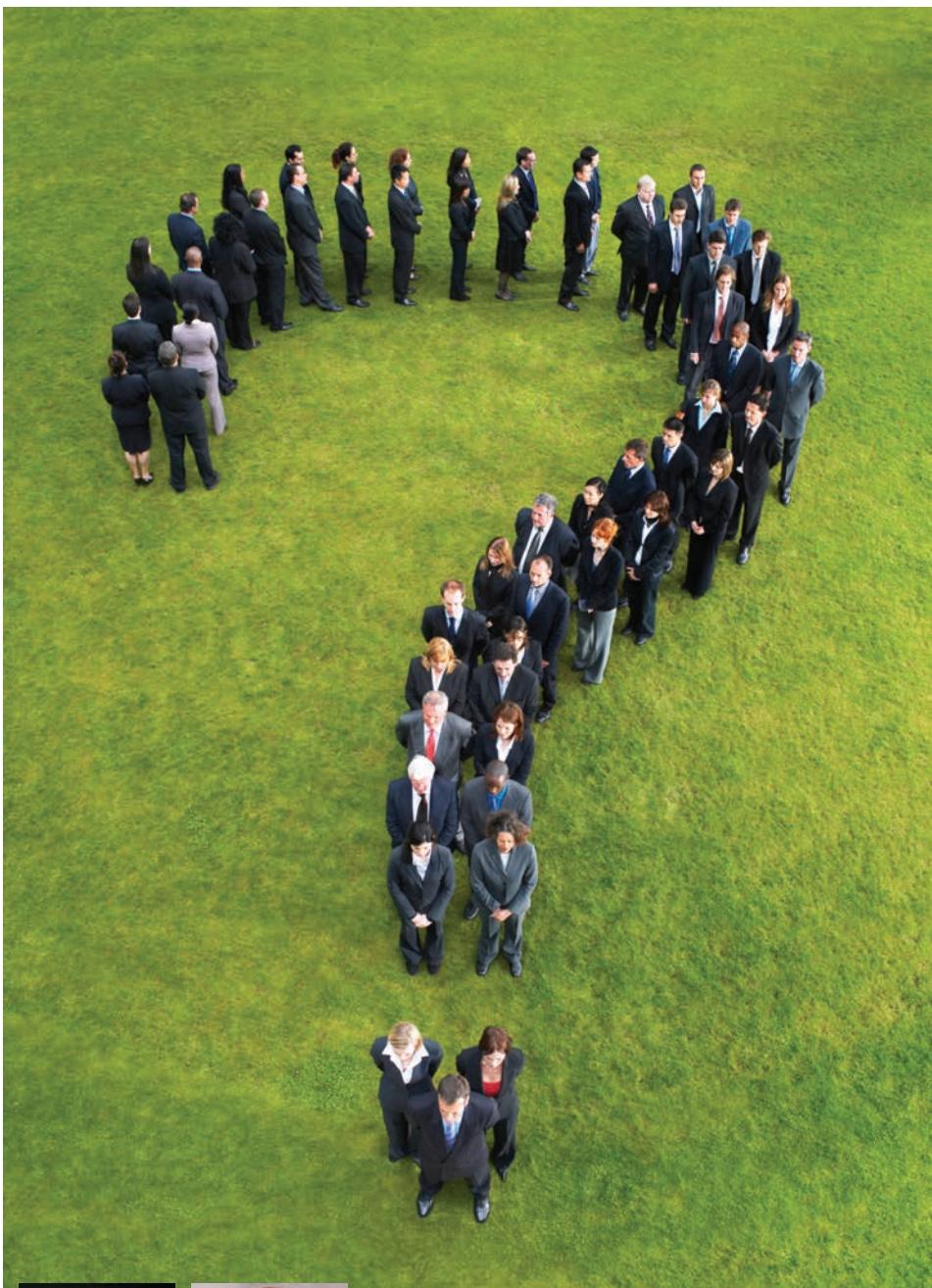


Circumventing Class Action Predominance Through Improper Merits Discovery



To achieve certification in putative class actions filed under Federal Rule of Civil Procedure 23(b)(3) and similar state court rules, plaintiffs must proffer, among other prerequisites, class-wide proof of the common legal and factual issue or issues that will predominate at trial. Often, however, plaintiffs do not have this class-wide proof. A growing and disturbing trend among plaintiffs' attorneys has emerged. They seek merits discovery—particularly regarding damages—for each potential class member, present this information in summary form, and then argue that it qualifies as class-wide proof for class-certification purposes. This puts the cart before the horse and attempts to circumvent Federal Rule of Civil Procedure 23(b)(3)'s predominance requirement.

This strategy, if permitted by a court, presents a defendant with a Hobson's choice: either the defendant can spend potentially millions of dollars responding to discovery, or the defendant can agree to an expensive settlement before a court even rules on class certification. As the United States Supreme Court has recognized, class actions can exert extreme pressure on defendants and create the risk of "*in terrorem*" settlements because "[f]aced with even a small chance of a devastating loss, defendants will [often] be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). See also *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (stating that



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class certification “dramatically affects the stakes for defendants” and that certification “makes it more likely that a defendant will be found liable” and “creates insurmountable pressure on defendants to settle”). *Accord In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

The Predominance Requirement

In class actions primarily seeking monetary relief, plaintiffs must satisfy not only the four threshold requirements under Federal Rule of Civil Procedure 23(a)— numerosity, commonality, typicality, and adequacy of representation—to achieve class certification, they also must satisfy the requirements of Federal Rule of Civil Procedure 23(b)(3). Under Federal Rule of Civil Procedure 23(b)(3), plaintiffs must demonstrate that “questions of law or fact common to class members predominate over any questions affecting only individual members”—*i.e.*, the “predominance” requirement—and they must demonstrate that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”—*i.e.*, the “superiority” requirement.

With the “predominance” and “superiority” requirements, Federal Rule of Civil Procedure 23(b)(3) intends to cover cases “in which a class action would achieve economies of time, effort, and expense, and promote... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” *Amchem*, 521 U.S. at 615 (quoting adv. comm. notes, 28 U.S.C. App., p. 697 (1994 ed.)).

To analyze whether a class-certification motion meets the predominance requirement, a court must “consider how a trial on the merits would be conducted if a class were certified.” *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 218 (5th Cir. 2003). This, in turn, entails “identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class (and can be answered on a class-wide basis), a process that ultimately prevents the class from degenerating into a series of individual [mini-]trials.” *Bell Atl. Corp. v. AT & T Corp.*, 339 F.3d 294, 302

(5th Cir. 2003). Simply put, a court must first “ascertain which are the predominant issues that must be decided on a class basis.” *Gene and Gene, LLC v. BioPay LLC*, 541 F.3d 318, 326 (5th Cir. 2008).

Notably, Federal Rule of Civil Procedure 23 requires that “[a]t an early practicable time after a person sues... as a class

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representative, the court must determine by order whether to certify the action as a class action.” Fed. R. Civ. P. 23(c)(1)(A) (emphasis added).

Circumventing the Predominance Requirement

Even when they do not truly have a class-wide basis to prove the predominant issues, plaintiffs’ attorneys may try to use merits discovery during the *class-certification stage* to create proof that they argue will, when aggregated and presented in a summary spreadsheet, for example, satisfy Federal Rule of Civil Procedure 23(b)(3) and make undertaking individual plaintiff-specific inquiries unnecessary at trial. We found examples of this trend, for instance, in cases filed against title insurance companies claiming that putative class members were overcharged for title-policy premiums or for closing costs. In a series of Texas federal district court cases, plaintiffs have pressed claims that putative class members were overcharged for title insurance premiums in violation of the Texas Insurance

Code Rate Rule R-8—which requires that a borrower who refinances a mortgage within seven years receive a premium credit if the original mortgage was insured.

Whether a borrower’s original mortgage was insured under a lender’s policy and the borrower should receive a premium discount is often difficult to determine when a borrower refinances. It is equally or more difficult to determine years after the fact during litigation—and unavoidably requires transaction-by-transaction inquiries specific to each potential class member. By extension this means that a fact finder could not determine the predominant issue in these cases—whether each particular putative class member qualified for a refinance credit under Texas Insurance Code Rate Rule R-8—on a class-wide basis. Thus, a plaintiff class could not meet the Federal Rule of Civil Procedure 23(b)(3) predominance requirement. By the same token, ascertaining *members* of the putative classes requires conducting a file-by-file review of each closing to identify borrowers who may have qualified for a refinance credit but did not receive one.

Plaintiffs in the Texas Insurance Code Rate Rule R-8 cases, however, have argued that they could satisfy the predominance test because much of the relevant information was available either electronically in title insurers’ internal databases, for example, or in “standard-form” documents, such as HUD-1 form settlement statements and other standard-form closing documents in the putative class members’ refinance files. Plaintiffs claim that they could collect all the pertinent information for each transaction and present it in summary spreadsheets that would obviate the need to decide complex individual issues at trial. They theorized that by conducting the individual inquiries in merits discovery, they would avoid factual and evidentiary disputes and would satisfy the predominance requirement. Of course, to suggest that disputes would not arise concerning discovery, evidentiary, and factual issues provokes disbelief, even setting aside manageability problems. Although the plaintiffs’ arguments may hold some superficial appeal in that they seem to address judicial economy and manageability, it ultimately cannot obscure that the very individualized inqui-

ries necessary to compile the summary data defeat the predominance requirement for class certification purposes.

Fortunately, the district court in *Benavides v. Chicago Title Insurance Company* debunked the plaintiffs' arguments and denied class certification—a decision that the Fifth Circuit affirmed last year. *See Hancock v. Chicago Title Ins. Co.*, 263 F.R.D. 283 (N.D. Tex. 2009), *aff'd sub nom., Benavides v. Chicago Title Ins. Co.*, 636 F.3d 699 (5th Cir. 2011) (*Benavides*). In that case, because the district court recognized that a fact finder could not determine liability or damages on a class-wide basis, and consequently determining the facts would involve reviewing thousands of refinance transactions individually, it concluded that it must deny class certification because individual issues would predominate. *See Benavides*, 263 F.R.D. at 388–90. The district court reasoned that

[e]ach borrower's claim presents an insular inquiry: whether the reissue credit was properly applied or withheld in that particular case. Merely asking the same questions across a spectrum of thousands of potential plaintiffs does not satisfy the strictures of Rule 23(b)(3).

To take *Benavides'* proposed “question (2)” as an example, the court cannot conclude that the question “[w]hether the plaintiffs qualify for the mandatory reissue discount in connection with the reissue lender title policy,” is a common substantive issue that predominates. In some cases the answer will be “yes,” and in others “no.”

Id. at 388–89 (footnote omitted).

Significantly, the district court in *Benavides* specifically rejected the plaintiffs' arguments that summary spreadsheets prepared from computerized data and information collected from standard-form documents could streamline discovery and avoid trial disputes and, thereby, satisfy the predominance test: “Even if spreadsheets or computer records could accelerate the process of reviewing the files, individualized fact-based inquiries would predominate at trial.” *Id.* at 389. Furthermore, the court concluded:

The fact that each file likely contains similar documents is also insufficient to transform a case-by-case inquiry into

class-wide proof. For a question to be a common substantive issue that predominates, it must be definitively answered for all class members using a *generalized set of facts and producing one unified conclusion....*

Benavides has therefore failed to “advance a viable theory employing

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generalized proof to establish liability with respect to the class involved.”... [B]ecause there is “no class-wide proof available” to determine which borrowers are owed a refund, “and only mini-trials can determine this issue,” the court finds that the predominance requirement of Rule 23(b)(3) is not satisfied.

Id. at 390 (emphasis added). *See also Benavides*, 263 F.R.D. at 391 (noting that if the case were to proceed as a class action, the court would be “required not only to oversee the culling of perhaps tens of thousands of files to identify overcharges, but also to settle the inevitable evidentiary disputes within those files”).

Ultimately, the court's conclusion that individual issues would predominate rested on two grounds: “First, certification of the class would require an extensive file-by-file review to sort out the factual details as to each plaintiff. Second, there are no truly class-wide questions that would benefit from class determination.” *Id.* at 390. The Fifth Circuit affirmed because the core issues “could not be determined on a class-wide basis using class-wide proof” and would have “to be answered specifically

and individually as to each plaintiff[,]” which meant that the issues did not satisfy the predominance requirement. *Benavides*, 636 F.3d at 701. *See also Benavides*, 636 F.3d at 703 (holding that the disputed issues were “individualized inquiries... whether particular persons qual[ified] for the discount and were denied it”).

The Fifth Circuit recently reiterated this logic in another Texas Insurance Code Rate Rule R-8 case, *Ahmad v. Old Republic National Title Ins. Co.*, No. 11-10695, 2012 U.S. App. Lexis 16901 (5th Cir. Aug. 13, 2012) (reversing class certification based on *Benavides*). The authors of this article represent the defendant title insurance company in *Ahmad*. The Sixth Circuit has taken a similar approach. *See Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 353 (6th Cir. 2011).

The *Benavides*, *Ahmad*, and *Randleman* decisions are consistent with the Supreme Court holding that a common question “must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke” in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). As the Supreme Court explained, “What matters to class certification... is not 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.* (citation omitted). Plaintiffs in other cases, however, still continue to press the argument that summary spreadsheets created after undertaking transaction-by-transaction merits discovery satisfy the predominance test.

In other putative class actions alleging that title insurance companies overcharged plaintiffs in collecting document-recording fees during real-estate closings, plaintiffs have employed a similar strategy of demanding detailed, transaction-by-transaction information for each potential class member in initial discovery and aggressively have sought court enforcement of the discovery before moving for class certification. This has permitted plaintiffs to compel defendants to undertake extensive and expensive reviews of

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tens of thousands of individual transactions and produce evidence in summary form that plaintiffs then use to justify class certification as a substitute for true class-wide proof on the issues that predominate.

On the other hand, in response to a virtually identical argument, the U.S. District Court for the Western District of Missouri held that individual issues defeated predominance because “each individual class member’s claim will require the analysis of unique and individualized pieces of evidence.” *Hartis v. Chicago Title Ins. Co.*, No. 08-cv-0607-DW, slip op. at 8 (W.D. Mo. Sept. 20, 2010) (unpublished). The court in *Hartis* recognized that “determining whether an over-collection occurred as to each po-

tential class member [would require] individualized review of the specific closing documents and governmental records particular to each potential class member,” precluding class certification. *Id.* Unfortunately, courts in other parallel cases have declined to prohibit plaintiffs’ attorneys from pursuing merits discovery that imposes the burden on defendants of conducting the very individualized reviews that the *Hartis* court found defeated predominance.

Conclusion

It would turn Federal Rule of Civil Procedure 23(b)(3) and its state counterparts on their heads if plaintiffs could satisfy the predominance requirement for class certification simply by (1) insisting on conducting

merits discovery regarding each potential class member to sort out the members of a class and the facts of their claims, (2) use that information to summarize voluminous evidence, and (3) offer that as “class-wide” proof to justify class certification. Neither the rule nor legal authority elsewhere authorizes this approach. Indeed, this stratagem subverts the very intent of Federal Rule of Civil Procedure 23(b)(3) by requiring defendants to produce individual discovery about each potential class member and assume the associated disruption and cost when plaintiffs have not first satisfied the requirements for class certification as contemplated by the drafters of Federal Rules of Civil Procedure 23(a) and (b)(3).

