IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Supreme Court No. 30,165

Ct. App. No. 26,058

Appealed from the District Court of Sandoval County
(Louis P. McDonald, District Judge)

JOAN FERRELL, MARIA C. CAPPUZZELLO, ELIZABETH MARTINEZ, and JAKE SALAZAR,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY and ALLSTATE INDEMNITY COMPANY,

Respondents.

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street NW
Washington, D.C. 20062
(202) 463-5337

CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street NW.
Washington, D.C. 20004
(202) 637-5491

RUTH FUESS
MILLER STRATVERT P.A.
500 Marquette NW, Suite 1100
Albuquerque, New Mexico 87125
Telephone: (505) 842-1950
Facsimile: (505) 243-4408

Counsel for Amicus Curiae

June 18, 2007

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

NEW MEXICO CASES:

FEDERAL CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

FEDERAL RULES

OTHER AUTHORITIES:

LEGISLATIVE MATERIALS:

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Supreme Court No. 30,165

Ct. App. No. 26,058

Appealed from the District Court of Sandoval County
(Louis P. McDonald, District Judge)

JOAN FERRELL, MARIA C. CAPPUZZELLO, ELIZABETH MARTINEZ, and JAKE SALAZAR,

Petitioners,

v.

ALLSTATE INSURANCE COMPANY and ALLSTATE INDEMNITY COMPANY,

Respondents.

BRIEF FOR AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

Pursuant to New Mexico Rule of Appellate Procedure 12-215, amicus curiae the Chamber of Commerce of the United States of America respectfully submits this brief in support of Respondents.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents an underlying membership of more than three million businesses and organizations of every size, in every sector, and from every region of the country.

The Chamber actively represents the interests of its members in court on issues of concern to the business community, and few legal issues are of greater concern to the business community than those relating to class certification. The Chamber regularly participates as an amicus curiae in federal and state cases presenting questions about the propriety of class certification, including, for example, Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997); State Farm Mutual Auto Insurance Co. v. Speroni, 525 U.S. 922 (1998); Miles v. Merrill Lynch & Co. (In re Initial Public Offering Securities. Litigation), 471 F.3d 24 (2d Cir. 2006); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996); and Sperry v. Crompton Corp., 863 N.E.2d 1012 (N.Y. 2007). Members of the Chamber have a strong interest in ensuring that courts undertake an appropriately rigorous inquiry into any class certification request. The Chamber's interest and the interests of its members arguably are most strongly implicated when, as here, plaintiffs' lawyers seek certification of a multi-state class in a legal area – insurance law – quintessentially not susceptible to collective analysis and resolution. The Court of Appeals in this case correctly decertified the multi-state class the district court improperly had constituted.

SUMMARY OF ARGUMENT

The New Mexico Court of Appeals correctly held that the trial court had erred in certifying a multi-state class to pursue claims for breach of an insurance contract, because the petitioner-plaintiffs' claims necessarily required consultation and divination of all thirteen states' insurance laws. The two related issues on review involve conflict-of-laws and class certification. Petitioners first contend that the trial court was entitled to apply New Mexico law to the claims of the entire multi-state class. According to petitioners, where it is not demonstrably clear that other states' laws or precedents actually conflict with New Mexico's, the New Mexico court comfortably can presume the other states' laws are the same. See, e.g., Br. 9. New Mexico

precedents and those of the United States Supreme Court show that petitioners have it exactly backwards; in fact a New Mexico court must presume that other states' laws are not the same absent a demonstration to the contrary. Petitioners' preferred result would precipitate an unseemly race to file in plaintiff-friendly jurisdictions multi-state class actions in emerging areas of the law, producing results binding on multitudes before other states have had a crack at deciding the issue for themselves. That is not a desirable outcome, either from the perspective of a corporate defendant or from that of an independent state court or legislature.

Petitioners alternatively contend that even if the Court of Appeals correctly concluded that the trial court in this putative multi-state class action would have to discern and apply thirteen states' laws to the plaintiffs' claims, the case nonetheless qualified for multi-state class certification. That, too, is quite misguided. A case in which a court must apply multiple states' laws to the issue presented is not one in which common issues predominate; nor is it one that can be efficiently managed by the trial judge. A host of other courts have so held in cases like this.

The Court of Appeals' holding to the same effect should be affirmed. To conclude otherwise – on either the conflicts-of-law issue or on the question whether New Mexico's class certification requirements are satisfied by this proposed multi-state class – would be to invite a host of multi-state class actions into this jurisdiction, to the detriment of corporations operating in New Mexico as well as the state's court system.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT NEW MEXICO LAW COULD NOT BE APPLIED ACROSS THE BOARD TO ADJUDICATE THE RIGHTS OF PLAINTIFFS RESIDING IN THIRTEEN STATES.

As the Court of Appeals explained in its thorough opinion, the plaintiffs' claim for "breach" of their insurance policies depends on interpreting state law and precedent relating to

whether a fee charged for the privilege of paying in installments amounts to a "premium." Op. ¶ 12. A state's particular definition of "premium," the Court of Appeals explained, is "central to the [plaintiffs'] case": "If the fees are not 'premium,' then Allstate has not breached the insurance contract by charging more in 'premium' than it promised to." Id. at ¶ 16.

To the extent they even could be discerned from each state's statutory or case law, the definitions of "premium" of the twelve other states in the proposed class (ranging all over the Nation from Alaska to West Virginia) could not "be characterized as 'identical' to New Mexico's, and we certainly cannot say that the laws would produce 'identical results.' " Id. at ¶ 18. To the contrary, "it is clear that the question of whether fees constitute premium could go either way in any of the class states and, in fact, the question could be answered differently in different states." Id. at ¶ 21. Indeed, as the Court noted, two New Mexico district courts had reached opposite conclusions on the issue,[1] as well as two California trial courts;[2] in addition, courts in states plaintiffs (no doubt by informed choice) elected not to propose as part of the class

---

1 The Court of Appeals handed down its decision in this case prior to its ruling in Nakashima v. State Farm Mutual Auto. Ins. Co., 2007-NMCA-027, 141 N.M. 239, cert. denied, 2007-NMCERT-3, 141 N.M. 401, in which it held that installment payment fees paid by a plaintiff policyholder were not part of total "premium" either under the policy or within the meaning of the state Insurance Code. See Pet. Br. 1 (noting that "the underlying certified claim at issue before this Court may become moot").

2 The California Court of Appeal, Fourth District, has since concluded that installment fees do not constitute "premium" under that State's insurance code. Interinsurance Exch. of the Auto. Club v. Superior Court, 56 Cal. Rptr. 3d 421 (Ct. App. 2007), review filed (May 8, 2007).

had issued appellate rulings adverse to the plaintiffs' arguments. Op. ¶ 22 (citing Blanchard v. Allstate Ins. Co., 774 So.2d 1002, 1006 (La. Ct. App. 2000) and Sheldon v. American States Preferred Ins. Co., 95 P.3d 391 (Wash. Ct. App. 2004)).

Petitioners do not directly contend that the Court of Appeals was wrong to conclude that other states' definitions of "premium" vary significantly enough to lead to potentially different results. They argue instead that because other states within the proposed class had not definitively answered the question presented here – whether installment fees are to be considered "premium" under state insurance law – the Court of Appeals should have resolved the conflict-of-law issue by concluding that New Mexico law could properly be applied to govern all of the claims from plaintiffs from all of the states in the proposed class. See Pet. Br. 8 (arguing that New Mexico courts "can apply [New Mexico] law to cases where the law of another state is uncertain or unknown"); id. at 9 (arguing that it may be "presum[ed] that the law of the foreign jurisdiction is the same as the forum state absent a demonstration that the law is to the contrary"). That is not how it works.

As the Court of Appeals explained in Enfield v. Old Line Insurance Co., "New Mexico courts cannot apply our law to parties from other states unless we can reasonably assure ourselves that the law in the affected jurisdictions is sufficiently consonant to avoid constitutional problems." 2004-NMCA-115, at ¶ 20, 136 N.M. 398, 402 (emphasis added) (citing Berry v. Federal Kemper Assurance Co., 2004-NMCA-116, at ¶¶ 77-80, 136 N.M. 454, 475 (2004)). Where, as here, a state has not yet issued a pronouncement one way or the other on a question of state law, a New Mexico court necessarily lacks that "reasonabl[e] assur[ance]" that the other state's law would sufficiently map on to New Mexico's own law to avoid the "constitutional problems" that crop up when one state purports to apply its own law to residents

of another. Enfield, 2004-NMCA-115, at ¶ 20; see also Berry, 2004-NMCA-116, ¶ 78 ("The forum state cannot simply assume that its law will govern").[3] Berry and Enfield therefore do not aid petitioners' arguments as they suggest; the cases rebut petitioners' position.

As the Court of Appeals noted, plaintiffs' arguments likewise run afoul of Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) – a case on which plaintiffs also heavily rely. The Supreme Court in Shutts declined to conclude that the law of Oklahoma, among others, presented a "false conflict" with that of Kansas (meaning that the two states' laws actually did not conflict). As the Supreme Court explained, no reported cases in Oklahoma addressed the issue at hand; answering the question "whether Oklahoma is likely to impose liability would require a survey of Oklahoma oil and gas law." Shutts, 472 U.S. at 817; see Op. ¶ 27 (quoting Shutts). It therefore quite plainly was not sufficient in Shutts for the Kansas court to point to the absence of Oklahoma case law on point as implicit justification for applying Kansas law; otherwise Shutts would not have reached the conclusion it did.

---

[3] Petitioners' related suggestion that the 1961 decision in Boswell v. Rico de Oro Uranium Mines, Inc., 68 N.M. 457, 362 P.2d 991 (N.M. 1961), supports their argument is equally misguided. Boswell stands for the unremarkable proposition that where a party has offered neither "pleading nor proof to the contrary," another state's law will be "presumed to be the same as the law of the forum." Boswell, 68 N.M. at 460. What petitioners grandly refer to as the "Boswell presumption," Pet. Br. 9, has no application here, where Allstate has offered ample and substantial pleading and proof that the relevant laws of the other states in the putative class are not so demonstrably similar to New Mexico's as to warrant applying forum law across the board.

Petitioners' reliance on Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), is also unavailing. Wortman elaborates on the circumstances in which a state court's application of its own law to claims brought by residents of another state violates the federal Constitution. Wortman simply does not read on the more elementary conflict-of-law question presented here. See Op. ¶ 37 (noting that Wortman "does not say anything about when the laws of two jurisdictions can be said to 'conflict' "). As the Court of Appeals explained, petitioners' argument conflates two separate concepts: the constitutionality of applying one state's laws to claims brought by residents of another state, and the resolution of a state conflicts-of-law issue by reference to forum conflicts-of-law principles. Op. ¶ 38. The antecedent – and dispositive – question in this case has to do with "false conflicts," and Wortman does not speak to that. Enfield does; Shutts does; as do the other cases to which the Court of Appeals pointed in its opinion (at ¶¶ 24-27). And what all of those cases teach is that a conflict between two states' laws is not "false" – it remains quite real – if another state's law is indeterminate or ambiguous on the issue.

That result makes sense. Think if it were otherwise: under plaintiffs' theory, plaintiffs seeking to make new law in an emerging area would simply choose one potentially habitable state court in which to file their first lawsuit, seek certification of a national or multi-state class, and explain that – because no other state court yet had opined on the issue – the host court should feel free to impose its own state's law to settle the emerging question for the entire class. That practice might spell ruin for the corporate defendant on the receiving end of that lawsuit. And as a procedural device, that practice would utterly defeat our notion of state-court jurisprudence, which embraces differing states' laws (and even differing rulings on similar laws) as an indication of the vitality of our fifty independent state court systems.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT A CLASS ACTION REQUIRING THE TRIAL COURT TO ASSESS AND APPLY THIRTEEN STATES' LAWS FAILED TO SATISFY NMRA 1-023.

Petitioners in their Court of Appeals briefing made what that Court described as a "cursory" alternative argument that the case could proceed as a multi-state class action even if the district court was required to divine and apply to their claims the laws of all thirteen states in the proposed class. Op. ¶ 44. Petitioners' previously "cursory" argument has blossomed into the lengthiest argument in their brief to this Court. See Br. 14-24. It remains as meritless as before, however. The Court of Appeals properly rejected the contention that a proposed class embracing claims from and governed by the laws of thirteen states could satisfy New Mexico's class certification prerequisites.

A. The Proposed Class Fails Rule 1-023's Predominance and Superiority Requirements.

"[I]t is unquestionably the role of an appellate court to ensure that class certification determinations are made pursuant to appropriate legal standards." Walsh v. Ford Motor Co., 807 F.2d 1000, 1006 (D.C. Cir. 1986). The Court of Appeals correctly concluded the district court had reached too far in certifying a thirteen-state class action.

New Mexico Rule 1-023 establishes requirements for class actions essentially identical to the requirements for class actions brought in federal court. Compare Rule 1-023(A)-(B) NMRA with Fed. R. Civ. P. 23(a)-(b). Because of the substantial similarity between Rule 1-023 and its federal counterpart, New Mexico state courts regularly rely on federal decisions interpreting Rule 23 when determining whether a class action may be maintained in New Mexico. Brooks v. Norwest Corp., 2004–NMCA–134, ¶ 8, 136 N.M. 599, 603; see also Pope v. Gap, Inc., 1998–

NMCA–103, ¶ 10, 125 N.M. 376, 379 (relying on federal precedent when applying New Mexico Rule 1-068).

A plaintiff seeking class certification bears the burden of demonstrating that all of the legal prerequisites for class certification are satisfied. See Brooks, 2004–NMCA–134, at ¶ 10, 103 P.2d at 44; Castano v. American Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996) (stating that "[t]he party seeking certification bears the burden of proof" regarding the elements of Rule 23). Rule 1-023(A) establishes four prerequisites each of which must be satisfied before a class action may proceed in New Mexico court. See Rule 1-023(A)(1)-(4) NMRA (enumerating numerosity, commonality, typicality, and adequacy requirements); Fed. R. Civ. P. 23(a) (same). Plaintiffs also must demonstrate that a proposed class action satisfies at least one of the several conditions of subsection (B). See Rule 1-023(B)(1)-(3) NMRA; see also Fed. R. Civ. P. 23(b) (same). Rule 1-023(B)(3) permits a class action only if the court concludes both "that the questions of law or fact common to the members of the class predominate over any question affecting only individual members" and that 2) "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Rule 1-023(B)(3) NMRA; see Brooks, 2004–NMCA–134, ¶ 30, 103 P.3d at 48 (plaintiff seeking certification must demonstrate both predominance and superiority). If a plaintiff fails to establish all four requirements of Rule 1-023(A) and at least one of those in Rule 1-023(B), the court should deny class certification. See Amchem Prods., 521 U.S. at 613-14; Brooks, 2004–NMCA–134, ¶ 9, 103 P.2d at 44.

When multiple state laws apply to claims in a putative class action, the predominance and superiority requirements of Rule 23(b)(3) come to the fore. "The predominance requirement may not be met when the questions of law in the case are not common to the entire class." 7AA Wright, Miller & Kane, Federal Practice & Procedure § 1780.1, at 202 (2005). And "the class-

action device may not be superior to other methods of adjudication if the manageability of the class action would be difficult due to the need to apply differing standards of liability." Id.

Rule 1-023(B)(3) is drafted in the conjunctive; a would-be class plaintiff must establish predominance and superiority. The petitioner-plaintiffs here failed to establish either.

Rule 1-023(B)(3)'s predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication" in a class action. Amchem Prods., Inc., 521 U.S. at 623. Where multiple state laws must be applied to resolve class plaintiff claims, "variations in state law may swamp any common issues and defeat predominance." See Castano, 84 F.3d at 741. That is because "[n]o class action is proper unless all litigants are governed by the same legal rules." In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1015 (7th Cir. 2002).

The New Mexico Court of Appeals similarly has recognized the predominance problems presented when a trial court must apply the substantive law of several different states: "[t]he more different laws are applicable, the more difficult it will be to say that common issues of law apply," which necessarily counsels against a finding of predominance under Rule 1-023(B)(3). Berry, 2004–NMCA–116, ¶ 79. Aside from the argument rebutted above and by Allstate in its brief – that New Mexico law should govern the claims of plaintiffs from thirteen states – petitioners understandably do not contend that a class action requiring the application of thirteen states' insurance laws would be one in which common legal issues "predominated." See Brooks, 2004–NMCA–134, ¶ 33 ("when individual issues predominate over common issues, a class action is neither fair nor efficient, and . . . the certification must fail").

Rather than rebut the sensible conclusion that a lawsuit implicating the laws of thirteen states is not one in which common legal issues "predominate," petitioners concentrate their

efforts on arguing that such a class nonetheless might be "manageable." Petitioners must show both predominance and superiority, of course, to gain certification; having essentially conceded the former, their answer on the latter hardly matters. But in any event, petitioners' superiority argument is wrong. The point of a class action is to streamline claims subject to common adjudication where due process permits it and efficiencies are gained from it. Nothing is gained by gathering for "collective" resolution multiple claims from multiple jurisdictions if during trial the court essentially must deconsolidate the claims, isolate out each claim from each state, assess its particular proofs and defenses, and resolve the case in that way. See Brooks, 2004–NMCA–134, ¶ 32 (emphasizing "fairness and efficiency" considerations inherent in superiority analysis); Adams v. Kansas City Life Ins. Co., 192 F.R.D. 274, 277 (W.D. Mo. 2000) (noting that applying the "substantive law of multiple [state] jurisdictions [might] render class certification counterproductive" and defeat the policy aims served by class actions).

That doubtless is what would transpire here. For as the Court of Appeals explained, the lack of clear guidance from other state courts on the pivotal question in this case – "whether fees constitute premium" – means that the "district court would need to make detailed inquiries into analogous precedents to try to guess what the courts of each of the class states would do if faced with the question." Op. ¶ 46. Forcing a district court to make what at best is an educated guess about the law of other states plainly renders a multi-state class unmanageable. See, e.g., Compaq Computer Corp. v. Lapray, 135 S.W.3d 657, 679-680 (Tex. 2004) (cautioning against multi-state class certification where judges would be forced to "guess" about unclear laws of other states).

Petitioners vehemently argue that courts occasionally find multi-state class actions manageable, and that this case similarly should be found to pass muster under the New Mexico rules. Pet. Br. 16. Not so. The few cases petitioners cite are readily distinguishable. Their lead-

off case (Pet. Br. 15), In re Prudential Insurance Co., 148 F.3d 283, 315 (3d Cir. 1998), involved a settlement class, which relieved the trial court from examining whether the case would be manageable if it went to trial. See id. at 308 (citing and quoting Amchem, 521 U.S. at 620, that a court certifying a settlement class " 'need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial' "); see also Wright, Miller & Kane, Federal Practice & Procedure § 1780.1, at 213-214 (explaining that "manageability concerns are not implicated" when a settlement class is proposed). In the In re School Asbestos Litigation case petitioners repeatedly cite (Pet. 15, 17-18), despite concluding that manageability was a "serious concern," the Third Circuit in the end declined to reverse multi-state certification due only to what the court of appeals called the "unprecedented" and "highly unusual" facts of mass asbestos litigation. 789 F.2d 996, 1011 (3d Cir. 1986). The Third Circuit's reluctant holding in that unique area plainly is not applicable to these very different facts and circumstances. See In re Rhone-Poulenc Rohrer Inc., 51 F.3d 1293, 1304 (7th Cir. 1995) (noting as to School Asbestos Litigation and similar cases that "[t]he number of asbestos cases was so great as to exert a well-nigh irresistible pressure to bend the normal rules").

The three federal district court cases petitioners cite (Pet. Br. 16-17) are similarly inapposite. The particular procedural and factual posture of In re Telectronics Pacing Systems, Inc., 172 F.R.D. 271, 287 (S.D. Ohio 1997), was such that the court concluded "most variations in state law . . . [we]re immaterial" to the issues remaining in play – thus no manageability issues existed there. The trial court in Steinberg v. Nationwide Mutual Insurance Co., 224 F.R.D. 67, 80 (E.D.N.Y. 2004), similarly concluded that the facts and legal issues presented in that case were sufficiently "uniform" to satisfy Rule 23(b)(3). Not so, of course, here, where the pivotal "premium" issue is susceptible to potentially different outcomes in different courts – not to

mention the many other dissimilarities among state laws pointed out in Allstate's brief. The state class in the final case petitioners cite, In re Terazosin Hydrochloride Antitrust Litig., was certified because each state antitrust statute was "interpret[ed] . . . coextensively with the federal [i.e., standardized] antitrust laws." 220 F.R.D. 672, 695 (S.D. Fla. 2004).

Arrayed against this bare handful of distinguishable cases are all of the cases in which courts have declined to certify – or reversed certifications of – multi-state classes, finding the multi-state class unmanageable and the Rule 23(b)(3) requirement unsatisified. This Court should affirm the Court of Appeals' considered conclusion that "the need to apply the ambiguous laws of . . . other class states would render this case unmanageable and not superior as a matter of law." Op. ¶ 47.

B. Remand Is Neither Necessary Nor Warranted.

The last in petitioners' series of fallback arguments is that even if the Court of Appeals correctly held that New Mexico law could not be applied across the board, and even if it correctly concluded that a thirteen-state class presented substantial predominance problems under Rule 1-023(B), and even if it correctly concluded that the proposed class was unmanageable under Rule 1-023(B), the Court should have merely remanded, not reversed, the district court's certification order. Br. 23. That is wrong again.

To begin with, it was the plaintiffs' burden – not the court's, and not the defendant's to prove the opposite – to establish that common questions of law predominated in the proposed thirteen-state class and that the proposed class was manageable. See Castano, 84 F.3d at 740; Walsh, 807 F.2d at 1017 (plaintiff seeking certification of a multi-state class must "demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles" to litigating the class action) (internal quotation omitted); see also In re

American Medical Sys., 75 F.3d 1069, 1086 (6th Cir. 1996) (holding that the trial court erred in requiring the defendant to show cause why a multi-state class should not be certified). A plaintiff cannot discharge its burden merely by acknowledging the differences among applicable state laws and assuring the court that trial will not be problematic. Castano, 84 F.3d at 742. Rather, a plaintiff must "catalog the differences [in applicable state laws] and provide the district court with a plan for managing the differences throughout trial." Berry, 2004–NMCA–116, ¶ 80; Walsh, 807 F.2d at 1017.

Having put all their eggs in the "false conflict" basket, however, petitioners in this case made no such detailed "suggestions regarding how the court could go about managing a suit in which the laws of different states had to be applied." Op. at ¶ 46. It was petitioners' burden to establish that a thirteen-state class would satisfy all of Rule 1-023's prerequisites. They failed to carry that burden, and the Court of Appeals quite properly declined to grant them a second opportunity to cure their deficient prior efforts. See Castano, 84 F.3d at 752 (reversing class certification and declining to remand for additional inquiry into certifiability).

It also simply is not a close question whether a thirteen-state class action satisfies Rule 1-023 when the suit requires inquiries into multiple states' different or ambiguous insurance law definitions of "premium" and different statutory or regulatory treatment of "installment fees"; when states in the proposed class provide for varying rights of action (some private, some reserved only to the state insurance commissioner) for "illegal dealing in premiums"; and when states in the proposed class maintain different laws relating to contract interpretation and defenses to claims of breach. That is why all of the other cases in this and other states to have considered this "premium" issue have been single-state cases, and why the Court of Appeals found it "clear that common questions of law would not predominate and the case would become

unmanageable if the district court were to attempt to apply the ambiguous laws of all thirteen jurisdictions." Op. ¶ 47 (emphasis added). For all of the reasons discussed above, in Allstate's brief, and in the briefs of the other amici supporting Allstate, a multi-state class addressing state-insurance-law-specific claims such as these fails as a matter of law to satisfy Rule 1-023.

III. REVERSAL WOULD INVITE PLAINTIFFS' ATTORNEYS TO FILE A GLUT OF MULTI-STATE CLASS ACTION LAWSUITS IN NEW MEXICO COURTS.

The decision of the Court of Appeals was straightforward and correct. And despite the petitioners' overwrought rhetoric about the imagined effect of the ruling on any plaintiff seeking to represent a class within the state, the Court of Appeals' decision did not particularly favor either side of the "v."; indeed, a New Mexico-only class remained intact after the appellate court's decision. The reason plaintiffs' counsel are keen to overturn the Court of Appeals' ruling and reinstate the district court's sprawling class certification may have to do with the evolving business of plaintiffs' class action work these days. With past sources of work – asbestos litigation, tobacco, and the like – becoming scarce, plaintiffs' lawyers, like any good entrepeneurs, are in search of the next big thing in class action work. See Alison Frankel, "It's Over," American Lawyer 78-81 (Dec. 2006); see also Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998), available at 1998 WL 122552 (testimony of former Attorney General Dick Thornburgh describing plaintiffs' attorneys efforts to identify and prosecute class complaints). And as plaintiffs' counsel test out new theories of class liability against purportedly deep-pocketed corporate defendants, they relatedly are testing states to determine whether their court systems will prove to be hospitable venues in which to pursue such claims. See, e.g., American

Tort Reform Found., "Judicial Hellholes 2006" (noting certain counties in other states where class action filings exceed the norm by several orders of magnitude).

This Court should decline petitioners' invitation to make the courts of this state the latest refuge for plaintiffs' lawyers seeking to push the boundaries of multi-state class actions. That course would exact a terrible penalty on companies doing business within this State – not to mention the court system, which would have to manage the inevitable influx of such filings. See Francis E. McGovern, The Defensive Use of Federal Class Actions in Mass Torts, 39 Ariz. L. Rev. 595, 606 (1997) (noting that jurisdictions that impose "low transaction costs" for mass filings "create the opportunity for new filings . . . If you build a superhighway, there will be a traffic jam.")

CONCLUSION

For all of the foregoing reasons and those in Allstate's brief, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street NW
Washington, D.C. 20062
(202) 463-5337

CATHERINE E. STETSON
HOGAN & HARTSON L.L.P.
555 Thirteenth Street NW
Washington, D.C. 20004
(202) 637-5491

T. J. Long-Quall for

RUTH FUESS
MILLER STRATVERT P.A.
500 Marquette NW, Suite 1100
Albuquerque, New Mexico 87125
Telephone: (505) 842-1950
Facsimile: (505) 243-4408

Counsel for Amicus Curiae

June 18, 2007

Certificate Of Service

Attorneys for Plaintiffs:

Robert Hanson
Peifer, Hanson & Mullins, P.A.
20 First Plaza, Suite 725 (87102)
P. O. Box 25245
Albuquerque, New Mexico 87125-5245
Telephone: (505) 247-4800
Facsimile: (505) 243-6458

David Freedman
Freedman, Boyd, Daniels, Hollander, Goldberg & Ives, P.A.
20 First Plaza NW, Suite 700 (87102)
P. O. Box 25326
Albuquerque, New Mexico 87125-0326
Telephone: (505) 842-9960
Facsimile: (505) 842-0761

Floyd D. Wilson
McCary, Wilson & Pryor
6707 Academy Road NE
Albuquerque, New Mexico 87109
Telephone: (505) 857-0001
Facsimile: (505) 857-0008

John M. Eaves
Eaves and Mendenhall P.A.
6565 Americas Pkwy. NW, Suite 950 (87110)
P. O. Box 35670
Albuquerque, New Mexico 87176-5670
Telephone: (505) 888-4300
Facsimile: (505) 883-4406

John J. Stoia, Jr.
Lerach, Coghlin, Stoia, Geller, Rudman & Robbins LLP
401 B. Street, Suite 1700
San Diego, California 92101
Telephone: (619) 231-1058
Facsimile: (619) 231-7423

Alan Konrad
Law Office
1619 Arcadian Trail NW
Albuquerque, New Mexico 87107
Telephone: (505) 345-0467
Facsimile: (505) 345-7310

T. I concurred on

Ruth Fuess