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Honorable Julia Jordan Weller
Clerk Of The Court

No. 1120010

IN THE SUPREME COURT OF ALABAMA

CAREMARK RX, INC. (now known as CVS CAREMARK CORPORATION); AMERICAN INTERNATIONAL GROUP, INC.; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, Pa.; AIG TECHNICAL SERVICES, INC.; and AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,
Appellants - Cross-Appellees - Defendants,

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,
Appellees - Cross-Appellants - Plaintiffs.

On Appeal from Jefferson County Circuit, CV-2003-6630-TK

BRIEF OF APPELLEES / CROSS-APPELLANTS
OPPOSING APPLICATION FOR REHEARING

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October 9, 2014

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ARGUMENT

I. THE SCOPE OF THE CLASS

A. APPELLANTS HAVE WAIVED THIS ISSUE BY FAILING TO MAKE ANY LEGAL ARGUMENTS OR CITE ANY LEGAL AUTHORITIES AS TO WHY NON-FILERS SHOULD BE EXCLUDED FROM THE CLASS DEFINITION

The class certified by the trial court (Order, p. 34, S5777; quoted at Ms. p. 16 of September 12, 2014, opinion) is essentially the 1999 class, less the few who opted out in 1999.[1] The 1999 class included roughly 80,000 shareholders, of whom about 18,000 filed approved claims (See Ms. p. 11). Shareholders received about 3 cents on the dollar from the $56M settlement. Appellants/defendants (CVS/AIG) take the position that the roughly 60,000 "non-filers" should be excluded from this present (certified in 2012) fraud class.

There is literally nothing to rehear because appellants' rehearing brief (pp. 3-6) cites no legal authorities and presents no argument as to why non-filers should be excluded.[2] The brief (pp. 5-6) merely contends

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[1] This Court, at *Ex parte Caremark RX, Inc.*, 956 So.2d 1117, 1125 (Ala. 2006), stated that: "Despite the existence of the new claims, there can be no dispute that the class of persons similarly situated to Lauriello with regard to these newly asserted claims is identical to the class certified in the MedPartners securities litigation."

[2] "Rule 28(a)(10), Ala.R.App.P., requires that arguments in an appellant's brief contain citations. Where

that the September 12th opinion must have intended to exclude non-filers, and appellants (p. 6) ask this Court to modify "the decretal paragraph" to make it plain that the September 12th opinion intended to exclude non-filers.

This is not an "argument." There is nothing to rehear. The September 12th opinion (Ms. p. 45) decreed that the trial court's certification "be affirmed in all respects."[3] Thus, it is incumbent upon the rehearing brief to present legal arguments and legal authorities as to how the certification was erroneous in regard to its inclusion of non-filers. Appellees urge this Court to overrule this issue, without any further opinion.

The rehearing brief (pp. 3-6) is solely premised upon the proposition that the body of the September 12th opinion intends to exclude non-filers from this fraud class, so only "the decretal paragraph" needs to be modified and corrected

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no legal authority is cited or argued, the effect is the same as if no argument had been made." *Stacey v. Peed*, 142 So.3d 529, 532, n. 3 (Ala. 2013) (internal citation omitted). See also Ala.R.App.P. 40(b): "The brief in support of the application must contain any arguments in support of the application the petitioner desires to present."

[3] Ms. pp. 42-43 also state: "We . . . conclude that the court did not exceed its discretion as to the designation of the class included in its certification order."

to accurately reflect that holding. This briefed position (pp. 3-6) is completely contradictory to what appellants say in the application for rehearing itself. At p. 1, the application asserts (emphases added):

> The [September 12th] Decision . . . rejected Defendants' contention that the class as certified by the trial court is impermissibly broad because it does not expressly exclude those who did not submit claims in connection with the settlement. . . . Because this exclusion of "opt outs" does not cover non-claimants, a fact that the Decision appears to overlook, Defendants' position has not been resolved.

Because appellants' application notes (correctly) that its non-filer position was "rejected" or "not resolved" by the September 12th opinion, its rehearing brief was required to present legal arguments and citations as to why non-filers ought to be excluded. The brief does not do that, so there is no issue to rehear in regard to non-filers.

B. EVEN IF THE SCOPE ISSUE IS RE-REVIEWED ON THE MERITS, THE TRIAL COURT WAS CORRECT TO INCLUDE NON-FILERS IN THIS CLASS

This non-filer issue is raised at pp. 93-94 of appellants' brief of June 13, 2013, where no legal citations are included. Appellants' brief (p. 93) makes only the purely conclusory assertions that non-filers "did not rely on any misrepresentation or suppression. . . and they

suffered no injury."[4]

First, this is purely a merits issue that has nothing whatsoever to do with certification issues. Whether non-filers possess a viable cause of action, and whether they can prove damages are merits issues. "[A] determination on the ultimate merits of an action during class certification is improper." *Eufaula Hosp. Corp. v. Lawrence*, 32 So.3d 30, 34 (Ala. 2009).

Whether the non-filers ultimately win or lose on the merits, their claims are obviously common, typical, etc. - literally identical, in fact. So, the merits *vel non* of the non-filers' claims are perfectly suited for class adjudication, as this merits defense can easily be presented as a subclass-wide defense against all 1999 non-filers as part of this fraud class action litigation. There can be no issues relevant to the Rule 23 factors of commonality and typicality because, when the fraud was consummated, all class members were equal and no one could know which members would, in the future, file approved claims.

Second, to the extent any discussion of the merits is

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[4] In response to the non-filer issue, appellees reference, and incorporate herein, pp. 63-64 of their appellees' brief and pp. 31-33 of their reply brief.

relevant at all, both filers and non-filers were identically injured by the fraud-in-the-settlement in 1999. They were all members of and "participants" in the 1999 class, and the entire class, as a unitary legal entity, was defrauded, not just those who ultimately filed approved claims. Ms. p. 31 of the September 12th opinion holds "that the class as a whole - not each individual member - was defrauded." (emphasis in original). Justice Murdock's opinion (Ms. p. 46) notes that the holding of this case is that "it was 'the class' that was defrauded." "*The class*" that was defrauded included *all* of the approximately 80,000 shareholders - not just that unknown, future subset of class members who later would file approved claims.

The $56M settlement was a settlement on behalf of the entire class; and, the hypothetical higher recovery (had the truth about unlimited insurance been known) would have been, as well. The higher recovery (settlement or judgment) would not have been derived or calculated solely on behalf of the undetermined persons and entities who will, in the future, actually file a claim that gets approved by the claims administrator. At the time the case would have settled or tried, all class members would have been together in an

identical legal position (because, at that moment in time, no one would know which class members would later follow through with filing a verifiable claim). So, appellants' "merits" argument against non-filers has no substance.

When the opt out period expired, in June 1999, no fraud had yet been consummated. But, every non-opt-out had taken exactly the same position: to give up the right to proceed on an individual basis in exchange for the benefits of the proposed settlement - if approved by the Court.[5] In June 1999, the proposed class had not yet suffered any legal injury, because the settlement had not yet been approved. Judge Wynn then held a final hearing and entered a final approval order based on what he had been told. Then, *all* members of the class suffered identical damage at precisely

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[5] Page 4 of appellants' rehearing brief says (emphasis added): "a person who did not submit an opt-out request and also submitted no claim form to collect proceeds from the Settlement was bound by the Settlement even though he or she received no payment." Exactly! This accurate observation undercuts appellants' positions because it helps to demonstrate how non-filers were "actual participants" in the class when it was defrauded and how they are affected by the fraud that settled a potentially $3B lawsuit for a mere $56M. Had the truth about unlimited insurance been disclosed in 1999, then class members who ultimately did not opt out and did not file claims could have made the election to opt out and seek unlimited insurance via individual claims, had they deemed the class offer not fair and adequate. The fraud damaged them, *inter alia*, by robbing them of that choice.

the same time and place, e.g., because they did not opt out and false information was given to gain court approval.

Third, barring 1999 non-filers from this 2012 fraud class would violate their due process rights. The fact that roughly 60,000 class members did not file claims in 1999 is perfectly understandable because many claims would have been too small to bother with, considering that stockholders were receiving only about 3% of their losses in the 1999 $56M settlement. A non-filer could have knowingly decided not to bother to claim 3%, but that same person would have bothered to file a claim to recover substantially more.

A settlement or judgment in this 2012 fraud class action will represent the amount of money that ought to have been recovered in 1999. The 1999 non-filers have never had a due process opportunity[6] to decide whether to make the effort to claim their pro rata share of a much larger pot of recovery funds. To exclude them from this 2012 fraud class would unconstitutionally deprive them of that choice, and there is no legal precedent requiring such.

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[6] "Civil litigation deprives the litigants of property . . . and thus must accord the litigants due process of law." William B. Rubenstein, Newberg on Class Actions § 11:21 (5th ed.) (database updated Sept. 2014).

When the non-filers did not opt out in 1999, they bound themselves to the class result, for good or for bad.[7] If this 2012 fraud class results in a positive recovery, the 1999 non-filers must be given a second claims period to get their due process share of the "good." Analogously, if there is a material change to a class action settlement, additional notice must be provided to class members with a new opportunity to object or file a claim.[8]

II. STATUTE OF LIMITATIONS IS NO IMPEDIMENT TO CERTIFICATION

First, this Court's agreement with Prof. Rubenstein's "entity theory"[9] necessarily rejected appellants' positions

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[7] "[T]he class member, by failing to opt-out, locked himself into the class for all purposes. . . ." William B. Rubenstein, Newberg on Class Actions § 16:15 (4th ed.) (database updated Sept. 2014) (quoting Homburger, State Class Actions and the Federal Rule, 71 Colum. L. Rev. 609, 626 (1971)). Non-filers "actively participated" in the 1999 class, because, e.g., the settlement barred their claims.

[8] See, for example, *International Union, United Auto., Aerospace, and Agr. Implement Workers of America v. Ford Motor Co.*, No. 07-CV-14845, 2009 WL 3757040, *15 (E.D. Mich. Nov. 9, 2009) ("Notice of an amendment to a class settlement and an opportunity to object may be required when the amendment will effectuate a material change in the settlement terms.").

[9] See, e.g., section II.B.1., pp. 33 et seq., of appellees' brief of July 12, 2013, entitled, "Plaintiffs' Case for Certification Rests Primarily Upon Prof. Rubenstein's 'Entity' Analogy or Theory." At Ms. p. 32, this Court agreed with Prof. Rubenstein that "this is a class

in regard to purported individual statute of limitations defenses. Appellants' rehearing brief (p. 6) asserts that its limitations defense is "separate and apart from the reliance" issue, but it is not: limitations is just the same old individual reliance issue dressed up in different words. This purported "separate" statute of limitations issue is subsumed by and answered by this Court's holding on the core issue of individual reliance.

Page 45 of appellees' brief explained: "If this Court rejects defendants' positions and agrees with the plaintiffs' 'entity' theory, then there is no separate statute of limitations issue to address." **If the 1999 fraud was committed on a single entity, the certified 1999 class, then, by operation of logic, there can be only a single statute of limitations applicable to this entire 2012 fraud class**. Ms. p. 31 of the September 12th opinion holds "that the class as a whole - not each individual member - was defrauded." (emphasis in original). Thus, the appellants' statute of limitations issue was necessarily rejected.

The very first sentence of appellants' rehearing brief

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action lawsuit about a class action lawsuit, not about a set of individual market transactions."

(p. 3) says: "Defendants acknowledge the Court's holding that to the extent the alleged fraud and/or suppression in this case was perpetrated, it was perpetrated on the Class in the 1998 litigation." By this admission, their statute of limitations position fails: the entity defrauded was the 1999 class, so one, single fraud victim can have only one limitations period, not 80,000 separate limitations periods, each to be individually litigated.

At Ms. pp. 26-27, this Court held that "individual reliance [is] irrelevant" because the fraud was communicated to class counsel to induce a reduced settlement "on behalf of the entire class." (emphasis in original). Ms. p. 33 says (emphasis added): "The unique facts of this case - the alleged representations were made to the class's agents (counsel) - distinguishes this case from those in which the reliance of individual class members was at issue. In reaching this conclusion we specifically reject the importance of the pre-settlement differences among class members. . . ." Quoting *Walco*, Ms. p. 34 uses the plural in stating that, "while it may be true that unique defense***s*** will be asserted by the Defendants in this action, this fact alone is insufficient to destroy the commonality

requirement. . . ." (bold "s" added). The September 12th opinion necessarily rejected the position that individual statute of limitations issues even exist, much less that they destroy the predominance of common facts and issues.

Second, and alternatively, whatever the merits of the limitations defense, it is a class-wide defense. The purported limitations defense is so uniform that appellants' position actually strengthens the case for certification.[10] See appellants' brief at p. 57: "It is Defendants' position that with all the public disclosure of the insurance as early as 1998, every class member (and every lawyer involved in the case) had constructive knowledge of the existence and scope of the excess insurance long before October 2001." This is the very definition of a class-wide defense. Right or wrong, win or lose, this affirmative defense is perfectly suited for class-wide treatment and adjudication.

Recall that appellants' limitation defense is based on certain press releases and public filings made in late 1998

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[10] For example, defense counsel King told the trial court, at R226, that: "It's our position in this lawsuit that this [the December 17, 1998, press release] unambiguously placed everyone, placed the public on notice such that any reliance after this date on any of the facts allegedly misrepresented or suppressed was unreasonable as a matter of law." (emphasis added).

and early 1999 (prior to class certification), and they contend that such information was sufficient to put the plaintiff class on notice of the alleged fraud. Even if the press releases or public filings could arguably put the plaintiff class on notice of something in late 1998 and early 1999, appellants' *subsequent* fraud in the settlement in May-July 1999 (e.g., the misinformation given to Judge Wynn, and the failure to disclose the true limits of insurance) renders such prior notice ineffective to create a limitations bar. See *Ex parte Alabama Farmers Co-op, Inc.*, 911 So.2d 696, 703 (Ala. 2004) ("the statute of limitations is tolled as to a fraud claim if, after discovery of the fraudulent acts and inquiry, the plaintiff is misinformed or falsely informed by the defendant"). Accordingly, even if the plaintiff class was on notice of fraud in late 1998 and early 1999, appellants' subsequent fraud committed later in 1999 would again toll the statute.[11] This plaintiffs' position, whether ultimately right or wrong, is a class-wide position that is identical in regard to each class member.

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[11] Note that, in post-1999 collateral but related litigations, defendants continued to represent to courts that the $56M settlement exhausted all available insurance. See appellees' brief of July 12, 2013, at pp. 6-7.

The merits of any statute of limitations defense is perfectly suited for class adjudication.

Third, ignoring altogether this Court's agreement with Prof. Rubenstein's "entity theory," and even if viewed as an individual affirmative defense, appellants have failed to prove that individual issues predominate. "The courts have traditionally been reluctant to deny class action status simply because affirmative defenses, including a defense based on a statute of limitations, may be available against individual members." 6A Fed.Proc., L.Ed. § 12:248 (2013).

Applying Justice Johnstone's concurring opinion's analysis in *U-Haul Co. of Ala., Inc. v. Johnson*, 893 So.2d 307, 313-14 (Ala. 2004): an affirmative defense does not automatically defeat class certification on predominance grounds; the burden of proof on the defenses lies with the defendant; the burden is discharged only with the production of "substantial evidence that a substantial number of putative class members" engaged in the activity that would defeat their claim; and, a court should be "skeptical" of overemphasizing affirmative defenses. As applied here, appellants/defendants must prove that a class member: had full knowledge of one or more of the purported disclosures

about the excess insurance; interpreted those disclosures to mean that the available insurance was more than sufficient to cover *any* settlement or judgment; and still believed that the $56 million settlement was fair, regardless of the amount of insurance available and regardless of the extent of liability and damages. Appellants have not identified even one such hypothetical class member, much less "that a substantial number of putative class members" fall into this category. The trial court's Order correctly (p. 32, S5775) rejected the defendants' positions as "hypothetical" and devoid of any "evidence and/or testimony."

Fourth, appellants' due process argument (rehearing brief, p. 8) has no application. Because the victim of the fraud was a certified class (a single, separate legal entity), reliance and statute of limitations issues can both be proven by showing that class counsel and the court relied and were defrauded.[12]

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[12] The two cases cited on p. 8 are not apropos: Certifications were denied for many other reasons in both *Thorn v. Jefferson-Pilot Life Ins. Co.*, 2004 WL 5745993 (D.S.C. 2004), *aff'd*, 445 F.3d 311 (4th Cir. 2006) (the trial court mentions due process once, and the appellate opinion not at all), and in *Novak v. Home Depot U.S.A., Inc.*, 259 F.R.D. 106 (D. N.J. 2009) (where n. 7 briefly mentions due process in a citation to a California appellate order categorized as "unpublished/noncitable").

Under the trial court's (b)(3) certification, affirmed herein, and ignoring the "entity theory," appellants/ defendants would remain free to prove that specific class members knew the truth and did not rely - and to have them removed from the class.[13] Individual defenses are not necessarily precluded, by operation of law, by a (b)(3) certification. The trial court here merely held that such purported and purely hypothetical individual defenses do not predominate over the common questions. This Supreme Court was correct to affirm that decision.

CONCLUSION

Appellees urge the expeditious overruling of this application for rehearing, without further opinion.

Respectfully submitted,

/s/ Bruce J. McKee
Bruce J. McKee

[13] Again, this is a hypothetical illustration of what might happen if the "entity theory" is ignored. The point is: there is no "due process" problem, even if the "entity theory" is ignored. But, appellees contend that this Supreme Court adopted the "entity theory," meaning that only one statute of limitations will apply to this case, e.g., because only one, single legal entity (the 1999 class) was the victim of this alleged fraud. If there is no "due process" problem without application of the "entity theory," there can certainly be no "due process" problem when applying the "entity theory."

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CERTIFICATE OF SERVICE

I hereby certify that on this the 9th day of October, 2014, a true and correct copy of the foregoing was served by first-class U.S. mail on the following counsel of record:

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