

NO. 70816-9

SUPREME COURT OF THE STATE OF WASHINGTON

ROXETTE BUSANI, individually and as the representative
of persons similarly situated,

Respondent,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner.

**BRIEF OF THE CHAMBER OF COMMERCE OF THE
UNITED STATES AND THE NATIONAL ASSOCIATION
OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER UNITED SERVICES AUTOMOBILE
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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States (“the Chamber”) is the world’s largest business federation, representing an underlying membership of more than three million businesses and organizations. The National Association of Manufacturers (“NAM”) is the nation’s oldest and largest broad-based industrial trade association. The *amici* regularly advocate the interests of their members in court on issues of national concern to the business community.

The petition relates to legal issues of critical importance to the *amici*’s membership. Businesses such as those the *amici* represent are the primary target of multi-state class actions of all types and often face potentially crushing liability in such actions. As a consequence, the *amici* and their members have a strong interest in ensuring that the courts of this State grant class certification only when doing so is both fair and consistent with due process.

STATEMENT OF THE CASE

Plaintiff/respondent Roxette Busani filed her amended complaint, individually and as the representative of persons similarly situated, against United Services Automobile Association (“USAA”) on August 9, 2000 in Pierce County Superior Court. She filed a motion for class certification on November 6, and the Superior Court certified a twenty-seven state class on

January 30, 2001. On March 23, the court denied the motion of defendant/petitioner USAA for reconsideration, and USAA subsequently filed with this Court its Statement of Grounds for Direct Review and Motion for Discretionary Review on April 10. Busani's opposition is due on May 18, and oral argument is set for May 24. The Chamber and NAM now file this brief as *amici curiae* to urge the Court to grant discretionary review and reverse the certification. The *amici* adopt the statement of facts set forth by USAA in its Motion and supporting brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Superior Court of Pierce County attempted to shoehorn the claims of some 20,000 persons in twenty-seven states into a single class action by holding that all of those claims may be tried under Washington law. It did so even though (1) the defendant is an out-of-state company; (2) most of the putative class members reside outside Washington; (3) most of the subject automobile accidents occurred outside Washington; (4) most of the insurance claims were filed and processed outside Washington, in the states where the insureds were domiciled, where their automobiles were principally garaged, and/or where the subject losses occurred; and (5) the claims of each class member give rise to individualized factual and legal determinations sufficient to overwhelm any questions applicable to the putative class as a whole. The certification

of a class in the face of these undeniable facts is in direct conflict with the limitations on class actions recognized by the United States Supreme Court and numerous state and federal courts across the country.

In ignoring this substantial body of case law indicating the impropriety of certifying this case as a class action, the Superior Court has contributed to the growing trend toward making Washington a haven for abusive class actions. If decisions like the one below are allowed to stand, lawyers from across the country can be expected to converge on Washington with dubious multi-state class actions that could not be certified elsewhere. The present case is an ideal vehicle for addressing this burgeoning problem.

ARGUMENT

I. Immediate Review Is Warranted To Ensure That Washington Does Not Become A Haven For Abusive Class Actions.

The modern class action is very often not a means to vindicate the rights of individuals; it is instead a lawyer-initiated, lawyer-directed affair, the real purpose of which is to generate a substantial common fund fee award.¹ Plaintiffs' lawyers regularly scan news reports for consumer complaints, actions by regulatory agencies, and other possible bases for

¹ See, e.g., Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 HASTINGS L.J. 165, 166 (1990) (noting that class counsel, not the class representative, directs every phase of such litigation).

class litigation; seek out individuals to serve as named plaintiffs; and then shop for friendly jurisdictions in which to file suit.² They then obtain class certification — often without meeting their burden to show that class status is warranted — and use the threat of a huge verdict to extort a quick settlement, the most central feature of which is a large attorney’s fee.

Because the amount of the judgment in a multi-state class action can be breathtaking,³ and the adverse publicity from such a judgment raises the stakes still higher, certification of a large class action places the defendant “under intense pressure to settle” even a meritless case for large sums. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).⁴ Class action litigation has thus become much like shooting fish in

² See Hearings on Mass Torts and Class Actions Before the Courts and Intellectual Property Subcomm. of the House Judiciary Comm., 105th Cong. (Mar. 5, 1998) (“Class Action Hearings”), 1998 WL 122552 (testimony of former Attorney General Dick Thornburgh); *id.* at <<http://www.house.gov/judiciary/41158.htm>> (statement of John P. Frank); Richard Schmitt, *Justice RFD: Big Suits Land in Rural Courts*, WALL ST. J., Oct. 10, 1996, at B1.

³ See, e.g., Ronald D. Rotunda, *The Long Gavel: In Class Actions, State Judges Are Trumping Other Jurisdictions’ Laws*, 23 LEGAL TIMES, May 15, 2000, at 67 (pointing to \$1.2 **billion** multi-state class action judgment in *Avery v. State Farm Mut. Auto. Ins. Co.*, No. 97-L-114 (Ill. Cir. Ct., Williamson Cty.), as subverting state sovereignty); cf. Ann Spragens, *Class-Action System Needs Reform*, CHI. TRIB., Oct. 15, 1999, at 20 (verdict in *Avery* “should sound a strong call for reform of the way the U.S. judicial system handles class-action litigation”).

⁴ *Accord Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (“[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into

a barrel: If a class action lawyer can find a forum willing to certify a case as a class action, the prospect of a substantial fee without the risk of a trial is inordinately high. As a result, there has been an explosion in class action litigation over the last several years.⁵

Regrettably, it appears that Washington is becoming part of this trend. Last November, for example, the King County Superior Court certified a class action on behalf of State Farm insureds alleging improper denials of first-party medical benefits provided by their automobile

the stratosphere.”); *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (noting that there is an “insurmountable pressure on defendants to settle” because the “[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low”).

⁵ The Federal Judicial Conference’s Advisory Committee on Civil Rules has reported, for example, that during a three-year period U.S. companies experienced a 300% to 1,000% increase in the number of putative class actions filed against them. See 1 Working Papers of the Advisory Committee on Civil Rules on Proposed Amendments to Civil Rule 23, at ix-x; see also Class Action Hearings, 1998 WL 122553 (statement of John W. Martin, Jr.). The Institute for Civil Justice has similarly found that many corporations in the last few years have experienced a doubling or tripling of the number of putative class actions pending against them. See Deborah Hensler et al., *Preliminary Results of the RAND Study of Class Action Litigation* 15 (RAND 1997). Moreover, it is clear that much of this increase has been concentrated in the state courts. See *id.* at 15; see also The Interstate Class Action Jurisdiction Act of 1999: Hearings Before the House Judiciary Comm., 106th Cong. (July 21, 1999), 1999 WL 528443 (statement of former Solicitor General Walter E. Dellinger); Elizabeth J. Cabraser, *Life After Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 386 (1998) (statement by leading class action attorney that “[i]t is no secret that class actions — formerly the province of federal diversity jurisdiction — are being brought increasingly in the state courts”).

policies.⁶ The court recognized that common issues did not predominate, declining to certify the action under CR 23(b)(3). But it inexplicably certified the case — and agreed to allow the pursuit of individual claims for money damages — under CR 23(b)(1) and (2), effectively rendering its CR 23(b)(3) ruling a nullity. The court permitted this backdoor money damages class action despite the fact that courts in other states had previously denied certification of multi-state class actions involving the same defendant, many of the same putative class members, and virtually identical legal claims.⁷

In the instant case, the Pierce County Superior Court certified a twenty-seven state class action seeking “inherent diminished value” (“IDV”) damages under the putative class members’ automobile insurance policies, even though in many jurisdictions it remains a question of first impression whether IDV claims are legally cognizable *even in individual actions*, and courts in several other states have already held that they are

⁶ See *Class of State Farm Insureds Claiming Improper Cost Cutting Certified in Washington*, MEALEY’S LITIG. REPORT: CLASS ACTIONS, Jan. 2001, at 11 (discussing *Sitton v. State Farm Mut. Auto. Ins. Co.*, No. 00 2 10013 2 SEA (Wash. Super. Ct.)).

⁷ See *Siler v. State Farm Mut. Auto. Ins. Co.*, No. 99 L 863, oral ruling (Ill. Cir. Ct., Madison Cty. Aug. 16, 2000); *Merrill v. State Farm Mut. Auto. Ins. Co.*, No. 497-316, order (S.D. Ga. June 11, 1998); *Smith v. State Farm Mut. Auto. Ins. Co.*, No. 89-CP-24-852, order (S.C. Ct. Common Pleas Feb. 23, 1990); see also *Hare v. State Farm Mut. Auto. Ins. Co.*, No. 2-98 CV 65, order (N.D. Ind. Mar. 26, 2001) (denying class certification after *Sitton* ruling).

not.⁸ Moreover, even in the short time since the court below granted certification, its ruling has been rejected explicitly by at least one court, which denied certification of a four-state IDV damages class on the ground that “the individual questions that arise in determining liability and damages in each separate case are too numerous to assure an efficiently run and managed trial.” *Cazabat v. Metropolitan Prop. & Cas. Ins. Co.*, 2001 WL 267762, at *7 (R.I. Super. Ct. Feb. 23, 2001) (noting that trial judge in *Busani* did not discuss possible individual questions to which IDV claims would give rise, and concluding that such issues are so numerous as to render a class trial “unmanageable and henceforth, not superior” to individual ones under Rule 23). And at least one other court has similarly denied certification of an IDV damages class, concluding both that the class claims would require “innumerable” separate trials on “individual questions of liability and damages” — thus defeating

⁸ See, e.g., *Siegle v. Progressive Consumers Ins. Co.*, __ So. 2d __, 2001 WL 456531, at *5 (Fla. Dist. Ct. App. May 2, 2001) (declining “substantially [to] re-write the insurance contract” to recognize claim for IDV damages, but noting split of authority and certifying question to Florida Supreme Court); *Carlton v. Trinity Universal Ins. Co.*, 32 S.W.3d 454, 465 (concluding as a matter of law that insurer cannot be held liable for IDV damages where it has fully repaired insured’s automobile); *Johnson v. State Farm Mut. Auto. Ins. Co.*, 754 P.2d 330, 331 (Ariz. Ct. App. 1988) (denying IDV claim and holding that insurer’s “liability is limited by the terms of the policy to the cost of repairing the vehicle less any deductible payable by the insured”); *Ray v. Farmers Ins. Exch.*, 200 Cal. App. 3d 1411, 1415-17 (Cal. Ct. App. 1988) (“To hold Farmers liable for the automobile’s diminution in value would make Farmers an insurer of the automobile’s cash value in virtually

predominance — and that the “facts would vary greatly among the proposed class members, making it impossible for * * * any * * * proposed representative, to satisfy the typicality requirement.” *McKinsey v. State Farm Fire & Cas. Co.*, No. E62323, order (Ga. Super. Ct. Aug. 27, 1999).

Immediate review is warranted here to put the breaks on this emerging trend toward improvident certification.

II. Immediate Review Is Warranted Because The Trial Court’s Application Of The Law Of Washington To The Claims Of All Putative Class Members Conflicts With The Holdings Of The U.S. Supreme Court And Numerous Other Federal And State Courts.

Respondent Busani sought and obtained certification of a twenty-seven state class of approximately 20,000 USAA policyholders, even though only a small fraction of the putative class actually resides in Washington. In its ruling, the trial court failed to address in any meaningful or systematic way the significant variations in the laws of the twenty-seven states, and instead approved a single action under Washington law after vaguely suggesting that this action might promote uniformity of decisions and concluding that it would permit recoveries by individuals across the country who might otherwise have no remedy for

all cases and would render essentially meaningless its clear right to elect to repair rather than to pay the actual cash value of the vehicle at the time of loss.”).

their alleged injuries. *See* USAA App., vol. II tab 14A, at 275-77 (oral class certification ruling of Jan. 30, 2001).⁹

But uniformity of decisions is a *non sequitur* when, as here, the laws of the several states are not uniform; and provision of a remedy to absent class members is no virtue when their home states have elected to strike a different balance between their interests and those of potential defendants. It should come as no surprise, therefore, that federal and state courts across the country — and most notably the U.S. Supreme Court — have consistently refused to apply a state’s laws extraterritorially to regulate transactions that occurred entirely in other states.¹⁰ The Superior

⁹ “USAA App.” refers to petitioner USAA’s Appendix to Motion for Discretionary Review.

¹⁰ *See, e.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-73 (1996) (Alabama jury could not apply Alabama law to punish defendant for transactions taking place in other states); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders”) (internal quotation marks omitted); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582-83 (1986) (rejecting New York’s attempt to “project its legislation” into other states) (internal quotation marks omitted); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818-23 (1985) (Kansas court could not apply forum law to claims of class members who had no connection with Kansas); *Edgar v. MITE Corp.*, 457 U.S. 624, 641-43 (1982) (plurality op.) (Illinois anti-takeover statute impermissibly regulated transactions occurring entirely outside of Illinois); *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975) (“[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State”); *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (“[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state * * * without throwing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority and upon the preservation of which the

Court's insistence in this case that Washington law could be applied across the board to the claims of putative class members in twenty-seven states is irreconcilable with all of these decisions.

Specifically, the Due Process and Full Faith and Credit Clauses prohibit application of one state's laws to the claims of persons in other states without "a significant contact or significant aggregation of contacts to the claims asserted by each member of the plaintiff class."¹¹ *Phillips*

Government under the Constitution depends."); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("[n]o State can legislate except with reference to its own jurisdiction"); *Rhone-Poulenc*, 51 F.3d at 1300-02 (issuing writ of mandamus directing decertification of class where trial judge intended to give single instruction merging laws of all fifty states); *Poe v. Sears, Roebuck & Co.*, No. 96-CV-358-RLV, 1998 WL 113561, at *4 (N.D. Ga. Feb. 13, 1998) (applying law of state in which defendant is headquartered to multi-state class "would not pass constitutional muster"); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371 (E.D. La. 1997) (Michigan law could not be applied in nationwide class action even though defendant was headquartered in Michigan); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997) (both due process and choice-of-law principles prohibited application of Michigan law in fifty-state class action); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 423 (E.D. La. 1997) (under applicable choice-of-law principles, Illinois law could not be applied to all members of fifty-state class); *Endo v. Albertine*, No. 88-C-1815, 1995 WL 170030, at *5 (N.D. Ill. Apr. 7, 1995) (Illinois law inapplicable to claims of out-of-state class members); *Oliveira v. Amoco Oil Co.*, 726 N.E.2d 51, 61-62 (Ill. App. Ct.) (Illinois law could not constitutionally be applied to transactions between Illinois-domiciled company and consumers in other states), *review granted*, 734 N.E.2d 895 (Ill. 2000); *Duvall v. TRW, Inc.*, 578 N.E.2d 556, 559 (Ohio Ct. App. 1991) (Ohio law inapplicable to claims of out-of-state class members).

¹¹ This State's "most significant relationship" test — *which the Superior Court declined to apply* — is, moreover, fully consistent with this constitutional mandate and represents yet another reason this Court should grant review. *See generally Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wash. 2d 893, 898-99 (1967) (rejecting *lex loci* rule and adopting "most significant relationship" test for choice-of-law problems in contract cases in part because test "gives much more

Petroleum Co. v. Shutts, 472 U.S. 797, 821 (1985) (internal quotation marks omitted). Likewise, the Commerce Clause bars a “single state [from] impos[ing] its own policy choice on neighboring States” (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996)), and instead preserves the sovereign authority of each state to regulate conduct occurring within its own borders.

These state sovereignty and federalism concerns apply with special force to cases involving insurance. As envisioned by the McCarran-Ferguson Act, 15 U.S.C. § 1011, the business of insurance is regulated “by the several States,” with different states adopting varying approaches. The federal policy of permitting each state to decide for itself how to regulate the relations between its own residents and insurers doing business within its borders cannot be overridden for the sake of consolidating numerous small claims into a single, massive action.¹²

emphasis to the desires and expectations of the parties”). The instant action does not satisfy even one of the several elements of the test the Court identified in *Baffin*. *See id.* at 901.

¹² In keeping with this policy, twenty-one states, including Washington, have adopted statutes expressly requiring the application of their own law to insurance contracts issued to their residents. *See* Ala. Code § 27-14-22; Alaska Stat. § 21.51.300; Ariz. Rev. Stat. § 20-1115; Cal. Ins. Code § 41; Colo. Rev. Stat. § 10-3-122; Fla. Stat. Ann. § 627.632; La. Rev. Stat. Ann. § 22.629; Md. Ins. Code § 12-209; Mass. Gen. Laws ch. 175, § 22; Minn. Stat. § 60A.08; Miss. Code Ann. § 83-8-7; Neb. Rev. Stat. § 44-357; N.C. Gen. Stat. § 58-3-1; Okla. Stat. tit. 36, § 3617; Or. Rev. Stat. § 27-14-12; S.C. Code Ann. § 38-61-10; Tenn. Code Ann. § 56-7-102; Tex. Ins. Code Ann. art. 21.42; Utah Code Ann. § 31A-

Washington has no valid interest in how USAA — an out-of-state company — responds to underinsured motorist claims arising elsewhere under policies issued through out-of-state insurance agents to non-Washingtonians. The trial court’s application of the laws of Washington to all class members’ claims would, therefore, unconstitutionally override the authority of twenty-six other states to regulate insurance transactions within their borders, and would effectively permit Washington to arrogate to itself the power to effectuate a nationwide policy governing the sale of insurance. Nothing could be more intrusive to the sovereignty of Washington’s sister states, more corrosive of the federal system, or more squarely in conflict with settled precedent across the country.

By the expedient of applying Washington law classwide, the Superior Court eliminated all state statutory and common law rules that would be more favorable to USAA than the laws of Washington, thereby

21-314; Va. Code Ann. § 38.2-312; Wash. Rev. Code § 48.18.200. Under the Commerce Clause, moreover, Washington may not dictate to other states how business should be conducted there and may not impose restraints, even on its own citizens, that would needlessly restrict commerce in those other states. *See MITE Corp.*, 457 U.S. at 640-46 (holding that Illinois’ anti-takeover statute, which interfered with the offeror’s tender for shares held by non-Illinois residents, violated Commerce Clause even though it was being applied to a tender offer for an Illinois corporation). Thus, the trial court’s application of Washington law to all class members’ claims plainly runs afoul of the laws of twenty other states and the Due Process, Full Faith and Credit, and Commerce Clauses, and it violates the principles that underlie both the McCarran-Ferguson Act and the insurance laws of this State.

relieving many class members of the burden to make the showing required of them in an individual case.¹³ It goes without saying, moreover, that any attempt to satisfy the strictures of the Due Process Clause by applying in a single trial before a single jury the differing laws of twenty-seven states — or, in this case, to make and then apply new law for each of those twenty-seven states — would defeat predominance, render the trial unmanageable, and hence run afoul of CR 23(b)(3).¹⁴

¹³ The differing state comparative fault and contributory negligence regimes to which USAA points in its Motion for Discretionary Review (at pp. 21-22) give rise to but one of the due process violations certain to occur if this case is allowed to proceed as a multi-state class action under the laws of Washington or any single state. Because it is rare, moreover, that one state's laws will be more favorable to the class members in all particulars than the law of all other states, the choice of Washington law also will almost invariably deprive some, if not many, absent class members of their due process right to have their claims adjudicated under the laws of their home states.

¹⁴ See, e.g., *Castano*, 84 F.3d at 741; *Rhone-Poulenc*, 51 F.3d at 1300-03; *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 679 (S.D. Cal. 1999); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 225 (W.D. Mich. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 460-61 (D.N.J. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 224 (E.D. La. 1998); *Peoples v. American Fid. Life Ins. Co.*, 176 F.R.D. 637, 646 (N.D. Fla. 1998); *Marascalco v. International Computerized Orthokeratology Soc'y, Inc.*, 181 F.R.D. 331, 337 (N.D. Miss. 1998); *Poe*, 1998 WL 113561, at *4; *Dubose v. First Sec'y Sav. Bank*, 183 F.R.D. 583, 588 (M.D. Ala. 1997); *Ex parte Green Tree Fin. Corp.*, 723 So. 2d 6, 11 (Ala. 1998); *Ex parte Exxon Corp.*, 725 So. 2d 930, 934 (Ala. 1998).

It follows that, although in certain circumstances, “a class action is not precluded by the possibility that individual issues may predominate once the general illegality of the questioned practice is determined” (*King v. Riveland*, 125 Wash. 2d 500, 519 (1994)), certification would be wholly improper here because “the general illegality of the questioned practice” could not be established with respect to any putative class member without careful interpretation of the unique statutory and decisional law of that individual's home state.

These issues are particularly appropriate for discretionary review because, if review is denied and the matter goes forward as a single action applying Washington law, any ensuing trial would violate due process for all of the reasons given above, and hence the judgment could not stand. Absent discretionary review, therefore, the parties and the Superior Court might be forced to expend significant resources needlessly, simply to present these same issues to this Court at a later date. Admittedly, that outcome is unlikely; what is far more probable is that the threat of massive liability would force USAA to accept a premature and coercive settlement.¹⁵ And should the case take that turn, this Court would forever lose the opportunity to pass on the question whether the Superior Court's judgment should have been brought into line with those of the U.S. Supreme Court and other federal and state courts throughout the country.¹⁶

¹⁵ Failure to step in to prevent the lower courts of this State from applying Washington law to transactions having no connection to Washington also would have the deleterious effect of deterring companies that justifiably fear extortionate class actions from doing business in Washington and thereby subjecting themselves to suit in Washington courts.

¹⁶ This Court may address the question of extraterritorial application of Washington law to the claims of out-of-state class members in *Pickett v. Holland America Line—Westours, Inc.*, No. 70300-1, review granted, 143 Wash. 2d 1001 (2001). Because that case could well turn on the applicability of a choice-of-law provision not at issue here, the Court should grant USAA's petition, regardless of its disposition in *Holland America*, in order to resolve the constitutional question of whether Washington law may be applied to the claims of non-Washingtonians who have no contact with Washington.

III. Immediate Review Is Warranted Because This Case Cannot Be Tried As A Class Action Without Relieving Plaintiff Of The Burden Of Proving The Individualized Elements Of Each Class Member's Claim And Depriving USAA Of The Right To Introduce Individualized Evidence In Response.

Immediate review also is warranted because the Superior Court's conclusions that common issues predominate and that the case can be manageably tried as a class action cannot be squared with decisions of other state and federal courts holding that the federal Due Process Clause prohibits trial of a case as a class action if doing so would necessitate relieving the plaintiffs of the burden of proving the individualized elements of their claims and/or depriving the defendant of its right to put on individualized proof and raise individualized defenses. The Texas Supreme Court has perhaps put it best:

The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery * * *. Although a goal of our system is to resolve lawsuits with great expedition and dispatch and at the least expense, the supreme objective of the courts is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. This means that convenience and economy must yield to a paramount concern for a fair and impartial trial. And basic to the right to a fair trial — indeed, basic to the very essence of the adversarial process — is that each party have the opportunity to adequately and vigorously present any material claims and defenses.

Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 437 (Tex. 2000) (quotation marks and citations omitted). *Accord Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997) (class actions are permissible only when their goals can be achieved “without sacrificing procedural fairness”) (internal quotation marks omitted); *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 312 (5th Cir. 1998) (class certification cannot “alter the required elements which must be found to impose liability and fix damages”); *Broussard v. Meinecke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998) (“the procedural device of [the class action] cannot be allowed to expand the substance of the claims of class members”).¹⁷

The Superior Court’s decision to certify a class in this case is utterly irreconcilable with the requirements of due process as explicated by these other courts. To put it bluntly, there is *no* way that this case can be tried as a class action without (i) relieving the class members of their burden to prove the individualized elements of their causes of action; (ii) depriving USAA of its right to put on individualized evidence and to

¹⁷ See also, e.g., *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990); *Western Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976); *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 487-89 & n.21 (E.D. Pa. 1997); *Masonite*, 170 F.R.D. at 425; *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 372 (D.N.J. 1987), *mandamus granted on other grounds*, 855 F.2d 1062 (3d Cir. 1988); *Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141, 1146 (D.N.J. 1979), *aff’d*, 647 F.2d 388 (3d Cir. 1981).

assert individualized defenses; and (iii) obliterating the variations among the laws of twenty-seven states.

Consider how the case of putative class representative Roxette Busani would be tried if she had filed an individual action against USAA. To begin with, the parties would know from the outset that, because Busani purchased her policy in Washington, the laws of Washington would govern the case. Next, Busani not only would have to establish that USAA had a legal duty under Washington law to inform her of her right to claim IDV damages, but also would have to prove by competent, admissible evidence: (1) that she was involved in a motor vehicle accident with an uninsured or underinsured motorist; (2) that the other driver was at fault and liable for any damage to her vehicle; (3) that at the time of the subject loss she had a paid-up USAA automobile policy affording underinsured motorist coverage with available reimbursement for IDV damages; (4) the pre-loss condition and value of her vehicle; and (5) the post-repair condition and value of her vehicle. In other words, Busani could not establish either liability or damages without demonstrating as a factual matter that her vehicle sustained IDV losses, and that those losses were the direct and proximate result of a covered accident with an underinsured motorist.

For its part, USAA would be free to present any defense available to it under Washington law. USAA would thus be entitled to assert, for example, any available statute of limitations defense. Similarly, by virtue of standing in the shoes of the underinsured motorist, it would have the right to present rebuttal evidence on the merits of Busani's claims, including evidence that Busani suffered no injury-in-fact, or that she was contributorily negligent. In other words, USAA would have the right to demand both that Busani satisfy all relevant procedural requirements under Washington law, and that she meet her burden of persuasion with respect to each and every element of her case.

The fact that Busani (or, more accurately, her contingent fee legal team) desires to aggregate her claim with that of 20,000 other USAA policyholders around the nation should change nothing. The Due Process Clause requires that the plaintiffs' burden to prove the individualized elements of their claims, USAA's right to probe the circumstances of each individual accident and to offer individualized defenses, the trial court's duty to instruct the jury in the law applicable to each claim, and the jury's duty to make individualized, case-by-case findings consistent with applicable state law remain undiminished. That being so, the "class trial" would necessarily devolve into 20,000 trials-within-a-trial. Thus, even if the class here had consisted solely of Washington residents, it is apparent

that a “class trial” would be unmanageable; when the problems are compounded twenty-sevenfold by the need for the trial court to declare as a matter of first impression the law of each state in which class members reside and to instruct the jury in each of these, any attempt at a class trial would be the antithesis of the efficiency and fairness that CR 23 is intended to promote. Because the Superior Court’s decision that the case can nevertheless be tried on a classwide basis is irreconcilable with USAA’s due process rights and sets a deleterious precedent for future cases, the Court’s immediate intervention is warranted.

CONCLUSION

Should the Court decline to reverse the certification order at this stage, the preservation of class status would “put[] a bet-your-company decision to [USAA’s] managers and may induce a substantial settlement even if the [plaintiffs’] position is weak.” *Szabo v. Bridgeport Mach., Inc.*, __ F.3d __, 2001 WL 476574, at *2 (7th Cir. May 4, 2001). It follows that “[t]his is a prime occasion for the use of [discretionary review], not only because of the pressure that class certification places on the defendant but also because the ensuing settlement [would] prevent[] resolution of the underlying issues” (*id.*) by depriving this Court of jurisdiction to review the propriety of the certification at any subsequent point. In order to hold the line against class action abuse in Washington

and prevent this State from becoming a favored forum for actions that would not be allowed elsewhere, this Court should grant discretionary review, reverse the certification order, and send an unequivocal message that class certification will be available in the courts of this State only when it is consistent with due process and fully satisfies the predominance and manageability requirements of CR 23.

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