IN THE

# United States Court of Appeals

FOR THE THIRD CIRCUIT

---

Case No. 24-1267

---

LEON DRUMMOND, LEE WILLIAMS, YESHONDA DRIGGINS,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,
v.
PROGRESSIVE SPECIALTY INSURANCE COMPANY;
PROGRESSIVE ADVANCED INSURANCE COMPANY,
Defendants-Appellants.

---

On Appeal from the United States District Court for the
Eastern District of Pennsylvania, No. 5:21-cv-04479-EGS

---

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

---

Jonathan D. Urick
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Kenneth A. Stoller
AMERICAN PROPERTY CASUALTY
INSURANCE ASSOCIATION
555 12th St. NW, Suite 550
Washington, DC 20004

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* certify that they have no outstanding shares or debt securities in the hands of the public, and it does not have a parent company. No publicly held company has a 10% or greater ownership interest in *amici curiae.*

/s/ Adam G. Unikowsky

# TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT REGARDING CONSENT ..... 1

IDENTITY AND INTEREST OF AMICI ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

I. Plaintiffs Failed to Prove Commonality and Predominance. ..... 4

A. Common questions do not exist—and certainly do not predominate—because ACV must be assessed on a vehicle-by-vehicle basis. ..... 4

B. The District Court's reasoning is wrong. ..... 8

II. Plaintiffs Failed to Prove Adequacy. ..... 15

CONCLUSION ..... 19

# TABLE OF AUTHORITIES

## CASES

*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) ..... 15

*Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023) ..... 15

*Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) ..... 4, 5, 11, 13

*Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), *superseded by rule as stated*, *Microsoft Corp. v. Baker*, 582 U.S. 23 (2017) ..... 15

*Dewey v. Volkswagen Aktiengessellschaft*, 681 F.3d 170 (3d Cir. 2012) ..... 16

*Ferreras v. American Airlines, Inc.*, 946 F.3d 178 (3d Cir. 2019) ..... 7, 11, 12, 16

*Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) ..... 5

*In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008) ..... 12

*Marcus v. BMW of North America LLC*, 687 F.3d 583 (3d Cir. 2012) ..... 14

*Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.*, 552 U.S. 148 (2008) ..... 15

*Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) ..... 2, 6

## OTHER AUTHORITIES

Fed. R. Civ. P. 23(a) ..... 4

Fed. R. Civ. P. 23(a)(4) ..... 15

Fed. R. Civ. P. 23(b) ..... 4

Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811 (2010) ..... 15

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97 (2009) ..... 14

Plaintiffs' Answer to Petition under Fed. R. Civ. P. 23(f) for Review of Class Certification, *Progressive Specialty Insurance Co. v. Drummond*, No. 23-8035 (3d Cir. Sept. 14, 2023), ECF No. 15.....10

## STATEMENT REGARDING CONSENT

All parties consent to the filing of this amicus brief.[1]

## IDENTITY AND INTEREST OF AMICI

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 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, like this one, that raise issues of concern to the nation's business community, including cases involving class actions.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 65% of the U.S. property-casualty insurance market, including

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* state that no party's counsel authored this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

more than 60% of Pennsylvania's automobile-insurance market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts.

The District Court's class-certification order contradicts hornbook class-action law. Progressive's insurance contracts require it to pay the "actual cash value" (ACV) of its insureds' totaled cars. Plaintiffs contend that one component of Progressive's "actual cash value" valuation—its application of a "Projected Sold Adjustment" (PSA)—is inaccurate. The District Court certified a class of insureds, finding that the "legitimacy of PSAs as a means of calculating ACV" is a question "common to the class" under Rule 23. Appx19 (Order at 16). This reasoning is wrong. Commonality requires not "the raising of common 'questions'—even in droves—but, rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011) (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). Here, the "legitimacy of PSAs as a means of calculating ACV" cannot generate any common answers because even if PSAs are inaccurate, a court would still have to determine, in every individual insured's case, whether the use of a PSA led to a valuation that

was lower than ACV. And because many insureds benefit from the use of a valuation that incorporates PSAs, Plaintiffs cannot show that they will adequately represent the putative class.

The District Court's certification order contradicts the Supreme Court's decisions establishing rigorous standards for class certification. The Chamber, the APCIA, and their members have a strong interest in ensuring that courts comply with those standards.

## SUMMARY OF ARGUMENT

The District Court erred in finding that Plaintiffs satisfied Rule 23's commonality and predominance requirements. Plaintiffs claim that Progressive failed to pay the ACV of class members' totaled cars. Their theory that Progressive's use of PSAs—which are one type of adjustment that Progressive folds into its valuation analysis—rests on outdated assumptions. But that showing, even if it could be made, would not establish Progressive's liability to any—much less every—class member. Plaintiffs would still have to prove, for each class member, that the PSA actually produced a valuation below ACV.

The District Court certified the class on the assumption that the Plaintiffs intended to show that the mere use of PSAs *in and of itself* is a contractual breach. But this is not Plaintiffs' theory—and even if it were, the Court should not have certified a class on that basis. Nowhere does the contract prohibit the mere use of

PSAs, and the District Court should not have certified a class based on a plainly incorrect legal theory.

The District Court also erred in finding that Plaintiffs would adequately represent the class. Plaintiffs' damages model would benefit some putative class members and harm others—the epitome of an intra-class conflict. The District Court held that there was insufficient evidence to determine one way or another whether this conflict would exist, but that means Plaintiffs should have *lost* because they bear the burden of proof at the class-certification stage.

## ARGUMENT

### I. Plaintiffs Failed to Prove Commonality and Predominance.

The District Court concluded that there was a question "common to the class," Fed. R. Civ. P. 23(a), which "predominate[d] over any questions affecting only individual members." Fed. R. Civ. P. 23(b). That conclusion was wrong. No common question exists. Even if one did, individual questions would predominate. The District Court's reasoning fundamentally misunderstands Rule 23 and, if adopted by this Court, would profoundly distort class-action practice in this circuit.

#### A. Common questions do not exist—and certainly do not predominate—because ACV must be assessed on a vehicle-by-vehicle basis.

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (citation omitted). "[P]laintiffs wishing to proceed

through a[n opt-out] class action must actually *prove*—not simply plead—that their proposed class satisfies each requirement" of Rule 23(b)(3)—commonality, predominance, and superiority. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 275 (2014). "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied.'" *Comcast*, 569 U.S. at 33 (quoting *Dukes*, 564 U.S. at 350-51).

In this case, Plaintiffs have not proven that any common question exists, much less that it predominates over individualized questions. Plaintiffs seek to certify a class of Progressive's insureds who purchased an insurance policy that promises to pay "actual cash value" (ACV) of totaled automobiles. When calculating ACV, Progressive averages two values—the valuation according to a guidebook published by the National Automobile Dealers Association ("NADA"), and the valuation according to a system designed by Mitchell International, Inc. When calculating the Mitchell valuation, Progressive applies an adjustment known as the "projected sold adjustment" (PSA) to account for the fact that many used cars sell for less than list price. Appx5 (Order at 2). Plaintiffs claim that PSAs are "premised upon outdated perceptions about the automobile market." *Id.* According to Plaintiffs, "Progressive's purportedly flawed methodology for calculating ACV has ultimately

damaged many of its insureds who were not paid the true ACV of their vehicle due to the application of PSAs." Appx9 (Order at 6).

But Plaintiffs do not contend that Progressive's use of PSAs results in a payment below ACV for *all* class members. Plaintiffs endorse an alternative valuation methodology, which does not use PSAs, in their expert reports. For a substantial minority of class members, this alternative valuation is lower than the Marshall valuation, which incorporates the PSA. If, for those plaintiffs, the use of the alternative would result in a payment of ACV, then the use of the Marshall valuation—which served to *increase* the ACV calculation—cannot possibly have yielded a breach of contract.

Therefore, no common question exists. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 564 U.S. at 350-51 (citation omitted). Commonality also requires not just "the raising of common 'questions'—even in droves—but rather, the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *Id.* (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, *supra* at 132). Here, Plaintiffs contend that PSAs are based on outdated assumptions and should not be used. In other words, they contend that the common question is: "should Progressive have used PSAs?" But no common answer to that question could drive the resolution of the litigation. Suppose Plaintiffs prove that PSAs are

systematically inaccurate and should never be applied. That finding would still not drive the resolution of the litigation with respect to *any* putative class member, because that finding would not answer the question that matters: did Progressive breach the contract by paying less than ACV? For every class member, the determination of whether Progressive breached the contract would still require an individualized analysis of whether the amount of money the class member received is lower than ACV. Plaintiffs therefore cannot show any common questions in the sense relevant to Rule 23.

Even if Plaintiffs could prove commonality, they could not prove predominance. "The predominance requirement asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Ferreras v. American Airlines, Inc.*, 946 F.3d 178, 185 (3d Cir. 2019) (internal quotation marks omitted). If each plaintiff would "need to provide particularized evidence" to prove their claim, "common issues do not predominate over individual ones." *Id.* at 186.

Here, individualized issues predominate for a straightforward reason: it is *inevitable* that there will be individual liability trials with respect to *every single* class member. As already explained, even if Plaintiffs were to prove, following class certification, that PSAs rest on outdated assumptions about the market for used cars, that fact would teach precisely nothing about whether Progressive is liable to any

particular class member. For every single class member, the court would still have to ask the question: was the payment *in fact* lower than ACV? That question would depend on individualized evidence regarding the characteristics of the class member's particular car. The asserted flaw in PSAs, if proven, might be one piece of relevant evidence supporting the insured's case, but a court would still have to weigh that evidence alongside all the other insured-specific evidence before making a determination regarding that particular insured. Because the court would need to review particularized evidence with respect to every putative class member before determining whether any of them were entitled to damages, individualized questions predominate.

B. The District Court's reasoning is wrong.

The District Court's reasoning with respect to both commonality and predominance is misguided. In finding that a common question exists, the District Court reasoned as follows: "As an action for breach of contract, the case turns generally on whether Progressive's use of PSAs violated its contractual obligation to pay the proposed class members the ACV of their vehicles." Appx19 (Order at 16). This statement misunderstands the parties' dispute. "Progressive's use of PSAs" could never, in and of itself, "violate[] its contractual obligation to pay the proposed class members the ACV of their vehicles." *Id.* The only thing Progressive could do that would "violate[] its contractual obligation to pay the proposed class

members the ACV of their vehicles" is *not pay the proposed class members the ACV of their vehicles*. *Id.* If Progressive uses a PSA, but nonetheless pays a class member the ACV of a vehicle, there is no breach. Thus, no common question exists, much less predominates—even if Progressive uses PSAs for every single class member, there will be, at most, *some* instances where it breaches the contract (because it pays less than ACV) and *other* instances where it does not breach the contract (because it pays ACV).

In finding that commonality is satisfied, the District Court went on to state: "Thus, the common answer is quite clear: the use of PSAs either did or did not violate the contract." Appx19 (Order at 16). In its discussion of predominance, the District Court doubled down on this reasoning: "The putative plaintiffs do not challenge the price for which PSAs predict each car will sell; rather, they challenge the application of PSAs altogether. The putative plaintiffs' argument, properly understood, is that ACV should not be calculated based on projected sale prices, which is what applying PSAs does. Progressive maintains that PSAs are legitimate. The putative plaintiffs maintain they are inaccurate because they misrepresent current market behavior. It is this dispute, not the individual projected sale price of each vehicle, that is at the center of this action." Appx23-24 (Order at 20-21).

This reasoning misunderstands the plaintiffs' claim. The plaintiffs are not alleging that the "use of PSAs," in and of itself, violated the contract. Instead, the

very first statement in the District Court's order accurately captures the plaintiffs' claims: "This case involves a group of plaintiffs who allege that their automobile insurance company failed to pay them the actual cash value of their vehicles after said vehicles were deemed a total loss." Appx4 (Order at 1). Plaintiffs' opposition to the Rule 23(f) petition characterizes the issue the same way: "[C]ommon evidence can be used to show Progressive breached its duty to determine ACV based on actual market value *and* to show it breached its duty to pay ACV *and* to identify the proper ACV amount and, thus, the amount of damages." Plaintiffs' Answer to Petition under Fed. R. Civ. P. 23(f) for Review of Class Certification at 15, *Progressive Specialty Ins. Co. v. Drummond*, No. 23-8035 (3d Cir. Sept. 14, 2023), ECF No. 15. And *that* issue cannot be resolved for every class member in one fell swoop, because—regardless of the accuracy of PSAs in general—that answer will turn on the particular facts of each claimant's case.

But suppose Plaintiffs actually *were* alleging that the use of PSAs—in and of itself—violated the contract. In other words, suppose Plaintiffs' theory, as the District Court apparently believed, was that even for those class members who actually *did* get ACV for their vehicles, Progressive breached the contract so long as it relied on PSAs in connection with its valuation. Could a class then be certified,

on the theory that whether "the use of PSAs … did or did not violate the contract," Appx19 (Order at 16), *is* a common question under Rule 23?

The answer is no. The problem with this effort to skirt Rule 23 is that it rests on a plainly incorrect interpretation of the contract. Nothing in the contract suggests that the mere use of PSAs—untethered from any actual valuation error—is a breach. Indeed, the contract is silent on PSAs. Nor would any insured have any reason to care whether Progressive uses PSAs, so long as the insured ultimately receives ACV. A breach-of-contract theory hinging on Progressive's mere use of PSAs would require rewriting the contract.

Thus, even if Plaintiffs *had* argued that the class should be certified because the contract contains a separate prohibition on using PSAs, class certification should have been denied because that substantive argument is *wrong*. Under Rule 23, a court may not accept a plaintiff's legal theory as gospel at the class-certification stage. "The Rule does not set forth a mere pleading standard." *Comcast Corp.*, 569 U.S. at 33 (internal quotation marks omitted). "Rather, a party must not only be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a)." *Id.* "The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Id.*; *accord Ferreras*, 946 F.3d at 184 ("[T]he decision to certify a class calls for findings by the court, not

merely a threshold showing by a party, that each of the requirements of Rule 23 is met." (quotation marks omitted)).

Applying that principle here, Plaintiffs claim that this case presents a common question: whether PSAs are "inaccurate because they misrepresent current market behavior." Appx24 (Order at 21). But in order to decide whether that is a common question, the court must decide whether such a finding would *in fact* be a sufficient basis to find a breach of contract with respect to each class member—not merely that Plaintiffs *claim* that it would. And it would not. The contract's plain language makes clear that each case turns on whether the individual projected sale price of each vehicle satisfied the requirement that Progressive pay ACV, not on whether PSAs are "inaccurate because they misrepresent current market behavior." *Id.* Under *Comcast*, the district court erred in certifying the class without scrutinizing the legal theory underpinning—and ultimately, defeating—Plaintiffs' theory of classwide liability. *See Ferreras*, 946 F.3d at 183 ("Prior to certifying a class, a district court must resolve every dispute that is relevant to class certification."); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) ("[B]ecause each requirement of Rule 23 must be met, a district court errs as a matter of law

when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements.").

This may result in a partial analysis of the merits of the plaintiff's claim at the class-certification stage. But that is an inevitable and common feature of class-action litigation. The Supreme Court has repeatedly "emphasized that it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and "[s]uch an analysis will frequently entail overlap with the merits of the plaintiff's underlying claim." *Comcast*, 569 U.S. at 33-34 (internal quotation marks omitted). "That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 34 (quotation marks omitted). That is precisely the case here. The question of "would proof that PSAs are generally inaccurate establish Progressive's liability with respect to each class member?"—the relevant inquiry for commonality under Rule 23—overlaps with the question of "did Progressive breach the contract by using PSAs?"—the relevant inquiry for liability. But notwithstanding this overlap, the Court must resolve the commonality question prior to class certification.

This is not to say, of course, that a court should resolve all common legal issues prior to class certification. Suppose a contract is ambiguous on a particular issue, and resolution of that ambiguity could resolve the defendant's liability to the

class in one fell swoop. In that case, this contract-interpretation question might be a "common question" under Rule 23, such that it should be answered after, rather than before, class certification. But the court must ascertain whether that legal question actually exists; it cannot simply accept the plaintiff's representation that it does.

If the District Court's reasoning is upheld, enterprising plaintiffs could extend this Court's precedent to manufacture class certification in every single case. They could simply assert that a legal theory exists that would allow the defendant's liability to be adjudicated on a classwide basis—and if the defendant argues that the legal theory was faulty, the plaintiffs could say that this is an issue to be resolved after class certification.

This outcome would violate the letter and spirit of Rule 23 and would result in serious harm to class-action defendants. Even if a legal theory undermining a class claim appears meritless, class certification is still a pivotal event. "[T]he certification decision is typically a game-changer, often the whole ballgame." *Marcus v. BMW of N. Am. LLC*, 687 F.3d 583, 591 n.2 (3d Cir. 2012). "With vanishingly rare exception, class certification sets the litigation on a path toward resolution by way of settlement, not full-fledged testing of the plaintiffs' case by trial." Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 99 (2009). In the typical case, "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims

to extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Sci.–Atlanta, Inc.*, 552 U.S. 148, 163 (2008). "Certification of a large class may so increase the defendant's potential damages liability and litigation costs" that even the most surefooted defendant "may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978), *superseded by rule as stated*, *Microsoft Corp. v. Baker*, 582 U.S. 23 (2017); *accord Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023) ("[T]he possibility of colossal liability can lead to what Judge Friendly called 'blackmail settlements.'" (quoting H. Friendly, *Federal Jurisdiction: A General View* 120 (1973)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) ("Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."). This is why "virtually all cases certified as class actions and not dismissed before trial end in settlement." Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. Empirical Legal Stud. 811, 812 (2010). Given that reality, the court should reaffirm that classes may not be certified based on manifestly faulty legal theories.

## II. Plaintiffs Failed to Prove Adequacy.

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." "[T]he linchpin of the adequacy requirement is the alignment of interests and incentives between the representative

plaintiffs and the rest of the class." *Dewey v. Volkswagen Aktiengessellschaft*, 681 F.3d 170, 183 (3d Cir. 2012). Here, there is a fundamental intra-class conflict. Plaintiffs claim that their proposed alternative valuation methodology is correct, and that the use of the Marshall valuation—which incorporates PSAs—caused an artificial decrease in the valuation of their cars. But it is undisputed that for a substantial number of class members, using the Marshall valuation *increased* the ACV calculation. Thus, Plaintiffs' position would make numerous class members *worse* off. That is the epitome of the type of intra-class conflict that should have barred certification.

The District Court gave two reasons for rejecting Progressive's adequacy objections. First, it reasoned that "the court cannot at this time ascertain whether, and to what extent, any potential class members may have benefited from Progressive's application of PSAs and consequently have conflicting interests from the class members that were harmed by Progressive's conduct." Appx21 (Order at 18). But that statement is more consistent with the conclusion that class certification should have been *denied*, not granted. It is the plaintiff's burden to prove adequacy: "Rule 23 requires more than allegations, initial evidence, or a threshold showing. It requires a showing that each of the Rule 23 requirements has been met by a preponderance of the evidence at the time of class certification." *Ferreras*, 946 F.3d at 184. If there is insufficient evidence to ascertain whether there is a classwide

conflict, this means that certification should be denied because Plaintiffs carry the burden of proof.

Second, the district court explained that "it is possible for Progressive to have paid the putative plaintiffs more than they would have if applying an alternative valuation method yet still have failed to pay the ACV of the putative plaintiffs' vehicles." Appx22 (Order at 19). The premise of this statement—that Progressive's liability turns on whether Progressive "failed to pay the ACV of the putative plaintiffs' vehicles"—is accurate. *Id.* However, as already explained, Plaintiffs failed to put forth a common methodology for establishing whether Progressive "failed to pay the ACV of the putative plaintiffs' vehicles," and the District Court's class-certification order is premised on the inaccurate assumption that such a common methodology is not even required. Instead, Plaintiffs claim the "common question" is whether the use of Marshall valuation (which incorporates PSAs) reduces accuracy—and as to *that* question, the interests of plaintiffs who benefit from the Marshall valuation diverge from the interests of plaintiffs who are harmed by the Marshall valuation.

The certification of an overbroad class that includes members who benefited from the Marshall valuation harms both Progressive and the absent class members. From a defendant's perspective, the bigger the class, the bigger the damages exposure. And it is not very comforting to the defendant that it may eventually have

the chance to winnow down the class. Defendants faced with excessively broad classes must, as a matter of risk management, assume the worst. Thus, when overbroad classes are certified, the coercive effect of class certification on defendants is magnified precisely *because* the District Court failed to adhere to Rule 23's procedural requirements.

The absent class members will also be prejudiced. Consider again the District Court's observation that "it is possible for Progressive to have paid the putative plaintiffs more than they would have if applying an alternative valuation method yet still have failed to pay the ACV of the putative plaintiffs' vehicles." Appx22 (Order at 19). That is true enough—and if, indeed, Progressive failed to pay the ACV of the putative class members' vehicles, it should be liable. The problem is that class counsel will not be making this argument on behalf of those class members. Instead, it will make an argument that will guarantee that those class members receive $0 in damages—that Plaintiffs' proposed alternative valuation should have been used without being averaged with the Marshall valuation. Alternatively, even if class counsel can come up with some theory whereby those class members are entitled to damages, those class members are nonetheless not adequately represented by counsel whose core claim that a valuation that *benefited* them was infected with faulty assumptions. Class counsel may benefit from a class composed of so many insureds—larger classes increase settlement pressure—but those insureds, whose

claims will be extinguished based on a legal theory that implies they should have gotten *less* money, lose out.

## CONCLUSION

The District Court's class-certification order should be reversed, and the case remanded for further proceedings.

Dated: May 6, 2024

Respectfully submitted,

/s/ Adam G. Unikowsky

Jonathan D. Urick
Kevin R. Palmer
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Kenneth A. Stoller
AMERICAN PROPERTY CASUALTY
INSURANCE ASSOCIATION
555 12th St. NW, Suite 550
Washington, DC 20004

Adam G. Unikowsky
JENNER & BLOCK LLP
1099 New York Ave. NW Suite 900
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(a)(5) because the brief contains 4,275 words, excluding the parts of the brief exempted by Rule 32(f).

This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman Font.

/s/ Adam G. Unikowsky

## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2024 a true and correct copy of the foregoing Brief was served via the court's CM/ECF system.

/s/ Adam G. Unikowsky