No. 13-3215

United States Court of Appeals for the Tenth Circuit

IN RE: URETHANE ANTITRUST LITIGATION

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
THE HONORABLE JOHN W. LUNGSTROM, PRESIDING
D.C. NO. 04-MD-1616-JWL

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DOW CHEMICAL COMPANY'S PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Circuit's Rule 28(a)(1), the *amicus curiae* certifies:

(A) Parties and Amici. Except for the following, all parties, intervenors, and amici appearing before the district court are listed in the Opening Brief of Petitioners: *Amicus Curiae* Chamber of Commerce of the United States of America.

(B) Rulings Under Review. References to the rulings at issue appear in the Opening Brief of Petitioners.

(C) Related Cases. The *amicus curiae* is aware of no related cases pending in this Court or any other Court. The class certification order at issue in this case was previously before this Court on a petition to appeal pursuant to Rule 23(f) of the Federal Rules of Civil Procedure. *In re Urethane Antitrust Litig.*, No. 08-602 (10th Cir. Sept. 2, 2008). This Court denied the petition. *Id.*

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The panel's ruling in this case raises recurring issues of critical importance to the law governing class actions. Plaintiffs' price-fixing claims were certified for class treatment and tried on that basis, producing a $1 billion judgment. Under the panel's decision, any plaintiff alleging an antitrust conspiracy can now invoke Rule 23 and put the defendants at risk of potentially ruinous liability—even if buyers in the relevant market negotiate prices individually and in practice often avoid price hikes. How? Based on "statistical" proof or an "inference" that a conspiracy to raise the products' "starting" prices injures *all* class members, regardless of whether, during actual negotiations, the price increases "stick." Op. 15, 9.

The panel's ruling calls out for en banc review. It conflicts with *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the decisions of several other circuits, the Rules Enabling Act, and due process. The class-action device cannot be used to "'abridge, enlarge, or modify any substantive right.'" *Id*. at 2561 (quoting 28 U.S.C. § 2702(b)). Rather, due process "requires … an opportunity to present every available defense" (*Lindsey v. Normet*, 405 U.S. 56, 66 (1972)), and class-action defendants are thus "entitled to litigate [their] statutory defenses to individual claims" (*Wal-Mart*, 131 S. Ct. at 2561)—here, to *rebut* any inference of injury.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than the *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission.

By approving class treatment for antitrust conspiracies, however, the panel's decision deprives defendants of the right to show that some consumers avoided any overcharges at all. As the panel acknowledged, buyers of polyurethane "negotiate individually with manufacturers regarding price and other terms," and "sometimes avoided price hikes by negotiating with the supplier." Op. 4, 5. In other words, even if some buyers were injured, others were not. But under the panel's holding, defendants cannot press such individualized defenses. That deprivation of the right to raise individual defenses cannot be reconciled with Supreme Court precedent, and itself justifies en banc review.

But there is more. If allowed to stand, the panel's decision will expose businesses to the risk of staggering class judgments and, even for those who manage to defeat liability, substantially higher litigation costs. And since the panel's decision allows virtually any antitrust conspiracy to be prosecuted as a class action, the Tenth Circuit promises to become a hotbed for plaintiffs using the threat of nationwide class liability to pressure defendants into settling baseless claims—claims that the defendants must defend without the ability to raise individualized defenses.

Nor is the panel's reasoning necessarily limited to antitrust claims. It logically could be applied to any conspiracy, including those under RICO. Plaintiffs asserting such claims may now advocate near-automatic class certification and an escape from individualized defenses.

The costs of this regime will be felt throughout the economy. Companies named as defendants "may find it economically prudent to settle and abandon a meritorious defense"—simply to avoid the "potential liability and litigation costs" (*Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978)), which may be "ruinous" (Fed. R. Civ. P. 23(f) Advisory Comm.'s Notes to 1998 Amendments). Ultimately, it is ordinary citizens who will pay—in the form of higher prices and fewer employment opportunities.

In light of the far-reaching consequences of the panel's decision, *amicus* the Chamber of Commerce of the United States of America ("the Chamber") has a vital interest in this case. The Chamber is the world's largest business federation, representing 300,000 direct members, and indirectly representing more than three million businesses and trade and professional organizations of every size, sector, and geographic region. One of the Chamber's most important functions is representing the interests of its members in matters before the courts. To that end, the Chamber regularly files *amicus* briefs in cases that present issues of vital concern to the nation's business community. One of those issues is class certification, and the Chamber filed at the merits stage here.

Given the Chamber's long history of participating in cases that concern the standards for class certification and the troubling implications of the panel's decision, the Chamber urges this Court to grant en banc review.

STATEMENT

Plaintiffs sued Dow and four other manufacturers of polyurethane, alleging that they "coordinated 'lockstep' price-increase announcements and agreed to try to make the price increases stick in individual contract negotiations." Op. 9. But the polyurethane market is characterized by "myriad … products, pricing structure[s], individualized negotiations, and contracts." *Id.* Buyers in this market "negotiate individually with manufacturers regarding price and other terms," and "sometimes avoided price hikes by negotiating with the supplier." Op. 4, 5. In other words, it is undisputed that some buyers were not injured.

The panel nevertheless held that the case was appropriate for class treatment, citing two alternative grounds for its decision. First, it held that a price-fixing conspiracy "creat[es] an inference of class-wide impact [*i.e.*, injury] even when prices are individually negotiated." Op. 13. Second, it held that "the existence of a [price-fixing] conspiracy [is] the overriding issue" and predominates over any "individualized damages issues." Op. 15. Both holdings establish the same precedent: Any alleged price-fixing conspiracy is now appropriate for class treatment.

At trial, the question of impact was litigated as a common issue. Plaintiffs relied on an expert, Dr. McClave, who used "regression models" and other statistical analysis to show classwide impact. Op. 17. Plaintiffs won a $400 million verdict—which, after trebling and offsets, became a $1.06 billion judgment against Dow.

REASONS TO GRANT THE PETITION

I. The panel's decision permits any conspiracy to be certified as a class action, which significantly expands the scope of class liability and conflicts with both the Supreme Court's decision in *Wal-Mart* and the decisions of numerous other circuits.

In upholding class certification based on an "inference" of classwide harm, the panel contravened both *Wal-Mart* and the decisions of several other circuits. Pet. 7-13. Further, by making other conspiracies, such as RICO or common-law civil conspiracies, far easier to certify as class actions, the effects of the panel's decision promise to reach far beyond the antitrust arena.

A. The panel's decision conflicts with *Wal-Mart* and the decisions of other circuits by precluding defendants from arguing that individual class members suffered no harm.

1. The panel here held that an alleged price-fixing conspiracy was appropriate for class treatment based solely on the existence of one common, "overriding issue"—"the existence of a conspiracy." Op. 13, 15. Under this holding, *any* conspiracy case may be tried as a class action, even where it is undisputed that some class members "successfully avoided damages" (Op. 13), and even where certification would deprive the defendant of its right to press individualized defenses.

That is exactly what *Wal-Mart* forbids. "The class action is an *exception* to the usual rule that litigation is conducted by and on behalf of the individual named parties only." 131 S. Ct. at 2550 (quotations and citation omitted, emphasis added). A case is not appropriate for class treatment unless resolving a common con-

tention "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551. Accordingly, where issues central to the litigation (*e.g.*, whether the plaintiff had suffered discrimination, or whether the plaintiff had suffered antitrust injury) can be determined only on an individualized basis, plaintiffs may not use the class device to deprive defendants of their right to "individualized proceedings"—*i.e.*, their right "to litigate [their] statutory defenses to individual claims." *Id.* at 2561.

As Dow has explained (Pet. 4-5), other circuits have reached similar conclusions, holding that class-wide injury may *not* be presumed from the existence of price-fixing conspiracies. *E.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 326 (3d Cir. 2008); *Blades v. Monsanto Co.*, 400 F.3d 562, 569-70 (8th Cir. 2005). As these decisions recognize, in many markets, the crucial question—"Was I injured?"—cannot be answered without depriving defendants of their right "to litigate [their] statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561. But the panel here broke from this reasoning, affirming class certification while acknowledging that the class members here consisted of polyurethane consumers who could "negotiate individually with manufacturers regarding price and other terms"—sometimes "avoid[ing] price hikes by negotiating with the supplier." Op. 5. In other words, there is no way to tell which consumers were injured without examining their individual circumstances.

These factual circumstances are hardly unique. Whenever transactions are individually negotiated, "the actual price paid will be determined at least in part by the negotiating styles of the customers. As a result, proof of antitrust injury is bound to be individualized." 2A Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* § 398(c), at 423 n.14 (2013). And as *Wal-Mart* and many other cases confirm, both due process and the Rules Enabling Act require courts to let class-action defendants press such individualized defenses.

2. The panel's answer to this difficulty was to allow the plaintiffs to rely on an expert who used "regression models" and "extrapolation models" to show classwide impact (Op. 17), creating a "battle of the experts." But under *Wal-Mart*, the class-action device may not be used to deprive defendants of their ability to rely on all of the "individualized" variables and negotiating dynamics that permitted plaintiffs to play one supplier off the other and reach agreement on a competitive price. 131 S. Ct. at 2561. Rather, class-action defendants have a right to show that certain individual class members were not harmed.

When a class has thousands of members, it simply is not feasible to hear such individualized evidence—with appropriate cross-examination—in a classwide trial. Yet the judgment in such cases is intended to have preclusive effect as to every class member. That is why due process has long required that, if "a few are permitted to sue … on behalf of the many, *care must be taken that persons are*

brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried." *Smith v. Swormstedt*, 57 U.S. 288, 303 (1853) (emphasis added). That is why Rule 23 requires genuine commonality and a finding that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). And that is why, if the common *question* of whether a class member was injured cannot be answered with common *proof*—"in one stroke" (*Wal-Mart*, 131 S. Ct. at 2551)—class certification is inappropriate.

The panel's opinion violates these principles. And future plaintiffs alleging antitrust conspiracies will invoke that opinion to justify the use of expert testimony that renders irrelevant all individual variations in harm. Review is warranted to bring Tenth Circuit law into compliance with Supreme Court precedent.

B. Review is further warranted because the panel's logic could be extended to all conspiracies.

While the plaintiffs here allege a price-fixing conspiracy, the panel's decision promises to be felt much more broadly, and probably in every case involving allegations of a conspiracy. This too supports full Court review.

For instance, a RICO conspiracy may be predicated on an agreement to conduct a pattern of racketeering activity (18 U.S.C. § 1962(d)), and one of the most common racketeering acts is fraud (*id.* § 1961(1) (defining "racketeering activity" to include several fraud offenses, including mail and wire fraud)). Similarly, many

states recognize the common law tort of civil conspiracy. *E.g.*, *Sterenbuch v. Goss*, 266 P.3d 428, 436 (Colo. App. 2011) (civil conspiracy is actionable if "the underlying acts be unlawful and create an independent cause of action"). Both types of actions pose the threat of crippling liability. *See* 18 U.S.C. § 1964(c) (authorizing treble damages for civil RICO violations); *T.A. Pelsue Co. v. Grand Enters., Inc.*, 782 F. Supp. 1476, 1490 (D. Colo. 1991) ("All co-conspirators are jointly and severally liable for damages proved in a conspiracy.").

The panel's logic extends to such claims. If the lone common issue of a conspiracy predominates over individualized issues of injury and causation in antitrust cases alleging price-fixing conspiracies—where prices are individually negotiated by hundreds or thousands of plaintiffs—it will likely also predominate over individualized issues of injury and causation in a civil RICO or civil conspiracy case. *See* 18 U.S.C. § 1964(c) ("[a]ny person *injured* in his business or property *by reason of* a violation … may sue therefor") (emphasis added); *Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702, 708 (11th Cir. 2014) ("[Section] 1964(c) requires RICO plaintiffs to prove both an 'injury to business or property,' … and proximate cause linking the defendants' pattern of racketeering activity with the [plaintiffs'] injury" (citations omitted)). And if a class may be certified based on "an inference of class-wide impact even when prices are individually negotiated"—because "price-fixing affects all market participants" (Op. 13)—it follows that future panels may certify classes alleging a conspiracy to defraud, even where the misrepresenta-

tions are individually delivered and there are numerous individualized questions of injury and causation.

Indeed, under the panel's reasoning, it is hard to imagine a conspiracy case where that issue does not predominate. And by making class certification virtually automatic in conspiracy cases, the decision threatens to deprive many defendants of their ability to litigate defenses to individual claims. Accordingly, en banc review is warranted.

II. The panel's decision will dramatically increase the costs of class actions, to businesses and consumers alike.

The practical and economic effects of the panel's ruling further underscore the need for review. By permitting any plaintiff who can allege an antitrust conspiracy to wield the threat of class certification, that ruling expands both the reach of Rule 23 and the risk of bet-the-company liability. These changes concern not just class-action defendants, but also those businesses that merely face the threat of a lawsuit. And as businesses adjust to this new landscape, the effects of the panel's decision will be felt throughout the economy.

A. The panel's decision will greatly increase the risk to business of massive liability, forcing them to settle meritless claims more frequently.

It is well known that class-action defendants face pressure to settle—and even to "abandon a meritorious defense" (*Coopers & Lybrand*, 437 U.S. at 476)—to avoid the "risk of potentially ruinous liability." Fed. R. Civ. P. 23(f) Advisory

Comm.'s Notes to 1998 Amendments. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-92 (2002) (referencing studies of settlement). These risks promise to skyrocket if, as the panel holds, classwide injury can be established from an "inference" that defendants undertook illegal conduct.

Certification of a class dramatically changes the parties' bargaining positions, and settlement pressure nearly always becomes immense. *E.g.*, *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (the rate of "blackmail settlements" likely will increase exponentially after certification). In sum, "[i]f a cohesive class can be created through … savvy crafting of the evidence," then "[t]he law [will] run a considerable risk of unleashing the settlement-inducing capacity of class certification based simply on the say-so of one side." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 103 (2009).

These concerns are particularly acute in antitrust cases. Antitrust defendants risk not only damages arising from their own conduct, but both joint-and-several liability and treble damages. And because antitrust cases are among "the most complex action[s]" to litigate, the defendants' litigation costs are especially large. *In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003). Given that defendants may incur many of these costs *after* a certification decision, the pressure to settle becomes even more immense at that point. *See, e.g.*, *Bell Atl.*

Corp. v. Twombly, 550 U.S. 544, 559 (2007) (recognizing the "potentially enormous expense of discovery").

All told, even meritless class actions impose tremendous costs on defendants. And because the panel's decision makes class certification virtually automatic in antitrust conspiracies, these costs are certain to increase dramatically—and with it the pressure to settle regardless of the merits.

B. The costs of improper class actions impose a substantial burden on the public and the economy.

The effects of the panel's decision will be felt far beyond the businesses that must defend class actions. The high costs of class action litigation are, at least in part, "passed along to the public" (*SEC v. Tambone*, 597 F.3d 436, 453 (1st Cir. 2010)), most recognizably in the form of higher prices. Further, defendants faced with burdensome class action litigation costs may be forced to reduce operations, curtail capital investment, and in extreme cases forgo entering new markets and developing new products—all of which will curtail employment. And when courts unduly lower the standards for obtaining class certification, they encourage unwarranted class-action suits—which ultimately impose costs on the taxpayers.

In other words, consumers and ordinary citizens may end up footing the bill for the economic toll of class actions. As the Supreme Court has noted, the costs associated with class actions are paid by both consumers and "innocent investors

for the benefit of speculators and their lawyers." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739 (1975).

In sum, it is essential to the strength of our economy—and to all who invest or are employed in it—that the class-action device not be used to deprive defendants of their ability to litigate their "statutory defenses to individual claims." *Wal-Mart*, 131 S. Ct. at 2561.

CONCLUSION

For the foregoing reasons, en banc review should be granted.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i), and 10th Circuit Rule 29.1, because this brief contains 2999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

/s/ Steffen N. Johnson
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* in Support of Dow Chemical Company's Petition for Rehearing or Rehearing En Banc, as submitted in Digital Form via the court's ECF system, is an exact copy of the hard copy document filed with the Clerk and has been scanned for viruses with TrendMicro OfficeScan Version 10.6.5372 Service Pack 3, virus definition file dated 10/21/2014 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

/s/ Steffen N. Johnson
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CERTIFICATE OF SERVICE

I hereby certify that, on October 21, 2014, I electronically filed the foregoing brief with the Clerk of Court for the U.S. Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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