-13. It concluded, however, that the need for thousands of individualized determinations was not incompatible with (b)(2) certification because those determinations would rest on "objective" data from the defendants' business records, rather than "subjective" evidence. *Id.* at 13-14.

In this respect, the Panel's approach again departs from the standard articulated in *Allison*. The need for individualized determinations – regardless of whether those determinations rest on objective or subjective evidence – is fundamentally inconsistent with the kind of "group remedy" for "the class as a whole" that *Allison* requires for (b)(2) classes, 151 F.3d at 415. Importantly, the individualized determinations are needed not only to determine the amount of

monetary damage a particular class member may have suffered, but also to determine whether a particular class member suffered any compensable injury at all. It is undisputed that the defendants long ago adjusted the premiums and benefits for many of the policies at issue. If some or all of those adjustments were sufficient to remedy any prior discrimination, as all agree is possible, the putative class may include members who are not entitled to any recovery at all. Similarly, the claims of at least one of the named plaintiffs – and presumably the claims of an undetermined number of class members – are barred by the statute of limitations because of actual knowledge of defendants' practices. Quite simply, the Panel's holding cannot be reconciled with *Allison*'s prescription (151 F.3d at 415): "Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case."

Under these circumstances, the ability to use "objective" (yet, *individualized*) evidence cannot obviate resolution of "the disparate merits of each individual's case." *Ibid*. The plaintiffs' requests for monetary damages, on top of the requested injunction requiring defendants to adjust premiums on a going-forward basis, are fundamentally inconsistent with *Allison's* concept of incidental monetary relief because those requests introduce "new and substantial legal or factual issues." *Ibid*.

II. THE PANEL'S ERRONEOUS STANDARD FOR (b)(2) CERTIFICATION WILL LEAD TO LARGER CLASSES AND MORE COMPLEX LITIGATION, EXACERBATING PRESSURE ON DEFENDANTS TO SETTLE CLAIMS WITHOUT MERIT.

The Panel Decision will have severe practical consequences for future class action litigants, many of which are members of *amicus* Chamber – as well as for defendants in this case. First, if plaintiffs' class counsel can bootstrap class certification for literally millions of individual damage claims from a request for an injunction that would benefit only a small fraction of those individuals – anything greater than a *de minimis* number of individuals, in the Panel's formulation (Slip Op. 9-10) – the inevitable consequence will be the certification of much larger classes than would be possible under a proper application of (b)(2). As *Bolin* recognized, plaintiffs' class counsel have powerful incentives to "attempt to shoehorn damages actions into the Rule 23(b)(2) framework. . . . Plaintiffs' counsel effectively gathers clients – often thousands of clients – by a certification under (b)(2)," *Bolin*, 231 F.3d at 976.

Second, by permitting the certification of (b)(2) classes even where thousands of individualized determinations may be required, rather than limiting certification to cases requiring the single "group" determination contemplated by (b)(2) (as in *Allison* and its progeny), the Panel's approach will increase enormously the complexity and cost of litigating (b)(2) class actions. When plaintiffs in complex actions for damages seek class certification under (b)(3) – the

rule intended to govern class certification in such cases – they must show, among other things, that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). In contrast, when class certification under (b)(2) is requested, district courts are expressly *forbidden* to consider questions of manageability and judicial economy, or whether individual issues, rather than common issues, predominate. *Forbush v. J.C. Penney Co., Inc*., 994 F.2d 1101, 1105 (5th Cir. 1993). Thus, if the distinctions between (b)(2) and (b)(3) are blurred, "defendants would potentially be forced to pay what is effectively money damages, without the benefit of requiring plaintiffs to meet the rigorous Rule 23(b)(3) requirements." *McManus*, 320 F.3d at 554.

The Panel's disregard for the proper distinctions between (b)(2) and (b)(3) classes thus permits certification of classes that cannot properly be certified under *either* rule, *i.e*., classes that predominantly seek monetary relief and lack the cohesion that is properly a predicate for certification under (b)(2), and that would be rejected as unmanageable or inferior to other methods of adjudication under (b)(3). This is undoubtedly what has happened in this case. Although plaintiffs could have requested certification under both (b)(2) (seeking injunctive relief where applicable) and (b)(3) (seeking to resolve common issues regarding monetary relief), they chose only the former, presumably recognizing that they

could not satisfy the requirements for the latter. Plaintiffs then argued to this Court, citing *Forbush*, that the District Court erred by considering "predominance" issues that plaintiffs claim are relevant only to a (b)(3) certification (see Pet. for Permission to Appeal 15-16).

If (b)(2) can be misused in this manner, litigants and trial courts will face inexorable pressure to sacrifice precision and fairness in order to cope with the overwhelming burden and complexity of litigating enormous and disparate "class" claims. District courts can be expected to rely increasingly on presumptions rather than actual proof, to curtail discovery into potentially dispositive facts, and to favor evidence pertaining to the entire "class" despite legally important distinctions among class members.[3] Even if the most blatant departures from the due process requirements are correctable, a wide variety of more subtle departures will be the inevitable result of using the (b)(2) procedural mechanism in cases for which it was not designed. There is only one way to fit a large square peg into a small round hole, and that is by cutting corners.

[3] The Panel Decision exemplifies these risks. See Slip Op. 14-15 (relying on "rebuttable" presumption that the class lacks knowledge of defendants' alleged concealment, while suggesting that depositions concerning class members' actual knowledge are unnecessary); *id.* at 15 ("constructive notice" to be determined on national, classwide basis despite variations in degree of local news coverage of issue).

All this will greatly exacerbate an already serious problem for class action defendants.[4] The cost of litigating large class actions and the risk of catastrophic damages in the event of a loss create irresistible pressures on defendants to settle, even when they have meritorious defenses or the plaintiffs' claims are weak. Class actions have been described as "judicial weapons of mass destruction. These suits promise such devastating consequences that even the most innocent of defendants must settle or risk total destruction." Oversight Hearings Regarding Mass Torts and Class Action Lawsuits, House Judiciary Committee, Subcommittee on Courts and Intellectual Property, 105th Cong. (Mar. 5, 1998) (testimony of former Attorney General Dick Thornburgh) (available at <http://www.house.gov/judiciary/41156.htm>).

These realities have not been lost on the courts. As the Supreme Court recognized 25 years ago, "[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). Class certification creates such "irresistible pressure to settle," *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274 (11th

[4] Plaintiffs may be prejudiced as well. See *McManus*, 320 F.3d at 554. When classes are certified under (b)(2) rather than (b)(3), class members may be deprived of important notice and opt-out protections. "Defendants attempting to purchase res judicata may prefer certification under (b)(2) over (b)(3)," *Bolin*, 231 F.3d at 976 – to the detriment of individual class members whose interests may diverge from the interests of the class as a whole.

Cir. 2000), because defendants cannot "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc Rorer*, *Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). When vast numbers of claims are aggregated, "settlement becomes almost inevitable – and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims," *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1016 (7th Cir. 2002), a phenomenon described by one respected federal judge and commentator as the "blackmail settlement." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).[5]

There is no good reason to create such problems by allowing plaintiffs to misuse Rule 23(b)(2). Cases that predominantly seek monetary relief should not be certified under (b)(2). They should be subject to the standards of (b)(3), the rule designed for that purpose.

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[5] See also Janet C. Alexander, *Do the Merits Matter? A study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 567 (1991) ("With . . . adjudication at trial a virtually unthinkable alternative, settlement becomes a foregone conclusion. Moreover, because the parties know that the case will not be decided on the merits, settlement negotiations will be based primarily on non-merits-related factors."); Oversight Hearings, *supra* (testimony of John L. McGoldrick, Vice President and General Counsel of Brisol-Myers Squibb Company) ("I personally have sat in corporate boardrooms and seen senior management of major American companies make the decision -- after shaking their heads in disgust at the legal system -- to pay what amounts to blackmail in order to settle truly meritless lawsuits. Often, this decision is made shortly after the company's lawyers have informed these senior executives that the chance of a judgment for the plaintiffs on the merits of the case is quite small.") (available at <http://www.house.gov/judiciary/ 41162.htm>).

CONCLUSION

For the foregoing reasons and for the reasons stated in the Petitions, the Court should grant rehearing or rehearing *en banc* in this matter.

September 8, 2003

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CERTIFICATE OF SERVICE

I, Donald J. Russell, hereby certify that on September 8, 2003, two paper copies of this Brief Of *Amicus Curiae* and one computer readable 3 ½ inch diskette containing a copy of the same in PDF format were served by U.S. Mail on each of the following counsel of record:

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