

No. A08-816
STATE OF MINNESOTA
IN COURT OF APPEALS

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

Respondents,

vs.

3M Company,

Petitioner.

**PETITION OF
MINNESOTA CHAMBER OF
COMMERCE FOR LEAVE TO
PARTICIPATE AS *AMICUS CURIAE***

The Minnesota Chamber of Commerce (“the Chamber”), pursuant to Rule 129.01 of the Minnesota Rules of Civil Appellate Procedure, respectfully requests leave to participate as *amicus curiae* in this appeal.

Interest of *Amicus Curiae*

The Minnesota Chamber of Commerce 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. Petitioner 3M is a member of the Chamber, but has not otherwise participated in the submission of this petition. The Chamber is uniquely able to provide this Court information and perspective on the importance of the class action issues the Court will address on the broad spectrum of Minnesota businesses.

In this case, the Chamber's interest is both public, and to a lesser degree, also private. With respect to the public interest, the Chamber's members share sincere concerns that the District Court's class certification decision is problematic and will prove pernicious in a wide variety of contexts. Ultimately, the certification of class actions needs to be guided by discernable standards based on the provable facts in a particular case or the process simply creates expensive litigation. The costs of that unwieldy litigation are felt by the parties to particular cases, and to their customers, employees, and shareholders of Minnesota businesses alike. The threat of unprincipled class certification also casts a pall over other cases.

To a limited degree, the Chamber's members have an interest that might also be viewed as private in nature, as Chamber members may from time to time be exposed directly to class actions, although the vast majority of cases do not directly face this issue. For these reasons, the Chamber's members are concerned that the unprincipled class certification decision in this case will expose member Minnesota businesses to unprecedented litigation expense and liability risks.

Reasons Why an *Amicus* Brief Will Be Helpful

The Chamber seeks leave to participate as *amicus curiae* to offer the perspective of Minnesota business on the issues presented by the trial court's class certification decision. In granting review of this decision, the Court has recognized that it will be helpful to all litigants to clarify the standards for class certification and, particularly, the standard of proof to be applied in factual disputes at the class certification stage. As recognized by the Court, this subject has been visited by the federal courts. *See, e.g., In re Initial Public Offerings Secs.*

Litigation, 471 F.3d 24 (2d Cir. 2006). The United States Supreme Court has recognized that a trial court considering a motion to certify a class action should undertake a “rigorous analysis.” *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147 (1982). The Chamber believes it can provide invaluable information to the Court to help it fully understand the importance of this requirement and the consequences of a trial court’s failure to undertake that analysis.

The trial court decision in this case certified a class with little regard for the merits of the claims and making only bare-bones findings as to the required prerequisites to class certification standards of Rule 23 of the Minnesota Rules of Civil Procedure. The use of raw “snapshot” statistical evidence, taken out of context and without any evident consideration of the limits to the value of those statistics, presents a difficult precedent for litigants facing class certification.

Properly supported by appropriate evidence and findings, class certification plays a proper role in meritorious litigation. Unsupported by proper consideration of the evidence, however, class certification only places inordinate pressure on defendants to settle, even in cases wholly lacking in merit. Courts have recognized that certification of class actions may place undue pressure on a defendant to settle without regard to the suit’s merits. *See, e.g. Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (“These settlements have been referred to as judicial blackmail.”). Where the trial court does not consider the merits, even where the merits overlap with class certification concerns, this pressure to settle is both intensified and unjustified. The certification of an unmanageable class, with class members who include most of the alleged perpetrators of the claimed wrong, is especially burdensome. This pressure may fall most intensely on litigants who cannot endure years of

expensive litigation before the merits can be addressed. The Chamber believes its members offer important and helpful insight on these issues across the full range of business size and type.

Although the Chamber does not directly support Petitioner 3M in this case, it will offer support for requiring trial courts to follow meaningful class certification standards, and therefore will urge reversal of the trial court's class certification decision here. The Chamber will be prepared to file its brief within the time allowed following service and filing of Petitioner 3M's opening brief on the merits and will work to ensure that its brief does not duplicate arguments made by the parties.

Conclusion

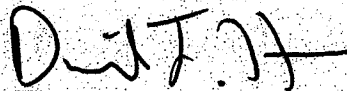
The Minnesota Chamber of Commerce submits that these issues are of far-reaching and substantial import to Minnesota business. The Chamber believes that it can provide the Court with the unique perspective of the broad Minnesota business community on this class action issue. The Chamber therefore requests that it be permitted to submit a brief as *amicus curiae* on the issues that affect Minnesota business.

Dated: July 11, 2008.

Respectfully submitted,

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