Appeal No. 1120010

IN THE SUPREME COURT OF ALABAMA

CAREMARK RX, INC.; AMERICAN INTERNATIONAL GROUP, INC.; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, Pa.; AIG TECHNICAL SERVICES, INC.; and AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY.

Defendants-Appellants-Cross Appellees,

v.

JOHN LAURIELLO individually and **JAMES O. FINNEY, JR., SAM JOHNSON,** and **CITY OF BIRMINGHAM RETIREMENT AND RELIEF SYSTEM,** for themselves and on behalf of a class of all others who are similarly situated,

Plaintiffs-Appellees-Cross Appellants.

Appeal of Order Certifying Class Action from the Circuit Court of Jefferson County, Alabama, Case No. CV 03-6630-TK

DEFENDANTS-APPELLANTS-CROSS APPELLEES' REPLY IN SUPPORT OF THEIR APPLICATION FOR REHEARING

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I. The Class Cannot Include Non-Claimants, As This Court Correctly Recognized

That Plaintiffs led with a "waiver" argument tells it all: The class cannot include non-claimants, this Court correctly recognized as much in its Decision, and Plaintiffs have no real substantive response.

There was no waiver. Defendants argued in their appellate briefs to this Court — in both their main brief (pp. 88-94 at 93-94) and their reply brief (at 34-35) — that the class as certified was impermissibly broad because non-claimants (a) had no claim and (b) had an inherent conflict with the members of the class who did claim. Defendants cited authority for both propositions: that such inherent conflicts defeated adequacy (Rule 23(a)(4)) and typicality (Rule 23(a)(3)),[1] and that individuals who have no claim cannot be included in the class.[2] Because all of the current class representatives did claim in 1999, they cannot possibly represent individuals who did not.

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[1] See pp. 89-90 of Defendants' main brief (citing Cutler v. Orkin Exterminating Co., 770 So.2d 67, 71 (Ala. 2000), and Ex parte GEICO, 729 So.2d 299, 309 (Ala. 1999)).

[2] See pp. 34-35 of Defendants' reply brief (citing Oshana v. Coca-Cola Co., 472 F.3d 506, 513-14 (7th Cir. 2006), and Owen v. Regence Bluecross Blueshield, 388 F.Supp.2d 1318, 1334 (D. Utah 2005)).

We read this Court's Decision as agreeing with Defendants on this point. That is the point of the application for rehearing. The Court agreed that the class would be overbroad if it included non-claimants; it simply believed that the Order it was affirming did not do so. That, we submit, is the only possible interpretation of the Court's statement that the Order below excluded from the class all those who were not "actual participants in the prior settlement process." (Decision at 42) Because the trial court's order did not expressly exclude non-claimants, and this Court affirmed the trial court's order "in all respects" (Decision at 45), Defendants sought rehearing and requested that the Court clarify its ruling to make clear that non-claimants must be excluded from the class. This argument, based on the Court's logic as expressed in the Decision, is more than enough to satisfy the requirement of Rule 40 that the application state "with particularity the points of law or the facts the applicant believes the court overlooked or misapprehended". Rule 40(b), Ala. R. App. P.[3]

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[3] There is likewise no merit to Plaintiffs' suggestion that Defendants' supporting brief does not comply with Rule 28(a)(10), Ala. R. App. P. That rule provides that the "Argument" of a brief should contain "the contentions of

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Indeed, Plaintiffs contend that the Decision as written does not exclude non-claimants. While this contention conflicts with the logic of the Decision, it proves the necessity of rehearing and clarification of the Decision. As Defendants have consistently maintained, and as this Court recognized, the class cannot include those that did not actively participate in the settlement of the 1998 litigation. Accordingly, those that did not submit claims in connection with the settlement cannot be included in the class here. The Court should, therefore, grant rehearing and modify the decretal paragraph of the Decision to require that non-claimants be excluded from the class.

Plaintiffs' argument (Opp. to Reh'g at 4-8) that the class should include non-claimants is not support for the Court's Decision but an attempt to change the Court's mind about a matter the Court has already decided in Defendants'

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the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." Rule 28(a)(10), Ala. R. App. P. Defendants' brief fully satisfies this rule. A cursory review of Defendants' brief will find that it contains their contentions and citations to portions of this Court's Decision, portions of the record, and case law upon which Defendants rely. See, e.g., Brief in Support of Application for Rehearing at 4-6, 7.

favor. Plaintiffs argue, first, that "this is purely a merits issue" (Opp. to Reh'g at 4), suggesting that the differing circumstances related to non-claimants can be ignored at this stage of the case. That is not the law. See, e.g., Univ. Fed. Credit Union v. Grayson, 878 So.2d 280, 286 (Ala. 2003) ('"Courts examine the substantive law applicable to the claims and determine whether the plaintiffs presented sufficient proof that common questions of law or fact predominate over individual claims."') (quoting Voyager Ins. Cos. v. Whitson, 867 So.2d 1065, 1071 (Ala. 2003)); Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (the analysis required at class certification frequently "will entail some overlap with the merits of the plaintiff's underlying claim").

That these circumstances go to the merits of the claims in this case is precisely the point. Those who did not claim previously cannot contend that they were injured by the settlement of the 1998 litigation, but even if they attempt to pursue relief on the theories asserted in this case, their "claims" are materially different from the claims of those who did. To point out just the most obvious distinction, anybody who did not claim will have to

overcome the separate hurdle — not in the path of anyone who did claim — of explaining **why** he did not claim and **why** he should be allowed to recover notwithstanding his indifference in 1999. The named plaintiffs - all of whom did claim — cannot possibly represent the interests of individuals who did not "actively participate" in the settlement of the 1998 litigation.

Plaintiffs' second assertion (Opp. to Reh'g at 4-5) that some non-claimants would have claimed had the amount of the settlement been larger is pure speculation: it might or might not be true as to any given non-claimant, and the only way to find out is to ask each one individually. Accordingly, individual issues would predominate as to non-claimants even if the conflicts inherent between those who did and did not claim in 1999 did not so clearly preclude both adequacy and typicality.

Plaintiffs' final contention that "barring 1999 non-filers from this 2012 fraud class would violate their due process rights" (Opp. to Reh'g at 7) is completely illogical. Because non-claimants must be excluded from the class in this case, such claims as they may have will not be impacted by this matter, one way or the other. Excluding

non-claimants from the class means that far from suffering a violation of their due process rights, they are not affected **at all**.

The Court got it exactly right when it said the class had to be limited to "actual participants in the prior settlement process," (Decision at 42), but it did not realize that the Order below was not so limited. Accordingly, rehearing should be granted and the decretal paragraph of the Decision should be modified to conform to the Court's determination.

II. The Statute of Limitations Is an Individual Issue Even With an Entity Class

Plaintiffs' reliance on the "entity" theory to attempt to refute Defendants' request for rehearing on statute of limitations grounds proves far too much. The Court has now held that the alleged reliance of class counsel can, at least at this stage, overcome potential individual reliance questions and justify class certification; Defendants disagree but acknowledge the holding. But extending that holding to the statute of limitations, as Plaintiffs seek to do here, would mean that even a person who knew or should have known everything there was to know about the excess insur-

ance long before October 22, 2001 can still recover damages. That is not and cannot be right.

Accepting as we must the Court's holding (Decision at 26-27) that "the alleged misrepresentation was uniform and the class members' individual reliance irrelevant," that holding does not address whether a class member knew or should have known of the excess insurance policy. Both as of July 1999, when the alleged fraud was supposedly consummated, and thereafter, different class members may have had different levels of knowledge about the excess insurance; to say that a class member who knew all about it but did not sue within the required two-year period can still recover would wipe the statute of limitations off the books. Nothing in the Court's Decision suggests that was its intent, but it is the necessary consequence of the position Plaintiffs take here. Accordingly, denying Defendants the right to inquire as to class members' individual states of knowledge would deprive Defendants of their due process right to present the defense of the statute of limitations.

Plaintiffs contend that this defense is "class-wide" (Opp. to Reh'g at 11), apparently because at least some of the evidence currently in the record on this point relates

to press releases and public filings generally available to all those involved in the settlement of the 1998 litigation. While these press releases and public filings are more than enough to put all class members on notice of the facts Plaintiffs now claim to have been misrepresented and suppressed, the knowledge and understanding of an individual class member regarding the excess insurance policy -- the facts relevant to the statute of limitations defense -- depend on much more than just these press releases and public filings. Representatives of at least some class members exchanged correspondence regarding disclosures related to the excess insurance policy (S1753); discovery has already unveiled that other class members in fact reviewed certain of these disclosures and questioned their lawyers regarding them (S2324-26); and still other class members were mailed material that disclosed the excess insurance policy and its impact on the litigation (S1894, 3929-30). By no means is this an exhaustive list of the varying circumstances that relate to Defendants' statute of limitations defense, but it exemplifies the kinds of individual-specific facts and circumstances that Defendants have the right to discover.

Application of the statute of limitations is perhaps the prototypical individual issue; it cannot be resolved without inquiry into the circumstances of each class member. For this reason, courts routinely deny class certification because of the individual issues associated with the statute of limitations defense. See, e.g., Barnes v. Am. Tobacco Co., 161 F.3d 127, 149 (3d Cir. 1998) ("Finally, we believe that determining whether each class member's claim is barred by the statute of limitations raises individual issues that prevent class certification."); Brousard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 342 (4th Cir. 1998) ("[T]olling the statute of limitations on each of plaintiffs' claims depends on individualized showings that are non-typical and unique to each franchisee."). This case is no different.

Plaintiffs also contend that individualized issues associated with the statute of limitations do not preclude class certification because the statute of limitations defense is merely hypothetical and Defendants have not presented evidence to show the significance of this defense. (Opp. to Reh'g at 13). This ignores the evidence developed in discovery (and noted above) that relates to varying

knowledge relating to the excess insurance policy of those who participated in the settlement. In any event, Plaintiffs' position in this regard ignores their evidentiary burden. Because, on its face, this case was filed after the expiration of the statute of limitations applicable to these claims (more than 2 years after the alleged fraud occurred in 1999), Plaintiffs must show that the statute of limitations was tolled. See Amason v. First State Bank, 369 So.2d 547, 550 (Ala. 1979); Parsons Steel, Inc. v. Beasley, 522 So.2d 253, 256 (Ala. 1988).[4] Thus, Plaintiffs, not Defendants, bear the evidentiary burden on the statute of limitations, and Plaintiffs cannot avoid the individual issues associated with that inquiry.

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[4] Because Plaintiffs must prove tolling, Plaintiffs' contention that Defendants' due process rights are protected because defendants "remain free to prove that specific class members knew the truth and did not rely - and to have them removed from the class" (Opp. to Reh'g at 15) is unavailing. Using the class action device, and Plaintiffs' entity theory, to modify the evidentiary burden Plaintiffs face interferes with Defendants' due process rights.

CONCLUSION

Defendants respectfully request that the Application for Rehearing be granted, and that the Court modify and/or clarify its Decision as set forth herein.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of October, 2014, a true and correct copy of the foregoing was served on counsel of record electronically as indicated below.

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