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IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMPLOYERS INSURANCE COMPANY OF WAUSAU, HELMSMAN MANAGEMENT SERVICES, LLC, LIBERTY INSURANCE CORPORATION, LIBERTY MUTUAL FIRE INSURANCE COMPANY, LM INSURANCE CORPORATION, THE FIRST LIBERTY INSURANCE CORPORATION, and WAUSAU UNDERWRITERS INSURANCE COMPANY,	)	No. 27, 2023
Defendants Below, Appellants/Cross-Appellees,	)	CASE BELOW: Superior Court of Delaware C.A. No.: S19C-01-051 CAK
v.	)	
FIRST STATE ORTHOPAEDICS, P.A., on behalf of itself and all others similarly situated,	)	
Plaintiff Below, Appellee/Cross-Appellant.	)	

BRIEF OF PUBLIC CITIZEN AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Rules

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Public Citizen is a nonprofit consumer-advocacy organization with members in all 50 states. Public Citizen appears on behalf of its members before Congress, administrative agencies, and the courts on a wide range of issues involving protecting consumers and workers, public health and safety, and maintaining openness and integrity in government. Public Citizen believes that class actions are an essential tool for seeking justice for wrongful conduct that has harmed many people and resulted in injuries large in the aggregate but not cost-effective to redress individually. In that situation, a class action offers the best means for individual redress and deterrence, while also serving the defendant's interest in achieving a binding resolution of the claims on a broad basis, consistent with due process.

Public Citizen has participated as amicus curiae in many cases construing FEDERAL RULE OF CIVIL PROCEDURE 23, on which SUPERIOR COURT RULE OF CIVIL PROCEDURE 23 is based.[2] Public Citizen believes that this brief may be helpful to this Court in addressing the class certification issues posed in this cross-appeal.

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[1] Pursuant to SUPREME COURT RULE 28, Public Citizen filed a motion for leave to file this brief.

[2] Including *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), *Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds*, 568 U.S. 455 (2013), and *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*, 141 S. Ct. 1951 (2021).

SUMMARY OF ARGUMENT

The Superior Court erred in denying (b)(2) class certification on the basis that there was no "need for … class certification" because the "relief plaintiff sought could be afforded in an individual action."[3] RULE 23(b)(2) contains no "necessity" requirement. The contrary view is unsupported by RULE 23's text and this Court's decisions.

Furthermore, the theory of (b)(2) certification adopted by the Superior Court is wrong for two additional reasons. First, it would effectively eliminate Rule 23(b)(2)'s reference to appropriate declaratory relief. Second, the Superior Court's decision rests on the erroneous premise that an individual judgment provides relief for absent class members equivalent to that of a class-wide judgment. Far from making class-wide relief "unnecessary," the award of individual relief to the named plaintiff demonstrates the appropriateness of granting the same relief to identically situated absent class members and, thus, supports certification under RULE 23(b)(2).

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[3] *First State Orthopaedics, P.A. v. Emps. Ins. Co. of Wausau*, 2022 WL 18228287, at *3 (Del. Super., Dec. 29, 2022).

ARGUMENT

I. RULE 23(b)(2) certification has no "necessity" requirement.

A. RULE 23's text does not require "necessity."

"Delaware Superior Court Civil Rule 23 provides the requirements that must be satisfied if a case is to proceed as a class action."[4] Under RULE 23's "two-step" analysis, the court first "determine[s] that the action satisfies all four requirements of Superior Court Rule 23(a)."[5] "If the Rule 23 subsection (a) requirements are satisfied, the second step is to properly fit the action within the framework provided for in subsection (b)," which "sets forth three disjunctive requirements in addition to the requirements of subsection (a)."[6] "If the action is properly maintainable as a class action under subsections (a) and (b), the remainder of Rule 23 governs the conduct of the proceedings."[7]

"Subdivision (b)(2) 'applies to class actions for class-wide injunctive or declaratory relief.'"[8] It provides:

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[4] *Wit Cap. Grp., Inc. v. Benning*, 897 A.2d 172, 178 (Del. 2006).

[5] *Id.*

[6] *Id.*

[7] *Prezant v. De Angelis*, 636 A.2d 915, 921 (Del. 1994).

[8] *Nottingham Partners v. Dana*, 564 A.2d 1089, 1095 (Del. 1989).

> An action may be maintained as a class action if the prerequisites in paragraph (a) are satisfied, and in addition: . . . (2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.[9]

Subdivision (b)(2) contains two requirements. Described as the "factual predicate" to certification,[10] the "first (b)(2) requirement" is that "the party opposing the class … ha[s] acted on grounds generally applicable to the class."[11] The "second (b)(2) requirement" is that the action must "primarily seek similar equitable relief with respect to the class as a whole."[12] As this Court has explained, "[s]ubdivision (b)(2) 'by its terms, clearly envisions a class defined by the homogeneity and cohesion of its members' grievances, rights, and interests.'"[13] It is "intended to reach situations where … final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a

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[9] DEL. SUPER. CT. CIV. R. 23(b) & (b)(2).

[10] *Nottingham Partners*, 564 A.2d at 1095.

[11] *Id.* at 1096.

[12] *Id.* at 1097 (emphasis removed).

[13] *Id.* at 1095 (citation omitted).

whole, is *appropriate*."[14]

The text of RULE 23(b)(2) nowhere includes a requirement that class-wide relief be "necessary." Instead, RULE 23(b)(2) uses a different term: "appropriate." "Appropriate" and "necessary" are not synonyms: "Appropriate" means "specially suitable," "fit" or "proper,"[15] whereas "[n]ecessary" means "essential" or "indispensable."[16] Thus, RULE 23(b)(2) requires only that final equitable relief must "fit" the class as a whole, not that such relief be "essential."

RULE 23(b)(2)'s phrase "thereby making appropriate" confirms that "appropriate" does not include "necessary." Subdivision (b)(2) provides that the "general[] applicab[ility]" of the actions of the party opposing the class "thereby mak[es] appropriate" final equitable relief for the class as a whole.[17] Accordingly, class-wide equitable relief is "appropriate" when such relief "perforce affect[s] the

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[14] *Id.* (emphasis added; quoting FRCP 23(b)(2) advisory committee's note to 1966 amendment). Because SUPERIOR COURT RULE 23 is "almost identical" to FEDERAL RULE OF CIVIL PROCEDURE 23, "the Advisory Committee's Note on the federal rule and the interpretation of that rule by the federal courts" are "persuasive authority." *Nottingham Partners*, 564 A.2d at 1094 (discussing CHANCERY COURT RULE 23).

[15] *Appropriate*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1965).

[16] *Necessary*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY.

[17] DEL. SUPER. CT. CIV. R. 23(b)(2).

entire class at once,"[18] thereby "settling the legality of the behavior with respect to the class as a whole."[19] Because the challenged actions are generally applicable to the class, such that the legality of those actions are answered for the entire class at once, final equitable relief "fits" the class as a whole. The "necessity" of class-wide relief plays no part in that analysis.

Moreover, unlike RULE 23(b)(3), which requires that a class action be a "superior" method of adjudicating the dispute, RULE 23(b)(2) requires no demonstration of the benefits of proceeding as a class action.[20] The omission of a separate superiority requirement reflects that "[w]hen a class seeks an indivisible injunction benefiting all its members at once, there is no reason to undertake a case-specific inquiry into … whether class action is a superior method of adjudicating the dispute. … [S]uperiority [is] self-evident."[21] Requiring "necessity"—an even more stringent requirement than "superiority"—makes no sense in the context of a rule

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[18] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361–62 (2011).

[19] *Nottingham*, 564 A.2d at 1097 (citation omitted).

[20] *See* SUP. CT. CIV. R. 23(b)(2); *Wal-Mart Stores,* 564 U.S. at 362 (stating that the RULE "considers [superiority] …. unnecessary to a (b)(2) class" (emphasis removed)); *Gayle v. Warden Monmouth Cty. Corr. Inst.*, 838 F.3d 297, 310 n.14 (3d Cir. 2016).

[21] *Wal-Mart*, 564 U.S. at 363–64.

designed to avoid the need for a demonstration of the benefits of class procedures.

Importing a "necessity" requirement "over and above RULE 23's enumerated criteria," is contrary to RULE 23's text.[22] In interpreting FEDERAL RULE OF CIVIL PROCEDURE (FRCP) 23(b), the U.S. Supreme Court explained that the phrase "[a] class action may be maintained" "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action."[23] The use of the word "may" "confer[s] categorical permission" for the plaintiff to bring a class action.[24] Likewise, SUPERIOR COURT RULE 23(b)'s phrase "[a] class action may be maintained" categorically entitles the plaintiff to pursue his claim as a class action so long as the requirements of RULE 23(a) and (b)(2) are met.

B. This Court's precedents confirm that RULE 23 contains no "necessity" requirement.

Illustrating the error below, this Court's decisions have not considered "necessity" when examining whether an action satisfies RULE 23(b)(2). For example, in *Nottingham Partners*, the Court affirmed the (b)(2) certification of a

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[22] *Gayle*, 838 F.3d at 310 n.14.

[23] *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010).

[24] *Id.*; *see also id.* at 399 (stating that "Rule 23 … empowers a … court 'to certify a class in each and every case' where the Rule's criteria are met").

class of plaintiff shareholders where the plaintiffs challenged the defendant corporation's recapitalization plan and amendments to its certificate of incorporation, among other things.[25] The Court affirmed the certification of a (b)(2) class because the two (b)(2) requirements were satisfied: (i) the defendant corporation "had acted on grounds generally applicable to the class ([the corporation's] shareholders)," and (ii) the action primarily sought equitable relief.[26] Absent from the Court's decision was any consideration of the "necessity" of class-wide relief.

Likewise, in *Leon N. Weiner & Assocs. v. Krapf*, this Court reversed the denial of (b)(2) certification for a defendant class of property owners without mention of whether class certification was "necessary."[27] There, the plaintiff was a property owner who sought a declaration that his property was not subject to the same deed restrictions as neighboring properties owned by the defendants. Because the plaintiff's construction proposal, which the defendants claimed violated the challenged deed restriction, was an "action 'generally applicable to the class'" and

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[25] 564 A.2d at 1091.

[26] *Id.* at 1096.

[27] 584 A.2d 1220, 1221 (Del. 1991).

the "plaintiff seeks declaratory relief against the class as a whole," this Court held that the trial court had erred in denying (b)(2) certification.[28]

In *In re Celera Corp. Shareholder Litigation*, the plaintiff sought (b)(2) certification of a shareholder class in an action challenging a corporate acquisition.[29] Again, without considering "necessity," this Court affirmed the trial court's (b)(2) certification of the shareholder class. The Court held that when the relief sought on behalf of a class includes declaratory or injunctive relief, RULE 23(b)(2) certification "is appropriate when the rights and interests of the class members are homogeneous."[30]

In short, a "necessity" requirement is contrary to this Court's decisions finding actions certifiable under RULE 23(b)(2) without regard to whether class certification was "necessary" for the plaintiff to secure relief.

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[28] *Id.* at 1227.

[29] 59 A.3d 418, 422 (Del. 2012).

[30] *Id*. at 433.

C. Federal decisions that analyze the text of federal RULE 23 reject a "necessity" requirement.

Judicial interpretations of FRCP 23, which are "persuasive authority" on the construction of SUPERIOR COURT RULE 23,[31] have rejected a "necessity" requirement for (b)(2) certification when they have analyzed FRCP 23(b)(2) with fidelity to its text.[32] Other federal courts that have adopted some form of "necessity" requirement generally have not cited the text of the RULE but rather other court decisions.[33]

As the Third and First Circuits have explained, the language of RULE 23 excludes "necessity" as a "freestanding requirement justifying the denial of class certification" and permits, at most, consideration of the "necessity" of class-wide relief only "to the extent it is relevant to the enumerated Rule 23 criteria, including 'that final injunctive relief or corresponding declaratory relief [be] *appropriate*

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[31] *Nottingham Partners*, 564 A.2d at 1094.

[32] *See Fujishima v. Bd. of Ed.*, 460 F.2d 1355, 1360 (7th Cir. 1972) ("If the prerequisites and conditions of Fed. R. Civ. P. 23 are met, a court may not deny class status because there is no 'need' for it"); *see also Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 239 F.R.D. 9, 23 (D.D.C. 2006) ("As numerous courts have observed, whether certification is 'necessary' is not a question Rule 23 directs the courts to consider." (collecting cases)).

[33] *See, e.g.*, *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973); *see also* Note, *The Necessity Doctrine: A Problematic Requirement for Certification of Rule 23(b)(2) Class Actions*, 8 HOFSTRA L. REV. 1023, 1031 (1980) ("Among the courts utilizing the necessity doctrine, none has grounded its decision on persuasive statutory authority.").

respecting the class as a whole.'"[34] As the Third Circuit has explained, only in narrow circumstances, where class-wide relief would offer "*no* meaningful additional benefit to prospective class members," would such relief not be "appropriate."[35] In general, "the imposition of individual relief is no guarantee it will be carried over to other class members," and thus "[t]he circumstances in which class-wide relief offers no further benefit … will be rare, and courts should exercise great caution before denying certification on that basis."[36] Accordingly, "a court must do more than assume or hypothesize that a ruling on the claims of an individual plaintiff will accrue to the benefit of the class."[37] Under the Third and First Circuits' approach, broad statements that individual relief renders class certification "unnecessary" provide no basis for denial of certification under RULE 23(b)(2); rather, "rigorous analysis" is required before a court may conclude that, in light of unusual circumstances, class-wide relief for wrongful conduct is not "appropriate."[38]

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[34] *Gayle*, 838 F.3d at 310 (quoting FRCP 23(b)(2)) (emphasis added); *see also Dionne v. Bouley*, 757 F.2d 1344, 1356 (1st Cir. 1985) (similar).

[35] *Gayle*, 838 F.3d at 310 (emphasis added).

[36] *Id*.; *see also Dionne*, 757 F.2d at 1356 (providing examples where certification "will arguably be unnecessary" but denial would be "improper").

[37] *Gayle*, 838 F.3d at 311.

[38] *Id*. (citation omitted).

II. The Superior Court's view of (b)(2) certification is wrong.

The Superior Court engaged in no rigorous analysis, but rather concluded that class-wide declaratory relief was not necessary simply because, in its view, a declaration of the individual plaintiff's rights served the same function as class-wide relief. Because RULE 23(b)(2) does not require "necessity," as explained above, the Superior Court erred in denying certification on that basis. Even under the view that RULE 23(b)(2) permits consideration of "necessity" as part of the determination of whether relief for the class as a whole is "appropriate," the Superior Court's rationale—i.e., that certification of claims for declaratory relief is "unnecessary" because a court's ruling resolving a legal issue in an individual action has the same effect as a class-wide declaratory judgment—is wrong. First, the Superior Court's view of (b)(2) certification would effectively read the reference to declaratory relief out of subdivision (b)(2). Second, a court decision resolving a legal issue between an individual plaintiff and a defendant does not serve the same purpose as a class-wide declaratory judgment; a judgment in favor of a class benefits absent class members in a markedly different way than a court opinion in an individual case.

A. The view adopted by the Superior Court is contrary to RULE 23(b)(2).

The theory, adopted by the Superior Court, that (b)(2) certification is "unnecessary" where the class seeks declaratory relief with respect to a legal issue on which the judge has issued an opinion in an individual action, would effectively

eliminate RULE 23(b)(2)'s reference to "appropriate … declaratory relief with respect to the class as a whole" from the Civil Rules. Such a theory would apply in *any* action seeking a ruling on a legal issue common to the class. Where an action is brought to "declare rights, status and other legal relations,"[39] and the same rights, status, and legal relations are at issue between multiple plaintiffs and a common defendant or set of defendants, it can always be said that the issue could be resolved in a legal opinion issued in a case brought by a single class member and the defendant. The view that an action for class-wide declaratory relief is unavailable for that reason makes the RULE'S express reference to class-wide declaratory relief superfluous because such relief would never be necessary on the view taken by the Superior Court.

The Superior Court's reasoning could also be extended to injunctive relief: Class-wide injunctive relief, on that view, would also be unnecessary if the legal issues common to the class or defendant could be determined in the context of an individual claim for injunctive relief. That view is "non-textual, … find[ing] no support in Rule 23 and, if applied, would entirely negate any proper class

[39] 10 DEL. C. § 6501.

certifications under Rule 23(b), a result hardly intended by the Rules Advisory Committee."[40]

The federal Advisory Committee's comments on FRCP 23(b)(2), which are "persuasive authority,"[41] also demonstrate that the theory of (b)(2) certification adopted by the Superior Court is wrong. In its note accompanying the 1966 amendments of RULE 23, which amended the RULE to include subdivision (b)(2), the Advisory Committee provided examples of (b)(2) class actions:

> Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class. Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensees also purchase or obtain licenses to use an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the

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[40] 2 NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 4:35 (6th ed. 2022) (collecting cases); *see also, e.g.*, *Charlebois v. Angels Baseball, LP*, 2011 WL 2610122, at *11 (C.D. Cal. 2011); *Californians for Disability Rts., Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008); *Disability Rights Council of Greater Wash.*, 239 F.R.D. at 23.

[41] *Nottingham Partners*, 564 A.2d at 1094.

legality of the "tying" condition.[42]

Although in each of these examples, an individual action for declaratory relief likewise would have "test[ed] the legality of the" defendant's behavior, class treatment was within the scope of subdivision (b)(2).[43] Professor Benjamin Kaplan, Reporter to the Advisory Committee on Civil Rules during the 1966 amendments, confirmed this understanding:

> [I]ndividual lawsuits, even if they could conceivably avoid untoward effects … would nevertheless be inadequate and inefficient. When the party opposing a class had acted on grounds apparently applying to the whole group, a representative suit should be available to secure for the class any appropriate injunctive or declaratory relief.[44]

Further, denying (b)(2) certification on the basis that an individual action would achieve like relief turns (b)(2) on its head. It is precisely because the court's ruling in a class action will apply equally to all class members that (b)(2) certification is appropriate.[45]

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[42] FRCP 23(b)(2) advisory committee's note to 1966 amendment (internal citations omitted).

[43] *Id.*

[44] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (i)*, 81 HARV. L. REV. 356, 389 (1967).

[45] *See In re Celera Corp. S'holder Litig.*, 59 A.3d at 433 ("[C]ertification

B. The "effect" of an individual judgment on later actions does not provide absent class members with the same relief as a class judgment.

The Superior Court's determination that (b)(2) certification was "unnecessary" rested on its view that its ruling in the individual action that the defendants had violated the law was "precedent" and "law of this case" that "resolve[s] the case in a manner that will bind Defendants even if no class is certified."[46] The Superior Court, however, misconstrued the effect of its ruling.

A trial court's anticipation of the precedential effect of its decision is no basis for denying prospective class members the security offered by a judgment to which they are parties. As the Superior Court itself recognized, a decision is "precedent" only "until it is not."[47] And "*stare decisis* alone will not always cause a defendant to abide by a holding with respect to similarly situated individuals."[48] Moreover, while *stare decisis* makes "a judicial opinion by the [Supreme Court], on a point of law,

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under Rule 23(b)(2) is appropriate when the rights and interests of the class members are homogeneous."); *accord* NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 4:35 (stating that "the intertwined nature of the individual litigants' situations[] is precisely the reason *to* certify").

[46] *First State Orthopaedics*, 2022 WL 18228287, at *3, 4.

[47] *Id.* at *3.

[48] *Gayle*, 838 F.3d at 310 (citation omitted).

expressed in a final decision," binding on all Delaware courts,[49] the same is not true of a decision of the Superior Court. At the time of its class certification decision, the Superior Court cannot assume that its decision will be subject to the review and affirmance by this Court that will make it a binding precedent.

The Superior Court's reliance on the "law of the case" doctrine is likewise misplaced. "The 'law of the case' is established when a specific legal principle is applied to an issue presented by facts which remain constant throughout ... the same litigation."[50] As "a form of *intra*-litigation *stare decisis,*"[51] In other cases, the law of the case doctrine has no applicability—and no binding effect.[52] The Superior Court's denial of class certification had the effect of excluding absent class members from this case; any further dispute between them and the defendants raising the legal issue resolved by the Superior Court, in this case, would therefore have to be addressed in a different case, where the Superior Court's ruling would not be "law of the case."

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[49] *Acct. v. Hilton Hotels Corp.*, 780 A.2d 245, 248 (Del. 2001).

[50] *Del. Dep't of Nat. Res. & Env't Control v. Food & Water Watch*, 246 A.3d 1134, 1138 (Del. 2021).

[51] *Id.*

[52] Moreover, even within the same case, the doctrine is not "an absolute restriction" because it "allows the Superior Court and this Court to reexamine issues that are 'clearly wrong, produce[ ] an injustice or should be revisited because of changed circumstances.'" *State v. Wright*, 131 A.3d 310, 321 (Del. 2016).

The Superior Court did not cite the doctrines of *res judicata* or collateral estoppel, but neither conclusively provides the Superior Court's ruling with binding effect in later cases brought by a nonparty. "Under the doctrine of res judicata, a party is foreclosed from bringing a second suit based on the same cause of action after a judgment has been entered in a prior suit involving the same parties."[53] Thus, the doctrine of *res judicata* is inapplicable to a case brought by a nonparty to the prior action.

The doctrine of collateral estoppel also has only limited effect in subsequent actions. "Where a court or administrative agency has decided an issue of fact necessary to its decision, the doctrine of collateral estoppel precludes relitigation of that issue in a subsequent suit or hearing concerning a different claim or cause of action involving a party to the first case."[54] "The test for applying collateral estoppel requires that (1) a question of fact essential to the judgment, (2) be litigated and (3) determined (4) by a valid and final judgment."[55] Although in Delaware, the doctrine does not generally require mutuality of the parties, mutuality nonetheless "must be retained in instances … where the desire to end litigation and avoid conflicting

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[53] *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000).

[54] *Id.*

[55] *Messick v. Star Enter.*, 655 A.2d 1209, 1211 (Del. 1995) (citation omitted).

decisions is overshadowed by statutory public policy and by principles of fairness and justice."[56] Thus, even if the requirements for applying collateral estoppel are satisfied, the doctrine may be inapplicable in subsequent lawsuits lacking mutuality.

In any event, the Superior Court erred in assuming that the *effect* of its ruling on later actions would achieve the same relief as a class judgment. Individual and class judgments do not provide equivalent relief for absent class members for several reasons. To start, to avail themselves of any precedential or preclusive effects of the judgment, "would-be class members" would have "to undertake the expense, burden, and risk of instituting their own litigation—barriers that in many cases will be prohibitive."[57] Those plaintiffs "must argue the case all over again and face the risk of losing if the case is assigned to a different judge or appealed to a higher court than the one issuing the first decision."[58]

Requiring would-be class members to initiate their own lawsuits to avail themselves of the effect of a prior judgment undermines the purpose of class actions

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[56] *Id.* at 1212.

[57] *Gayle*, 838 F.3d at 311; *see also* Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 358 (1988) (stating that "the pure stare decisis effect of the first decision is of only limited value" because "[t]hose who could take advantage of it must first learn about the original case, then obtain counsel to file an additional lawsuit").

[58] Weber, *supra*, at 358.

in providing a mechanism for small claimants to aggregate their claims "into something worth someone's (usually an attorney's) labor."[59] In addition, "absent the attorneys' fees provided by class treatment, attorneys may well be less willing to seek individual relief on plaintiffs' behalf."[60]

Next, "[w]ithout certification, the preclusive effect of the judgment and the scope of any injunction remain open to question."[61] As explained above, a prior judgment would have either no effect or only a limited effect on a later action brought by a would-be class member who was not a party in the prior action. In contrast, a class judgment defines the class members and the scope of the equitable relief provided to that class.[62]

"[T]he imposition of individual relief is no guarantee it will be carried over to

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[59] *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citation omitted); *see also Nottingham Partners*, 564 A.2d at 1094 (similar).

[60] *Gayle*, 838 F.3d at 311 n.15.

[61] George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 21 (1983).

[62] *Cf.* CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1785.2 (stating that "some courts … have suggested that class certification is preferred because it will make the scope of any judgment explicit and unmistakable, to the benefit of both plaintiffs and defendants").

other class members."[63] Courts have rejected the defendant's assertions that class relief was "unnecessary" for this reason.[64] Moreover, the record calls into question the notion that the defendant insurers would follow the Superior Court's judgment in dealing with others similarly situated to the plaintiff. Despite the Superior Court's ruling that the defendant insurers' form denials in the Explanation of Benefits failed to satisfy the Delaware Workers' Compensation Act's requirement that carriers explain their claim denials, the defendants "have not proffered a global effort to withdraw their explanations, or to correct them with new explanations."[65]

Class certification also benefits *defendants* by ensuring that the resolution of an issue is binding on all potential plaintiffs within the scope of the class. If class certification is denied and the named plaintiff prevails against the defendant, subsequent plaintiffs may benefit from that ruling through a preclusion doctrine. If, however, the defendant prevails against the named plaintiff after certification is denied, the defendant cannot benefit from that ruling by invoking preclusion in actions brought by subsequent plaintiffs who were not parties to the case. With class

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[63] *Gayle*, 838 F.3d at 310.

[64] *See, e.g.*, *Almendares v. Palmer*, 222 F.R.D. 324, 334 (N.D. Ohio 2004); *Wilson-Coker v. Shalala*, 2001 WL 930770, at *5 (D. Conn. Aug. 10, 2001); *Coleman v. Pension Ben. Guar. Corp.*, 196 F.R.D. 193, 200 (D.D.C. 2000).

[65] *First State Orthopaedics*, 2022 WL 18228287, at *7.

certification, the court's favorable or unfavorable ruling is binding on all class members.

Further, because "special mootness rules apply in the class action context,"[66] individual and class actions are not equal mechanisms for remedying the defendant's unlawful action. In the class action context, because "the named plaintiff purports to represent an interest that extends beyond his own,"[67] "a class action is not rendered moot when the named plaintiff's individual claim becomes moot after the class has been duly certified."[68] Because of the "danger that the individual claim might be moot,"[69] "class certification may be the *only* way to provide relief."[70]

Finally, an individual action lacks the procedural protections of a class action. Even if an individual action could achieve the sought-after relief, class certification ensures that the class is fairly and adequately represented.[71] In addition, certification

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[66] *Lusardi v. Xerox Corp.*, 975 F.2d 964, 974 (3d Cir. 1992).

[67] *Id.*

[68] *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 66–67 (2013) (discussing *Sosna v. Iowa*, 419 U.S. 393 (1975)) (emphasis removed).

[69] *Dionne*, 757 F.2d at 1356.

[70] *Gayle*, 838 F.3d at 312 n.17. *See also* NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 4:35 n.12 (collecting cases).

[71] *See* DEL. SUPER. CT. CIV. R. 23(a)(4).

ensures that class members receive notice of any proposed settlement and that the settlement obtains court approval.[72] These protections are essential to protecting the due process rights of absent class members.[73]

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submit that the Superior Court's denial of class certification should be reversed.

Date: June 1, 2023

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[72] *Id.* 23(e).

[73] *See In re Celera Corp. S'holder Litig.*, 59 A.3d at 434 (Rule 23 "is designed to protect the due process rights of absent class members" (citation omitted)); *Prezant*, 636 A.2d at 921; *accord* NEWBERG & RUBENSTEIN ON CLASS ACTIONS § 4:35 (stating that "certification alone will ensure that absent parties receive due process protections embedded in Rule 23").

IN THE SUPREME COURT OF THE STATE OF DELAWARE

EMPLOYERS INSURANCE COMPANY OF WAUSAU, HELMSMAN MANAGEMENT SERVICES, LLC, LIBERTY INSURANCE CORPORATION, LIBERTY MUTUAL FIRE INSURANCE COMPANY, LM INSURANCE CORPORATION, THE FIRST LIBERTY INSURANCE CORPORATION, and WAUSAU UNDERWRITERS INSURANCE COMPANY,	)	No. 27, 2023
Defendants Below, Appellants/Cross-Appellees, v.	)	CASE BELOW: Superior Court of Delaware C.A. No.: S19C-01-051 CAK
FIRST STATE ORTHOPAEDICS, P.A., on behalf of itself and all others similarly situated,	)	
Plaintiff Below, Appellee/Cross-Appellant.	)	

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1. This certifies that the Brief of Public Citizen as Amicus Curiae in Support of Plaintiff-Cross-Appellant complies with RULE 13(a)(i)'s typeface requirement because it has been prepared in Times New Roman 14-point typeface using Microsoft Office 365.

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