No. 09-90035

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BARBER AUTO SALES, INC.,
individually and on behalf of all persons similarly situated,

Plaintiff-Respondent,

v.

UNITED PARCEL SERVICE, INC.,

Defendant-Petitioner.

On Petition from the United States District Court for the Northern District of Alabama, Hon. Inge Prytz Johnson Presiding (Case No. 5:06-CV-04686-IPJ)

BRIEF FOR CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING UNITED PARCEL SERVICE, INC.'S PETITION FOR REVIEW OF ORDER GRANTING CLASS CERTIFICATION

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December 8, 2009

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

***Barber Auto Sales, Inc. v. United Parcel Service, Inc.*, No. 09-90035**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Eleventh Circuit Rules, amicus curiae Chamber of Commerce of the United States of America hereby states as follows:

A. The Chamber of Commerce of the United States of America has no parent corporation, and no subsidiary corporation. No publicly held company owns 10% or more of its stock.

B. The undersigned further certifies that the following persons, associations of persons, or corporations have either a financial interest in or other interest that could be substantially affected by the outcome of this case:

1. Alexander Corder Plunk & Shelly, PC
2. Barber Auto Sales, Inc.
3. Barber, Bruce
4. Borenstein, Ruth N.
5. Chamber of Commerce of the United States of America
6. Clement, Paul D.
7. Conrad, Robin S.
8. Corder, James M., Jr.
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13. Hearron, Marc A.
14. Johnson, Hon. Inge Prytz
15. King & Spalding LLP
16. Lightfoot, Franklin & White, L.L.C.
17. Lowe & Grammas LLP
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21. Morrison & Foerster LLP
22. Murphy, Paul J.
23. Pantazis, Dennis G.
24. Roth, Nicholas B.
25. Sarwal, Amar D.
26. United Parcel Service, Inc. (ticker symbol UPS)
27. Varner, Chilton Davis
28. Ventry, Anthony, III

29. White, Jere F., Jr.

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Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the Nation's business community.

Among those issues of concern is abuse of the class-action procedural device to permit class members to recover more than they are entitled to under the substantive law, as threatened by the district court's decision here. Accordingly, amicus has a strong interest in this Court's reversal of the decision below to protect the substantive law rights of its members.

STATEMENT OF THE ISSUE

Whether an appeal should be granted to review the class certification order.

SUMMARY OF THE ARGUMENT

Two aspects of the district court's decision raise particular concern about class action abuse. First, the district court permitted unnamed class members to

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[1] A motion for leave to file this brief amicus curiae is being filed herewith.

evade clear contractual and statutory requirements that customers give UPS timely notice of each disputed charge before resorting to litigation. Using class action procedures to alter notice obligations for unnamed class members would deprive businesses of the opportunity to resolve customer disputes in a cost-effective manner by avoiding litigation and create class-wide liability for claims that could not succeed on an individual basis.

Second, the court accepted the named plaintiff's ("Barber") novel theory that a class may be certified based on proof of a common business practice that purportedly constitutes a breach of contract even though the practice lacks a nexus to the claimed wrong and would not suffice as proof of breach by an individual plaintiff pursuing an individual claim. Identifying an issue that would be common to all class members required the district court to define UPS's allegedly wrongful conduct at such a broad level of generality that it was divorced from the actual merits of the class members' claims. Thus, the court defined the allegedly wrongful practice as the use of purportedly flawed measuring devices ("MDMDs") that resulted in claimed overcharges for mismeasured packages. But defining UPS's use of MDMDs as the common issue and breaching conduct is both too broad—as it would allow class members to hold UPS liable for packages that the MDMDs had measured accurately and ignores evidence that many customers receive downward price adjustments on audited packages—and too narrow—as

UPS's proof of the machines' accuracy will deprive class members of an opportunity to prove that they were overcharged because particular packages were mismeasured. As evident here, acceptance of Barber's theory would expose any business to potential class-wide liability based on whatever common conduct a customer could identify and impermissibly substitute proof of that business practice for the showing required to prove an individual claim.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION TO PRECLUDE CLASS ACTIONS FROM BEING ABUSED TO ALTER THE PARTIES' SUBSTANTIVE RIGHTS

A. Appeal Of The Certification Order Is Warranted To Address The Unsettled Question Whether Unnamed Class Members May Evade Contractual and Statutory Notice Requirements

The contract between UPS and its customers plainly requires any customer with a billing dispute to notify UPS "within 180 days of receiving the contested invoice," or else the "billable dispute is waived." Pet. Ex. 22 at 3. And it provides that claims against UPS arising from a billing dispute are "extinguished" unless the claimant "complies with all applicable notice and claims periods" and "pleads on the face of [the] complaint . . . compliance with those notice and claims periods as a contractual condition precedent to recovery." Pet. Ex. 8, ¶ 450. Federal law imposes the same notice requirement as a condition precedent to filing suit against an interstate shipper over a billing dispute. *See* 49 U.S.C. § 13710(a)(3)(B).

The district court turned that notice requirement on its head when it held that Barber's filing of this lawsuit "suffices . . . as notice of a claim for purposes of the 180 day contract requirement" for *all* class members whose claim arose within 180 days of Barber's class action complaint, including those who did not individually notify UPS of a dispute. Pet. Ex. 22, at 8. As UPS argued below, the question whether each class member complied with the contractual condition precedent is an individualized inquiry that cannot be resolved through common proof and is therefore incompatible with class certification. *See Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1270 (11th Cir. 2009) ("claims are not suitable for class certification" where plaintiffs must "introduce a great deal of individualized proof" (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1255 (11th Cir. 2004))).

This Court has not addressed whether contractual and statutory notice provisions defeat class certification for recurring consumer disputes on the ground that they require individualized inquiries into each claimant's compliance with the notice requirement.[2] UPS's petition, therefore, presents an unsettled legal question in this circuit that is critical to the present litigation and that will be important in

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[2] While no court of appeals has addressed whether the class representative can give notice on behalf of class members for purposes of satisfying contractual notice provisions for recurring consumer disputes, other circuits have held that statutory notice requirements are not so satisfied. *See Drobnak v. Andersen Corp.*, 561 F.3d 778, 785 (8th Cir. 2009); *Chevron USA, Inc. v. Vermilion Parish Sch. Bd.*, 377 F.3d 459, 463-464 (5th Cir. 2004).

future litigation because many businesses, including amicus's members, have notice-and-claim provisions in their consumer contracts and are protected by statutory notice requirements. *See Prado-Steiman v. Bush*, 221 F.3d 1266, 1275 (11th Cir. 2000) (granting Rule 23(f) petition favored where "the appeal will permit the resolution of an unsettled legal issue that is 'important to the particular litigation as well as important in itself'" (citation omitted)).

Moreover, the district court was wrong to rewrite the contract such that the filing of the class-action complaint itself satisfied the notice requirement for the unnamed class members. The contract provides that the notice requirement is a "condition precedent"—i.e., a condition that must be satisfied *before* suit may be filed. And the contract requires every claimant to plead on the face of the complaint that he or she has complied with the notice requirement—a provision that would be rendered a nullity if the filing of the complaint could itself satisfy the notice requirement. Further, the purpose behind such notice requirements is to give businesses an opportunity to propose a satisfactory resolution to a customer's dispute without first resorting to the courts; that purpose would be defeated and the notice requirement superfluous if the act of filing suit were deemed sufficient.

Outside the class-action context, courts have routinely enforced contractual provisions like UPS's notice requirement mandating that the parties attempt to resolve disputes through some specified non-binding process before filing suit.

Indeed, this Court in *Kemiron Atlantic, Inc. v. Aguakem International, Inc.*, 290 F.3d 1287, 1289, 1291 (11th Cir. 2002), held that a party could not invoke an arbitration clause because he had not satisfied the contractual condition precedent of requesting and pursuing non-binding mediation.[3] Such provisions must have the same force in the class-action context, because to treat them differently would violate the Rules Enabling Act by elevating the procedural class-action device over substantive law. *See* 28 U.S.C. § 2072(b) (Rules of Civil Procedure cannot be used to "enlarge . . . [a] substantive right").

Finally, notice-and-claim procedures like that in UPS's contract further important policy interests and are consistent with the purposes of Rule 23 class actions. The process is mutually non-binding in that it does not deprive either party of the right to have the dispute heard by a neutral decisionmaker. And it addresses the common problem of the overbroad class by identifying and filtering out those unnamed class members who were not actually injured and therefore had no reason to seek redress through the informal process. It therefore furthers the

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[3] Other circuits have similarly held that a party's failure to comply with mandatory non-binding dispute resolution procedures bars that party from pursuing litigation. *See HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003); *Bill Call Ford, Inc. v. Ford Motor Co.*, 48 F.3d 201, 208 (6th Cir. 1995); *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 335 (7th Cir. 1987); *see also* James R. Coben & Peter N. Thompson, *Disputing Irony: A Systematic Look at Litigation About Mediation*, 11 Harv. Negot. L. Rev. 43, 108 (2006) ("Courts routinely enforce contractual obligations to mediate as a condition precedent to litigation.").

Rule 23 requirements that all class members be similarly situated and that their claimed injuries be concrete rather than speculative or latent.

B. The Certification Order Is Premised On A Novel System-As-Breach Theory That Fails To Establish All Class Members' Rights To Recovery

The district court accepted Barber's novel theory that a class may be certified based on proof of a common business practice that purportedly constitutes a breach of contract, even though that business practice is not causally linked to the class members' alleged harm and could not support a claim for breach of contract were the actions pursued individually rather than as a class. The district court's certification order, if left unreviewed, will invite abuse by class-action plaintiffs. Under the district court's rationale, class certification is warranted—and amicus's members can be subjected to the possibility of class-wide liability—whenever a customer can identify purportedly common conduct, even without proof that the alleged business practice caused harm to every class member. In large, lucrative class actions like this one, certification imposes enormous pressure to settle even the least meritorious claims. *See Prado-Steiman*, 221 F.3d at 1274. The district court's ruling should be reviewed because it exacerbates that problem and opens the door for further abuse of the class-action device against amicus's members.

To conclude that this case was amenable to class certification, the district court had to identify an issue that was purportedly common to all class members and would predominate over other issues. In reaching that result, the court viewed

the primary issue in each class member's claim not as whether the class member was overcharged for each particular package shipped, but rather as the abstract question of whether UPS used allegedly flawed MDMDs to measure packages. Thus, the district court held that a single issue—"[A]re the [MDMD] machines accurate[?]"—would resolve every class member's claim. Pet. Ex. 17 at 9.

Defining the purportedly wrongful practice at that level of generality, however, results in the claimed wrong being divorced from the actual merits of the claims. Barber proffered no evidence of any systemic problem with the MDMDs' accuracy, *i.e.*, that the MDMDs always overestimate the dimensions of packages by the same amount (or at all). Indeed, the district court conceded that the evidence showed "a variety of measuring errors" that were allegedly "caused in multiple ways." Pet. Ex. 17 at 15 n.4. Consequently, the evidence needed to prove that each class member was overcharged, and by how much, would be inherently individualized. Proceeding individually on the merits, no plaintiff could recover for breach of contract simply by showing that the MDMDs are inaccurate in general, without also establishing that MDMDs caused inaccurate readings and resulted in overcharges for his or her own particular packages. *See Klay*, 382 F.3d at 1264 (decertifying class because proof of HMOs' broad conspiracy to underpay class of doctors does not relieve burden to prove facts of each particular alleged underpayment). But the accuracy of the MDMDs in general—a question not

causally connected to Barber's claimed harm—is precisely the "common" issue that the court seized upon in its class certification order. The court, in effect, altered the merits of the claims in order to fit the plaintiff's allegations. *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 220 (2d Cir. 2008) ("Rule 23 is not a one-way ratchet, empowering a judge to conform the law to the proof.").

The district court's approach therefore resulted in a class that is too broad, because it encompasses class members who were not harmed. *See id.* at 232 (Rules Enabling Act is violated if some uninjured class members benefit from the class's recovery). Even if Barber successfully proved at trial that the MDMDs in certain circumstances produce erroneous measurements, the evidence proffered thus far shows that there is undoubtedly a large segment of the class whose packages were in fact measured accurately or who may have benefitted from measuring errors in their favor. Thus, proof that UPS uses flawed MDMDs will not establish that UPS breached its contract as to *every* class member. *See Vega*, 564 F.3d at 1270 (common issue must have "direct impact on every class member's effort to establish liability") (citation omitted).[4] Accordingly, to protect

[4] That the district court limited the class to UPS customers who were charged a higher amount than they self-reported is no answer. This limitation excludes only class members who were charged the same or less than what they self-reported, regardless of the accuracy of the customers' own measurement. It does not exclude customers who were charged the same or less than what they *should* have been charged based on an accurate measurement of the shipment.

UPS's due process rights, the district court will have to allow UPS to defend the action by presenting individualized evidence establishing that particular plaintiffs were not overcharged. *See McLaughlin*, 522 F.3d at 231-232 (discussing due process right to present evidence as to individual plaintiffs' claims); *In re St. Jude Med., Inc.*, 522 F.3d 836, 840 (8th Cir. 2008) (same). But the need for that individualized evidence—such as evidence of a customer's history of inaccurate self-reported measurements or that the MDMD used to measure a customer's particular shipment was accurate—belies the notion that the purportedly common issue of the MDMDs' accuracy predominates. *See Vega*, 564 F.3d at 1274.

While the class is overly broad, it is simultaneously too narrow as well. If the case proceeds as a class action and UPS prevails at trial because there is insufficient proof of the MDMDs' malfunctioning, then *every* class member's claim will be conclusively resolved in UPS's favor. But some class members may in fact have valid claims that they were overcharged because their particular packages were mismeasured by UPS, including because they were measured by a different measuring system or by an MDMD that measured a package incorrectly. Those class members with valid claims will simply be out of luck.

CONCLUSION

For the reasons set forth above and in the petition, this Court should grant the petition and review the district court's order granting class certification.

Respectfully submitted,

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December 8, 2009

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2009, a copy of the foregoing Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting United Parcel Service, Inc.'s Petition for Review of Order Granting Class Certification was served by UPS Overnight Delivery upon the following:

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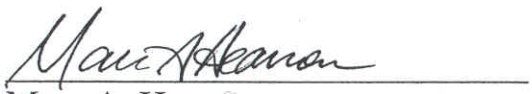

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