SUPREME COURT **STATE OF COLORADO** Colorado State Judicial Building 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Petitioner: STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, an Illinois Corporation. v. **Respondents:** PAULINE REYHER, and DR. WALLACE BRUCKER, on behalf of themselves and all others similarly situated.	▲ **COURT USE ONLY** ▲ Case Number: 2010SC77
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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN TORT REFORM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, this brief complies with C.A.R. 28(g) because it contains 3,095 words excluding the parts of the brief exempted by C.A.R. 28(g).

Michael D. Alper

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INTEREST OF *AMICI CURIAE*

Representing 300,000 direct members, including over 2,000 members in Colorado, and indirectly representing the interests of more than three million companies and professional organizations of all sizes and in all industries, the Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber advocates the interests of its members in matters before federal and state courts, legislatures, and executives. The Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber's members are frequently targets of class action litigation. Although class actions can be useful devices, they are also prone to abuses that can pose significant risks to the business community and the nation's economy. A decision to certify a class greatly increases the burdens of litigation, including the risk of a ruinous adverse jury verdict. An erroneous certification decision often forces defendants to settle cases regardless of merit, distorting the legal system and causing substantial economic harm. Application of the proper standards for class certification is thus an issue of utmost importance to the Chamber and its members.

Founded in 1986, the American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities,

associations, and professional firms that have pooled their resources to promote reform of the civil justice system, and to ensure that civil litigation is fair, balanced, and predictable. ATRA routinely files *amicus curiae* briefs in cases concerning important issues of liability, and its members have a substantial interest in the development of sound legal principles governing the certification of class action litigation.

Amici have extensive experience litigating the importance of these issues, which extends beyond the immediate concerns of the parties.

INTRODUCTION

After conducting a two-day evidentiary hearing during which five witnesses testified and nearly thirty exhibits were admitted, the trial court determined that class certification was inappropriate. In particular, it concluded based on the evidence presented that, although there were some common questions of fact or law, individualized issues of liability and injury would predominate at trial. The trial court's careful application of the controlling certification requirements based on the evidence presented was consistent with both Colorado law and prevailing federal practice.

In reversing the trial court's decision denying certification, the court of appeals relied instead on unsupported allegations in the complaint—concluding, for example, that if those allegations were true, plaintiffs "could ... conceivably" prove liability with common evidence at trial.[1] In so holding, the court of appeals ignored the actual record evidence undermining plaintiffs' class-wide theory of liability, which the trial court correctly determined would result in individualized consideration of each plaintiff's claims at trial.

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[1] *Reyher v. State Farm Mut. Auto. Ins. Co.*, 230 P.3d 1244, 1258 (Colo. App. 2009).

The court of appeals erred. The question at the class certification stage is not whether plaintiffs "could ... conceivably" prove liability with common evidence at trial; rather, the question is, as the trial court summarized, whether "the proof at trial *would be* predominantly common to the class or primarily individualized."[2] If the court of appeals had directly confronted that question, it would have affirmed the trial court's well-reasoned order denying certification.

If affirmed, the decision of the court of appeals will impose undue burdens on local businesses and consumers. Virtually every putative class action complaint alleges that "common" questions will predominate in the litigation. Under the decision of the court of appeals, those complaints not only may but *must* be certified—regardless of the evidence—if those allegations "could ... conceivably" be proven at trial. That approach will exert substantial pressure on businesses, facing hundreds or thousands of claims in any certified class action, to settle even non-meritorious cases. In turn, the number of class actions filed in Colorado will increase, disproportionately harming local companies that will be forced to pass on additional costs, including to Colorado consumers. Individuals with potentially valid claims also may be prejudiced because they will be lumped together with

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[2] *Brucker v. State Farm Mut. Auto. Ins. Co.*, Case No. 2003CV18, slip op. (Colo. Dist. Ct. Dec. 19, 2008) (emphasis added) (hereafter, "Tr. Ct. (ID: 22995439)").

class members whose "common"-proof theories lack evidentiary support and face dismissal before or during trial.

For these reasons, the Court should reverse the decision of the court of appeals.

ARGUMENT

I. THE COURT OF APPEALS' CERTIFICATION RULING IS CONTRARY TO COLORADO LAW.

Colorado law requires plaintiffs to demonstrate by a preponderance of the evidence that they can satisfy each requirement for class certification. *Jackson v. Unocal Corp.*, 231 P.3d 12, 16 (Colo. App. 2009), *cert. granted*, 2010 Colo. LEXIS 373 (Colo. May 10, 2010) (No. 09SC668); *see also* Colo. R. Civ. P. 23(b). "Some inquiry into plaintiffs' theory of the case" is required "to ensure that common class issues predominate over individual ones." *Farmers Insurance Exchange v. Benzing*, 206 P.3d 812, 820 (Colo. 2009). Courts must "probe" behind the pleadings and "analyze the substantive claims and defenses that will be raised," particularly when there are "factual disputes relating to class certification." *See id.* at 819-20; *Jackson*, 231 P.3d at 20; *LaBerenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 334 (Colo. App. 2007); *Medina v. Conseco Annuity Assurance Co.*, 121 P.3d 345, 348 (Colo. App. 2005).

Although the trial court followed those requirements, the court of appeals ignored them. Rather than probing behind the pleadings and analyzing the trial court's findings of fact on certification, the court of appeals held that the class must be certified because plaintiffs had alleged that they "could" establish State Farm's liability with class-wide proof. *Reyher*, 230 P.3d at 1257-58. The court stated that "plaintiffs could ... prove that State Farm had a company-wide practice of unlawfully relying *solely* on the database without investigation to reprice the class members' bills." *Id.* (emphasis added). The court likewise asserted that "[p]laintiffs could also *conceivably* prove that State Farm systematically failed to pay the class members' reasonable medical bills because it determined reasonable payments by using a database incapable of determining reasonableness." *Id.* (emphasis added). Absent from the opinion was any citation to the record developed before the trial court or analysis of the trial court's findings.

If the court of appeals had given due consideration to the record, it would have been clear that "individualized inquiries" would be required "to resolve issues of liability." *Benzing*, 206 P.3d at 819. Following a two-day hearing, the trial court found that each medical bill was reviewed initially for coding errors. Tr. Ct. (ID: 22995439) at 7. The bill then was processed by the Sloans Lake Auto Injury Management ("AIM") database. *Id.* If there were coding errors or the bill was

repriced, it was reviewed by an adjuster "in the context of the overall claim." *Id.* A repriced bill could be appealed by the provider. *Id.* at 9. If appealed, State Farm would recheck the bill and send it to Sloans Lake for further review by "nurses and consultants or [the] medical director." *Id.* The bill also was reviewed by an adjuster who analyzed "the merits of the individual bill" and, in some cases, consulted with a supervisor. *Id.* Plaintiffs failed to rebut any of this evidence at the class certification stage. Indeed, plaintiffs' expert acknowledged that she was not aware of what steps State Farm took to evaluate the reasonableness of plaintiffs' bills. *Id.* at 6.

To be sure, the court of appeals emphasized that State Farm had repriced 13,747 claims using the AIM database during the proposed class period. *Reyher*, 230 P.3d at 1255. But that observation does not tell the whole story, as the trial court explained, because there was "no evidence as to the number of repricing actions which were appealed, or how many resulted in payment of more than the repriced amount, or the number of times adjusters did not accept the repricing recommendations of [Sloans Lake]." Tr. Ct. (ID: 22995439) at 9. Thus, the basic premise of plaintiffs' class-wide theory—*i.e.*, that State Farm had a "systematic[ ]"

practice of evaluating medical bills based solely on the AIM database—is without record support.[3]

The court of appeals not only ignored the district court's findings, it ignored that, whatever the nature of plaintiffs' allegations, State Farm is entitled to defend itself at trial by presenting evidence supporting its *actual* decisions to pay or deny claims in whole or in part. For example, State Farm is entitled to present evidence about how each repriced bill was adjusted, including (1) whether the bill was reviewed by an adjuster after it was repriced by the AIMS database, (2) what the adjuster considered during his or her review, (3) the adjuster's ultimate determination, (4) whether there was any appeal, and (5) the outcome of the appeal. State Farm is also entitled to present evidence about the reasonableness of each bill. Indeed, plaintiffs' own expert concedes that "the reasonableness of a doctor's fees schedule may vary from doctor to doctor and from location to location." Tr. Ct. (ID: 22995439) at 6. *See Ammons v. Am. Family Mut. Ins. Co.*, 897 P.2d 860, 863 (Colo. App. 1995) (affirming trial court's refusal to certify class

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[3] Permitting plaintiffs to proceed on an unsupported class-wide theory of liability also raises questions about their ability to "fairly and adequately protect the interests of the class." *Jackson*, 231 P.3d at 17. As further described below, if the case proceeds to trial and plaintiffs are not able to establish State Farm's liability with common proof, class members with potentially meritorious claims could be denied recovery.

claims alleging defendant insurance company failed to pay reasonable and necessary mileage expenses under the No-Fault Act, reasoning "what is 'reasonable and necessary' may depend upon the particular circumstances of individual cases").

State Farm also would be entitled to present evidence about whether each class member sustained economic injury. Although the court of appeals ruled that named plaintiff Pauline Reyher had standing, a substantial number of other insureds either did not pay any additional money to their providers or signed broader assignments of their claims against State Farm. *Reyher*, 230 P.3d at 1251-52. The evidence presented at trial is also likely to show that some providers' income depends on State Farm's payment of claims, while many other providers—like named plaintiff Dr. Wallace Brucker—are "unaffected by whether [State Farm] paid patients' bills." *Id.* at 1253.

In the end, as the trial court determined, individualized issues about liability and injury would thus predominate at any proposed class trial. Tr. Ct. (ID: 22995439) at 21-22.

II. THE COURT OF APPEALS' RULING ALSO IGNORES RELEVANT FEDERAL CLASS CERTIFICATION LAW.

The court of appeals' failure to "probe behind" the allegations in plaintiffs' complaint, and its related failure to consider the actual evidence relevant to class

certification, also conflicts with settled principles of federal law, upon which Colorado courts rely on class certification questions. *Goebel v. Colorado Dep't of Inst.*, 764 P.2d 785, 794 n.12 (Colo. 1988); *see also Benzing*, 206 P.3d at 818.

Rule 23 of the Federal Rules of Civil Procedure requires a "rigorous analysis" of the class certification requirements, even if that analysis "involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160 (1982). A court does not satisfy its obligation by merely relying upon allegations in the complaint that common questions "could ... conceivably" be proven at trial. *See Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 365 (4th Cir. 2004) ("[i]f it were appropriate for a court simply to accept the allegations of a complaint at face value in making class action findings, every complaint asserting the requirements of Rule 23(a) and (b) would automatically lead to a certification order...."); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (same). Nor may a court rely on a party's "assurance ... that it intends or plans to meet the requirements" under Rule 23. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 318 (3d Cir. 2009).

District courts are instead required to make "findings" supported by a preponderance of the evidence that each of the class certification requirements has

been satisfied. *E.g.*, *Hydrogen Peroxide*, 552 F.3d at 320.[4] They must "consider all relevant evidence and arguments … whether offered by a party seeking class certification or by a party opposing it." *Id.* at 307; *see also IPO*, 471 F.3d at 42 ("district judge is to assess all of the relevant evidence admitted at the class certification stage"). And although district courts do not engage in independent fact-finding on the merits, they can (and, indeed, must) engage in fact-finding that bears on the propriety of certification. *Hydrogen Peroxide*, 552 F.3d at 307; *IPO*, 471 F.3d at 41; *Blades v. Monsanto Co.*, 400 F.3d 562, 575 (8th Cir. 2005); *Szabo*, 249 F.3d at 676. Only then may a district court fulfill its obligation to find that the evidence "more likely than not establishes each fact necessary to meet the requirements of Rule 23." *Hydrogen Peroxide*, 552 F.3d at 320.[5]

This prevailing national practice is grounded in principles of due process. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (class action

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[4] *See also Vallario v. Vandehey*, 554 F.3d 1259, 1266-67 (10th Cir. 2009); *Oscar Private Equity Inv. v. Allegiance Telecom., Inc.*, 487 F.3d 261, 268 (5th Cir. 2007); *In re Initial Public Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("*IPO*"); *Gariety*, 368 F.3d at 366 (4th Cir.); *Szabo*, 249 F.3d at 676 (7th Cir.).

[5] None of these required inquiries invades the province of the fact-finder. The reason is "the determination as to a Rule 23 requirement is made only for purposes of class certification and is not binding on the trier of fact, even if the trier of fact is the class certification judge." *IPO*, 471 F.3d at 41; *see Hydrogen Peroxide*, 552 F.3d at 324 (same); *Gariety*, 368 F.3d at 366 (same); *accord Jackson*, 231 P.3d at 20.

device may not "abridge, enlarge or modify any substantive right"). The rigorous application of class certification standards protects defendants by ensuring that dissimilar claims and individualized defenses are not lost before the jury, and that plaintiffs do not litigate on behalf of a composite "perfect plaintiff pieced together for litigation." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998); *see also Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."); *Cimino v. Raymark Industr., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998) (defendant's Seventh Amendment right to jury trial on all elements of a legal claim "is not altered simply because the case is a Rule 23(b)(3) class action"). And it protects absent class members by ensuring that a meritless "common" theory of liability does not foreclose their own individualized claims. *See Szabo*, 249 F.3d at 677.

The trial court followed this prevailing approach here. It did not rely solely on the allegations in the complaint, but reviewed the evidence presented during a two-day evidentiary hearing. And it determined, based on its reading of the evidence, that common questions would not predominate during a class trial. Tr. Ct. (ID: 22995439) at 21-22.

The court of appeals, by contrast, disregarded the prevailing federal approach at every turn. It did not consider all of the relevant evidence admitted

before the trial court or the trial court's resolution of that evidence. Nor did it determine that the trial court erred in resolving the factual or legal disputes relevant to the certification requirements. The court of appeals, instead, simply credited allegations in the complaint and held that plaintiffs "could ... conceivably" prevail at trial based on those allegations. *Reyher*, 230 P.3d at 1257-58. Under this reasoning, "every complaint ... would automatically lead to a certification order," as long as the plaintiffs asserted that Rule 23(b) was satisfied. *Gariety*, 368 F.3d at 365.

III. THE COURT OF APPEALS' DECISION WILL UNFAIRLY BURDEN COLORADO COMPANIES AND CONSUMERS.

The decision of the court of appeals is also contrary to public policy interests. It will permit (if not require) trial courts to certify virtually any putative class action, thereby creating enormous pressure on companies to settle even non-meritorious claims. It will also draw an increasing number of class actions to Colorado, and will place disproportionate costs on Colorado-based companies, courts, and, potentially, local consumers.

Under the court of appeals' approach, so long as the operative complaint identifies "common" questions that "could ... conceivably" be proven at trial, a trial court must certify a class, even if the record shows that the claims will be tried

using predominantly individualized evidence. It is difficult to imagine what putative class action would not be certified under that approach.

The most obvious results of the decision below will be more class action lawsuits, certification decisions, and settlements. Plaintiffs with quintessentially individualized personal injury claims will nevertheless file proposed class actions in the hopes of exerting more settlement pressure. And trial courts, facing the decision of the court of appeals, may feel obliged to certify those proposed classes. Those certification decisions may in turn raise the cost of litigation so high that a corporate defendant cannot risk a jury trial, regardless of the merits—opening the door to so-called "blackmail settlements." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)). Even if a defendant is confident in its defense on the merits, it will sometimes, aided by pressure from the capital markets, choose to settle a frivolous case rather than rely on a single jury to resolve potentially thousands of claims. *E.g., Rhone-Poulenc*, 51 F.3d at 1298 (companies "may not wish to roll these dice. . . . They will be under intense pressure to settle."); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.").

The regime created by the court of appeals will also draw filings from outside the state. When jurisdictions loosen standards for class certification, an influx of foreign lawsuits against businesses inevitably follows. *See* S. Rep. No. 109-14, at 13 (2005) (noting that expansion of state class action litigation resulted from lax application of Rule 23 requirements in some state courts); Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997) ("Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam.").[6]

Colorado companies, including constituent members of *amici*, would suffer the brunt of those filings by out-of-state plaintiffs. While the Class Action Fairness Act ("CAFA") permits the removal of nationwide class actions to federal court, 28 U.S.C. §§ 1332(d)(2), 1453, certain class actions filed against in-state defendants may not be removed, *id.* § 1332(d)(4). Colorado-based companies sued

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[6] In Illinois, for instance, certain courts that failed to apply certification requirements with rigor and approved abusive settlements became magnets for class action lawsuits. *See, e.g.*, Lester Brickman, Manhattan Institute, *Anatomy of a Madison County (Illinois) Class Action: A Study of Pathology* 2 (2002), *available at* http://www.manhattan-institute.org/pdf/cjr_06.pdf (noting that number of class actions filed in 2001 in Madison County, Illinois was 20 times the national average). Colorado could likewise attract a disproportionate share of class actions if the decision below is allowed to stand.

in local courts will thus be uniquely subjected to the pernicious effects of the decision below—including the overwhelming pressure to settle. These companies will incur disproportionate legal costs that eventually will be passed on, in whole or in part, to Colorado consumers.

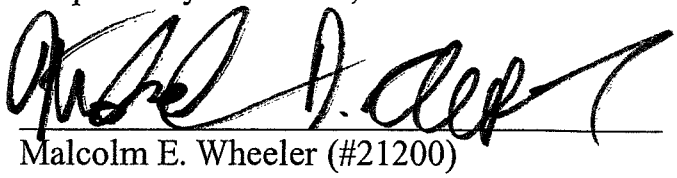
The court of appeals' approach may also harm plaintiffs with potentially legitimate claims. If a court certifies a class action based on theories that "could ... conceivably" be proven on a class-wide basis despite record evidence that class-wide mechanisms of proof do not exist, absent class members with claims supported by *their own*, individualized evidence may be barred from recovery. *See Szabo*, 249 F.3d at 677 ("[c]ertifying classes on the basis of incontestable allegations in the complaint . . . [may be] injurious to other class members").

CONCLUSION

For these reasons, the decision of the court of appeals should be reversed.

Dated: July 16, 2010

Respectfully submitted,



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I HEREBY CERTIFY that on this 16th day of July, 2010, true and complete copies of the foregoing Brief of the Chamber of Commerce of the United States of America and the American Tort Reform Association as *Amici Curiae* in Support of Petitioner, were sent by United States Mail, first class postage prepaid, to:

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