

No. A08-816

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State of Minnesota  
**In Court of Appeals**

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Clifford L. Whitaker, et al. on behalf  
of themselves and all others similarly situated,  
*Respondents,*

vs.

3M Company,  
*Petitioner.*

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**BRIEF OF MINNESOTA CHAMBER OF COMMERCE, AMICUS CURIAE**

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## Statement of *Amicus*<sup>1</sup>

The Minnesota Chamber of Commerce (“the Chamber”) is Minnesota’s largest business advocacy organization. The Chamber was founded in 1909 and represents more than 2,400 businesses of all types and sizes in urban, suburban, and rural areas throughout the state. The membership of the Minnesota Chamber of Commerce includes small businesses and Fortune 500 companies alike. The mission of the Chamber is to enhance the competitiveness of Minnesota companies.

### Argument

#### **I. It is Imperative That Courts Follow the Rules Requiring Careful Attention to The Facts Relating to Class Certification.**

Class certification standards ensure the fair and efficient adjudication of class actions, and their importance in litigation is great. This case presents an opportunity to clarify the established guidelines to make sure that Minnesota businesses are not subjected to class litigation run amok. Certification in this case, apparently made in derogation of compelling evidence suggesting that the requirements for class action were not met, raises serious concerns about the fairness and the effectiveness of the litigation process in Minnesota.

#### **A. A necessary corollary of the duty to make findings is the need to weigh the evidence that bears on class certification, even if that inquiry overlaps with the merits.**

It is axiomatic that merely alleging the criteria for class certification is not enough to support it. The United States Supreme Court has recognized that the trial court must apply

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<sup>1</sup> Pursuant to MINN. R. CIV. APP. P. 129.03, the Chamber certifies that this brief is written by the Chamber’s counsel of record, and no party or counsel for a party authored the brief in whole or in part. No person other than the Chamber, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

a “rigorous analysis” that all of the elements of Rule 23 are met. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). The Court also established the standard that should guide the Minnesota courts: “actual, not presumed, conformance with Rule 12” is “indispensible.” 457 U.S. at 160.

The court necessarily has to consider the facts to determine if Rule 23’s requirements are met. These requirements serve several important roles, notably protecting a party opposing a class from having to defend a false aggregation of disparate or meritless claims. The rules also protect class members from the casual adjudication of their rights in actions in which they have no voice.

Rule 23 quite intentionally imposes multiple requirements for class certification. Rule 23.01 explicitly imposes four prerequisites: a) numerosity making joinder impracticable, b) commonality of questions of law or fact, c) typicality of the claims of the class representatives of the class as a whole, and d) the ability of the class representatives to protect adequately the interests of the class. These requirements obviously imply the existence of a class, and that that class can be defined to determine unambiguously who is a member of the class and who is not. In addition, the court must find that the class can be certified under one of the subdivisions of Rule 23.02. For the reasons discussed by 3M, these requirements are not met in this case, and the district court’s perfunctory analysis of the weighty evidence militating against certification should not be endorsed by this Court.

Probably no U.S. Supreme Court decision has caused as much confusion as the Court’s dictum in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), suggesting that courts should not address the merits of litigation at the class certification stage. *See generally* David

S. Evans, *Class Certification, The Merits, and Expert Evidence*, 11 GEO. MASON L. REV. 1, 8-9 (2002) (“Many district courts have misread *Eisen* as saying that anything that smacks of merits is off limits in considering the class issues.”) The line is now fairly clear: the court shouldn’t be deciding the merits, but must be free to address evidence that may overlap with the merits but which relates to the issues on class certification.

**B. This Court should make it clear that a party seeking class certification needs to show entitlement by a preponderance of the evidence.**

Although it is difficult to discern just what standard the district court applied in this case, it is perfectly clear that it did not make a determination that plaintiffs had proven anything by a preponderance of the evidence. *Amicus* will leave it to the parties to argue the specific evidence in this case, but the standard to be applied to that evidence is an important issue far beyond the facts of this case. Accordingly, the Chamber as *amicus* urges this Court to set forth a clear requirement to the district courts requiring them to review the evidence on class certification (not the entire body of evidence in the case) under the preponderance-of-the-evidence standard, and to certify a class only when that standard is met as to all required elements. Where, as appears to be the case here, the party opposing class certification proffers evidence that seriously undermines or erases any proper inference in favor of certification, the trial court must be required to consider the evidence on both sides and to certify only if the required proof is made.

No other standard makes sense for this decision. Certainly the approach apparently used in this case – relying on allegations in the Complaint with merely some class evidence – is contrary to the greater weight of authority. The Seventh Circuit has observed that mere

deference to the allegations in a complaint “cannot be found in Rule 23 and has nothing to recommend it.” *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001).

A strong consensus has developed in the federal circuit courts requiring proof by a preponderance of the evidence. *See 3M Br. at 20-23*. That standard works well in federal practice, and does not unduly burden the courts. Instead, it provides a rational, workable guideline to the district courts and a meaningful framework for the appellate review that is appropriate under *Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (2002). It is also followed in numerous states. *See 3M Br. at 22*.

It is especially important that the Minnesota appellate courts adopt this rational and workable standard. Allowing trial courts to certify class actions without consideration of the facts—both pro and con—that bear on the issue of certification only encourages the filing of class “strike suits.” *See, e.g., West v. Prudential Secs., Inc.*, 282 F.3d 935, 938 (7th Cir. 2002)(reluctance to address conflicting expert evidence at certification stage “amounts to a delegation of judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert.”).

Once a class action is improvidently certified, there is little rescue for a defendant until a trial, and that almost never happens. The cost to Minnesota defendants—in terms of time, expense, and distraction from economically productive activities, including creation of jobs—is huge. The pressure to settle is also important, and is particularly unfortunate for claims that lack intrinsic merit. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978)(“[C]ertification of a large class may so increase the defendant’s potential damages liability and litigation costs that he may find it economically prudent to settle and abandon a

meritorious defense.”); *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102 (D.C. Cir. 2002)(“[T]he grant of class status can put substantial pressure on the defendant to settle independent of the merits of plaintiffs’ claims.”). Regardless of the extent of that pressure in particular cases, when it occurs without consideration of the merits, it distorts the litigation process. This Court should act to create a workable requirement for state judges just as the federal courts have done.

**C. It is necessary that trial courts make findings of fact to support a class certification decision.**

The district court’s “findings” in this case are mere restatements of the requirements of Rule 23. This Court should reject those findings as insufficient, and require that class certification not be sustained without a rigorous analysis. The trial court’s plainly insufficient initial findings are hardly helped by the later-filed Memorandum of Law in support of the order. *A.66*. The statements in that memorandum reflect anything but rigorous analysis. On the crucial issue of considering expert evidence, the trial court appears to eschew the guidance of the majority of decisions on this matter. This Court should establish a clear requirement to the lower courts that a court confronting a motion for class certification must consider all the evidence placed before it that bears on class certification. Here, it is clear that the trial court applied a much more superficial analysis, essentially just considering whether the plaintiff had incanted the provisions of the rule and had advanced arguments to support that. Nothing suggests that the trial court considered the compelling evidence submitted by 3M or that the court in any way weighed that evidence.

Minn. R. Civ. P. 23.02(c) expressly requires that the court “find” the predominance of common questions over those affecting individual members. The trial court here appears to

have understood that findings were appropriate, but it did not enter meaningful findings. It simply restated the rule's provisions. If these findings are sufficient for this case, they could be copied verbatim and used by judges in any case.

**D. The need for the actual consideration of the evidence, and not the mere assessment of the pleadings, is underscored by the recent amendments to Rule 23.**

Rule 23 of the Minnesota Rules of Civil Procedure was amended in 2006 in several important ways. The rule was amended to conform verbatim to its federal counterpart, Fed. R. Civ. P. 23, as that rule had been revamped in 2003.<sup>2</sup> This amendment reflects the desirability of conformity between the state and federal rules, particularly on a matter such as class certification which is both important to all litigants and relatively infrequently encountered in state court. The 2006 amendment to Minn. R. Civ. P. 23.03 changed the requirement for timing of the class certification from “as soon as practicable” under the prior rule to “at an early practicable time.” The reason for this amendment was to recognize that certification often should be taken up after, as was done in this case, there is discovery into the merits. *See* FED. R. CIV. P. 23(c)(1), Advis. Comm. Note—2003 Amends. (rule amended in recognition of fact that it is often “appropriate to conduct controlled discovery into the ‘merits,’ limited to those aspects relevant to making the certification on an informed basis.”) This restructuring of the rule, coupled with the inclusion of the express requirement in Minn. R. Civ. P. 23.02(c) that the court must “find” predominance of the common

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<sup>2</sup> The Minnesota advisory committee expressly adopted the rationales for amendment set forth in the federal advisory committee notes. *See* MINN. R. CIV. P. 23, ADVIS. COMM. COMMENT—2006 AMEND., *reprinted in* MINNESOTA RULES OF COURT—STATE 35 (West 2008 ed.)(federal notes “provide useful information on the purposes for these amendments and may be consulted for interpretation of these rules.”).

questions, should dispel any question of whether the trial court should consider competing evidence and make findings.

**II. This Court Should Be Particularly Reluctant to Affirm Certification of An Unwieldy Class in an Area Where Claims Can be Litigated Individually.**

Employment discrimination claims such as those advanced in this case are routinely handled in individual actions. Again, the trial court simply incants the language of Rule 23.02(c) in its findings to conclude that the common issues predominate over individual issues in this case. *A.63*. In the later-filed Memorandum, the trial court acknowledges that the separate, phase 2 damage proceedings “are not without complexity” but nonetheless that it is preferable to individual cases. It nowhere explains how this counter-intuitive conclusion could be so. The only stated reason—that the complexity of the proceedings concocted for this class would deter participation—is indeed a powerful argument against sustaining this certification order.

This Court should be aghast looking at a class certification order affecting a major Minnesota employer where there may be 6,000 members in the putative class but only a small fraction of those having the claims being litigated. 3M’s brief identifies<sup>3</sup> only 173 possible employees with promotion discrimination claims, and as few as 10 for other claims. *3M Br. at 42*. It is incapable of dispute that claims shared by only—at most—10 class members cannot be typical of the claims of others in a “class” of 6,000. Class litigation like this strikes terror in the eyes of the members of the Chamber. It raises the spectre of

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<sup>3</sup> *Amicus* Chamber does not address the veracity of the data relied on by 3M, but they appear to be part of the record. *Amicus* has access only to the Redacted Appendix, and those redactions appear to be significant in the portion of the Appendix discussed here. *See A.191-205*.

exhausting, draining litigation involving an employer's entire workforce where at most only a few employees in fact have claims. This disrupts business as well as creating a litigation morass from which it is hard for a defendant to extricate itself. The trial court decisions here do nothing to explain how these claims might be handled in a manageable way.

The class definition itself reveals its overbreadth—"all employees" above a certain age and below a certain level of executive responsibility—must include many, many persons who never applied for a promotion and never wanted one. It must include many employees who were promoted, perhaps even frequently, but who nonetheless remain in the class. 3M points out how employees arbitrarily become class members merely by accepting transfers to Minnesota or merely by turning 46 shortly before the eventual trial of this case (or whenever the class "closes"). The sum of these inherent problems with the class definition should give this Court pause; they point to an absurd, unworkable class.

3M describes only some of the problems created by defining a class that includes as plaintiffs the vast majority of the 3M employees who supposedly made the employment decisions and evaluations that give rise to the class claims. How could a class be more unworkable? Worse than the unmanageability issues within the litigation process, however, are the imposition of impossible burdens on an employer of having broad swaths of its managerial employees put in the position of being both claimants and targets of debilitating claims against them and their employer. The court can't fairly measure the impact of this situation on a major innovative employer like 3M. The trial court appears to have dealt with it simply by ignoring it. This Court should bear in mind the inevitable burdens placed on litigants by undisciplined class certification, however, and should understand that the

burdens of litigation such as this are only more disastrous for smaller, less established employers.

Overinclusiveness of the class definition is only an academic problem in some classes, such as where there is no ongoing relationship between the class members and the defendant. Here, it would be bound to create problems even if the overinclusiveness were only overbreadth—the inclusion of class members who have no claims. But with the compounding problem of including numerous class members who are also the managers who the class assert made the employment decisions that are alleged to be wrongful, the class becomes a sorry litigation

Class actions can be exceedingly economically inefficient. They are invariably expensive. Where the “class action” is a haphazard conglomeration of claims (and non-claims), allowed by not requiring facts that establish the criteria of Rule 23, the class action is both wasteful and extortionate. *See, e.g., Ronconi v. Larking*, 253 F.3d 423, 428 (9th Cir. 2001)(noting that lawsuits can “extort a great deal of undeserved settlement money” and an extorted settlement payment “just wastes capital and unfairly transfers money from those who have earned it to those who have not.”). Here, Rule 23 of the Minnesota Rules of Civil Procedure stands as an important bulwark against abusive class actions. This Court should issue clear guidance to trial courts and litigants on the need for a party seeking class certification to prove entitlement by a preponderance of the evidence and the need for trial judges to weigh evidence to decide whether that burden has been carried. The stakes are high for this decision, for the litigants, and for the state’s economy.

## Conclusion

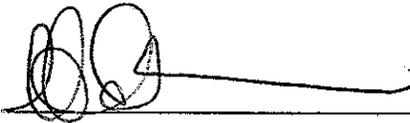
For the foregoing reasons, *amicus curiae* Minnesota Chamber of Commerce respectfully urges this Court to reverse the class certification decision in the case and in the process to issue a published decision that establishes a standard for Minnesota class actions that comports with the standard that has developed in the federal courts, requiring a class action proponent to establish all requirements for class certification by a preponderance of the evidence, and requiring the trial courts to make meaningful findings and conclusions to permit meaningful appellate review.

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Respectfully submitted,

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