STATE OF CLASS ACTIONS TEN YEARS AFTER THE ENACTMENT OF THE CLASS ACTION FAIRNESS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

OF THE

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STATE OF CLASS ACTIONS TEN YEARS AFTER THE ENACTMENT OF THE CLASS ACTION FAIRNESS ACT

FRIDAY, FEBRUARY 27, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 9:07 a.m., in room 2141, Rayburn Office Building, the Honorable Trent Franks (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, DeSantis, King, Gohmert, Cohen, Conyers, and Nadler.

Staff present: (Majority) Zachary Somers, Counsel; Tricia White, Clerk; (Minority) James J. Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. Good morning. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the Chair is authorized to declare a recess of the Committee at any time.

10 years ago last week, Congress passed, and President George W. Bush signed into law, the Class Action Fairness Act, or CAFA as it commonly known. The bill was authorized by Chairman Goodlatte in the House and Chairman Grassley in the Senate, and received strong bipartisan support in both chambers. As it has been 10 years since CAFA was enacted, it seems like it is time for this Subcommittee to examine the current state of class action litigation in the Federal courts.

The class action is a mechanism designed to allow injured parties to join together with others who have suffered the same harm when their claims are not large enough to make pursuing them individually cost efficient. If used properly, class actions are a valuable tool in our system of justice, but they are only beneficial when the redress of actual injuries suffered by class members is the priority of the litigation.

In recent years, however, class actions have been used with increased frequency in ways that do not promote the interests they were intended to serve. CAFA was designed as a balanced approach to address some of the most egregious problems in class action litigation. Its goals were to promote fairness, ensure that inter-

state class actions are tried in Federal court, and establish new protections for consumers against abusive class action settlements.

In many ways, the Act has been highly successful at achieving its goals. However, despite CAFA's successes, many legal commentators have raised concerns about new class action abuses that CAFA was not intended to address. One of the problems that has emerged with increased frequency is CAFA's enactment no injury class actions. In these cases, attorneys seek damages on behalf of a class of plaintiffs who have not suffered any actual harm. Rather, plaintiffs in these cases seek compensation for potential injuries that may never occur.

These class actions are being filed despite the fact that it is a bedrock principle of both Federal and state law that a civil suit may not proceed if there is no injury. By allowing no injury class actions to proceed, judges are turning this bedrock principle on its head simply because a case is brought as a class action instead of by an individual plaintiff. As the Supreme Court has observed, class actions will always "present opportunities for abuse." This likelihood for abuse is at its greatest in actions in which the class of plaintiff does not need to show that they are actually harmed.

If no injury class actions are not bad enough, in the wake, CAFA attorneys have invented another class action device as well, a class action in which no plaintiff exists. These no plaintiff class actions are made possible through the use of cy pres settlements. In these cases, an uninjured third party with no connection to the litigation, usually a non-profit organization, is awarded money as part of a settlement because it would be too difficult or costly to identify the alleged victims. These settlements present a whole host of problems, not the least of which is that they almost certainly violate the Constitution's Article 3 case or controversy requirement.

With the advent of no injury and no plaintiff class actions, it is not surprising that a recent empirical study conducted by our first witness, Andy Pincus, determined that "class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can and do enrich attorneys."

It is also not surprising that a recent independent public opinion poll sponsored by DRI found that 78 percent of Americans believe that plaintiffs should only be able to join a class action if they can show that they were actually harmed, and 85 percent of Americans believe that class action lawyers should be required to obtain permission from individuals before enrolling them as plaintiffs.

I look forward to the witnesses' testimony, and I hope that through this hearing we can begin to examine what improvements are needed to ensure that the Federal class action system is functioning in a manner that is fair and efficient for plaintiffs and defendants.

And with that, I would recognize the Ranking Member for his opening statement.

Mr. COHEN. Thank you, Mr. Chairman. Class actions do benefit society by providing plaintiffs access to court. In cases where a defendant may have caused small injuries to a large number of persons, class actions have offered an important way for injured people to obtain remedies they might otherwise not be able to get. I see it all the time in my personal life. I open up an envelope, and

there is a class action based on something that has happened with a stock I have owned. And while I know the attorney is going to make a goodly amount of money, I am going to get something and knew about it, and never would have gotten anything otherwise. So class actions do a lot of good for a lot of people.

Class actions are a way to stop large-scale wrongdoing by a defendant. By doing so, they can protect our health, promote safe products, fight discrimination, ensure fair wages, punish fraud, and stockholders get benefits. Unfortunately, the Class Action Fairness Act of 2005 made it harder and more expensive for plaintiffs to pursue class actions.

Most controversially, the Act made it easier to remove class actions from State court to Federal court where class actions and litigation generally may be more difficult for plaintiffs to pursue. This is true even when the plaintiffs are all from one State that does business in that State, and the claim arises under State law. Still, it gives an opportunity to move it out of State courts.

The Act may have denied many people the benefits of class actions over the last decade. This is a shame. The Center for Justice and Democracy at New York Law School published a report in October 2014 entitled "First Class Relief: How Class Actions Benefit Those Who Are Injured, Defrauded, and Violated." This report details numerous class actions that have helped to remedy wrongs committed against consumers, employees, students, borrowers, service members, small businesses.

I ask unanimous consent at this point, Mr. Chairman, to offer this report for the record.*

Mr. FRANKS. Without objection.

Mr. COHEN. Thank you, sir. There are simply too many examples of the good that class actions have done for people to discuss in detail here. A few examples: *Morgan v. Richmond School of Health and Technology*, a for-profit school settled with 4,000 primarily African-American and low income students, who the school targeted for reverse redlining by using deceptive practices to enroll them for what the school knew was an inadequate education, saddling students with large debts, but without improved opportunities for employment. The students never would have had a thought about bringing an action themselves. Could not have, would not have got relief.

In Re Dynamic Random Access Memory anti-trust litigation where defendant manufacturers of dynamic random access memory chips used in computers and videogame consoles settled for $242 million with a class of 19,000 plaintiff companies that purchased those chips, with recoveries for class members ranging from $1,000 to $1 million.

Carter v. Wells Fargo Advisors, where Wells Fargo settled a gender discrimination class action brought by 1,200 female financial advisors who alleged discrimination in pay, promotion, and other employment decisions for $32 million, or about $18,000 for each class member, and injunctive relief against future discrimination.

***Note:** The information referred to is not reprinted in this hearing record but is on file with the Subcommittee, and can be accessed at: *http://centerjd.org/content/first-class-relief-how-class-actions-benefit-those-who-are-injured-defrauded-and-violated.*

Sure, there are interests who would not have wanted that to go forth. There are interests that would not want us to have access to class actions because they want to continue to discriminate against women, take advantage of African-Americans and young students, and rip them off, and pay them less. It needs to stop. The only way to do that is class actions.

That is the best, often the only mechanism that can deliver those good results. Individual cases may be too costly to pursue and not worth the compensation available to the individual victim. But in the aggregate, these cases involve large-scale wrongdoing that should be stopped, and the attorneys that bring the cases are private attorneys general that are doing the work that government otherwise could be doing if the resources were there to work in a collective fashion, where the laws were such that this was illegal. Well, it would already be illegal, but easier to pursue.

The majority witnesses will say today that class actions do not benefit class members and are not worth the costs they impose on corporate defendants. They will assert that class actions primarily benefit plaintiffs' lawyers. Well, that is not true, and the plaintiff lawyers deserve the pay they get because they are acting in the public interest and do benefit the public. In making these assertions, they rely on no objective data. Instead we will hear about a deeply flawed study conducted by the Mayer Brown law firm, otherwise a firm that I think well of for they employ Toby Moffett, a great American. But the study that they use critics have noted has cherry picked data and mischaracterization of cases to support its conclusions.

Today, the American Association for Justice and the National Association of Consumer Advocates released a report called "Class Actions are a Cornerstone of Our Civil Justice System: A Review of Class Actions Filed in 2009." This report contains a detailed case-by-case rebuttal of the Mayer Brown study that the majority witnesses today rely on in support of their assertions, attacking class actions and plaintiffs' lawyers. And I ask unanimous consent that it be made a part of the record. Mr. Chairman?**

Mr. FRANKS. Without objection.

Mr. COHEN. Thank you. The NACA and AAJ report shows that, in fact, class members did benefit in the cases cited in the Mayer Brown study. These people included Bernie Madoff's victims, employees who lost retirement funds due to misconduct by retirement fund members, and disabled tenants in public housing.

I also take issue with the assertion that class actions simply benefit plaintiffs' lawyers. All the benefits of class actions outlined would not be possible but for the hard work and dedication of the lawyers who are willing to fight such actions on behalf of victims. They ought to be commended for their work, not attacked.

Finally, I note that the Rules Advisory Committee of the Judicial Conference of the United States is currently considering amendments to Rule 23, which governs class actions. Given that Federal judges deal routinely with class actions, the consequences of CAFA,

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**Note: The information referred to is not reprinted in this hearing record but is on file with the Subcommittee, and can be accessed at:

http://www.consumeradvocates.org/sites/default/files/Class%20Action%20Report%202-27-15.pdf.

we should leave it to their expertise to determine what changes need to be made. It is amazing that we worry about the attorneys and what they make when they bring class actions on behalf of who have been wronged when the courts have found it wrong, but we do not worry about the tremendous salaries that are paid to the executives of the companies that are doing the unlawful work. That is one of the greatest flaws in our system today in America, the disparity in wealth and what the corporate CEOs are making and taking home and getting in benefits.

I will yield back the remainder of my time.

Mr. FRANKS. And I thank the gentleman, and I would now yield to the distinguished Chairman of the Committee, Mr. Goodlatte, from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman. Mr. Chairman, 10 years ago, I introduced and helped usher the Class Action Fairness Act through Congress and to the President's desk where it was signed into law. This legislation corrected a serious flaw in our Federal jurisdictional statutes that forbid Federal courts form hearing most interstate class actions.

While the reforms contained in the Class Action Fairness Act have been integral in improving the civil justice system in the United States, abusive class action practices still exist today. I hope that through this hearing, the Committee can begin to examine some of the current problems in Federal class action litigation, and look for ways to improve the system to ensure that class action lawsuits are benefitting the victims they are intended to compensate.

The class action device is a necessary and important part of our legal system. It promotes efficiency by allowing plaintiffs with similar claims to adjudicate their cases in one proceeding, and it promotes fairness by allowing claims to be heard in cases in which there are small harms to a large number of people that would otherwise go unaddressed because the cost of an individual plaintiff to sue would far exceed the benefits.

In the 1960's and 70's, class actions that sought injunctive relief were used to accomplish landmark civil rights reform, such as integrating public school systems, improving conditions in our prison systems, and challenging discriminatory housing and public accommodation laws. Today's class action litigation, however, has in large part shifted far away from these important civil rights suits, and is now dominated by class actions brought by enterprising plaintiffs' attorneys seeking money damages on behalf of consumers.

The rules that govern class action litigation have not kept up with this shift. In fact, other than the Class Action Fairness Act, no other major reforms to the laws governing Federal class actions have been adopted since 1966. Judging by some of the problems that have arisen since Class Action Fairness Act was enacted 10 years ago, additional reform is likely needed.

I am concerned that in the years since the Class Action Fairness Act was enacted, there has been a proliferation of class actions filed by entrepreneurial attorneys on behalf of whole classes of plaintiffs that have not suffered any actual injury. These class actions are often comprised of class members that do not even know

that they have been harmed, do not care about the minor injuries that the lawsuit is based on, and generally have no interest in pursuing litigation.

These co-called no injury class actions appear to violate Article 3 of the Constitution, which requires a plaintiff suffer an actual and concrete injury in order to have standing to sue in Federal court. This principle does not change simply because a case is brought as a class action instead of by an individual. Alarmingly, however, many Federal courts have departed from this constitutional requirement and certified class actions in which the class members have not suffered any actual harm.

No injury class actions appear to be to no one's benefit except the lawyers who are able to generate large fees litigating and settling these no injury cases. In fact, no injury class actions can actually harm the very class members on whose behalf they are purportedly brought. This harm occurs when individuals who have actually been injured are forced to sacrifice valid claims in order to preserve the lesser claims that everyone in the class can assert, or when consumers who are currently uninjured forgo real claims on future injuries in order to pursue more minor no injury claims. In short, no injury class actions can lead to substantial under compensation for consumers who have suffered actual harm.

I am also concerned that we may be witnessing a significant increase in class action settlements that produce little or no benefit to the members of the class. We tried to address this trend in the Class Action Fairness Act by putting significant restrictions on coupon settlements. But in the wake post-CAFA innovations, we may need to consider more reform to restrict parasitic settlements that benefit no one other than the attorney who brought the class action.

Given that class action lawsuit involve more money and touch more Americans than virtually any other litigation pending in our legal system, it is important that we have a Federal class action system that benefits those who have been truly injured and is fair to both plaintiffs and defendants. I look forward to the witnesses' testimony and any suggestions they may have for improving the laws governing class actions in Federal court.

And I thank the Chairman, and yield back.

Mr. FRANKS. I thank the gentleman, and I would now yield to the Ranking Member of the Committee, Mr. Conyers from Michigan.

Mr. CONYERS. Thank you, Mr. Chairman. Members of the Committee, I may be the only one on this Subcommittee that was here when the Class Action Fairness Act was sped through the Congress in 2005, and here we are again.

When Congress considered the measure 10 years ago, I warned that it would simply benefit corporate wrongdoers to the detriment of large numbers of people who suffer great harm. This is because the Act makes it relatively easy for corporate defendants to have their cases removed from State courts to the Federal courts, a venue where they believe they have greater advantages. And unfortunately, my concerns have proven to be correct over 10 years since the Act's passage.

Although proponents of this legislation claimed in 2005 that the Act was necessary to curb forum shopping by plaintiffs, in reality

this law has proved to be the ultimate tool for forum shopping by defendants. There are several reasons why the changes effected by the Class Action Fairness Act are so problematic.

To begin with, the Act offends federalism by undermining State laws in State courts. You see, State law often is the source of many critical consumer and environmental protections through common law, tort, and statutory provisions. In turn, class actions are vital to enforcing these rights as they allow aggregation of small claims that otherwise might not warrant individual litigation. Nevertheless, the Class Action Fairness Act makes virtually every class action removable to Federal court, thereby divesting State courts of the ability to interpret and develop State law.

In addition, by making it easier to remove class actions to Federal court, the Act makes class certification more difficult and expensive. Back in 2005, I correctly predicted that Federal courts would be less likely to certify class actions. This has become a reality because of a series of adverse Federal precedents that make it more difficult to establish the class action certification requirements under Rule 23 of the Federal Rules of Civil Procedure.

For instance, in 2011, the Supreme Court substantially narrowed the scope of Rule 23's commonality requirement in the Walmart Stores case. This case denied class certification in an employment discrimination class action suit seeking to vindicate the rights of as many as one and a half million female workers. The Court in a 5 to 4 decision, along ideological lines on the basic issue presented in the case, namely whether the purported class satisfied Rule 23's requirement that there be questions of law or fact common to the class of female employees.

The Court's conservative justices found it did not, giving what many critics say is a very narrow reading of Rule 23's commonality requirement. This narrow reading severely constrains the ability of plaintiffs to band together in large class actions, even when as in Dukes, the plaintiffs alleged the same type of injury, which in that case was gender-based employment discrimination. This decision has effectively made the Federal courts an even more favorable forum for defendants in consumer, anti-trust, environmental, and employment discrimination cases.

Finally, the Act increases the work load of an already overburdened Federal court system. In 2005, we were concerned about the effect that the Act would have on Federal courts considering the number of judicial vacancies, which at the time was 5 percent of the Federal judicial positions. Well, as you might suspect, the number has climbed to 7 percent as of last October. And I also note that there are only 1,500 Federal judges as compared to 30,000 State judges.

Growing caseloads force Federal judges to have even less time for case management and supervision, thereby resulting in delayed justice in class actions and other Federal cases, and creates the risk that judges will dismiss cases or encourage less than optimal settlements to clear their dockets.

So I conclude with the observation that this Act, Class Action Fairness, has made it increasingly difficult for consumers, employees, small businesses, to vindicate their rights and to seek rem-

edies for harmful acts of corporate wrongdoers. It was bad policy then, and remains so today.

And I thank the Chairman for allowing some extra time.

Mr. FRANKS. And I thank the gentleman. And without objection, other Members' opening statements will be made part of the record.

So now, I will introduce our witnesses. Our first witness is Andrew Pincus, a partner at Mayer Brown, who focuses his practice on briefing and arguing cases in the Supreme Court and other appellate courts, as well as on developing legal arguments in trial courts. He has argued 24 cases in the Supreme Court and filed briefs in more than 150 cases in that Court.

Mr. Pincus served as General Counsel to the U.S. Department of Commerce from 1997 to 2000, and as an assistant to the Solicitor General in the Justice Department from 1984 to 1988. Thank you for being here, sir.

Our second witness is John Parker Sweeney, president of DRI - the Voice of the Defense Bar. With 22,000 members, DRI is the Nation's largest professional association of civil defense attorneys. In addition, Mr. Sweeney is a partner at a law firm here in Washington. He has over 30 years of complex litigation experience, including defending major class actions and serving as national counsel in class action and mass tort cases across the country. Welcome, sir.

Our third witness is Patricia Moore, a professor of law at St. Thomas University School of Law where she teaches civil procedure, evidence, pre-trial litigation, and complex litigation. She has published over a dozen law review articles, including several articles on class action litigation.

Prior to entering academia, Professor Moore was a civil litigation partner at a national firm where she was the first woman to rise through the ranks and become partner in the firm's litigation department. Welcome.

Our final witness is Jessica Miller, a partner at Skadden Arps, who has brought experience in the defense of class actions and other complex civil litigation with a focus on product liability matters and multidistrict litigation proceedings. She has litigated in numerous Federal and State trial courts, and also has extensive appellate experience. In addition, Ms. Miller has been involved in several major Federal legislative efforts, and has written extensively on class action and tort reform issues.

Each of the witness' written statements will be entered into the record in its entirety, and I would ask each witness to summarize his or her testimony in 5 minutes or less. And to help to help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow indicating that you have 1 minute to conclude your testimony, and, of course, when the light turns red, it indicates that the witness' 5 minutes have expired.

So now, before I recognize the witnesses, it is the tradition of this Subcommittee that they be sworn, so if you will please stand.

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

[A chorus of ayes.]

Mr. FRANKS. You may be seated. Let the record reflect that the witnesses have answered in the affirmative.

I would now recognize our first witness, Mr. Pincus. And, Mr. Pincus, if you will turn that microphone on before you. Yes, sir.

TESTIMONY OF ANDREW J. PINCUS, PARTNER, MAYER BROWN, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM

Mr. PINCUS. Thank you, Mr. Chairman. Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee, it is an honor to appear before you on behalf of the Chamber of Commerce and its Institute of Legal Reform. And, Congressman Cohen, thank you for your very kind comments about my friend, Toby Moffett. We are very proud to have him at Mayer Brown.

In 1966, nearly 50 years ago, the Federal Courts Rules Committee authorized new class action procedures with little historical precedent, in particular, the catch-all damages class action permitted by Rule 23(b)(3). As several Members of the Subcommittee have noted, the Committee acted with the laudable goals of making it easier for plaintiffs with small claims to obtain access to justice, and enabling the courts to manage disputes involving large numbers of claimants.

Serious questions have been raised about how well that innovation is working, particularly how it is interacting with other significant changes in the litigation system over the past 5 decades. That debate has largely been a war of anecdotes. People on the plaintiff side point to class actions that achieved great results. People on the defense side point to class actions that did not. It is not a very satisfying discussion.

As several Members of the Subcommittee noted, my law firm tried to answer the question in a more systematic way by undertaking an empirical analysis of a neutrally-selected sample of punitive employee and consumer class action lawsuits. And just a word about the methodology because I know some people have criticized it. What we did was basically, since there is no database of all the class actions filed in the Federal courts, was to look in the reporters that report for the legal community about class actions, and take the ones that were mentioned as being filed in 2009. So we did not cherry pick the sample. It was whatever was reported in those publications, and then we tried to follow through on what happened.

And I am certainly looking forward to reading and responding to the report that Congressman Cohen mentioned. I am sorry that it was not released a few days earlier so I could have responded to it here today, but we will definitely respond.

But let me talk a little about the results that we found. Not one of the class actions ended in a final judgment on the merits. Every one that was resolved was either dismissed or settled, and the vast majority of resolved cases produced no benefits for members of the class. One-third of those that were resolved were dismissed voluntarily by the plaintiffs, so no benefit to the class. Just under another third were dismissed by the courts on the merits. Again, no benefits. So the remaining one-third were all settled on a class basis. What happened in those settlements?

As several Members of the Subcommittee have noted, a lot of those settlements these days provide for a significant share of the money to go to lawyers, and often a significant share of the settlement dollars to go to third parties through the cy pres process, not to the members of the class.

With respect to the funds that the agreements allocate to members of the class, it is very hard to figure out whether any members of the class actually receive them because information regarding the actual distribution of the money as opposed to the settlement that says X million dollars or X tens of millions of dollars for the class. How much do members of the class actually pick up is often not public, almost always not public.

In our study, we tried to find data to the extent we could, and we could for six cases. One of them, as someone has mentioned, was a Madoff case, which obviously involved very, very large prospective recoveries to the members of the class. The others delivered funds to only miniscule percentages of the class—.00006 percent, .33 percent, 1.5 percent, 9.66 percent, and 12 percent.

These results are not unusual. A senior consultant at a claims administrator, the settlement administrators that perform the distribution processes, says that "In consumer class actions, the claims rate"—in other words, the rate of members of the punitive class that get money—"is almost always less than 1 percent, and the median claims rate is .023 percent." So 1 out of 4,350 class members actually recovers.

Does this mean that every class action is unjustified? No. Does it mean that there are significant problems in our class action system? I think yes, and I think what it means is the incentive structure that we have in class actions today does not work for plaintiffs lawyers, for judges, and for defense counsel.

And I see that my time is up, and I will be happy to elaborate on that and answer any other questions that the Subcommittee has. Thank you.

[The prepared statement of Mr. Pincus follows:]***

***Note:** The supplemental material submitted with this witness statement is not printed in this hearing record but is on file with the Subcommittee. The complete statement can be accessed at: http://docs.house.gov/meetings/JU/JU10/20150227/103030/HHRG-114-JU10-Wstate-PincusA-20150227.pdf.

Statement of the U.S. Chamber of Commerce

ON: **The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act**

TO: **U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice**

BY: **Andrew J. Pincus, MAYER BROWN LLP**

DATE: **February 27, 2015**

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

Statement of

Andrew J. Pincus
Partner, Mayer Brown LLP

"The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act"

Hearing Before the Subcommittee on the Constitution and Civil Justice of the House Committee on the Judiciary

February 27, 2015

Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee:

My name is Andrew Pincus, and I am a partner in the law firm Mayer Brown LLP. Thank you for the opportunity to testify before the Subcommittee today on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.

In 1966—nearly fifty years ago—the Advisory Committee on Rules substantially amended Federal Rule of Civil Procedure 23, the rule that governs class actions in federal courts. Those changes authorized new procedures with little historical precedent—in particular the "catch-all" damages class action permitted by Rule 23(b)(3)—with the laudable goals of making it easier for plaintiffs with small claims to obtain access to justice and enabling the courts to manage disputes involving large numbers of claimants.

But these dramatic innovations have produced a variety of very significant unintended consequences, particularly when combined with other changes in the litigation system over the past fifty years such as, among other things:

- the rise of an entrepreneurial class-action plaintiffs' bar;
- the dramatic, asymmetric increase in pre-trial litigation costs resulting from electronic discovery directed against defendants;
- enactment of laws authorizing recovery of statutory damages that, according to some courts, eliminate the need for a plaintiff class to

prove that the defendant's alleged violation caused injury to each class member and to quantify the amount of the injury; and

- some courts' willingness to permit recovery in class actions based on the putative class members' uncorroborated claim of injury—claims that defendants are barred from contesting.

These developments, of course, have not been confined to federal courts. State courts adopted class procedures similar to, or even less stringent than, the requirements of Federal Rule 23. And over the nearly five-decade period that followed, a number of state courts became known as "magnet" jurisdictions that were home to some of the most serious abuses of the class action device.

Congress in the Class Action Fairness Act of 2005 ("CAFA") worked toward resolving some of the most flagrant abuses of class actions—most significantly by ensuring that large interstate class actions seeking $5 million or more could more easily be removed to federal court.

But neither before CAFA, nor after its enactment, has there been a broad-based study of the practical consequences of the class action device in the modern litigation system: is it in fact fulfilling the laudable goals that motivated the 1966 amendments, or is it falling far short of those goals—producing significant injustice, rather than justice?

To begin to address this question, my law firm studied a neutrally-selected sample of putative class actions filed in 2009. The results are disturbing: the vast majority of these cases resulted in no benefit to any member of the putative class, because they were dismissed voluntarily or on the merits, or remained pending years after they were filed. One third of the cases we studied were settled on a classwide basis; when data were available, we learned that the practical outcome usually was that a miniscule percentage of class members saw any monetary benefit from the settlement.

Although there appear to be many reasons for this phenomenon, one stands out. It has long been recognized that there are inherent conflicts between the interests of class counsel and class members. A resolution of the case that is optimal for class counsel—by maximizing the return for the effort expended—may not produce an optimal result for the class members. Thus, a settlement early in the case may yield the highest return-per-hour of attorney time, but also may produce a relatively small amount for class members. Indeed, when a case settles on a classwide basis, class members often receive little or no meaningful benefit. Sometimes class members receive no monetary relief, because their attorneys instead structure a settlement that uses *cy pres* awards to third parties or injunctive relief requiring minor changes or disclosures to inflate the claimed value of the class recovery—and the associated attorneys' fee award. Although courts

must assess the adequacy of settlements, they are unable to do so effectively in the absence of an adversary presentation; they also lack the power to refuse to approve a settlement on the ground that the case shouldn't have been brought in the first place—which is true of far too many class actions.

These concerns are aggravated by two disputed issues in class action litigation today:

- There is a debate in the federal courts over the requirement of "ascertainability" for class certification. As most courts have recognized, a class may not be certified unless there is a reliable and administratively feasible way of identifying class members. That rule protects both class members—by ensuring that they can be identified and therefore eligible for any payments that are available as a result of a settlement or judgment—and defendants' due process rights to raise available defenses to the claims of class members. Unfortunately, some courts have effectively jettisoned the ascertainability requirement, authorizing class certification (and thereby forcing settlements) when few, if any, class members can reliably be found.

- Article III of the U.S. Constitution requires a plaintiff to have "standing"—*i.e.*, suffered an actual and concrete injury—to sue in federal court. But a number of courts have departed from this basic principle and have authorized the certification of classes when class members have not suffered any harm, and rely solely on either the bare existence of an alleged statutory violation untethered to harm or speculation about the possibility of future harm.

I. Empirical evidence raises serious questions about whether the benefits of today's class actions outweigh their costs.

The debate about the benefits that class actions provide to individuals—and the costs they impose on defendants, the legal system, and the economy as a whole (including on the individuals they are supposed to benefit)—has historically rested on competing anecdotes.

Proponents of class action litigation contend that the class device effectively compensates large numbers of injured individuals. They point to cases in which they say class members have obtained benefits.

Skeptics respond that individuals obtain little or no compensation and that class actions are most effective at generating large transaction costs—in the form of legal fees—that benefit both plaintiff and defense lawyers. They point to cases in which class members received little or nothing.

Until recently, no one has taken a close empirical look into how class actions stack up to the anecdotal claims made about them. Rather than simply relying on anecdotes, my law firm undertook an empirical analysis of a neutrally selected sample set of putative consumer and employee class action lawsuits filed in or removed to federal court in 2009. We released our study in December 2013, and it is attached as Exhibit 1 to this written testimony.

Our study provides strong evidence that ***class actions provide far less benefit to individual class members than proponents of class actions assert.*** We learned:

- In our entire data set, ***not one of the class actions ended in a final judgment on the merits for the plaintiffs*** during the time frame of the study. And none of the class actions went to trial, either before a judge or a jury.

- The vast majority of cases produced ***no benefits to most members of the putative class***—even though in a number of those cases the lawyers who sought to represent the class often enriched themselves in the process (and the lawyers representing the defendants always did).

    - ***Approximately 14% of all class action cases remained pending four years after they were filed***, without resolution or even a determination of whether the case could go forward on a class-wide basis. In these cases, class members have not yet received any benefits—and most likely will never receive any, based on the disposition of the other cases we studied.

    - ***Over one-third (35%) of the class actions that have been resolved were dismissed voluntarily by the plaintiff.*** Many of these cases settled on an individual basis, meaning a payout to the individual named plaintiff and the lawyers who brought the suit—***even though the class members receive nothing***. Information about who receives what in such settlements typically isn't publicly available.

    - ***Just under one-third (31%) of the class actions that have been resolved were dismissed by a court on the merits***—again, meaning that class members received ***nothing***.

- ***One-third (33%) of resolved cases were settled on a class basis.***

    - This ***settlement rate is half the average for federal court litigation,*** meaning that a class member is far less likely to have

even a chance of obtaining relief than the average party suing individually.

- ***For those cases that do settle, there is often little or no benefit for class members.***

- What is more, ***few class members ever even see those paltry benefits—particularly in consumer class actions.*** Unfortunately, because ***information regarding the distribution of class action settlements is rarely available***, the public almost never learns what percentage of a settlement is actually paid to class members. But of the six cases in our data set for which settlement distribution data was public, ***five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%.*** Those results are consistent with other available information about settlement distribution in consumer class actions.

- Although some cases provide for automatic distribution of benefits to class members, automatic distribution almost never is used in consumer class actions—only ***one of the 40*** settled cases fell into this category.

- Some class actions are settled without even the potential for a monetary payment to class members, with the settlement agreement providing for ***payment to a charity or injunctive relief that, in virtually every case, provides no real benefit to class members.***

The bottom line: The hard evidence shows that class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can (and do) enrich attorneys. Legislators and policymakers who are considering the efficacy of class actions cannot simply rest on a theoretical assessment of class actions' benefits or on favorable anecdotes to justify the value of class actions. Instead, any policy determination that relies on the claimed benefits of class actions would have to engage in significant additional empirical research to conclude—contrary to what our study indicates—that class actions actually do provide significant benefits to consumers, employees, and other class members.

II. There are structural conflicts between the interests of class counsel and class members—and class members typically lose out.

Plaintiffs' attorneys seeking to represent a class often face incentives that put them at odds with the interests and rights of absent class members.[1] These lawyers' desire for a fee award can often conflict with Rule 23's goal of providing greater access to justice for class members.

First, many putative class actions are settled in a manner that ends the case without any benefit to class members.

Some cases are settled without any determination that a class should be certified—meaning that the case results in no recovery to the putative class. Forty-five of the 148 cases we examined in our sample were voluntarily dismissed by the named plaintiff who had sought to serve as a class representative or were otherwise resolved on an individual basis. That may mean that the plaintiff (and his or her counsel) simply decided not to pursue the class action lawsuit, in which event the case may have been meritless or too difficult to prosecute—and the putative class therefore would have been unlikely to benefit at all. Just as likely (if not more so) the case may have been settled on an individual basis without any benefit to the rest of the class.[2] These settlements often provide that the plaintiff—and his or her attorney—receive recoveries themselves, but absent class members receive nothing from such settlements.

Even when there is a determination that a class should be certified, many cases settle in a manner that produces negligible benefits for class members. Consumer class actions are almost always settled on a claims-made basis, which means that class members are bound by a class settlement—and thereby release all of their claims—but only obtain recoveries if they affirmatively request to do so, usually through use of a claims form.

Claims-made settlements do not provide substantial benefits to individual members of the class; ***the actual amount of money delivered to class members***

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[1] *See, e.g.*, Report on Contingent Fees in Class Action Litigation January 11, 2006 Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, 25 Rev. Litig. 459, 495 (2006) ("When it comes to fees, class counsel and class members have a fundamental conflict of interest. Every dollar not spent on fees is a dollar that would go to the class members.").

[2] In fourteen of the cases that were voluntarily dismissed—approximately one-third of all voluntary dismissals in the data set—the dismissal papers, other docket entries, or contemporaneous news reports made clear that the parties were settling the claim on an individual basis, although the terms of those settlements were not available. Many of the remaining voluntary dismissals also may have resulted from individual settlements.

in such cases almost always is a miniscule percentage of the stated value of the settlement. That is because, in practice, relatively few class members actually make claims in response to class settlements: many class members may not believe it is not worth their while to request the (usually very modest) awards to which they might be entitled under a settlement. And the claim-filing process is often burdensome, requiring production of years-old bills or other data to corroborate entitlement to recovery. Indeed, as we explain in further detail in our study, the class members' actual benefit from a settlement—if any—is almost never revealed.

Second, class action settlements are often structured to provide only injunctive relief (which may provide little or no benefit to class members) or a *cy pres* distribution (in which money is paid to charitable organizations rather than class members). ***These settlements***—which made up nine cases out of the 40 we examined that settled on a class-wide basis—***serve primarily to inflate attorney's fee awards without benefiting the putative class***. In many cases, injunctive relief has little or no real-world impact on class members—consisting of minor changes in behavior or modest alterations to disclosures—but is used to provide a basis for claiming a "benefit" to class members justifying an award of attorney's fees to class counsel.

Like injunctive relief settlements, ***the* cy pres *doctrine is being used by plaintiffs' lawyers to inflate artificially the purported size of the benefit to the class in order to justify higher awards of attorney's fees to the plaintiffs' lawyers.*** In four of the cases we examined, the settlement provided that one or more charitable organizations would receive either all monetary relief, or any remaining monetary relief after claims made were paid out.

Courts often assess the propriety of an attorneys' fee award in the settlement context by comparing the percentage of the settlement paid to class members or charities with the percentage of the settlement allocated to class counsel.[3] That approach has been endorsed by the Manual for Complex Litigation.[4] If no funds are allocated to the class, or a small portion of the amount ostensibly allocated to the class is actually distributed and the remainder of the funds returned to the

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[3] *See, e.g., Strong v. BellSouth Telecommunications, Inc.*, 137 F.3d 844, 851 (5th Cir. 1998) (affirming the district court's decision to compare the "actual distribution of class benefits" against the potential recovery, and adjusting the requested fees to account for the fact that a "drastically" small 2.7 percent of the fund was distributed); *see also Int'l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1223 (2000) (O'Connor, J., respecting the denial of certiorari) (noting that fee awards disconnected from actual recovery "decouple class counsel's financial incentives from those of the class," and "encourage the filing of needless lawsuits where, because the value of each class member's individual claim is small compared to the transaction costs in obtaining recovery, the actual distribution to the class will inevitably be small").

[4] *See* Federal Judicial Center, *Manual for Complex Litigation (Fourth)* § 27.71 (2004).

defendants, the relative percentages might trouble a judge who is reviewing the fairness of the settlement (assuming that this information is disclosed). But if the amount not collected by class members is contributed to a charity that can be claimed to have some tenuous relationship to the class, then the percentage allocated to attorneys' fees may appear more acceptable.

The result, as one district court has warned, is that attorney fee awards "determined using the percentage of recovery" will be "exaggerated by *cy pres* distributions that do not truly benefit the plaintiff class."[5] As Professor Martin Redish has noted, the *cy pres* form confirms that "[t]he real parties in interest in . . . class actions are . . . the plaintiffs' lawyers, who are the ones primarily responsible for bringing th[e] proceeding."[6] One district court has noted that when a consumer class action results in a *cy pres* award that "provide[s] those with individual claims no redress," where there are other "incentives" for bringing individual suits, the class action fails Rule 23(b)(3)'s requirement that the class action be "superior to other available methods" of dispute resolution.[7]

Other studies of class settlements and attorneys' fees confirm that these examples are not outliers. Such settlements commonly produce insignificant benefits to class members and outsize benefits to class counsel. A RAND study of insurance class actions found that attorneys' fees amounted to ***an average of 47% of total class-action payouts***, taking into account benefits actually claimed and distributed, rather than theoretical benefits measured by the estimated size of the class. "In a quarter of these cases, the effective fee and cost percentages were 75 percent or higher and, in 14 percent (five cases), the effective percentages were over 90 percent."[8]

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[5] *SEC v. Bear Stearns & Co.*, 626 F. Supp. 2d 402, 415 (S.D.N.Y. 2009).

[6] Testimony of Martin H. Redish at 7, U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, *Hearing: Class Actions Seven Years After the Class Action Fairness Act* (June 1, 2012), available at http://judiciary.house.gov/hearings/Hearings%202012/Redish%2006012012.pdf.

[7] *Hoffer v. Landmark Chevrolet Ltd.*, 245 F.R.D. 588, 601-04 (S.D. Tex. 2007) (Rosenthal, J.). In one of the cases in our sample, the same district judge cautioned that *cy pres* awards "'violat[e] the ideal that litigation is meant to compensate individuals who were harmed,'" but ultimately approved the award because prior court precedents had authorized the use of *cy pres*. *In re Heartland Payment Sys., Inc. Customer Data Sec. Breach Litig.*, 851 F. Supp. 2d 1040, 1076 (S.D. Tex. 2012) (Rosenthal, J.).

[8] Nicholas M. Pace et al., *Insurance Class Actions in the United States*, Rand Inst. for Civil Just., xxiv (2007), http://www.rand.org/pubs/monographs/MG587-1.html. Another RAND study similarly found that in three of ten class actions, class counsel received more than the class. *See* Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Executive Summary), Rand Inst. for Civil Just., 21 (1999), http://www.rand.org/pubs/monograph_reports/MR969.html.

In other words, for practical purposes, ***counsel for plaintiffs*** (and for defendants) ***are frequently the only real beneficiaries of the class actions***.

III. Courts remain divided over the fundamental question of whether the members of the class must be "ascertainable."

When plaintiffs' counsel stand to benefit from the certification of outsized classes (on the theory that such classes produce outsized fee awards), they have an incentive to draw the boundaries of their classes broadly to include a wide range of potential class members. Increasingly, plaintiffs' attorneys have attempted to define classes ***when it is impractical to figure out who is a class member***.

Most courts have recognized that the existence of an "ascertainable" class is a critical requirement for certifying a class.[9] Some plaintiffs' lawyers have attacked this "ascertainability" requirement based on the mistaken assumption that Rule 23 promotes the ability to certify a class action at all costs. They have ignored that class actions are a means of dispute resolution, not an end in themselves. As the Supreme Court has repeatedly instructed, class actions are an "exception to the usual rule" that cases are litigated individually, and it is therefore critical that courts apply a "rigorous analysis" to the requirements governing class certification before a lawsuit is approved for class treatment.[10]

Like the requirements set forth in Rule 23(a), ascertainability is rooted in due process principles. Who could dispute that if a named plaintiff brought an individual lawsuit against a company about a particular product, he would have to prove at trial that he purchased the challenged product and was injured as a result?

That basic principle does not change when a case is brought as a class action. Due process requires that a defendant have the opportunity to raise every available defense to each member of the class. Similarly, the ability of putative class members to hold a defendant liable for a claim cannot depend on whether the case has been brought as a class action or an individual case.[11] That is why the Rules

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[9] See, e.g., *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 592-94 (3d Cir. 2012); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-14 (7th Cir. 2006); *Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.)*, 471 F.3d 24, 30, 44-45 (2d Cir. 2006); *DeBremaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970).

[10] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011).

[11] *E.g., Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J., in chambers) (suggesting that due process is violated if "individual plaintiffs who could not recover had they sued separately can recover only because their claims were aggregated with others' through the procedural device of the class action"); *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (noting that "[i]f this were an individual claim, a plaintiff would have to prove at trial he purchased WeightSmart" and that a "defendant in a class action" has the same "due process right to raise individual challenges and defenses to claims").

Enabling Act, in which Congress authorized the development of the Federal Rules of Civil Procedure, provides that those rules cannot "abridge, enlarge, or modify any substantive right."[12] That requirement is especially important in the context of class actions under Rule 23: as the Supreme Court has explained, the class action is merely a procedural device, "ancillary to the litigation of substantive claims."[13]

A recent example from the Central District of California demonstrates this point. There, the court decertified a class of purchasers of pomegranate juice.[14] The plaintiffs had alleged that the company's advertising had included statements about the "various health benefits" of "certain Pom juice products," and these statements were purportedly false or misleading. The court held that the class was not ascertainable. As the court observed, "[i]n situations where purported class members purchase an inexpensive product for a variety of reasons, and are unlikely to retain receipts or other transaction records, class actions may present such daunting administrative challenges that class treatment is not feasible." The court looked to the low price of the products, the low probability that consumers "retained receipts," the fact that the challenged statements appeared only in advertising (and not on the products themselves) and consumers' varied reasons for purchasing the products. The court concluded that "there is no way to reliably determine who purchased [the challenged] products or when they did so."

Faced with decisions like this, plaintiffs' attorneys have encouraged courts to base class membership on individuals' uncorroborated self-identification. But many courts have rightly resisted efforts to let class members identify *themselves* using affidavits affirming their class membership. Any challenges defendants made to the validity of affidavits "required to prove class membership" would result in the very "individualized fact-finding or mini-trials" that courts have found are the hallmark of a non-ascertainable class. What is more, precluding defendants from making such challenges would increase the risk of fraudulent claims; "[i]t is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims." Meanwhile, uncritical acceptance of affidavits evidencing class membership would violate the due process right "to challenge the proof used to demonstrate class membership," which is "similar, if not the same," as the right to "challenge the elements of a plaintiff's claim."[15]

Recent empirical evidence underscores the concern that class members are especially likely to receive no benefit when the identities of class members are not readily ascertainable and therefore direct notice to absent class members is not possible. In connection with the settlement of a class action involving purchasers of

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[12] 28 U.S.C. § 2072(b).

[13] *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980).

[14] *See* In re POM Wonderful LLC, 2014 WL 1225184 (C.D. Cal. Mar. 25, 2014).

[15] *Carrera*, 727 F.3d at 307, 310.

Duracell batteries, a senior consultant at a major settlement administrator explained that based on "hundreds of class settlements, it is [the administrator's] experience that consumer class action settlements with little or no direct mail notice ***will almost always have a claims rate of less than one percent***."[16] The settlements reviewed involved consumer products "such as toothpaste, children's clothing, heating pads, gift cards, an over-the-counter medication, a snack food, a weight loss supplement and sunglasses." *Id.* And the median claims rates for those cases was a miniscule ".023%"—which is roughly 1 claim per ***4,350*** class members. To put it another way, in the mine-run consumer class-action settlement involving products for which class members are not readily identifiable and direct notice is largely impossible, approximately ***99.98%*** of class members receive ***no benefit at all***.

Because information regarding the distribution of class action settlements is not usually available to the public, this rare glimpse into actual claims administration data is significant. (It is also consistent with the range of claims rates that my firm was able to find in the class action settlements that we studied.) This data, moreover, confirms that the only true beneficiaries of the certification and settlement of consumer class actions in general—and especially of unascertainable classes—are the lawyers (both on the plaintiffs' and the defense side).

IV. There is an alarming trend of plaintiffs bringing, and courts approving, class actions where class members have suffered no tangible injury at all.

A basic principle of American constitutional law is that a party cannot invoke the machinery of the federal courts and file a lawsuit unless that party has been injured in some concrete and tangible way. This requirement of standing is fundamental to Article III of the U.S. Constitution. But in practice, this centuries-old principle is at risk as courts have begun, at an alarming rate, to authorize class action lawsuits where few, if any, class members have actually been injured.

A. Abuse of statutory damages provisions in federal statutes coerce defendants to settle class actions.

A large number of federal statutes provide for statutory damages as a remedy for violation of the statute. The Fair Credit Reporting Act, for example, provides for statutory "damages of not less than $100 or not more than $1,000" for a "willful" violation of the act's requirements.[17] A wide range of other statutes, including the

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[16] *See* Decl. of Deborah McComb ¶ 5, *Poertner v. Gillette Co.*, No. 6:12-cv-00803 (M.D. Fla. Apr. 22, 2014) (emphasis added), available at http://blogs.reuters.com/alison-frankel/files/2014/05/duracellclassaction-mccombdeclaration.pdf.

[17] 15 U.S.C. § 1681n(a)(1).

Truth in Lending Act,[18] Fair Debt Collection Practices Act,[19] Fair and Accurate Credit Transactions Act,[20] and the Telephone Consumer Protection Act,[21] all similarly provide for statutory damages.

The availability of statutory damages under these laws have launched thousands of class actions. As commentators have observed, the reason that Congress provided for fixed amounts of damages (often far exceeding the value of any actual harm suffered by a plaintiff) was to encourage *individual* plaintiffs to bring lawsuits. But it is hard to believe that Congress intended to allow such damages to be aggregated across millions of class members, transforming minor missteps into billion-dollar cases: the late Professor Richard Nagareda observed that "[t]he distortion of the underlying remedial scheme comes from the aggregation of statutory damages seemingly set forth by Congress with the scenario of *individual litigation* in mind."[22] As Judge J. Harvie Wilkinson of the U.S. Court of Appeals for the Fourth Circuit has put it: "I worry that the exponential expansion of statutory damages through the aggressive use of the class-action device is a real jobs killer that Congress has not sanctioned."[23]

Judge Wilkinson's observation is even more troubling when applied to a new and pernicious trend in class actions—the lawsuit without injury. Some courts have held that—despite instructions from the U.S. Supreme Court that "Article III's standing requirements" "cannot [be] erase[d]" by statute[24]—a plaintiff may bring a class action based solely on an allegation that he or she experience the violation of a federal statute, regardless of whether he or she suffered any harm beyond the bare statutory violation. Such "injur[ies] in law," coupled with the entitlement to statutory damages, create what Judge Wilkinson characterized in a related context as "a perfect storm."[25]

The Supreme Court may have an opportunity to weigh in on this issue: It is currently considering a petition for certiorari in *Spokeo, Inc. v. Robins*, No. 13-1339, which asks whether the injury-in-fact requirement for Article III standing is

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18 15 U.S.C. § 1640(a)(2)(B).

19 15 U.S.C. § 1692k(a)(2)(B).

20 15 U.S.C. § 1681n(a)(1)(A).

21 47 U.S.C. § 227(b).

22 Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1886 (2006) (emphasis added).

23 *Stillmock v. Weis Markets*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring specially).

24 *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).

25 *Stillmock*, 385 F. App'x at 276 (Wilkinson, J., concurring specially).

satisfied when the only "injury" alleged is a technical violation of a federal statute that caused the plaintiff no concrete harm.[26] Many leading businesses—as well as the Chamber—have urged the Court to take the case, explaining that they (and their members) are under siege from these types of class actions.[27]

In the meantime, without guidance from the Supreme Court, plaintiffs' attorneys have continued to exploit disagreement among the lower courts over lawsuits without injury. And the consequence is to threaten businesses with the prospect of ruinous potential liability, because defendants face enormous pressure to settle even an unmeritorious case. Justice Ginsburg has observed that "[a] court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims."[28] As the Supreme Court has explained, "[w]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims."[29]

B. A class should not include those who have suffered no injury at all.

In a related trend, plaintiffs' attorneys have started aggressively pursuing putative class actions in which the named plaintiff might claim a concrete injury, but large numbers of absent class members have suffered no genuine injury at all.

That kind of bait-and-switch violates Article III. For an individual to have standing, he or she must have experienced an injury "in a personal and individual way."[30]

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[26] Petition for Certiorari at i, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. May 1, 2014), http://www.classdefenseblog.com/files/2014/12/Spokeo-cert-petition.pdf. (I am counsel of record for the petitioner.)

[27] *See, e.g.*, Brief for Amici Curiae eBay, Inc., Facebook, Inc., Google, Inc., and Yahoo! Inc., in Support of Petitioner, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. June 6, 2014), http://sblog.s3.amazonaws.com/wp-content/uploads/2014/06/13-1339-Spokeo-Inc.-v.-Robins-Br.-for-Amici-eBay-Inc.-et-al.-Jun....pdf; Brief of the Chamber of Commerce of the United States of America and the International Association of Defense Counsel as Amici Curiae in Support of Petitioner, *Spokeo, Inc. v. Robins*, No. 13-1339 (U.S. June 6, 2014), http://sblog.s3.amazonaws.com/wp-content/uploads/2014/06/NCLC-IADC-Amicus-Brief-in-Spokeo-final-6-5-14.pdf.

[28] *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1465 n.3 (2010) (Ginsburg, J., dissenting).

[29] *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

[30] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Two recent cases illustrate the growing problem in which class action plaintiffs' attorneys have sought to pursue product-liability claims on behalf of classes containing all of the products' purchasers—including uninjured class members—where the purported product defect occurred in only a small portion of the products sold. In *Sears, Roebuck and Co. v. Butler*,[31] for example, the U.S. Court of Appeals for the Seventh Circuit affirmed certification of a class of purchasers of Kenmore-brand front-loading clothes washers, even though only the vast majority of purchasers never experienced the alleged musty orders or false error codes at issue in the product-defect claims. And in *Whirlpool Corp. v. Glazer*,[32] the Sixth Circuit affirmed certification of a similar class of Whirlpool-brand washers, overlooking the predominance of individual issues addressing whether a plaintiff was one of the few whose machines would ever develop an odor by concluding that all class members suffered harm by paying a "premium price" for the product at retail.

Although the decisions in *Sears* and *Whirlpool* were rife with problematic applications of Rule 23—any of which should have led the respective courts to deny certification—each case also violated the core legal requirement that class plaintiffs prove commonality by virtue of "hav[ing] suffered the same injury."[33] In other words, how could a named plaintiff and the class members "have suffered the same injury" if the class was full of individuals who suffered no injury at all?

Sears and *Whirlpool* illustrate how far afield courts have strayed from the laudable goals underlying Rule 23. Class members who have not been injured—and could not pursue claims in their own right—may nonetheless be eligible to obtain a recovery simply because a court has approved the use of the class device. That outcome is unfair to those class members who *have* been injured, and is also unfair to defendants facing the settlement pressure imposed by an artificially enlarged class.

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Thank you again for the opportunity to testify before the Subcommittee today. I look forward to answering your questions.

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[31] 2013 WL 4478200 (7th Cir. Aug. 22, 2013), *cert. denied* (U.S. Feb. 24, 2014). (My colleagues at Mayer Brown LLP were counsel of record for Sears, Roebuck and Co. before the U.S. Supreme Court.)

[32] 722 F.3d 838 (6th Cir. 2013), *cert. denied* (U.S. Feb. 24, 2014). (My colleagues at Mayer Brown LLP were counsel of record for Whirlpool Corp. before the U.S. Supreme Court.)

[33] *Dukes*, 131 S. Ct. at 2551.

Mr. FRANKS. Thank you, Mr. Pincus.

And I will now recognize our second witness, Mr. Sweeney. And I hope you turn on your microphone, sir.

TESTIMONY OF JOHN PARKER SWEENEY, PRESIDENT, DRI—THE VOICE OF THE DEFENSE BAR

Mr. SWEENEY. Good morning, Mr. Chairman.

Mr. FRANKS. Is that microphone on, Mr. Sweeney?

Mr. SWEENEY. Yes, it is.

Mr. FRANKS. Okay. Maybe pull it a little closer.

Mr. SWEENEY. First, I want to thank the Subcommittee for inviting DRI to appear here today. With 22,000 members, DRI is the largest association of lawyers defending American businesses in court. Over the past 4 years, DRI has submitted two dozen briefs to the United States Supreme Court providing our views in class action cases for their benefit. DRI also conducts the Nation's only annual national opinion poll devoted exclusively to the civil justice system.

I would like to express our appreciation today for the time and skill that went into the enactment of the Class Action Fairness Act of 2005. This legislation brought increased fairness, consistency, and efficiency to the civil justice system. As with most important legislation, however, experience with the Act reveals opportunities to make the Act more effective and address threats to its purposes.

Although we discuss other issues in my full statement, I would like to concentrate my opening remarks this morning on the issue of no injury class actions. Our clients want to do the right thing by their customers, and they want and try to play by the rules. These no injury class actions unfairly burden them as they unfairly burden our judicial system.

The Supreme Court has held that Article 3 standing requires a plaintiff to have suffered an injury in fact. This is a bedrock prerequisite for access to the courts. Yet American businesses face many actions brought by plaintiffs who have admitted they have not been harmed, and propose a class of equally unharmed individuals.

In these no injury class actions, plaintiffs ask the courts to ignore the requirement of injury-in-fact, often by seeking to recover some fixed amount or range of statutory damages without any showing of injury on the part of them or the members of the class they purport to represent.

Examples include claims brought under the Consumer Fraud or Deceptive Practices Act of various States. In a typical case, the plaintiff contends the defendant committed widespread technical violations of some statute, admits that he and the class he seeks to represent sustain no actual harm as a result of violations, or if some are harmed, most are not, and then seeks to have the court award aggregate damages based on some formulaic calculation or range of statutory penalties unrelated to any actual injury-in-fact.

These cases fail to meet Article 3 standing requirements, both for the class representatives themselves and for the absent class members. They also raise broad policy concerns about using the civil justice system to punish defendants for technical statutory viola-

tions. And punishment it is because if class members are by definition unharmed, there is nothing compensatory about the process.

Permitting aggregated actions by unharmed individuals places enormous pressure on defendants to settle claims that would be valueless if tried on an individual basis, and needlessly divert limited judicial resources. These settlements raise the same concern the 109th Congress had with coupon settlements that Class Action Fairness Act was passed to address.

Congress also passed the Rules Enabling Act to prevent the use of procedural rules to abridge or enlarge substantive rights. Permitting class actions under Rule 23 on behalf of unharmed absent class members who lack Article 3 standing flies in the face of this important congressional mandate.

Because some courts permit such aggregation of no injury claims while others do not, the current environment is unpredictable for our members and our clients. More importantly, permitting litigation by and on behalf of unharmed parties impairs the ability of the civil justice system to process deserving claims for actual harm.

As an organization devoted to improving the civil justice system, we believe a hard look at addressing the problem no injury actions is warranted. We are not alone in that belief. For the past 3 years, we have conducted our national opinion poll. We have asked class action questions on each of our polls. In 2013, 68 percent said they would require plaintiffs to show actual harm to join a class action. In 2014, we asked if respondents would support a law requiring a person to show they were actually harmed by a company's products, service, or policies. 78 percent would support such a law. Large majorities support this reform across 12 demographic categories, Republicans and Democratic, and liberals and conservatives alike.

Mr. Chairman, the American public thinks it makes no sense to pay damages to people who have suffered no harm. They support reform. It is just common sense to them as it is to us. Thank you. I look forward to answering the Subcommittee's questions.

[The prepared statement of Mr. Sweeney follows:]

John Parker Sweeney, President of DRI – Voice of the Defense Bar

Testimony Before

Subcommittee on the Constitution and Civil Justice
The U.S. House of Representatives

February 27, 2015

"The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act"

John Parker Sweeney, President of DRI – Voice of the Defense Bar
Testimony Before The
U.S. House of Representatives Subcommittee on the Constitution and Civil Justice
February 27, 2015
"The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act"

Good morning, Mr. Chairman, Mr. Cohen, and members of the subcommittee. I am John Parker Sweeney, president of DRI – The Voice of the Defense Bar. I will summarize my statement and ask that my full statement be included in the record.

I want to first thank the subcommittee for allowing us to appear here today. With 22,000 members, DRI is the largest association of lawyers defending American businesses – large and small – in court. Over the past four years, we have submitted 23 amicus briefs to the Supreme Court in cases involving class actions. We also conduct the nation's only annual national opinion poll devoted exclusively to the civil justice system.

I would also like to express our appreciation for the time and skill that went into the enactment of the Class Action Fairness Act of 2005. This legislation brought increased fairness and efficiency to the civil justice system. The importance of CAFA is highlighted by the Supreme Court's significant decisions over the past ten years in the areas of class and collective actions.

Representative actions such as class actions and collective actions are exceptions "to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki,* 442 U.S. 682, 700-701 (1979). Exceptional litigation can create exceptional problems and calls for exceptional treatment and the enactment of CAFA helped address some of the exceptional problems inherent in aggregate litigation. As with most important legislation, the passage of time and the accrual of practical experience reveal

opportunities that would make the law more effective, as well as address the vulnerabilities that threaten its purposes.

Although there are a number of areas of concern to DRI's members, we would like to highlight today three areas we believe merit further study and reform:

1) No-injury class actions;

2) The use of the *cy pres* doctrine to increase the cost of class action settlements; and

3) Continued issues with removal of class actions to federal court.

Each of these areas presents unique challenges and each impacts the very concerns that led to the enactment of CAFA in the first place. We believe CAFA's reforms have worked and our discussion here is intended to highlight issues that warrant further review.

I. NO-INJURY CLASS ACTIONS

Article III standing is an "irreducible constitutional minimum," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and an individual lacks standing unless he has been affected "in a personal and individual way." *Id.* at 560 n.1. A plaintiff cannot rely on any injury others may have suffered to satisfy this requirement. *See Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("[T]he plaintiff . . . must allege a distinct and palpable injury to himself . . . ."). In other words, the plaintiff must have suffered an "injury in fact."

Yet defendants today face abstract claims that threaten to undermine the civil justice system: suits brought by plaintiffs who admittedly have not been harmed on behalf of a proposed class of similarly unharmed individuals. In these no-injury class actions, plaintiffs ask the courts to ignore the requirement of harm, often by seeking to recover some fixed amount or range of statutory damages without any showing of an injury.

Much of our concern over "no-injury" classes involve suits brought under state law, such as deceptive trade practices or consumer protection statutes that provide for a measure of damages untethered to any actual harm sustained by a person. With respect to such "statutory damages," one commentator has explained:

> Several states provide that private litigants may recover statutory damages, which are the greater of actual damages or an amount ranging from $25 in Massachusetts to $2,000 in Utah. State laws allow plaintiffs to receive the statutory minimum without proving actual damages. Nebraska law allows the court, in its discretion, to increase the award 'to an amount which bears a reasonable relation to the actual damages' up to $1,000 when 'damages are not susceptible of measurement by ordinary pecuniary standards.'

Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 Kan. L. Rev. 1, 22-23 (October, 2005).

Federal statutes also contain statutory damages provisions. For example, the Fair and Accurate Transaction Act of 2003 ("FACTA") requires retailers to truncate credit card information on electronically printed receipts given to customers. 15 U.S.C. § 1681c(g). A part of the Fair Credit Reporting Act, ("FCRA"), 15 U.S.C. §§ 1681 et seq., FACTA incorporates the statutory damages provision of the FCRA, which can range from $100 to $1,000 per violation. 15 U.S.C. § 1681n. Copyright law also contains statutory damages provisions. 17 U.S.C. § 504(c), as does the Fair Debt Collections Practices Act. 15 U.S.C. § 1692k(a)(2) (providing for statutory damages but limiting amount recoverable in class actions to $500,000 or 1% of the violator's net worth). The Telephone Consumer Protection Act also provides for statutory damages in lieu of actual damages for violations of its provisions. 47 U.S.C. §§ 227(b)(3) and 277(c)(5).

Our experience with statutory damages class actions under both state and federal law is that while few if any of the putative class members have suffered any actual harm, the sheer

number of potential class members creates significant exposure to the defendant. Two justifications typically advanced for statutory damage awards are: (1) the actual damages sustained for a particular violation are difficult to measure or prove and statutory damages provide some measure of compensation to the plaintiff; and (2) to punish a defendant and to deter others from committing similar acts in the future. See, Ben Sheffner, *Due Process Limits on Statutory Civil Damages*, Washington Legal Foundation Legal Backgrounder, Vol. 25, No. 27 at 1 - 2 (August 6, 2010) (discussing proffered justifications for statutory damages in copyright cases). As noted below, when the plaintiff and the putative class have admittedly suffered no harm, there is nothing compensatory about such awards.

When these statutory damage provisions are combined with the aggregate power of the class action device, however, defendants can face significant and potentially ruinous exposure for conduct that admittedly harmed no one. *See e.g.*, *In re Trans Union Corp. Privacy Litig.*, 211 F.R.D. 328, 350 (N.D. Ill. 2002) (denying certification of a nationwide statutory damages class because while "certification should not be denied solely because of the possible financial impact it would have on a defendant, consideration of the financial impact is proper when based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due process concerns attended upon such an impact"). In fact, a recent certiorari petition identified 19 lawsuits (14 of them putative class actions) involving alleged technical violations of ten different federal statutes where the plaintiff suffered no economic or other harm. Petition For A Writ of Certiorari, at 9 – 12, *First National Bank of Wahoo v. Charvat*, (No. 13-679). The Court denied that petition and while it had previously granted certiorari in a case raising a similar issue, it ultimately dismissed that writ as improvidently granted. *First American Financial Corp. v. Edwards*, 132 S.Ct. 2536, 2537 (2012).

In a typical case, the plaintiff contends the defendant committed wide-spread technical violations of some statute. She admits that she and the class she seeks to represent sustained no economic or other actual harm as a result of the violation. She then seeks to have the court award aggregate damages based on some formulaic calculation drawn from a range of penalties recoverable under the statute allegedly violated. In other cases, the claims are brought by state attorneys general under a *parens patrie* theory. The relief sought in many class actions or in *parens patrie* actions brought by state attorneys general is based not on the actual harm suffered by any individual person, but rather on some legislatively-defined statutory damage amount set for each violation. Under this scenario, even an unwitting defendant can face catastrophic liability for inadvertent and technical violations when sued in a class action or state AG action. Although some statutes, such as the Truth in Lending Act – recognize the gross unfairness of imposing a statutory damages penalty where aggregate treatment is sought – most statutes do not contain such language and a number of courts have refused to consider the unfairness of the relief sought in making their certification decision.

These cases implicate Article III standing requirements – both for the putative class representatives and for the absent class members. They also implicate broad policy concerns over the appropriateness of using the civil justice system to punish defendants for what are at most technical violations. And punishment it is. Because the class members are by definition unharmed, there is nothing compensatory about the process. Permitting aggregated actions by unharmed individuals places enormous pressure on defendants to settle claims that would valueless if tried on an individual basis. With little or no interest on the part of absent class members in participating in these settlements, they implicate the same concerns the 109th

Congress had with coupon settlements that it attempted to address with CAFA. We believe this is an area in need of further study and reform.

Congress passed the Rules Enabling Act, 28 U.S.C. § 2072, to prevent the use of procedural rules to abridge or enlarge substantive rights. Permitting suits on behalf of unharmed absent class members who lack Article III standing (as several courts have held) contravenes this important Congressional mandate. Likewise, because some courts permit aggregation while others do not – despite the fact that the same statutory provisions and same procedural rules are at issue – the current environment is utterly and unnecessarily unpredictable for our members and our clients. In addition, permitting litigation by and on behalf of unharmed parties impairs the ability of the civil justice system to efficiently adjudicate the claims more properly before it. As an organization devoted to improving the civil justice system, we believe a hard look at addressing the problem of no injury class actions is warranted.

And we are not alone in this belief.

For the past three years, we have conducted the DRI National Opinion Poll on the Civil Justice System. We've asked class action questions on each of our polls. On the question of "harm" in our 2013 poll, 68% said they would require plaintiffs to show actual harm, rather than potential harm, to join a class action.

This year, we took it a step further. We asked if the respondent would support a law requiring a person to show that they were actually harmed by a company's products, services, or policies rather than just showing the potential for harm. Seventy-eight percent would support such a law; just 19% would oppose it. Large majorities supporting this reform occur across 11 demographic categories. Men, women, Republicans (86%), Democrats (71%), Liberals (73%),

Conservatives (85%). We believe these results further support a probing examination of the question of permitting no-injury class actions to proceed.

II. THE INCREASING USE OF *CY PRES* PAYMENTS IN CLASS ACTIONS

As Judge Posner recently noted, "*Cy pres* (properly *cy près comme possible*, an Anglo-French term meaning "as near as possible") is the name of the doctrine that permits a benefit to be given other than to the intended beneficiary or for the intended purpose because changed circumstances make it impossible to carry out the benefactor's intent. A familiar example is that when polio was cured, the March of Dimes, a foundation that had been established in the 1930s at the behest of President Roosevelt to fight polio, was permitted to redirect its resources to improving the health of mothers and babies." *Pearson v. NBTY, Inc.*, 772 F.3d 778, 784 (7th Cir. 2014). Over the last decade, courts have increasingly used the *cy pres* doctrine to disperse settlement or judgment funds that remain unclaimed after attempted distribution to class members. That practice is coming under growing criticism. See, e.g., Jennifer Johnston, Comment, *Cy Pres Comme Possible to Anything is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J.L. Econ. & Pol'y 277 (2013); Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014. We believe that criticism is worth considering.

In some instances, settlements made for the ostensible benefit of class members go entirely to *cy pres* recipients because it is infeasible or otherwise difficult to provide benefits directly to class members. Attorneys' fees are often calculated on the gross amount of class settlement. The availability of *cy pres* awards skews the entire process by increasing the size of settlement (and potentially class counsel's fees) while providing no direct benefit to the class members on whose behalf the suit was purportedly brought and whose rights are impacted by the

action. This ad hoc and unlegislated expansion of the class action device calls for specific reform to prohibit or strictly limit its use. Reforms here could be addressed through more rigorous application of the existing civil procedure rules, by the adoption of more explicit rules, and by the enactment of statute specifically addressing it.

III. CONTINUED ISSUES WITH REMOVAL OF CLASS ACTIONS

As the Supreme Court recently noted, "Congress enacted CAFA in order to "amend the procedures that apply to consideration of interstate class actions" in part because "certain requirements of federal diversity jurisdiction had functioned to keep cases of national importance in state courts rather than federal courts." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S., 134 S.Ct. 736, 739 (2014) (internal citations and quotations omitted). Even with CAFA, we have seen continued concerns with issues related to the amount in controversy requirements and inconsistent treatment of them by districts and appellate courts both with respect to class actions and to traditional diversity claims. Congress attempted to address this issue somewhat with the Federal Courts Jurisdiction and Venue Clarification Act of 2011, Public Law 112-63, which added 28 U.S.C. § 1446(c)(2)(B), which provides that removal is proper if the district court finds, "by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in section 1332(a) [$5,000,000]." But what evidence is required to allow the district court to make that finding, and when that evidence must be submitted, is the subject of on-going dispute.

The Supreme Court recently addressed a portion of these concerns in its recent decision in *Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547 (Dec. 15, 2014). There, it rejected a presumption against removal in CAFA cases and held that a defendant is not required to provide evidence as to the amount in controversy at the time of removal. In that case, the

evidence was essentially undisputed that the amount in controversy exceeded $5,000,000. Although the defendant asserted such in its notice of removal, the district court held it could not consider post-removal evidentiary submissions supporting that assertion and remanded the case. A divided Tenth Circuit refused to consider the defendant's appeal. The Court granted the defendant's certiorari petition to consider a split between the Tenth Circuit and between five and seven other courts of appeal on the question and the majority agreed the defendant was not required to attach evidence at the time of removal.

Nonetheless, we still comprehend two concerns about the current treatment of the amount in controversy requirement in class action cases. First, we question whether imposing a $5,000,000 amount in controversy requirement over class actions makes sense when, to use the language of the Senate Judiciary Committee's report on CAFA, "a citizen can bring a 'federal case' by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state." Senate Report No. 14, 109 Cong., 1st Sess., at 11 (2005). We believe that the Committee should consider whether putative interstate class actions involving minimally diverse parties should be subject to the same jurisdictional minimum as traditional diversity claims. This threshold would eliminate a considerable amount of procedural wrangling at the removal stage and place class action defendants on equal footing with other out-of-state defendants sued in state court.

The second issue we believe warrants study goes directly to the courts' treatment of the amount in controversy requirement and the inappropriate burdens some have placed on class action defendants seeking to remove cases to federal court. In particular, we believe a hard look at what "evidence" is required in order for a removing defendant to establish the requisite amount in controversy under 28 U.S.C. § 1446(c)(2)(B). We believe the approach taken by the

United States Court of Appeals for the Seventh Circuit in *Back Doctors Ltd. v. Metropolitan Property and Casualty Insurance Company*, 637 F.3d 827 (7th Cir. 2011) properly balances the amount in controversy issues and invite the Committee to consider whether the essence of its holding should be incorporated into unambiguous statutory language applicable to all diversity removals.

In *Back Doctors, Ltd.*, the court attempted to lay down a fairly simple test for determining whether a class action defendant had met the amount in controversy requirement. It began by noting that the Supreme Court had long-ago held that when a plaintiff initiates an action in federal court (and thus is the proponent of federal jurisdiction), its allegations regarding the amount in controversy must be accepted unless it is impossible for it to recover the jurisdictional minimum. 637 F.3d at 829 (*citing St. Paul Mercury Indemnity Company v. Red Cab Co.*, 303 U.S. 283 (1938)). The Seventh Circuit held, consistent with 28 U.S.C. § 1446(c)(2)(B), that the same rule applied where a removing defendant (as the proponent of federal jurisdiction), made allegations regarding the amount in controversy in the notice of removal. 637 F.3d at 830. The defendant alleged that the compensatory damages exceeded $2,900,000 and that a potential punitive award in light of nature of the claims was sufficient to push the amount in controversy above $5,000,000. The plaintiff countered by pointing out that it had not sought punitive damages on behalf of itself or the putative class and without the possibility of a "speculative" punitive award, the amount in controversy could not be met.

The court recognized that while jurisdictional *facts* must be alleged and, if challenged, proven by a preponderance of the evidence, that does not require the defendant to show it was more likely than not the plaintiff class would recover in excess of the jurisdictional amount. *Id.* at 829. It then identified what it considered to be jurisdictional *facts*:

> The legal standard was established by the Supreme Court in *St. Paul Mercury*: unless recovery of an amount exceeding the jurisdictional minimum is legally impossible, the case belongs in federal court. Only jurisdictional facts, such as which state issued a party's certificate of incorporation, or where a corporation's headquarters are located, need be established by a preponderance of the evidence.

Back Doctors Ltd., 637 F.3d at 830. Because the defendant in that case could show that the compensatory damages sought exceeded $2,900,000 and because the plaintiff could not show that punitive damages were legally impossible to recover under state law, the court reversed the district court's remand order and directed it to consider the case on the merits. *Id.* at 831. We believe this approach would best balance the federalism concerns inherent in diversity removals while allowing the courts to devote their resources to issues other than fights over jurisdiction.

Now, if I may, Mr. Chairman, let me spend a few minutes on the DRI National Public Opinion Poll on the Civil Justice System. Often time in discussing these issues we forget about the American people, to whom the civil justice system really belongs. And that's why we created the DRI Poll.

As an advocacy group, we know that the integrity of our data has to be impeccable. That's why we selected Gary Langer of Langer Research Associates (NY) as our pollster. Langer is the former head of polling for ABC News and a former board member of the American Association of Public Opinion Researchers which sets the standards for the industry. All of our polls have been accepted by the Roper Center at the University of Connecticut, a premier repository that makes methodologically sound polls available to researchers. Summary results of all of our polls are available on our web site at www.dri.org.

We've asked class action questions on each of our polls. Let me highlight some of the data that we've obtained. We found that 38 percent of all adult Americans say they've been invited to join a class action suit. Six in 10 of them declined. That means a total of 15 percent of

all adults report having participated in a class action suit, the equivalent of nearly 37 million adults. And while 68 percent feel their participation was worthwhile, nearly three-quarters of those who won an award say it was "insignificant."

Basic attitudes on class actions are mixed. Fifty percent of Americans think most of these lawsuits as justified; 38 percent see them as unjustified, with the rest unsure. Ideology is a key factor: Liberals are 27 percentage points more apt than strong conservatives to see class-action suits as justified, 61 vs. 34 percent, as are Democrats over Republicans, 57 vs. 44 percent.

Yet there's substantial bipartisan and cross-ideological consensus on two questions – the preference that a class-action plaintiff should show actual harm and opposition to opt-out enrollment. Regardless of partisan and ideological preferences, two-thirds or more agree on these.

I mentioned earlier that 78% of Americans would support a law requiring a showing of actual harm in order for an individual to participate in a class action law suit. On another class action issue, 85% of Americans say class action lawyers should be required to obtain permission from individuals before enrolling them as plaintiffs.

Mr. Chairman, large majorities of the American public find it makes no sense to pay damages to people who have suffered no harm. They find it makes no sense to represent people in a lawsuit without asking their permission.

The public supports reform. It's just common sense to them…and should be to us.

LANGER RESEARCH ASSOCIATES

SURVEY RESEARCH DESIGN · MANAGEMENT · ANALYSIS

Feb. 27, 2015

Briefing Paper: Public Attitudes on Class-Action Litigation

Prepared for testimony of DRI-The Voice of the Defense Bar before the U.S. House Subcommittee on the Constitution and Civil Justice

Independent public opinion polling sponsored by DRI-The Voice of the Defense Bar since 2012 has found broad public support for significant reforms in the handling of class-action lawsuits, including opposition to opt-out enrollment and support for changes in who can join such suits.

These surveys also have demonstrated the vast reach of this type of litigation – 38 percent of all adult Americans say they've been invited to join a class action suit – as well as mixed feelings about their utility. While 54 percent think class actions often enable people to hold companies responsible, 62 percent say they often force companies that have done no wrong to pay damages.

Further, just half think most class action lawsuits that are filed are justified.

The random-sample telephone surveys have been conducted for DRI by the nonpartisan survey research firm Langer Research Associates, with rigorous methodology; neutral, balanced questions; and independent data analysis. The company, which polls for ABC News, Bloomberg and others, is a charter member of the Transparency Initiative of the American Association for Public Opinion Research and subscribes to its Code of Professional Ethics and Practices.

This memo summarizes some key findings from the research to date. Full results are available at DRI's website, http://www.dri.org, including analyses, full questionnaires, topline results and methodological details. Raw datasets from these surveys have been deposited with the nonprofit Roper Center for Public Opinion Research at the University of Connecticut for unfettered secondary analysis.

Among the findings:

- Just 26 percent of Americans say that showing the potential for harm should be adequate to join a class-action lawsuit. Sixty-eight percent instead say plaintiffs should be permitted to join a class only if they can show they've actually been harmed.

  The question: Do you think people should be allowed to join class-action lawsuits as plaintiffs only if they can show that they've been harmed by a company's products or actions, or is it enough for them to show the potential for harm, regardless of whether they've actually been harmed?

- A vast 85 percent say class-action lawyers should be required to obtain permission from individuals before enrolling them as plaintiffs. Just 10 percent support the current practice allowing lawyers to include individuals whom they believe are eligible without getting their permission first, then providing them the opportunity to opt-out later.

  The question: Lawyers who file class-action suits often include people who they think are eligible to be plaintiffs without first getting their permission. People who don't want to participate can drop out later. Do you think lawyers should or should not be required to get permission from people before including them as plaintiffs in class-action lawsuits?

It's probable that few Americans are closely following these issues; as such their expressed attitudes most likely reflect underlying world views, for example favoring personal precepts of fairness, individualism and self-determination. While additional information and argumentation could influence public views, the DRI survey's baseline measurements provide valuable insight into public preferences on these relatively little-studied issues.

Most broadly, basic attitudes on class actions are mixed. Fifty percent of Americans see most of these lawsuits as justified; 38 percent see them as unjustified, with the rest unsure. Ideology is a key factor: Liberals are 27 percentage points more apt than strong conservatives to see class-action suits as justified, 61 vs. 34 percent, as are Democrats over Republicans, 57 vs. 44 percent.

Yet there's substantial bipartisan and cross-ideological consensus on the preference that a class-action plaintiff should show actual harm and on opposition to opt-out enrollment. Across partisan and ideological groups, two-thirds or more agree on the former, eight in 10 or more on the latter.

As noted, 38 percent say they've been invited to join a class action; six in 10 of them declined. That leaves a total of 15 percent of all adults who report having participated in a class action suit, the equivalent of nearly 37 million adults. As many say they joined "to send a message" as to win an award. And indeed while 68 percent feel their participation was worthwhile, nearly three-quarters of those who won an award say it was "insignificant."

Selected results follow. Full results are available at http://www.dri.org.

Respectfully submitted,

Gary Langer, president
Langer Research Associates
New York, N.Y.

2012:

12. Have you yourself ever been invited to participate in a class action lawsuit, or not?

	Yes	No	No opinion
8/19/12	38	62	*

13. (IF INVITED TO PARTICIPATE) Have your ever participated in a class action lawsuit, or not?

	Yes	No	No opinion
8/19/12	39	61	1

12/13 NET:

	---------- Invited ----------			Never been	No
	NET	Participated	Never participated	invited	opinion
8/19/12	38	15	23	62	*

15. (IF EVER PARTICIPATED) Did you participate mainly to (win damages), to (send a message to the company involved) or some other reason?

	Win damages	Send a message	Other reason	No opinion
8/19/12	43	45	10	1

16. (IF EVER PARTICIPATED) Did you receive an award, or not?

	Yes	No	No opinion
8/19/12	70	28	2

17. (IF EVER PARTICIPATED AND RECEIVED AN AWARD) Would you describe that award as substantial, modest or insignificant?

	Substantial	Modest	Insignificant	No opinion
8/19/12	8	19	73	*

18. (IF EVER PARTICIPATED) Do you think your participating in this suit was worthwhile, or not worth the trouble?

	Worthwhile	Not worth trouble	No opinion
8/19/12	68	27	5

2013:

8. In class-action lawsuits, a group of people known as plaintiffs sue a company for what they see as a faulty product, bad service or an unfair policy. Do you think most class-action lawsuits filed in this country are justified or unjustified?

	Justified	Unjustified	No opinion
10/6/13	50	38	13

9. Do you think people should be allowed to join class-action lawsuits as plaintiffs only if they can show that they've been harmed by a company's products or actions, or is it enough for them to show the potential for harm, regardless of whether they've actually been harmed?

	Show harm	Show potential for harm	No opinion
10/6/13	68	26	6

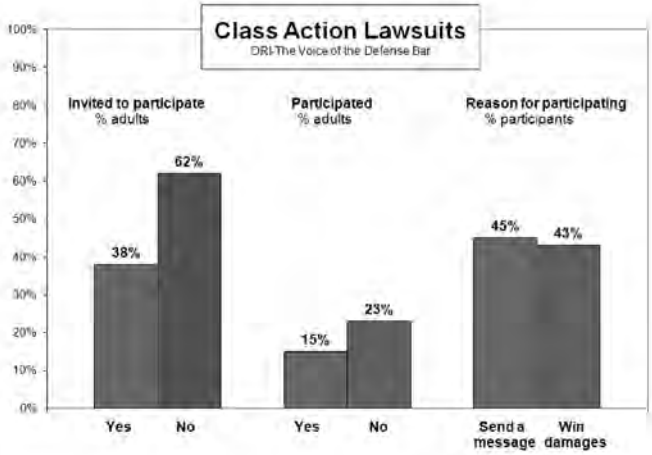
Compare to (2014): 4. Would you support or oppose a law saying that in order to join a class action lawsuit a person has to show that he or she has been actually harmed by a company's products, services or policies, rather than just showing the potential for harm?

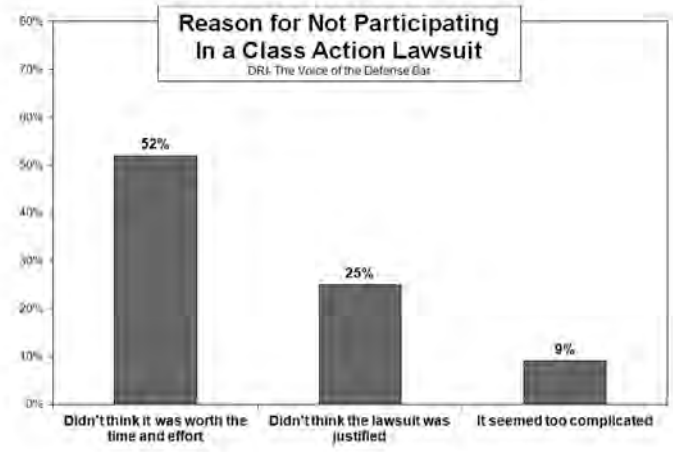
	Support	Oppose	No opinion
9/21/14	78	19	4

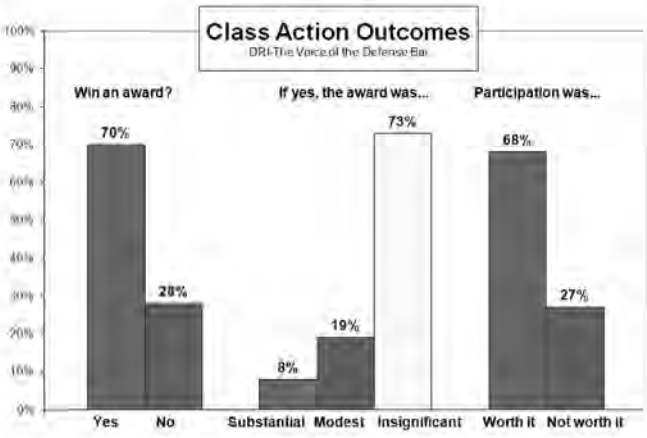
10. Lawyers who file class-action suits often include people who they think are eligible to be plaintiffs without first getting their permission. People who don't want to participate can drop out later. Do you think lawyers should or should not be required to get permission from people before including them as plaintiffs in class-action lawsuits?

	Should be required	Should not be required	No opinion
10/6/13	85	10	5

Selected Charts




Reason for Not Participating
In a Class Action Lawsuit
DRI- The Voice of the Defense Bar
52%
25%
9%
Didn't think it was worth the time and effort
Didn't think the lawsuit was justified
It seemed too complicated


Class Action Outcomes
DRI-The Voice of the Defense Bar
Win an award?
If yes, the award was...
Participation was...
70%
28%
8%
19%
73%
68%
27%
Yes
No
Substantial
Modest
Insignificant
Worth it
Not worth it

Mr. FRANKS. Thank you, Mr. Sweeney.

And I would now recognize our third witness, Ms. Moore. Ms. Moore, please turn on your microphone and pull it close.

TESTIMONY OF PATRICIA W. MOORE, PROFESSOR OF LAW, ST. THOMAS UNIVERSITY SCHOOL OF LAW

Ms. MOORE. Thank you, Mr. Chairman, Ranking Member Cohen, and Members of the Committee and the Subcommittee. It is my privilege to testify before you here today.

The majority witnesses largely ignore the types of class actions which harm class members much more than by a small amount of money. Employment discrimination, wage and hour litigation, civil rights cases, anti-trust cases, securities cases—there is hardly a nod to these critically important types of class actions that vindicate the rights of workers, small business, members of minority groups, and institutional investors who are watching out for people's retirement funds.

The majority witnesses misplace their focus on compensation in consumer class actions. For small value claims, compensation is not the most important societal goal. The key question for society is whether the defendant has been required to internalize the cost of breaking the law by cheating a whole bunch of consumers out of a small amount of money each. Without the payment of money as a result of a class action, the company has no deterrent to ignoring the law.

It has been a decade since CAFA was enacted into law, and the consensus of litigants on both sides and academics is that CAFA has been extremely successful in bringing actions based on State law into Federal court. The majority witnesses admit this. Even more importantly than their victory on CAFA, defendants have won major victories on class actions in the Supreme Court. One allows corporations to make consumers, simply by clicking on a mouse, give up their right to go to court and give up their constitutional right to appear before a jury. Another case makes it very hard for employees to band together to fight unlawful discrimination against them on the basis of race or gender.

The evidence that the majority witnesses rely on here primarily is the Mayer Brown study and a DRI survey. However, the methodological flaws in these so-called empirical studies could be picked out by a college student in a beginning statistics class.

The Mayer Brown study was conducted by a biased party with a financial stake in the outcome of the study. The study sample was not randomly selected, nor was the study comprehensive. Mayer Brown cherry picked 188 cases, which is about 6 percent of all class actions filed in Federal court every year. The DRI survey is just that, an opinion survey. It in no way attempts to empirically measure class actions. Many of the questions that they asked people were totally misleading and assumed false premises in the way they were stated.

The majority witnesses have talked a lot about this concept of class members having no injury. Even a cursory review of cases that I have seen would call into question the premise that class members are receiving compensation for no injury. For example, the poster child for this so-called no injury class is the BP litiga-

tion, in which BP recently attempted to gain cert in the Supreme Court so that they could overturn the Deep Water Horizon settlement by telling the Supreme Court that the class included people along the Gulf Coast who had suffered no injury. This was not true because the very settlement agreement that BP itself had agreed to and negotiated defined the class to include only those people who had suffered an injury.

Besides sometimes mischaracterizing what actually happens in these cases, the majority witnesses are really arguing that they do not like the remedies that are granted by the substantive law itself. If a Federal or a State statute says you are entitled to statutory damages if a company breaks the law, the legislature itself has said we think it is an important public policy that this law be obeyed.

And for Members of Congress who are very concerned about States' rights, the majority witnesses are trying to overturn what the State law has defined as an injury. If the State legislature has said that something is an injury under State law, then it is an injury even if the Chamber thinks it is no big deal or that it is a technical violation.

One of CAFA's purposes was to ensure that important cases based on State law should be in Federal court. So amending CAFA may affect important rights created by the States.

Thank you very much for your attention. I look forward to answering your questions.

[The prepared statement of Ms. Moore follows:]

Prepared Statement of Patricia W. Moore

Professor of Law
St. Thomas University School of Law

Hearing on "The State of Class Actions Ten Years after the Class Action Fairness Act"

Before the Committee on the Judiciary

Subcommittee on the Constitution and Civil Justice

United States House of Representatives

February 27, 2015

Good morning, Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee. Thank you for inviting me to testify on "The State of Class Actions Ten Years after the Class Action Fairness Act" (CAFA). It is my pleasure to be here today.

It is my understanding that no specific legislation has been proposed as of today, and that this is an investigatory hearing. I offer three overall points to help place into a broader perspective the specific suggestions that others may make.

First, in evaluating suggestions in some quarters that class actions impose significant private costs, we must not forget the public benefits of class actions, and why, despite their imperfections, they are a quintessentially American feature of the civil justice system. Class actions vindicate the rights of people whose individual claims, while legally valid, are too small to justify the expense of a lawsuit. In other words, class actions allow a large number of similarly-situated people to redress harm. In addition, class actions deter wrongful conduct by corporations that otherwise could violate existing laws with impunity.[1] Class actions also promote economy and efficiency, reducing the number of lawsuits by bringing issues affecting all class members under one umbrella. These benefits will be diminished if class actions are further restricted or become uneconomical to pursue.

Second, in looking at the big picture of class actions since CAFA's passage, it is essential to consider legislative developments and Supreme Court decisions that have severely restricted not only class actions, but access to justice for average Americans.[2] This is particularly true in federal courts, which at least partly explains corporate defendants' frequent preference to be in federal court rather than state court.[3] Many in academia and elsewhere consider the most important of the Supreme Court's recent class action decisions – *Wal-Mart v. Dukes* and *AT&T Mobility v. Concepcion* -- to have cut off the ability to even file a class action, let alone obtain class certification.[4] More broadly, many believe that there has been a sustained and concerted attack on the legal remedies of workers, consumers, and other injured parties, masked as

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[1] *See, e.g.*, Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic ex Post Regulation*, 43 GA. L. REV. 63 (2008); DEBORAH HENSLER, ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 421 (RAND Institute for Civil Justice 2000) ("Forcing defendants to return ill-gotten gains may send powerful deterrent signals to businesses contemplating illegal practices.")

[2] "Access to justice is fundamental to all democratic societies, and it is a bedrock principle of our nation." Jonathan Lippman, *State Courts: Enabling Access*, 143 DAEDALUS 28 (Summer 2014) (Chief Judge of the State of New York describing efforts to improve access to justice in that state). *See also, e.g.*, Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PENN. L. REV. 1543, 1545 (2014) (authors' data compilation shows that "once highly supportive of private enforcement [of public laws], the Supreme Court, increasingly influenced by ideology and increasingly conservative, has become antagonistic"); Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501 (2012).

[3] *See infra* at Section II(B).

[4] *E.g.*, Arthur R. Miller, *The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative*, 64 Emory L.J. 293, 298-302 (2014); Georgene Vairo, *Is the Class Action Really Dead? Is That Good or Bad for Class Members?*, 64 Emory L.J. 477, 479 (2014) ("It is no secret that the United States Supreme Court has made obtaining class certification and group dispute resolution more difficult."); Robert H. Klonoff, *The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 735 (2013) ("the emergence of myriad cases that cut back the ability to pursue classwide relief represents a troublesome trend that undermines the compensation, deterrence, and efficiency functions of the class action device.")

"procedural reform" or "tort reform."[5] Further restrictions on class actions must be seen as part of this campaign.

Finally, any contention that might be made about class actions must be placed in perspective by realizing that there are very little statistics on any aspect of class actions or class action practice that is publicly available for either the federal courts or the state courts. One implication of the lack of official data is that it is difficult, if not impossible, to fit into the "big picture" of class actions any reference to a few lower-court cases. We do not and cannot know if a given case is normal or aberrant. This makes it easy for proponents of any particular view to conduct policy analysis by anecdote. Therefore, as you consider the advisability of further legislation, I hope you will consider mandating the public release of court data on class actions that is already in existence, but currently shielded from public view. As I said in an earlier article, "A topic that is important enough to require legislation is important enough to require adequate record-keeping."[6]

I discuss these three points in greater detail below.

I. Class Actions Provide Numerous Societal Benefits for Workers, Consumers, Small Businesses, and Others.

As this Subcommittee ponders the direction of class actions, it should evaluate not just the private costs of class actions, but the public benefits. Class actions do not only benefit class members or lawyers – their most important benefits are "shared among society as a whole."[7]

Class actions are "a means of private enforcement of various public policies that serve as a supplement to government enforcement."[8] From the class action in *Brown v. Board of Education*[9] in the 1950's to today's class action against the City of New York seeking to correct the brutally violent conditions at Rikers Prison,[10] class actions have sought and obtained the vindication of civil rights and human rights.

Another type of class action allows a large number of consumers who have each been cheated of a relatively small amount of money to band together to enforce the law, overcoming the transaction costs that would prohibit any of them from suing individually. Thus, class actions force the defendant-wrongdoer to "internalize the social costs" of its illegal actions.[11] In so doing, class actions deter "large-scale wrongdoing"[12] more strongly than any alternative.

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[5] *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013).

[6] *Confronting the Myth of "State Court Class Action Abuses" Through an Understanding of Heuristics and a Plea for More Statistics*, 82 UMKC L. REV. 133 (2013) (applying the influential work of Nobel laureate Daniel Kahneman on the role of heuristics and biases in judgment and decision-making to the long-running debates about the civil justice system and class actions in particular).

[7] Erik D. Cansler, *Forcing Defendants to Internalize the Costs of Wrongdoing*, 38-Feb. COLO. LAW. 53 (2009).

[8] Miller, *supra* note 4, at 297.

[9] 347 U.S. 483 (1954).

[10] Michael Winerip et al., *Even as Many Eyes Watch, Brutality at Rikers Persists*, N.Y. TIMES (Feb. 22, 2015).

[11] *See also* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006) ("There is but one true objective here--one valid

Class actions also provide benefits to small businesses, corporate defendants, and the court system itself. Class treatment of common issues enables defendants and courts to treat a large volume of similar claims in the aggregate rather than one by one, which is more efficient and more economical. Class actions also enable corporations to gain the certainty they desire by estimating a limit to their liability – a global peace -- when a final judgment is entered. The limit occurs because all class members who did not opt out are bound, and will be barred from suing on their own.[13]

Just a few recent examples will suffice to illustrate the way in which class actions are used by average citizens to redress harms:

- In a class action filed on behalf of a class of checking account holders against a bank for charging excessive overdraft fees, the court after a two-week bench trial held that by using "a bookkeeping device to turn what would ordinarily be one overdraft into as many as ten overdrafts," the bank "thereby dramatically [multiplied] the number of fees the bank [could] extract from a single mistake."[14]

- A class action alleged that a for-profit college used deceptive practices to urge minority and low-income students to shoulder large student loans for what the college knew was an inadequate education. The action was later settled for approximately $5 million.[15]

- A class action filed by oil and gas mineral owners in Oklahoma and Texas against an operator alleges the systematic underpayment of royalties by selling the hydrocarbons produced to an affiliate entity at less than market price.[16]

There are also numerous examples of small businesses using class actions to combat antitrust violations committed by much larger companies. Just two examples include:

- A class of purchasers of diamonds alleged anticompetitive behavior by De Beers Diamonds and ultimately negotiated a settlement of $295 million.[17]

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normative measure by which to gauge any class action procedure or practice, or any proposed reform. All that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions.")

[12] Miller, *supra* note 4, at 297.

[13] FED. R. CIV. P. 23(c)(2)(B)(vii). *See* Vairo, *supra* note 4, at 479.

[14] *Gutierrez v. Wells Fargo Bank, N.A.*, No. C 07-05923 (C.D. Cal. Aug. 10, 2010) (holding after a two-week bench trial that this was an unfair and deceptive business practice in violation of California law). Incidentally, plaintiffs filed this case originally in federal court under CAFA jurisdiction.

[15] Order Approving Class Action Settlement, Morgan v. Richmond School of Health & Technology, Inc., No. 3:12-cv-373 (E.D. Va. July 25, 2013).

[16] Plaintiff's Original Class Action Complaint, Coffey v. Chesapeake Exploration, L.L.C., No. 10-cv-1054 (W.D. Okla. Sept. 27, 2010). Again, plaintiffs filed this case originally in federal court under CAFA jurisdiction.

[17] Sullivan v. DB Investments, Inc., No. 08-2784 et al. (3d Cir. Dec. 21, 2011) (en banc).

- A class of freight forwarders that purchased air freight services from domestic and foreign airlines that provide airfreight-shipping services alleged that the defendants unlawfully fixed prices to charge higher rates.[18]

Some dispute the benefits of class actions.[19] Class actions are an imperfect device in an imperfect world. Plaintiffs, defendants, and lawyers act in their own self-interest. But that is why there is so much judicial oversight of class actions as compared to a non-class action: so that the benefits of class actions can be achieved with a minimum of prejudice.

At bottom, class actions' detractors have simply failed to offer an effective substitute for achieving the enforcement, deterrence, compensation, and efficiency goals of the class action device. A frequently-mentioned substitute for class actions is governmental enforcement of companies' legal violations, such as actions brought by state attorneys general and other public agencies. But while this is an important part of regulatory enforcement, it does not and cannot accomplish everything that private enforcement by class actions does.[20] First, "public agencies lack sufficient financial resources to monitor and detect all wrongdoing or to prosecute all legal violations,"[21] and in today's political climate it is unlikely that taxes would be raised to augment the enforcement resources of agencies like the Federal Trade Commission or the Food and Drug Administration. Second, regulatory agencies are part of the executive branch of government, and their political priorities may shift with changing administrations.

In addition, the suggestion that private arbitration is an adequate substitute for a class action is fanciful. Discovery limitations in arbitration disadvantage the claimant, who bears the burden of proof. The significant costs of the arbitration must be partially borne by the claimant up front. Arbitration "does not typically provide a right to appeal, and review of arbitral awards by courts is limited under the [Federal Arbitration Act] to grounds of corruption, fraud, 'evident partiality,' misconduct, and actions that are ultra vires."[22] Moreover, arbitration is typically a private and confidential process that does not result in published opinions.[23] As such, arbitration awards do not contribute to the development of the law, fail to stimulate interest in legal reform, and have no deterrent effect on future wrongdoing.[24] Data on arbitrations is even harder to come by than data on court filings. The Consumer Finance Protection Bureau has been studying

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[18] In re Air Cargo Shipping Services Antitrust Litigation, 2014 WL 7882100 (E.D.N.Y. Oct. 15, 2014).

[19] *See, e.g.*, Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, 64 EMORY L.J. 399 (2014).

[20] *See, e.g.*, Georgene M. Vairo, *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 REV. OF LITIG. 721, 803 (2013) (citing recent studies showing that "private enforcement can be more effective than governmental enforcement").

[21] CLASS ACTION DILEMMAS, *supra* note 1, at 69.

[22] J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 Vand. L. Rev. 1735 (2006).

[23] *See* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 LAW & CONTEMP. PROBS. 75, 91 (2004) ("Unlike public litigation . . . journalists cannot usually read and report on arbitration claims").

[24] Richard Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts*, 38 HOUS. L. REV. 1237, 1262-64 (2001) (arbitration undermines the development of the law); Richard Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 2004 LAW & CONTEMP. PROBS. 279, 298-303 (mandatory arbitration conflicts with "democratic values").

mandatory arbitration clauses for years and has not yet issued a final report.[25] Arbitration lacks the transparency and public accountability of court proceedings.[26]

In summary, there is no substitute for the vindication of public rights afforded by the class action. Hampering class actions any further will entail real costs to society.

II. Legislative and Caselaw Developments Have Increasingly Restricted Not Only Class Actions, but Access to Justice Generally, and Have Rendered the Environment of the Federal Courts Even More Welcoming to Large Institutional Defendants Over Individual Plaintiffs.

A. The Supreme Court's Recent Decisions on Class Actions Have Broadened CAFA Jurisdiction, Obstructed Class Certification, and Allowed Businesses to Unilaterally Block People from Even Filing Class Actions.

Any investigation into the state of class actions today needs to consider important developments in the Supreme Court since the passage of CAFA. The most important of these decisions have seriously undercut plaintiffs' ability to bring and maintain class actions.[27]

- ***CAFA jurisdiction***. With respect to CAFA specifically, the Supreme Court has decided two cases that make it even easier for defendants to remove class actions from state court to federal court: *Standard Fire Insurance Co. v. Knowles*[28] and *Dart Cherokee Basin Operating Co., LLC v. Owens*.[29] These decisions go a long way towards answering the concerns of the U.S. Chamber of Commerce or DRI – the Voice of the Defense Bar that not all federal judges were welcoming CAFA removals with open arms.

- ***Mandatory arbitration clauses barring class actions, jury trials, and class arbitration***. The Supreme Court has strengthened its support for binding mandatory arbitration clauses in contracts, even when a consumer has no opportunity to negotiate that contract any greater than clicking "accept" on a mouse,[30] and even when the cost to a plaintiff of proceeding alone, without class treatment, is greater than any potential recovery that plaintiff could win even if successful.[31] As a result, companies can keep almost any dispute that arises from a contract with a mandatory arbitration clause out of court, away from a jury, and can force the lone claimant to go it alone, without recourse to combining with others similarly injured.[32] Even the

[25] *Arbitration Study Preliminary Results: Section 1028(a) Study Results To Date* (Dec. 12, 2013), http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.
[26] While the American Arbitration Association's rules require some public access to records of class arbitrations, a quick review of these online records reveals that they are woefully incomplete.
[27] *See supra* note 4.
[28] 133 S. Ct. 1345 (2013).
[29] 135 S. Ct. 547 (Dec. 15, 2014).
[30] AT&T Mobility v. Concepcion, 131 S. Ct. 1740 (2011).
[31] American Express Co. v. Italian Colors, 133 S. Ct. 2304 (2013).
[32] This development has not been without its staunch detractors, particularly in those agencies whose duty is to protect workers and consumers. Pursuant to the mandate of the Dodd-Frank Wall Street Reform and Consumer

conservative Federalist Society published a piece shortly after the *Concepcion* decision entitled, "Did the Supreme Court Just Kill the Class Action?"[33]

- ***Employment discrimination.*** Perhaps no Supreme Court decision on class actions has ever generated as much controversy as *Wal-Mart v. Dukes*,[34] which reversed the certification of a class of female Wal-Mart employees alleging gender discrimination in promotion and pay. The majority of commentators believe that *Dukes* raises new barriers to class certification in employment discrimination class actions,[35] and that such new barriers have affected all class actions.[36] One reason is that, as dissenting Justice Ginsburg noted, the majority in *Dukes* erroneously heightened, in the absence of any rules-based textual support, the standard for satisfying one of the preliminary prerequisites of a class action.[37]

- ***Wage and hour litigation.*** In *Genesis Healthcare Corp. v. Symczyk*,[38] the Court, by a 5-4 majority, held that a plaintiff could not continue to pursue a collective action under the Fair Labor Standards Act by refusing to accept an offer of judgment under Rule 68 that fully satisfied the plaintiff's individual claim. Although the dissenters in *Symczyk* took pains to point out that the case came to the Court in a unique procedural posture – the plaintiff had failed to challenge below the erroneous holding that the offer of judgment mooted the individual suit – the dissent found the implication of the case very troublesome: "No more in a collective action brought under the FLSA than in any other class action may a court, prior to certification, eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole. That course would short-circuit a collective action before it could begin, and thereby frustrate Congress's decision to give FLSA plaintiffs 'the opportunity to proceed collectively.'"[39]

Wage and hour class actions and collective actions deserve special mention because empirical research shows that the most common type of class action filed today is one that

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Protection Act, the Consumer Financial Protection Bureau has been studying the use of pre-dispute arbitration clauses in consumer financial markets. The CFPB's preliminary report was issued in December 2013, and it is expected that its final report will be released soon. *See Arbitration Study*, *supra* note 25. And the National Labor Relations Board has again held that an employer violates the National Labor Relations Act when it requires an employee to sign an agreement that she will not resort to class or collective action to pursuant violations of the Fair Labor Standards Act. Murphy Oil USA, Inc., 361 NLRB No. 72 (2014).

[33] Brian T. Fitzpatrick, *Did the Supreme Court Just Kill the Class Action?*, CLASS ACTION WATCH (September 2011), http://www.fed-soc.org/publications/detail/did-the-supreme-court-just-kill-the-class-action.

[34] 131 S. Ct. 2541 (2011).

[35] *E.g.*, Nina Martin, *The Impact and echoes of the Wal-Mart Discrimination Case*, Business Ethics: The Magazine of Corporate Responsibility (Oct. 1, 2013), http://business-ethics.com/2013/10/01/0958-the-impact-and-echoes-of-the-wal-mart-discrimination-case/ ("Jury verdicts have been overturned, settlements thrown out, and class actions rejected or decertified, in many instances undoing years of litigation.")

[36] *E.g.*, A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B. U. L. Rev. 441 (2013) (discussing the effects of the Court's heightened commonality standard).

[37] Wal-Mart v. Dukes, 131 S. Ct. at 2562 (Ginsburg, J., dissenting).

[38] 133 S. Ct. 1523, 1532 (2013).

[39] *Id.* at 1536 (Kagan, J., dissenting).

charges a violation of wage and hour legislation.[40] To be blunt, these suits allege that employers are nickel-and-diming working people all over the country by failing to pay them the wages to which they are entitled under the law.[41] In fact, complaints of these violations have become so common that last year President Obama directed the Labor Department "to modernize and streamline the existing overtime regulations" because those "regulations regarding exemptions from the [Fair Labor Standards] Act's overtime requirement, particularly for executive, administrative, and professional employees (often referred to as 'white collar' exemptions) have not kept up with our modern economy."[42]

Employers have learned that an effective way to get rid of these suits is to pick off the named plaintiff – offer the plaintiff a settlement that consists of everything the plaintiff is asking for, plus fees for his or her lawyer, and make the entire case go away. It takes a certain kind of employee, some might say brave, some might say cantankerous, to undergo the emotional upheaval of bringing a lawsuit. If the employee is still employed by the company, he or she is risking unemployment by upsetting those in charge. The employee also may be risking future employment opportunities by seeming to be a "troublemaker" to other employers. Not all employees are willing to assume these risks and throw down the gauntlet. By eliminating the one employee who has done so, an employer has a good chance of quieting the rest.

In *Symczyk*, a majority of the Supreme Court showed a willingness to tolerate this behavior by employers.[43] Adding insult to injury, federal courts are also upholding mandatory

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[40] EMERY G. LEE III & THOMAS E. WILLGING, THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES, FEDERAL JUDICIAL CENTER 4-5, 31 (2008); Hilary Hehman, *Findings of the Study of California Class Action Litigation, 2000-2006: First Interim Report,* Judicial Council of California: Administrative Office of the Courts (March 2009), at 5, http://www.courts.ca.gov/documents/class-action-lit-study.pdf (last visited Feb. 23, 2015).

[41] A few example include: failing to pay overtime when more than forty hours per week are worked; failing to give workers the breaks and meal breaks they are entitled to under the law; or failing to pay for time spent performing time-consuming activities that are necessary to the job, such as wearing special protective clothing or accessing necessary computer applications.

[42] Presidential Memorandum for the Secretary of Labor: Updating and Modernizing Overtime Regulations (March 13, 2014), http://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations. At the signing of the Presidential Memorandum, President Obama explained:

> [T]oday, millions of Americans aren't getting the extra pay they deserve. That's because an exception that was originally meant for high-paid, white-collar employees now covers workers earning as little as $23,660 a year. So if you're making $23,000, typically, you're not high in management. If your salary is even a dollar above the current threshold, you may not be guaranteed overtime. It doesn't matter if what you do is mostly physical work like stocking shelves, it doesn't matter if you're working 50 or 60 or 70 hours a week -- your employer doesn't have to pay you a single extra dime.
>
> And I think that's wrong. It doesn't make sense that in some cases this rule actually makes it possible for salaried workers to be paid less than the minimum wage.

The White House Blog, *Action for Our Workers: President Obama Signs Memorandum to Update Overtime Pay* (March 13, 2014), http://www.whitehouse.gov/blog/2014/03/13/action-our-workers-president-obama-signs-memorandum-update-overtime-pay.

[43] Genesis v. Symczyk, *supra* note 38.

arbitration clauses that specifically apply to the FLSA and state wage laws.[44] And several states have eliminated by statute employees' rights to bring wage and hour litigation as a class.[45]

In light of all these recent serious judicial restrictions on class actions, Congress should be very cautious and observe restraint in proceeding with legislation in response to asserted concerns with class actions raised by special interests.[46] Many of the "concerns" of special interests that I have seen appear to boil down to a belief that one judge here or another judge there ruled against them on some point. The judicial system has an age-old system for handling such "concerns": appeal, petition for certiorari, or filing *amicus curiae* briefs. And there is no shortage of lawyers working for these special interests and fighting these battles in legislatures, rules committees,[47] and courtrooms across the country.[48] In fact, spurred on by the same special interests, the Advisory Committee on Civil Rules has a very active "Rule 23 Subcommittee" that is currently evaluating possible modifications to the federal class action rule.[49]

Although I have seen no draft language of any legislation or rule amendment that might be proposed, adding more restrictions or specificity to the text of Rule 23 or to CAFA may remove judges' discretion to handle a particular class action as he or she sees fit based on an intimate knowledge of the case. One scholar's recent examination of numerous decisions on class certification emphasizes the critical role of preserving judicial discretion in ruling on class certification.[50] Statutory "solutions" often have unintended consequences.

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[44] *E.g.*, Sutherland v. Ernst & Young LLP, 726 F.3d 290, 293 (2d Cir. 2013) (upholding a mandatory arbitration clause that specifically applied to the FLSA and state wage laws, as well as a provision that "disputes pertaining to different employees will be heard in separate proceedings").

[45] Kentucky, Tennessee, and Alabama.

[46] *See, e.g.*, Lawyers for Civil Justice, Comment to the Advisory Committee on Civil Rules and its Rule 23 Subcommittee (Aug. 13, 2014).

[47] The same special interests are pressing the Advisory Committee on Civil Rules for amendments to Rule 23, airing many of the same "concerns."

[48] Business and corporate interests – defendants in class actions – employ an army of elite lawyers and well-funded conservative "think tank" organizations who deploy themselves in every possible arena of influence to assert what they see as their interests in the civil justice system. *E.g.*, IADC Amicus Brief Program, 81 DEF. COUNS. J. 404 (2014) ("The International Association of Defense Counsel has an active amicus curiae program, submitting briefs on issues of importance to IADC members and their clients.") In addition to the IADC, other influential organizations that regularly submit pro-business amicus briefs on class actions and other issues are the "Lawyers for Civil Justice," the "Center for Class Action Fairness," the National Association of Manufacturers, the U.S. Chamber of Commerce, DRI – Voice of the Defense Bar, and The Cato Institute. Indeed, the very able and distinguished Andrew Pincus just filed an amicus brief on behalf of the U.S. Chamber of Commerce in the Ninth Circuit Court of Appeals. Jones v. ConAgra Foods, Inc., No. 14-16327 (9th Cir.), Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Defendant-Appellee, filed Jan. 28, 2015. In that case, the trial judge in the Northern District of California *denied* class certification, and the *amicus* just wants to make sure that the Ninth Circuit affirms the denial.

[49] Memorandum from Advisory Committee on Civil Rules to Committee on Rules of Practice and Procedure (Dec. 2, 2014) (reporting on Advisory Committee meeting of Oct. 30, 2014).

[50] Tobias Barrington Wolff, *Discretion in Class Certification*, 162 U. PENN. L. REV. 1897, 1951 (2014) ("The point of recognizing discretion in class certification is not to restrict the class action as a tool for the private enforcement of public norms. To the contrary, the point is to preserve it.") *See also* CLASS ACTION DILEMMAS, *supra* note 1, at 485 ("We think it is judges who hold the key to improving the balance of good and ill consequences of damage class actions.")

B. Other Legislative and Judicial Developments Have Hampered the Pursuit of Justice for People Harmed By the Illegal Actions of Others, Especially in Federal Court

Any suggestion that Congress should further expand CAFA jurisdiction still rests on the premise that federal courts are simply "tougher" on class actions than state courts. But empirical studies did not support that premise when CAFA was passed, and they still do not.[51]

Without solid evidence that state courts do not scrutinize class actions as closely as federal courts, institutional defendants' stated desire to be in federal court over state court must transcend any theoretical difference in class action standards. Corporate defendants' preference for federal courts in the class action context is only one facet of their preference for federal courts in general.[52]

There are many procedural differences between federal and state courts, and many of those procedural differences are favorable to defendants in federal court.[53] Plaintiffs in federal court are mostly individuals suing a business or governmental organization,[54] and plaintiffs' success rate in federal court has declined in recent years.[55]

A brief catalogue of the growing procedural disadvantages plaintiffs face in federal court would include the following. The heightened pleading standard discernable after the *Twombly* and *Iqbal* cases makes it more difficult for plaintiffs to formulate a complaint that will survive a motion to dismiss.[56] Oddly, in an era of global business, it has become harder for plaintiffs to assert personal jurisdiction over foreign defendants.[57] Discovery has been incrementally restricted in federal courts time and again over the past thirty years, and more defense-favoring restrictions on discovery in federal court are in the works, in the package of amendments to the

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[51] *See Confronting the Myth*, *supra* note 6.

[52] *See, e.g.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982 (2003); Patricia W. Moore, *Comments in Opposition to the Proposed Amendments to the Federal Rules of Civil Procedure*, http://www.regulations.gov/#!documentDetail;D=USC-RULES-CV-2013-0002-0491 (Jan. 31, 2014).

[53] A survey by the Federal Judicial Center found that over 46% of plaintiffs' attorneys (almost half of them) did not affirmatively agree with the statement that "The outcomes of cases in the federal system are generally fair." *See* EMERY G. LEE III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 68-69 (Federal Judicial Center, Oct. 2009).

[54] Patricia W. Hatamyar Moore, *The Civil Caseload of the Federal District Courts*, ___ U. ILL. L. REV. ___ (forthcoming 2015), draft posted at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2416864; Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 Stanford L. Rev. 1275, 1314-17 (2005)

[55] *E.g.*, Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Supreme Court*, Cornell Law School Legal Studies Research Paper Series, No. 13-94 (2013); Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 Law & Soc. Inquiry 497, 501-502 (1996) (finding that "[b]ig business wins overwhelmingly, as plaintiff and defendant, in cases that involve it");.

[56] *E.g.*, Patricia W. Hatamyar, *An Updated Quantitative Study of Iqbal's Impact on 12(b)(6) Motions*, 46 U. RICHMOND L. REV. 603 (2012); Elizabeth Schneider, *The Changing Shape of Federal Civil Procedure*, 158 U. PENN. L. REV. 517 (2010) (arguing that *Twombly* and *Iqbal* altered litigation practices so that fewer civil rights and employment discrimination cases are filed while a greater number of these cases are dismissed).

[57] Daimler AG v. Bauman, 134 S.Ct. 746 (2014); J. McIntyre Machinery, Ltd. v. Nicastro, 131 S. Ct. 2780 (2011); Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846 (2011).

Federal Rules of Civil Procedure that is currently awaiting the Supreme Court's approval.[58] It is often much easier for defendants to win summary judgment in federal court, so that the case never proceeds to a jury. Limitations on expert witnesses can be stricter in federal court, leading to the barring of plaintiffs' expert witnesses that in turn lead to the loss of the case.[59]

Besides the procedural advantages that defendants hold in federal court, which may seem pedantic or at least profoundly boring to the lay observer, a more visceral difference between the federal and state court systems is the identity of the decision makers, namely the judges. In federal court, corporations and the lawyers who represent corporations are very likely to face a judge who has a background just like theirs. Most federal judges, whether appointed by a Republican or a Democratic president, spent most of their career prior to becoming a judge practicing law in large, elite law firms that primarily represent corporations, primarily on the defense side.[60] I am not suggesting that federal judges are consciously biased; most are distinguished, dedicated professionals of the highest integrity. But their background shapes their perceptions, and in the course of litigation where there are many avenues for the judge to exercise a tremendous range of discretion, it would not be surprising if in their discretion they were more likely to see things from a corporation's or a defendant's point of view.[61]

In summary, the most common type of case in our federal district courts today is a case by an individual citizen against an organization, either a business organization or a governmental organization.[62] Despite the underdog victory in the original battle of David and Goliath, in today's federal court lawsuit, Goliath usually wins.[63] This is the principal reason for defendants' usual preference for federal court; class action standards are just a piece of it.

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[58] Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, __ U. CINN. L. REV. __ (forthcoming 2015).

[59] For a general discussion of the progression of rights-restricting changes in procedure, see, e.g., Miller, *supra* note 5.

[60] *See, e.g.*, Nat'l Emp't Lawyers Ass'n Rpt.: Judicial Hostility To Workers' Rights: The Case For Professional Diversity On The Federal Bench, http://exchange.nela.org/NELA/Contribute/Resources/ViewDocument/?DocumentKey=4c6e4546-acac-48fc-8bb3-7b1cc2bdc443 (2012) ("Like his predecessors, President Obama's nominees have largely been corporate lawyers, judges, or prosecutors prior to their nominations, while fewer have been public defenders, legal services attorneys, or public interest lawyers. Even fewer have devoted their professional careers to representing workers and civil rights litigants"); Michael J. Yelnosky, *The Bar Association Panel Should Diversify its Representation*, Wash Post, Aug. 15, 2013, http://www.washingtonpost.com/opinions/the-bar-association-panel-should-diversify-its-representation/2013/08/15/b79c5a18-045f-11e3-88d6-d5795fab4637_story.html (noting that in the ABA's Standing Committee on the Federal Judiciary, which rates potential nominees for federal judicial vacancies, "[n]ot one of the lawyers on the committee for 2013–14 regularly represents individuals who bring lawsuits alleging they were harmed by the actions of corporations or other business entities, and not one represents individuals charged with anything other than white-collar crimes").

[61] *See* Coleman, *supra* note 2.

[62] Moore, *supra* note 54.

[63] *See supra* note 55.

III. There Are No Publicly Available Court Data on Class Actions, Federal or State, to Use as a Baseline in Evaluating Claims Based on Anecdotal Cases.

"The kind of basic information that we demand in discussions of other policy issues like the economy, or employment, or education, simply does not exist [for the legal system]."[64] In no area of civil practice is this truer than for class actions.

CAFA is a primary focus of this hearing. Since the major purpose of CAFA was to bring more diversity class actions into federal court, we might now want to know the answer to some simple questions: how many diversity class actions are either filed in or removed to federal court today, ten years after CAFA? Has the volume increased or decreased? What types of class actions are most frequently filed? Do they allege mostly wage and hour violations, consumer complaints, or something else? What was the estimated total harm to class members? How many class actions were dismissed? How many were certified? Of those class action cases that were certified, how many were settled? What was the range of settlement amounts? Of the settlement fund, how much went to attorneys' fees? How much on average did each class member ultimately recover? And so forth.

There are no publicly available aggregate data anywhere that answer any of the above questions about any federal or state court in the United States. Without access to official court records, litigants or lobbyists with different axes to grind now run to the legal databases such as Westlaw and Lexis to try to find these answers. They pick and choose the particular cases that support the outcome they want to achieve. It would be all but impossible for a policy maker to put the competing claims into the neutral context that would be provided by full statistical records. This was the main point of my article, *Confronting the Myth of "State Court Class Action Abuses" Through an Understanding of Heuristics and a Plea for More Statistics*.[65]

In *Confronting the Myth*, I studied the legislative history leading up to CAFA's passage in 2005. I noticed that it was filled with overblown assertions of "state court class action abuses" and a "flood of class actions overwhelming the state courts." There was no good empirical support for these assertions; in fact, the only existing rigorous empirical studies did *not* support these assertions. Instead, CAFA's proponents offered only anecdotal evidence of a few allegedly "outrageous" cases hand-picked to create revulsion in the hearer, and some unscientific and nonrandom data collected from self-selected and self-interested survey participants.[66]

After a diligent and thorough search for basic statistical information on class actions, I concluded that it largely did not exist, either pre-CAFA or post-CAFA:

> It is an amazing but true fact that no court, state or federal, in the United States actually compiles, on a regular basis, to be generally distributed to the public, any

[64] Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097, 1134 (2008). *See also, e.g.*, Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, 143 DAEDALUS 129 (2014) (describing dearth of data on state courts, where the vast number of civil lawsuits are filed).
[65] 82 UMKC L. Rev. 133 (2013).
[66] *See id.* at 138-154.

> information about the number, type, or disposition of class actions filed. The federal courts, despite releasing annually an impressive volume of data, do not release figures on class actions. State courts, which rarely release anything but the most general data on caseloads, may not even keep, let alone release, figures on class actions. The limited data that do exist on class actions have been compiled by government-sponsored and academic researchers.[67]

In my article, I went on to argue that without the baseline of data provided by statistical records, it was too easy for parties to exploit the well-documented psychological biases that human beings all share. We are hard-wired to jump to hasty conclusions in the absence of full information, particularly when the limited information that we do have appeals to the emotions.[68]

The lack of court data on class actions continues to the present day. Exhibit A is a list of all fifty states' judicial websites, none of which contain any aggregate information on class actions filed in their state. But for the federal courts, the status quo could be easily changed. Since class actions are the subject of passionate debate and many Supreme Court opinions, Congress can and should illuminate the facts by requiring the information on federal class actions that is already being collected to be made available to the public and to Congress itself.

Two types of court records on federal class actions should be publicly accessible but currently are not. First, Congress should require the Administrative Office of the United States Courts ("AO") to start releasing Tables X-4 and X-5 again along with the voluminous statistics that it already releases annually.[69] Up until 2004, these statistical tables compiled, for every federal district court in the country, the number and types of class actions pending (Table X-4) and the number and types of class actions filed, by basis for federal jurisdiction (Table X-5).[70] For no apparent reason, the AO stopped releasing these tables in the year CAFA was passed – 2005 – and has not released them in the ten years since then.

The second set of existing government data that would aid in research about class actions and many other facets of the federal courts is the Integrated Federal Courts Database series ("IDB"), which contains records of every case termination in federal district court.[71] The IDB

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[67] *Id.* at 135.

[68] *Id.* at 154-160, *citing*, *e.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008).

[69] *E.g.*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2012 ANNUAL REPORT OF THE DIRECTOR, *available at* http://www.usconrts.gov/Statistics/JndicialBusiness/2012.aspx. The federal courts compile much of their civil caseload statistics from the Civil Cover Sheet, required when filing a civil case in federal district court. *See Civil Cover Sheet Form*, http://www.uscourts.gov/uscourts/FormsAndFees/Forms/JS044.pdf (last visited Feb. 22, 2015). The Civil Cover Sheet has long a box to check indicating whether the suit is brought as a class action, and this information can easily yield aggregate data on class action filings.

[70] *See, e.g.*, ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2004 ANNUAL REPORT OF THE DIRECTOR, Tables X-4, X-5 (2005), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2004.aspx [hereinafter 2004 ANNUAL REPORT].

[71] The IDB is maintained and distributed by the National Archive of Criminal Justice Data ("NACJD"), the criminal justice archive within the Inter-University Consortium for Political and Social Research.

contains at least thirty variables coded for each case, including the variable CLASSACT (Class Actions), which purports to indicate whether the case was filed as a class action.[72]

This entire series of government databases of all federal civil cases was available without restriction up until May 2012. However, since then it has become virtually impossible to conduct certain types of academic research using the IDB, for two reasons. First, in 2012 the IDB database series was suddenly restricted from general dissemination. A researcher must now be approved to gain access to these datasets.[73] Second, even if the researcher is approved, the copy of the database that is provided to the researcher has the docket numbers of the cases and the judges to whom the cases are assigned blacked out.[74] These incomprehensible restrictions were imposed only recently, in November 2012.[75] For decades, important empirical studies of the federal courts were conducted without these "blackouts" in place.[76] Concealment of this data seems to be protecting judges, and perhaps litigants, from critical scrutiny, and it contravenes the transparency that American citizens expect from their government.

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[72] *E.g.*, *Federal Judicial Center*, CODEBOOK FOR CIVIL PENDING DATA – WITH PLT AND DEF BLANKED, at 17 (2010) (ICPSR 29281), *available at* http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/29281/documentation.

[73] *See* http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072/studies/30401?archive=ICPSR&sortBy=7&permit%5B0%5D=AVAILABLE ("Users interested in obtaining these data must complete a Restricted Data Use Agreement form and specify the reasons for the request."). Gaining approval is a time-consuming process that inexplicably involves the approval of an academic researcher's Institutional Review Board. IRBs typically provide "ethical and regulatory oversight of research that involves human subjects." *See, e.g.*, National Institute of Environmental Health Science, http://www.niehs.nih.gov/about/boards/irb/. But using the IDB does not involve "human subjects": the IDB contains no information that is not already publicly available on PACER, meaning it contains no information that is not *already* a matter of public record on the court docket. The IDB simply codes this information in a way that can be used for quantitative statistical research. A private researcher, in theory, could put this information in his or her self-created database from what is on PACER, but it would take the researcher the rest of his or her career to even do one year of case terminations. And PACER is not free, even to academic researchers, who must pay the standard $0.10 per page accessed. The IDB contains no proprietary, confidential, or sensitive information that justifies obscuring its content from Congress and the public.

[74] Without the identifying docket numbers of each case, one cannot easily (if at all) find the PACER records of the case to check the accuracy of any of the coding, contact the parties or attorneys in the case, study the behavior of "repeat players" in federal courts, or compare other available databases such as Westlaw or CourtLink to see how they may differ from the official records of the court. *See* Lynn M. LoPucki, *The Politics of Access to Court Data*, 80 Tex. L. Rev. 2161, 2169-70 (2002) (describing similar blackouts in bankruptcy court records). Without the judge's name, one cannot perform quantitative research of outcomes by any particular judge.

[75] Federal Judicial Center, Federal Court Cases: Integrated Data Base, 2010. ICPSR30401-v2. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [distributor], 2012-11-26, available at . http://www.icpsr.umich.edu/icpsrweb/ICPSR/series/00072/studies/30401?archive=ICPSR&sortBy=7&permit%5B0%5D=AVAILABLE (last visited Feb. 22, 2015) (on "2012-11-26 [the date of a new version of the 2010 database][,] The docket numbers were recoded to 9-fill to protect the confidentiality of individuals involved in the case.").

[76] *See, e.g.*, Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1314–17 (2005) (used IDB to calculate a greater trial rate than that suggested by the AO's aggregate figures); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1579 (2003); Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1460 (2003) ("[T]he AO data are very accurate when they report a judgment for plaintiff or defendant, except in cases in which judgment is reported for plaintiff but damages are reported as zero."); Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 LAW & SOC. INQUIRY 497, 501-502 (1996) (using the IDB, finding that "a very small number of business 'mega-litigants' account[ed] for most of the [business litigation] activity" in the federal courts");

Without better access to court information on class actions, the important class action debate can devolve into cherry-picking information and mischaracterizing an anecdote as the status quo.

I deeply appreciate the Subcommittee allowing me to testify today, and I will attempt to answer any questions that the members of the Subcommittee may have.

Exhibit A

State Court Judiciary Web Sites (no aggregate information on class actions)

Alabama Judiciary, http://judicial.alabama.gov (last visited Feb. 19, 2015).
Alaska Judiciary, http://courts.alaska.gov (last visited Feb. 19, 2015).
Arizona Judiciary, http://www.azcourts.gov (last visited Feb. 19, 2015).
Arkansas Judiciary, https://courts.arkansas.gov (last visited Feb. 19, 2015).
California Judiciary, http://www.courts.ca.gov (last visited Feb. 19, 2015).
Colorado Judiciary, http://www.courts.state.co.us (last visited Feb. 19, 2015).
Connecticut Judiciary, http://www.jud.ct.gov (last visited Feb. 19, 2015).
Delaware Judiciary, http://courts.delaware.gov (last visited Feb. 19, 2015).
District of Columbia Judiciary, http://www.dccourts.gov (last visited Feb. 19, 2015).
Florida Judiciary, http://www.flcourts.org (last visited Feb. 19, 2015).
Georgia Judiciary, http://www.georgiacourts.gov (last visited Feb. 19, 2015).
Hawaii Judiciary, http://www.courts.state.hi.us (last visited Feb. 19, 2015).
Idaho Judiciary, http://www.isc.idaho.gov (last visited Feb. 19, 2015).
Illinois Judiciary, http://www.state.il.us/court (last visited Feb. 19, 2015).
Indiana Judiciary, http://www.in.gov/judiciary (last visited Feb. 19, 2015).
Iowa Judiciary, http://www.iowacourts.gov (last visited Feb. 19, 2015).
Kansas Judiciary, http://www.kscourts.org (last visited Feb. 19, 2015).
Kentucky Judiciary, http://courts.ky.gov (last visited Feb. 19, 2015).
Louisiana Judiciary, http://louisiana.gov/Government/Judicial_Branch (last visited Feb. 19, 2015).
Maine Judiciary, http://www.courts.state.me.us (last visited Feb. 19, 2015).
Maryland Judiciary, http://www.courts.state.md.us (last visited Feb. 19, 2015).
Massachusetts Judiciary, http://www.mass.gov/courts (last visited Feb. 19, 2015).
Michigan Judiciary, http://www.courts.michigan.gov (last visited Feb. 19, 2015).
Minnesota Judiciary, http://www.mncourts.gov (last visited Feb. 19, 2015).
Mississippi Judiciary, http://courts.ms.gov (last visited Feb. 19, 2015).
Missouri Judiciary, http://www.courts.mo.gov (last visited Feb. 19, 2015).
Montana Judiciary, http://courts.mt.gov (last visited Feb. 19, 2015).
Nebraska Judiciary, http://www.supremecourt.ne.gov (last visited Feb. 19, 2015).
Nevada Judiciary, http://www.nevadajudiciary.us (last visited Feb. 19, 2015).
New Hampshire Judiciary, http://www.courts.state.nh.us (last visited Feb. 19, 2015).
New Jersey Judiciary, http://www.judiciary.state.nj.us (last visited Feb. 19, 2015).
New Mexico Judiciary, http://www.nmcourts.gov (last visited Feb. 19, 2015).
New York Judiciary, http://www.courts.state.ny.us (last visited Feb. 19, 2015).
North Carolina Judiciary, http://www.nccourts.org (last visited Feb. 19, 2015).
North Dakota Judiciary, http://www.ndcourts.gov (last visited Feb. 19, 2015).
Ohio Judiciary, http://www.supremecourt.ohio.gov (last visited Feb. 19, 2015).
Oklahoma Judiciary, http://www.oscn.net (last visited Feb. 19, 2015).
Oregon Judiciary, http://courts.oregon.gov (last visited Feb. 19, 2015).
Pennsylvania Judiciary, http://www.pacourts.us (last visited Feb. 19, 2015).
Rhode Island Judiciary, http://www.courts.ri.gov (last visited Feb. 19, 2015).
South Carolina Judiciary, http://www.judicial.state.sc.us (last visited Feb. 19, 2015).

South Dakota Judiciary, http://ujs.sd.gov (last visited Feb. 19, 2015).
Tennessee Judiciary, http://www.tncourts.gov (last visited Feb. 19, 2015).
Texas Judiciary, http://www.txcourts.gov (last visited Feb. 19, 2015).
Utah Judiciary, http://www.utcourts.gov (last visited Feb. 19, 2015).
Vermont Judiciary, http://www.vermontjudiciary.org (last visited Feb. 19, 2015).
Virginia Judiciary, http://www.courts.state.va.us/courts (last visited Feb. 19, 2015).
Washington Judiciary, http://www.courts.wa.gov (last visited Feb. 19, 2015).
West Virginia Judiciary, http://www.courtswv.gov (last visited Feb. 19, 2015).
Wisconsin Judiciary, http://www.wicourts.gov (last visited Feb. 19, 2015).
Wyoming Judiciary, http://www.courts.state.wy.us (last visited Feb. 19, 2015).

Mr. FRANKS. Thank you, and thank you all for your testimony. We will now proceed under the——

Forgive me, Ms. Miller. I now recognize Ms. Miller for 5 minutes, and please turn on your microphone.

TESTIMONY OF JESSICA MILLER, PARTNER, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

Ms. MILLER. Good morning, Chairman——

Mr. FRANKS. Would you pull that microphone close to you and make sure that——

Ms. MILLER. Can you not hear me? Is that better?

Mr. FRANKS. Yes, ma'am. Yes, ma'am.

Ms. MILLER. Good morning, Chairman Franks, Ranking Member Cohen, and Members of the Subcommittee. If I had walked into this hearing today just off the street and listened to the opening statements of the Chairman, the Ranking Member, and the Committee Members, I am pretty sure that my sympathies would naturally have been with those of you who were talking about racial discrimination, civil rights, private attorneys general. Those are all things that are really important to me.

But I practice in the class action area every day, and I have done so for 20 years, and that is not what it is about. That is not the reality of what is happening in class actions today. The reality is shakedowns by plaintiffs' lawyers who are bringing class actions not against companies that are cheating consumers. They are bringing class actions on behalf of people who have products that work. And I think the most obvious example of that are these roofing class actions and these washing machine class actions, which are being brought against every single manufacturer. So it is not like there is a bad guy out there. Everybody in America who has a front load washing machine has been a plaintiff in a class action.

And I think that is so important to think about because if you go to somewhere like Europe, all they have got is front load washing machines. There is no great conspiracy by the washing machine industry to trick Americans into buying, you know, energy efficient front load washers.

And I think another good example are these roofing class actions, right? You have got roofs. They are sitting out there. It is snowing. It is hailing. You know, things happen to roofs. And what happens with a no injury or over broad class action is that plaintiffs' lawyers find one person whose roof had a problem. Well, yes, roofs have problems. And then suddenly you have got a nationwide class action on behalf of every single person who has ever had a roof in America because one person had a problem with a roof.

And so, that is where you get these over broad and no injury class actions we are talking about today. We are not talking civil rights here. We are talking about people whose roofs are functioning fine, who do not have any desire to be part of a class action, and all of a sudden we have some Federal courts are certifying these cases. And then you have these settlements, and what happens? A bunch of people who never had a problem with their roof suddenly get a couple of dollars in the mail that they did not want. Half of them do not even, you know, cash the checks.

I think the most poignant example of what is wrong with our class action system is the Pella class action in the 7th Circuit. So, this was a class action that involved allegedly rotting windows, and the defendant tried to avoid class certification by telling the court there are lots of people whose windows did not rot. There are lots of people whose windows were installed improperly. There were a lot of different experiences that people had with these windows. But the court said we are going to certify this class action even though you guys are saying it is over broad.

And so, then what happened? So the class action settled, and that is not a surprise because if you are a defendant, even if you make a great product, one person's product is going to fail. Someone's windows are going to rot. Somebody is going to have forgotten to close the windows, or to repaint the windows, or something. Something is going to happen. There is going to be one person in America whose windows rot no matter how good American corporations are, right? And if that person is before the wrong jury, all of a sudden this defendant could have millions of dollars of liability or hundreds of millions of dollars. So Pella settled the case.

And then what happened? Well, only one-half of 1 percent of class members expressed any interest in the settlement. One-half of 1 percent showed up to get their money. And this was not one of those class actions where they only offered you a couple of bucks. This was actually a class action with some real money for those who were motivated or cared about it. But nobody was interested.

So then, the court said, oh, we have a problem here. This settlement is no good because all the money went to the lawyers and no money went to the consumers. But what everybody is missing is that no money went to consumers because consumers were happy with their windows.

So that is what we are talking about when we say no injury class actions. We are not talking about, you know, any sort of corporate conspiracy to harm America. We are talking about basically people recruiting somebody, sending out emails. Has anybody had a problem with your roofing shingles, because I can get you some money. And then we can leverage that into money for everyone in America who has roofing shingles, whether they are good, bad, or have not had any problems. And that is what we feel Congress needs to address. That is not promoting justice in this country. There is no benefit to these types of class actions.

And I think the solution that would help address this problem is legislation that would say we can only have class actions proceeding to Federal court if all the class members have suffered the same type of injury as the named plaintiff. And the reason I say is think about my roofing case. Think about my washing machine case. If the named plaintiff claims to have mold, or if the named plaintiff claims to have a problem, there may, in fact, have been a manufacturing defect with one person's shingles.

But you do not want to have a system where that person cannot bring in money for millions of other people who have not had a problem. And if you have legislation that says everybody has got to suffer the same type of injury, then it is not eradicating class actions. It is eradicating meritless class actions.

Thanks, and I look forward to answering any questions.

[The prepared statement of Ms. Miller follows:]

Testimony of Jessica Miller[1]
Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary
United States House of Representatives

"The State of Class Actions Ten Years After Enactment of the Class Action Fairness Act"

Good morning Chairman Franks, Ranking Member Cohen and Members of the Subcommittee. Thank you for inviting me to testify today about the Class Action Fairness Act ("CAFA") and the path forward to further improving federal class action practice.

Enactment of CAFA will long be remembered as a milestone in the crusade for a more just and more effective civil justice system. CAFA's expansion of federal diversity jurisdiction has moved countless class actions of national importance from state to federal court. In the process, CAFA has eliminated magnet state-court jurisdictions that were once a haven for meritless and abusive class action lawsuits. In most cases, plaintiffs must now comply with the dictates of Rule 23 of the Federal Rules of Civil Procedure, and their class proposals are subject to the Supreme Court's mandated "rigorous analysis" of Rule 23's factors. These factors are designed to establish a fair mechanism for aggregate litigation that is faithful to the fundamental due-process interests of both class members and defendants. Thus, by opening federal courthouse doors to interstate class actions, CAFA has required plaintiffs to take the requirements of class certification seriously. And because more appellate courts have been willing to exercise discretionary appellate review of cases that are brought under CAFA, plaintiffs are finding it increasingly difficult to evade a federal forum – and the more rigorous application of class-certification standards that exists in most federal courts.[2]

While CAFA has been integral to improving the civil justice landscape in the United States, problems remain. On the tenth anniversary of this landmark legislation, I would respectfully urge Congress to focus its attention on certain troubling aspects of federal class action jurisprudence that were not eradicated by CAFA, specifically: (1) the tendency of certain courts to view consumer class actions as presumptively appropriate even if the facts governing class members' claims vary and/or most of the class members did not suffer any injury; and (2) the continued embrace by some federal courts of class action settlements that offer nothing to consumers. Although these sound like two distinct problems, I believe they are fundamentally intertwined. Because some courts are embracing overbroad class actions with few – if any – injured class members, there is usually almost no interest among class members in participating when the case settles. The result is that all the money goes to the attorneys. And one of the

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[2] A review of the case law reveals over 200 cases in which federal appeals courts have interpreted CAFA.

interesting (and also frustrating) things you see in the caselaw is that the same judges who are allowing these overbroad, no-injury class actions to proceed are then turning around a year or two later and complaining because nobody but the lawyers claimed any money in the settlement.

I. CAFA HAS PRODUCED IMPORTANT REFORMS FOR CLASS ACTION PRACTICE.

Congress sought to accomplish three specific goals in enacting CAFA: (1) to "assure fair and prompt recoveries for class members with legitimate claims"; (2) to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction"; and (3) to "benefit society by encouraging innovation and lowering consumer prices."[3] CAFA has largely accomplished these goals.

A. CAFA Has Ensured That Truly Interstate Class Actions Are Litigated In Federal Court.

Traditionally, federal courts had diversity jurisdiction over a class action only if two conditions were satisfied: (1) all of the class representatives were citizens of a different state from all of the defendants; and (2) the amount in controversy for each named plaintiff exceeded $75,000. As a result, plaintiffs' attorneys would routinely bring frivolous class actions in state courts, particularly in so-called magnet jurisdictions (like Madison County, Illinois) that gained a reputation for applying weak class-certification standards. If one court denied certification, plaintiffs could file virtually identical claims in different state courts throughout the country in order to find a judge willing to certify their claims. This practice resulted in "judicial inefficiencies and contraven[ed] the Supreme Court's anti-forum shopping policy."[4] "[W]hen enacting CAFA, one of the goals expressed by Congress was to expand federal class action jurisdiction in an effort to reduce 'abusive practices by plaintiffs and their attorneys,' including 'forum shopping to take advantage of potential state court biases against foreign defendants.'"[5]

This core objective has largely been fulfilled. "[F]orum shopping in state court 'judicial hellholes' has been reduced" as a result of CAFA.[6] For example, in the two years following

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[3] CAFA, Pub. L. No. 109-2, § 2(b)(1)-(3), 119 Stat. 4, 5 (2005); *see also City of Md. Heights v. Tracfone Wireless, Inc.*, No. 4:12CV00755 AGF, 2013 U.S. Dist. LEXIS 29677, at *3-4 (E.D. Mo. Mar. 4, 2013) ("CAFA was enacted to address perceived abuses in consumer class action practice, such as forum shopping, coupon settlements, awards of little or no value, and confusing notices that prevent class members from being able to fully understand and effectively exercise their rights.").

[4] Kalee DiFazio, *CAFA's Impact on Forum Shopping and the Manipulation of the Civil Justice System*, 17 Suffolk J. Trial & App. Advoc. 133, 139 (2012).

[5] *Lewis v. Ford Motor Co.*, 685 F. Supp. 2d 557, 561 n.6 (W.D. Pa. 2010) (citation omitted).

[6] Georgene Vairo, *What Goes Around, Comes Around: From the Rector of Barkway to Knowles*, 32 Rev. Litig. 721, 774 (2013) (footnote omitted); *see also* Jennifer Johnston, *Cy Pres Comme Possible to Anything is Possible: How Cy Pres Creates Improper Incentives in Class Action Settlements*, 9 J.L. Econ. & Pol'y 277, 299 n.220 (2013) ("CAFA also helped deter class actions being brought in 'favorable' state courts.")

CAFA's enactment, only 16 class actions were filed in Madison County, an annualized decline of more than 90 percent, and studies by the Federal Judicial Center have shown an increase in federal court filings, making clear that the main locus of class actions has shifted to federal court.[7]

B. CAFA Has Tightened The Requirements For Class Settlements.

Another important contribution of CAFA has been heightened standards for class action settlements, which have resulted in the more equitable disposition of class claims. In particular, CAFA created new rules for reviewing coupon settlements – i.e., settlement agreements under which class members are compensated for their purported injuries with coupons, discounts or credits toward further purchases of the defendant's products or services. CAFA specifically requires a coupon settlement to be "fair, reasonable, and adequate," and places restrictions on attorneys' fees in such settlements. 28 U.S.C. § 1712. Although the "'fair, reasonable, and adequate' standard is identical to that contained in Rule 23(e)(2), . . . courts have interpreted section 1712(e) as imposing a heightened level of scrutiny in reviewing" coupon settlements.[8] Thus, federal courts – already more skeptical than state courts of so-called "sweetheart deals" – have generally taken even greater care in reviewing proposed coupon settlements since CAFA's enactment.[9]

In one recent case, for example, the Seventh Circuit vacated a lower court's approval of a class settlement stemming from RadioShack's alleged printing of credit and debit card expiration dates on customer receipts, which constituted violations of the Fair and Accurate Credit Transactions Act.[10] The settlement provided a $10 voucher redeemable at RadioShack stores for each class member, representing less than one-tenth of the statutory damages allowed under the federal statute. The settlement also gave class counsel a fee of $1 million, which was marginally reduced by the district court. According to the Court of Appeals, the "attorneys' fee [was]

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[7] Emery G. Lee III & Thomas E. Willging, Fed. Jud. Ctr., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules* 1 (2008), http://www.uscourts.gov/uscourts/Rulesandpolicies/rules/fourth%20interim%20report%20class%20action.pdf; *see also* Vairo, *supra* note 6, at 774 ("CAFA appears to have resulted in the slowing down of filings in plaintiff-friendly Madison County, Illinois."); Robert H. Klonoff, *F. Hodge O'Neal Corporate & Securities Law Symposium: The Future of Class Actions: The Decline of Class Actions*, 90 Wash. U. L. Rev. 729, 745 (2013) ("CAFA has in fact had an enormous impact in shifting most class actions to federal court.").

[8] *Sobel v. Hertz Corp.*, No. 3:06-CV-00545-LRH-RAM, 2011 U.S. Dist. LEXIS 68984, at *20-21 (D. Nev. June 27, 2011) (internal quotation marks and citation omitted) (citing cases).

[9] *See, e.g.*, *Galloway v. Kan. City Landsmen, LLC*, No. 4:11-1020-CV-W-DGK, 2013 U.S. Dist. LEXIS 92650, at *5-6 (W.D. Mo. July 2, 2013) ("[T]he Class Action Fairness Act of 2005 . . . requires more 'heightened judicial scrutiny of coupon-based settlements' than settlements resulting in cash payments.") (citation omitted); *Sobel*, 2011 U.S. Dist. LEXIS 68984, at *20-21; *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1069 (C.D. Cal. 2010) (employing "heightened level of scrutiny" in rejecting proposed class settlement); *see also Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 654 (7th Cir. 2006) ("[A]lthough this case is not covered by the Class Action Fairness Act . . . we note that in that statute Congress required heightened judicial scrutiny of coupon-based settlements based on its concern that in many cases 'counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value.'") (citation omitted).

[10] *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. Ill. 2014).

grossly disproportionate to the award of damages to the class."[11] Of the millions of class members who received notice of the class settlement, only 83,000 submitted a claim for a coupon.[12] Judge Richard Posner, writing for the court, explained that "the law quite rightly requires more than a judicial rubber stamp" to class-action settlements.[13] As part of its analysis, the Court of Appeals emphasized that district courts must "be alert to the many possible pitfalls in coupon settlements—pitfalls that moved Congress to [enact] the Class Action Fairness Act with specific reference to such settlements."[14] The parties – and the district court – had justified the $1 million fee award in large measure based on the $2.2 million in administrative costs borne by the defendant.[15] However, as the appellate court explained, the attorneys' fees had to be based on the actual value received by the class, which was at most $830,000 based on the coupons. Because the lower court failed to assess the reasonableness of the fee award against the actual benefit provided to the supposedly aggrieved class members, the coupon settlement did not pass muster under Rule 23.

C. CAFA Has Put An End To Improper, Coercive Nationwide Class Actions.

Finally, CAFA has virtually put an end to sprawling nationwide class actions that turn on varying state laws. Prior to CAFA, magnet state courts routinely certified state-law-based nationwide class actions in which judges applied the law of their state nationwide, in derogation of the laws of the states in which the class members resided. By contrast, federal courts have agreed with virtual unanimity that such class actions are improper.

In *Pilgrim v. Universal Health Card*, for example, the court struck the class allegations in a putative nationwide class action asserting claims for consumer fraud and unjust enrichment, in a decision that was affirmed by the U.S. Court of Appeals for the Sixth Circuit.[16] The plaintiffs sued Pilgrim, purporting to represent a nationwide class of similarly situated individuals – and claiming relief under Ohio's consumer-fraud law and for unjust enrichment.[17] The Sixth Circuit upheld the district court's ruling in *Pilgrim*, agreeing that the "consumer-protection laws of the State where each injury took place would govern [plaintiffs'] claims."[18] The Court of Appeals held that "[i]n view of this reality and in view of [the fact] that the consumer-protection laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving this dispute."[19] As the court explained, "[i]f more than a few of the laws of the fifty states differ . . . the district judge would face an impossible task of instructing a jury on the

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[11] *Id.* at 632.

[12] *Id.* at 628.

[13] *Id.* at 629.

[14] *Id.* at 635.

[15] *Id.* at 630.

[16] *Pilgrim v. Universal Health Card, LLC*, No. 5:09CV879, 2010 U.S. Dist. LEXIS 28298 (N.D. Ohio Mar. 25, 2010), *aff'd*, 660 F.3d 943 (6th Cir. 2011).

[17] *Id.*

[18] *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011).

[19] *Id.*

relevant law."[20] *Pilgrim* is just one of many cases that may not have been subject to federal jurisdiction before CAFA, in which courts have rejected nationwide classes.[21] Thus, CAFA has had great success in achieving one of its primary goals: curtailing abusive nationwide class actions.[22]

II. SOME ASPECTS OF CLASS ACTION PROCEDURE WERE NOT ADDRESSED IN CAFA AND CRY OUT FOR REFORM.

CAFA had a limited purpose of allowing more interstate class actions into federal court. While this purpose has largely been fulfilled, some other abusive aspects of federal class action practice that harm consumers, businesses, and the economy as a whole, were not addressed by CAFA and still need reform. In particular, a growing number of courts have embraced the notion that consumer class actions are presumptively the norm – rather than an exception to individual actions – causing them to twist Rule 23 and Supreme Court precedent to justify class actions on a routine basis. This lax approach to class certification has led certain courts to certify overbroad, no-injury consumer class actions. In addition, some courts have permitted most of the benefits obtained in consumer class actions to flow to class counsel rather than the supposedly aggrieved class members, thereby incentivizing plaintiffs' lawyers to file overbroad cases and leverage them into large settlements in which most class members have no interest and virtually all the money goes to the lawyers.

Overbroad class actions create a chain reaction of problems. First, they threaten the due process rights of defendants who are forced to defend against hundreds of thousands of claims based on the unique experiences of a handful of people. Second, they undermine the proper administration of justice by creating a mechanism whereby absent class members can recover in a lawsuit, even though they would never recover if they brought a similar lawsuit as individuals.

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20 *Id.* at 948 (internal quotation marks and citation omitted).

21 *See, e.g.*, *Kennedy v. Natural Balance Pet Foods, Inc.*, 361 F. App'x 785, 787 (9th Cir. 2010) (affirming denial of certification of proposed nationwide class asserting consumer-fraud claims; "[u]nderstanding which law will apply before making a predominance determination is important when there are variations in applicable state law") (internal quotation marks and citation omitted); *Karhu v. Vital Pharm., Inc.*, No. 13-60768-CIV-COHN/SELTZER, 2014 U.S. Dist. LEXIS 26756, at *6 (S.D. Fla. Mar. 3, 2014) ("[T]he claims of the Nationwide Class implicate the [warranty, unjust-enrichment and consumer-fraud] laws of multiple states. . . . These legal permutations would render an eventual trial unwieldy, and would overshadow the common factual questions that otherwise unite the class members' claims."); *Coe v. Philips Oral Healthcare Inc.*, No. C13-518 MJP, 2014 U.S. Dist. LEXIS 146469, at *9-10 (W.D. Wash. Oct. 10, 2014) (striking class allegations because "[m]aterial differences between the various consumer protection laws prevent Plaintiffs from demonstrating Rule 23(b)(3) predominance and manageability for a nationwide class"); *Lawson v. Life of the S. Ins. Co.*, 286 F.R.D. 689, 700 (M.D. Ga. 2012) ("variation among state contract laws on credit insurance policies, render this [nationwide] case unsuitable for class action treatment pursuant to Rule 23(b)(3)"); *Marshall v. H&R Block Tax Servs.*, 270 F.R.D. 400, 409 (S.D. Ill. 2010) ("Plaintiffs have not satisfied the predominance requirement of Rule 23(b)(3) and have not met their burden of outlining a manageable way for the Court to deal with the variations in state law claims.").

22 151 CONG. REC. H730 (statement of Rep. Jim Sensenbrenner) ("The sponsors believe that one of the significant problems posed by multistate class actions in State court is the tendency of some State courts to be less than respectful of the laws of other jurisdictions, applying the law of one State to an entire nationwide controversy and thereby ignoring the distinct and varying State laws that should apply to various claims included in the class, depending upon where they arose.").

And third, because most defendants cannot risk the economic threat of a massive lawsuit even if it is frivolous, these suits almost always settle. However, because the great majority of class members are perfectly satisfied with the prodnct or service that is being challenged, there are almost no takers for these class action settlements, and the only people who benefit are the lawyers who brought them. The upshot is that overbroad class action lawsuits undermine justice and put a strain on our economy, on productivity and on innovation.

A. Some Courts Are Certifying Overbroad, No-Injury Class Actions That Sidestep Article III Standing Principles And The Predominance Requirement Of Rule 23(b)(3).

One of the most troubling aspects of current federal class action law is the embrace of no-injury class actions by certain federal courts. The term "no injury" class action typically refers to cases where the named plaintiff sues over a product that allegedly has a potential to malfunction but has not actually malfunctioned or caused the consumer any problems. Defendants have long argued that such class actions are illegitimate because the plaintiffs are essentially seeking a windfall – they want to recover damages for a risk that has not materialized and may never materialize over the life of a product.

For many years, courts agreed that no-injury class actions are not viable, culminating in 2002, with the Seventh Circuit's pronouncement in the Ford Explorer/Firestone tire litigation, that "[n]o injury, no tort, is an ingredient of every state's law."[23] The *Bridgestone/Firestone* ruling, which decertified a nationwide class, was the result of a series of lawsuits in which both state and federal courts had rejected no-injury lawsuits, either at the motion-to-dismiss stage, or at class certification. Until recently, courts had widely rejected no-injury cases involving claims targeting a variety of products from vehicles to medical devices.[24]

Over the past several years, however, the federal landscape for no-injury class actions has changed. This development has come about for several reasons, including looser treatment of Article III standing principles by a number of courts, unfortunate developments in states' laws and more liberal attitudes towards class certification among certain federal judges.

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[23] *See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002).

[24] *See, e.g.*, *Lee v. Gen. Motors Corp.*, 950 F. Supp. 170, 171-74 (S.D. Miss. 1996) (dismissing plaintiffs' claims of inherently defective detachable fiberglass roofs for failure to plead sufficient damages); *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 657-58 (D.N.J. 1986) (complaint alleging that design defect was "'likely' to cause" damage failed to state a claim); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 603 (S.D.N.Y. 1982) (no cause of action for defect that never manifests); *Khan v. Shiley Inc.*, 217 Cal. App. 3d 848, 857 (1990) (plaintiff with allegedly defective heart valve failed to state a claim unless the valve malfunctioned); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99 (S.D.N.Y. 1997) ("It is well established that purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own.") (internal quotation marks and citation omitted); *Martin v. Ford Motor Co.*, 914 F. Supp. 1449, 1453, 1455 (S.D. Tex. 1996) (plaintiffs' claims could not succeed where they admitted they had not sustained any personal injuries relating to the seat belt restraint system in a vehicle).

1. Liberal approach to Article III standing principles.

Some courts have appropriately recognized that "[i]mplicit in Rule 23 is the requirement that the plaintiffs and the class they seek to represent have standing."[25] As these courts have explained, "class definitions should be tailored to exclude putative class members who lack standing"[26] because "Article III still does not give individuals without standing a right to sue."[27]

In an attempt to circumvent these core principles, a number of federal courts have recently opened the door to no-injury class actions by adopting more liberal approaches to Article III standing. According to these courts, mere overpayment for an allegedly defective product constitutes injury in fact even if the product never malfunctions. Courts have been especially receptive to such theories where the plaintiff proffers expert evidence in support of the claim that she paid a premium for a product based on the defendant's alleged misconduct.[28]

Alternatively, some courts have concluded that overbreadth problems can be resolved at the back end. These courts hold that an administrative process can be adopted to sort the injured from the uninjured in the event of a class verdict.[29] But such an approach raises serious problems. For one thing, it assumes that district courts will be able to separate injured class members from uninjured class members in an administratively feasible manner. But the most commonly invoked method, affidavits from class members stating that they were injured, has serious practical limitations because it requires the voluntary participation of absent class members, the majority of whom are likely not inclined to respond even in the best of circumstances. The affidavit method is also inherently unreliable because it is based solely on class members' say-so. And unless some provision is made for the defendant to raise challenges on that basis – for example, through depositions or live testimony – the use of affidavits to prove class membership also contravenes defendants' due-process rights by denying them the opportunity to challenge such evidence.[30] In short, this back-end approach justifies class certification by ignoring the individualized issues that, in a truly rigorous class-certification analysis, would normally preclude class treatment.

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[25] *In re Copper Antitrust Litig.*, 196 F.R.D. 348, 353 (W.D. Wis. 2000); *see also, e.g.*, *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006).

[26] *Burdick v. Union Sec. Ins. Co.*, No. CV 07-4028 ABC (JCx), 2009 U.S. Dist. LEXIS 121768, at *10 (C.D. Cal. Dec. 9, 2009) (citing cases).

[27] *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 419 (D. Me. 2010).

[28] *See, e.g.*, *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 530 & n.2 (C.D. Cal. 2011) (plaintiff had standing due to premium paid for product, especially where "Plaintiff's allegations of a premium are supported by her expert").

[29] *See, e.g.*, *In re Nexium Antitrust Litig.*, Nos. 14-1521 & 14-1522, --- F.3d ----, 2015 WL 265548, at *7-8 (1st Cir. Jan. 21, 2015).

[30] *See, e.g.*, *id.* at *18-20 (Kayatta, J., dissenting).

2. State-law developments

Changes in state law have also affected no-injury class actions, making them more prevalent. The most obvious example is California's consumer protection law. Under California's Unfair Competition Law ("UCL"), private plaintiffs can only sue if they "suffered injury in fact" and "lost money or property as a result of . . . unfair competition."[31] In 2009, the California Supreme Court significantly narrowed the scope of the "injury in fact" and causation requirements in *In re Tobacco II Cases*. In that case, which involved allegations of fraudulent advertising by tobacco companies, the California Supreme Court held that the "injury in fact" and causation requirements for standing only apply to the named plaintiffs in a putative class action brought under the UCL.[32] Some courts have broadly construed *Tobacco II* as eschewing any requirement of injury on the part of absent class members. In other words, "once the named plaintiff" establishes that she "suffered injury in fact and lost money or property as a result of the unfair competition . . . no further individualized proof of injury or causation is required to impose restitution liability against the defendant in favor of absent class members."[33] As a result, federal courts are certifying cases based on unmanifested product defects in California with great frequency on the ground that *Tobacco II* has eliminated the need for individualized inquiries regarding injury and causation in class actions.[34]

3. More liberal class action rulings by circuit courts

Finally, the embrace of no-injury class actions is also the direct result of lax approaches to class certification by certain federal appeals courts, approaches that are at odds with recent Supreme Court precedent strengthening the requirements for class certification.

In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court reversed an *en banc* ruling of the U.S. Court of Appeals for the Ninth Circuit, terminating a sprawling nationwide class action that encompassed 1.5 million female Wal-Mart employees who alleged discrimination and sought injunctive relief, declaratory relief and back pay. In its ruling, the Court confirmed that analysis of the class action requirements under Rule 23 must be "rigorous."[35] As the Supreme Court

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[31] Cal. Bus. & Prof. Code § 17204.

[32] *In re Tobacco II Cases*, 46 Cal. 4th 298, 324-26 (2009).

[33] *In re Steroid Hormone Prod. Cases*, 181 Cal. App. 4th 145, 154-55 (2010) (reversing trial court's denial of class certification, finding that lower court had improperly concluded that absent class members were required to prove reliance and injury).

[34] *See, e.g.*, *Keegan v. Am. Honda Motor Co.*, 284 F.R.D. 504, 533 (C.D. Cal. 2012) ("[B]ecause the UCL claim focuses on defendants' failure to disclose and the impact that it had on class members' decision to purchase class vehicles, the fact that class vehicles experienced varying degrees of tire wear does not mean that the claim cannot be proved through the presentation of common evidence."); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 480 (C.D. Cal. 2012) (certifying class encompassing class members whose washing machines did not experience the alleged defect; *Tobacco II* "renders claims under the UCL . . . ideal for class certification because they will not require the court to investigate 'class members' individual interaction with the product'") (citation omitted).

[35] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

explained, "Rule 23 does not set forth a mere pleading standard."[36] To the contrary, the Court held, a plaintiff must "affirmatively demonstrate his compliance with the Rule."[37]

Just two years later, the Supreme Court made clear, in *Comcast Corp. v. Behrend*, that the "rigorous analysis" requirement applies to the predominance requirement of Rule 23(b)(3).[38] In *Comcast*, the Court applied this rigorous analysis to the issue of damages, concluding that the district court had erred in failing to consider the viability of the plaintiffs' classwide damages theory before granting certification.[39] The Court ultimately held that the class should not have been certified because the proposed damages testimony did not match the plaintiffs' theory of liability in the case, noting that plaintiffs' damages expert had assumed four distinct antitrust injuries when the district court had certified only one of those theories for class treatment.[40]

In the wake of *Comcast*, certain courts have sidestepped the "rigorous analysis" requirement with respect to the question of damages and injury. These courts have held that the presence of individualized damages is irrelevant to the predominance consideration because, under Rule 23(c)(4) – which governs issues classes – the court can certify the question of liability as long as common questions predominate as to that issue alone, and leave damages questions for another day. That was the case in *Butler v. Sears, Roebuck & Co.* and *Glazer v. Whirlpool Corp.*, both of which involved allegations that defendants manufactured or sold front-load washing machines with a design defect that makes them prone to accumulate mold.[41] The defendants in both cases had argued that certification was improper because the vast majority of consumers did not experience problems with their washers. The Sixth and Seventh Circuits concluded that class certification was nevertheless appropriate, and the defendants sought certiorari. In 2013, the Supreme Court vacated and remanded both rulings for further consideration in light of its *Comcast* ruling.

On remand, both appellate courts affirmed their prior rulings in the washing machine cases, concluding that they were not called into question by the Supreme Court's holding in *Comcast*. In *Butler*, the Seventh Circuit distinguished the case from *Comcast*, concluding that "there is no possibility . . . that damages could be attributed to acts of the defendants that are not challenged on a class-wide basis" because the damages at issue – i.e., mold and problems with the control units of the washers – all resulted from the two common defects alleged in the case.[42] The fact that not everyone in the class was injured did not create a problem like the one in *Comcast*, the court concluded, because damages could be resolved individually in subsequent proceedings after liability was resolved on a classwide basis – a so-called "issues class" approach

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36 *Id.*

37 *Id.*

38 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013).

39 *Id.* at 1432-33.

40 *Id.* at 1433-34.

41 *See Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

42 *Butler*, 727 F.3d at 800.

to class certification. More recently, the Seventh Circuit recently relied on its *Butler* ruling in *In re IKO Roofing Shingle Products Liability Litigation*, reversing the denial of class certification in a roofing case where many class members had not experienced problems with their roofing tiles.[43]

Similarly, the Sixth Circuit viewed the *Comcast* decision as limited to the question of whether damages could be resolved on a classwide basis – a rule it found irrelevant in *Glazer* because the district court "certified only a liability class and reserved all issues concerning damages for individual determination."[44] The Sixth Circuit justified this narrow view of *Comcast* based on its belief that *Comcast* merely "reaffirms" the settled rule that "liability issues relating to injury must be susceptible [to] proof on a classwide basis" to establish predominance.[45] The defendants in *Butler* and *Glazer* once again petitioned for Supreme Court review. But the Court denied certiorari the second time around, declining the opportunity to clarify whether overbroad consumer class actions are viable under *Comcast*.

There are myriad problems with the issues-class approach embraced by the Sixth and Seventh Circuits. For one thing, that approach is a green light for no-injury class actions in which large portions of the absent class members experienced no problem with their product, raising serious Article III standing issues. Further, the issues-class approach is inherently unfair to defendants because it is much easier for plaintiffs to secure a classwide verdict when the jury does not hear the actual facts of any individual plaintiff's claims.[46] This approach also contravenes the Seventh Amendment, which bars a second jury from considering issues already decided by a prior jury in the same case. As one court explained, "the risk that a second jury would have to reconsider the liability issues decided by the first jury is too substantial to certify [an] issues class."[47]

A final problem with the issues-class approach embraced by the Sixth and Seventh Circuits is that it sanctions the use of a dubious procedure that no one actually wants to litigate. For plaintiffs, the promise of the class action device is significantly compromised because victory in the common phase does not generate any cash for their pockets; damages, if any, would only be awarded in follow-on proceedings, which would potentially have to be litigated on an individual basis, and often for small sums of money that would never cover the costs of trying the case. Defendants likewise will often prefer to settle such matters because doing so is

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43 *In re IKO Roofing Shingle Prods. Liab. Litig.*, 757 F.3d 599, 602 (7th Cir. 2014) (if *Comcast* meant what defendants argued it did, "then class actions about consumer products are impossible").

44 *Glazer*, 722 F.3d at 860.

45 *Id.*

46 *See, e.g.*, *In re Paxil Litig.*, 212 F.R.D. 539, 547 (C.D. Cal. 2003) (refusing to certify class to resolve the purportedly "common" issue of general causation because such a trial would unfairly rob the defendant of the ability to present individualized "evidence rebutting the existence or cause of" the plaintiffs' alleged illnesses); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (rejecting issues class that "would have allowed generic causation to be determined without regard to those characteristics and the individual's exposure" as unfair and inefficient).

47 *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698-99 (N.D. Ga. 2008).

substantially more cost effective than litigating a common phase and countless follow-on trials. These problems are magnified in cases, like the washing machine cases, in which the claimed defect has manifested for only a small number of class members because few putative class members would have claims that could actually qualify for compensation.

A surprising development in the area of issues classes was Whirlpool's decision to eschew settlement and go to trial in the *Glazer* case, which resulted in a defense verdict. While some may argue that Whirlpool's victory vindicates the view that defendants can win issues trials, Whirlpool should not have been forced to take a litigation risk that many companies cannot afford simply because class certification was improvidently granted. It remains to be seen whether Whirlpool's victory will curb plaintiffs' counsel's interest in issues classes.

The growing embrace of issues classes and no-injury consumer class actions among certain federal appeals courts reflects a resistance to the heightened standards for class certification laid down by the Supreme Court. To reverse this trend, Congress may wish to consider an amendment to Rule 23 or a statutory fix. Congress could clarify that Rule 23(c)(4) is a mere "housekeeping rule" to be applied, if at all, once predominance is satisfied as to the entire cause of action, as the Fifth Circuit has already recognized.[48]

Another solution that would go a long way toward addressing this problem is legislation mandating that class actions will only be allowed to proceed in federal court if all of the class members claim to have suffered the same type of injury as the named plaintiff. Thus, for example, if the named plaintiff brings a lawsuit claiming that his vehicle malfunctioned in a certain way, he or she cannot represent a class that includes everyone who purchased the same model vehicle regardless of whether or not it malfunctioned. This would be very modest legislation. Indeed, several federal courts have interpreted Federal Rule of Civil Procedure 23's typicality requirement to impose this very sort of limitation already. But it would go a long way to address the problems that continue to affect class action practice.

B. Some Consumer Class Actions Still Provide No Benefit To Class Members.

There is also still an ongoing problem, even in federal court, of class counsel – as opposed to actual class members – reaping the benefits of the class device. This can be seen in fee-focused class settlements, as well as *cy pres* settlements that do not deliver any direct benefit to the purportedly injured class members.

One recent decision by the Seventh Circuit invalidating a class settlement illustrates the problem of disproportionate fee awards. In *Eubank v. Pella Corp.*, the parties entered into a proposed settlement arising out of claims involving allegedly defective windows that caused leaking.[49] According to the Seventh Circuit, the settlement, which consisted of a fee of $11

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[48] *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("Reading rule 23(c)(4) as allowing a court to sever issues . . . would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case when there is a common issue, a result that could not have been intended.").

[49] *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014).

million, was "inequitable – even scandalous."[50] While class counsel argued that the settlement was worth $90 million to the class, the Seventh Circuit noted that the defendant itself only estimated that the class would recover $22.5 million. As the Seventh Circuit explained, "the settlement did not specify an amount of money to be received by the class members as distinct from class counsel. Rather, it specified a procedure by which class members could claim damages" – a procedure that was "stacked against the class."[51] In particular, class members could submit a claim directly to the defendant with a maximum award of $750, or submit a claim to arbitration with a $6,000 damages cap. Out of the 225,000 notices that had been sent to class members, less than 1,300 claims had been filed before the district court approved the settlement. Those claims sought less than $1.5 million, "a long way from the $90 million that the district judge thought the class members likely to receive were the suit to be litigated."[52] The Seventh Circuit therefore invalidated this settlement as one-sided.

To be sure, the *Pella* settlement was a bonanza for plaintiffs' lawyers and had no meaningful benefits for the class. But one obvious reason for that result, which the Seventh Circuit failed to recognize, is that such class actions include large numbers of consumers who were satisfied with the product or service at issue and therefore have zero motivation to obtain compensation. The result is paltry distribution of money to the class and a windfall to class counsel for a class that should never have been certified in the first place. Thus, addressing the problem of "overbroad" class actions would also help reduce problematic settlements.

Unfortunately, many courts have taken a different approach, resorting to *cy pres*, the practice of distributing unclaimed settlement money in class actions to third-party charities. While the use of *cy pres* in class action settlements has benefited numerous organizations, ranging from art schools to law schools and from the American Red Cross to legal aid societies, the practice is troubling because it raises serious questions about the purpose of the class action device. As one court put it, "[t]here is no indirect benefit to the class from the defendant's giving the money to someone else."[53] And *cy pres* diminishes any incentive to identify class members since the lawyer will receive the same amount of fees even if participation is negligible. For this reason, *cy pres* settlements create a potential for conflicts of interest between the financial interests of class counsel and the rights and interests of the absent class members. In short, it is unclear why courts are allowing lawyers to bring suits on behalf of people who have no interest in suing and essentially forcing companies to make a charitable donation, all in an elaborate effort to obtain a handsome attorneys' fee for class counsel.[54]

The disconnect between *cy pres* settlements and the benefits obtained by the supposedly injured class members was illustrated in a recent case decided by the Seventh Circuit. In *Pearson v. NBTY, Inc.*, the Seventh Circuit invalidated a "selfish" $5.6 million settlement

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[50] *Id.* at 721.

[51] *Id.* at 723-24.

[52] *Id.* at 726.

[53] *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

[54] Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 640 (2010).

negotiated to ensure "meager" benefits to class members and maximum fees to attorneys.[55] Judge James B. Zagel of the U.S. District Court for the Northern District of Illinois had approved a settlement of multiple class actions arising out of allegedly deceptive labeling of glucosamine supplements. The settlement created a $2 million class fund to compensate aggrieved class members, of which any residual amount would be remitted to the Orthopedic Research and Education Foundation as a *cy pres* payment.[56] The settlement also provided for limited injunctive relief that required minor changes to the products' labeling.[57] While the district court reduced the fee award to $1.9 million, it was still more than twice the amount of monetary benefit actually received by the injured class members. After all, only 30,245 claims were actually filed, yielding a class distribution of less than $900,000.[58] The Seventh Circuit reversed the lower court's ruling, declaring that the settlement "disserves the class" by conferring only "meager" benefits to the class, while awarding class counsel with close to $2 million.[59] In so doing, the appellate court explained that the "$1.13 million *cy pres* award to the orthopedic foundation did not benefit the class, except insofar as armed with this additional money the foundation may contribute to the discovery of new treatments for joint problems – a hopelessly speculative proposition."[60] Moreover, the court stressed that "[a] *cy pres* award is supposed to be limited to money that can't feasibly be awarded to the" class members – "which ha[d] not been demonstrated."[61]

Notably, in 2013, the Supreme Court declined to take up a challenge to a class action settlement utilizing *cy pres* in *Marek v. Lane*, a case involving Facebook. In that case, the U.S. Court of Appeals for the Ninth Circuit approved a $9.5 million settlement of a privacy lawsuit, of which approximately $3 million was used to pay attorneys' fees, administrative costs, and incentive payments to the class representatives. The remaining $6.5 million was a *cy pres* award dedicated to establishing a new charity organization called the Digital Trust Foundation, to create educational programs about the protection of identity and personal information online.

The Center for Class Action Fairness, representing an objector to the settlement, subsequently filed a petition for certiorari before the Supreme Court challenging the Facebook settlement and asking the Court to clarify the law governing *cy pres*. While the Court denied the petition, Chief Justice Roberts issued an unusual statement with respect to the Court's denial of certiorari, signaling that the Court may delve into the issue of *cy pres* in the future.[62] Recognizing that *cy pres* is a "growing feature" of class action settlements, Chief Justice Roberts declared that "[i]n a suitable case, this Court may need to clarify the limits on the use of" that

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55 *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014).

56 *Id.* at 780.

57 *Id.*

58 *Id.*

59 *Id.* at 787.

60 *Id.* at 784.

61 *Id.*; *see also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 169-70, 178-79 (3d Cir. 2013) (invalidating settlement where class only received $3 million, leaving $18.5 million to be paid to charities).

62 *See Marek v. Lane*, 134 S. Ct. 8 (2013).

practice.[63] In issuing this statement, the Chief Justice cited to a prominent law review article authored by Professor Martin Redish and other scholars that is highly critical of *cy pres*.[64] The Chief Justice's reliance on that article, which theorizes that *cy pres* violates fundamental constitutional principles, could be a prelude to a serious assessment of *cy pres* by the Supreme Court. Moreover, the Advisory Committee on Civil Rules has signaled its interest in *cy pres*, indicating that the practice may be addressed as part of some modification to Federal Rule of Civil Procedure 23.

In sum, consumers in many negative-value class action lawsuits are still not receiving any real benefits. Rather, class counsel continue to press for fee-based settlements that are virtually all for their own benefit. Congress might consider legislation mitigating the problems associated with *cy pres* and fee-focused settlements. Specifically, Congress could require that the fees awarded to class counsel in all class action settlements be tied to the value of money and benefits actually redeemed by the injured class members – not the theoretical value of the *cy pres* remedy. Such a restriction would be consistent with the intent behind CAFA, which mandates that any portion of plaintiffs' counsel's fees that is based on the value of coupons awarded to class members "shall be based on the value to class members of the coupons that are redeemed," rather than the theoretical value of the coupons available to class members.[65] It makes little sense to require a relationship between class counsel's fees and the benefits directly obtained by class members in coupon settlements, while not imposing the same requirement in *cy pres* settlements, where the benefits realized by class members are even more tenuous.

CONCLUSION

CAFA has played a vital role in class action procedure throughout the nation. Most notably, it has helped shift countless interstate class actions into federal court, away from magnet state-court jurisdictions that routinely employed lax class-certification standards and exhibited bias towards out-of-state defendants. The result is more rigorous scrutiny of class action proposals, which in turn has led to a fairer and more just class action landscape. However, while the objectives underlying CAFA have largely been advanced, problems remain in class action practice. Congress should begin to consider other problematic areas of federal class action jurisprudence that were not addressed by CAFA, including the growing acceptance of no-injury class actions by certain federal courts and the topsy-turvy settlements that typically result from those sorts of class actions. I appreciate the Subcommittee allowing me to testify today and I look forward to answering any questions that the Members of the Subcommittee may have.

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[63] *Id.* at 9.

[64] *See id.* (citing Redish, 62 Fla. L. Rev. at 653-56).

[65] 28 U.S.C. § 1712(a).

Mr. FRANKS. And thank you, Ms. Miller, and thank you all for your testimony. And we will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes. And, Mr. Pincus, if it is all right, I will start with you, sir.

As I mentioned in my opening statement, I have some serious concerns with these no injury class actions. And these lawsuits, as you are aware, the class of plaintiffs has not personally experienced any actual injury. These class actions seems to pose a host of constitutional problems under Article 3 and the due process clause. So if you could briefly describe some of the constitutional problems with no injury class actions.

Mr. PINCUS. Sure. Thank you, Mr. Chairman. Let me start out by talking about a different category of no injury class actions than the ones that Ms. Miller was talking about that I do talk about in my testimony, which is this increasing phenomenon of cases where Congress has provided for statutory damages, it is true, often for regulatory violations. And so, a claim is brought for a claimed violation of what often is a very complicated regulatory scheme. And even the named plaintiff cannot show that he or she has suffered any actual injury.

For example, if it is a claim about a credit report, the plaintiff cannot say someone has relied on this false credit report, and it somehow has injured my ability to get a loan, or injured my reputation, or in some other way. There is no actual damage in the traditional sense that this person can say here is how I was hurt. The person says, I do not have to show I was actually hurt because it has provided for statutory damages, and everyone is in the class is entitled to the $100 or $1,000 of statutory damages.

So what does that mean? First of all, it means that the courts are, if this theory were accepted, hearing claims that do not satisfy the fundamental Article 3 requirement of an actual injury in order to access the Federal courts. But it also means in practical terms the ability in the economy we have today for one uninjured person to assert a claim on behalf of a million or millions of similarly uninjured people, and claim that each one is entitled to $1,000. So pretty quickly you have got a claim for a billion dollars where nobody suffered any actual injury, and where, if that claim is accepted, the other class action criteria are sort of easy to meet because you do not have to show reliance by anybody who caused the injury. You do not have to show causation in terms of the fact that the statutory violation actually injured the particular people in the class. And you do not have to quantify the amount of the actual injury.

So combining these two developments—statutory damages, the no injury claim, and class actions—puts together a very powerful weapon to file a class action and get a very large settlement when, in fact, nobody may be injured. And I think one of the fundamental problems with these no injury cases is of the type that Ms. Miller was talking about. When you combine a big class with people who may have been injured and people who have not been injured, that pot of money is going to be allocated amongst everybody. So what happens to the consumers in that punitive class? The people who are really injured are going to get less because the people who are

not injured are sharing in the pot. And that does not seem an appropriate result for anybody.

Mr. FRANKS. Thank you, sir. Ms. Miller, I was fascinated by your legislative suggestion, and, you know, and kind of staying on this subject, would you elaborate a little bit more on what kind of legislation could address these types of lawsuits? And also if you could express whether or not you think placing any restrictions on these lawsuit would eliminate the deterrent effect, which I think is ostensibly the most powerful argument that no injury class actions provide.

Ms. MILLER. Sure. Rule 23(b)(3), which is currently the rule that governs whether a class can be certified, has a requirement in it of typicality, right? Rule 23 has a requirement of typicality. The named plaintiff is supposed to be typical of the class members.

And for many years, the types of class actions we are talking about today would not have been certified by most Federal courts because courts said the named plaintiff needs to be typical of everyone else. And if I have a rotting roof, I am not typical of all the people who do not have a rotting roof. For some reason, a number of courts have just moved away from that, and have sort of watered down the typicality requirement of Rule 23, such that you can now have a class action where the named plaintiff is not at all typical of everyone else.

And so, the sort of legislation I am talking about, which would say that all the class members have to suffer the same type of injury as the named plaintiff, it is really not anything dramatically different from what really is in Rule 23 and should be the law right now. It would basically just be legislating that when Rule 23 says typicality, that typicality requirement is actually is a legitimate valid thing that courts need to be considering.

So to the extent that there was discussion today about gender discrimination suits, this would not affect that sort of suit, right, because if you have a suit where everybody was discriminated against, that is not what this is talking about. This is talking about where the named plaintiff suffered one type of injury, and that is not representative of what was suffered by the absent class members or, in 99 percent of the cases, not suffered by the absent class members.

Mr. FRANKS. Well, thank you very much. And I would now yield to the Ranking Member for his questions for 5 minutes.

Mr. COHEN. Thank you, Mr. Chair. Ms. Miller, your testimony was quite good, and I think Uncle Frank would be happy to have heard it and proud of you. Lautenberg that is, one of my heroes. But is there not good that comes out of class actions on gender and race issues, some areas like that, consumer issues?

Ms. MILLER. I think that one of the problems is that there has developed this notion that a class action is a means of effectuating societal good, and that a class action has certain public policy benefits. And I think when Rule 23 was developed, it really was a procedural tool. And a class action can have some good, but it is only going to have some good if the requirements of Rule 23 are satisfied and everybody suffered the same injury.

Mr. COHEN. All right. I understand.

Ms. MILLER. Right. So if you have——

Mr. COHEN. But when everybody suffers the injury, all the women, all the African-Americans, is there not good that comes from those class actions?

Ms. MILLER. I think there can be good that comes from class actions.

Mr. COHEN. Maybe a situation where there is not good that comes when women or African-Americans are part of a class action and a court rules that they were harmed.

Ms. MILLER. Right. I want to make a couple of points. First of all, remember that we are talking about CAFA. And what CAFA did was CAFA brought class actions into Federal court that would never have been in Federal court. It was not the gender discrimination and the race discrimination, which are brought under Federal law. Those cases were already in Federal court. So really what CAFA brought into Federal court were class actions based on consumer protection statutes, so this really is a consumer protection issue.

There absolutely can be good that comes from class actions regardless of the topic, but there can only be good if the rules are satisfied, because if you have a named plaintiff who does not represent everybody else, then the class action just becomes a tool of blackmail. And regardless of what you are trying to promote, regardless of what social norms you are trying to promote, it has to be done fairly.

Mr. COHEN. Ms. Moore——

Ms. MILLER. And I am obviously not——

Mr. COHEN. Thank you. Thank you, Ms. Miller. Ms. Moore, what do you think of Ms. Miller's remedy that she suggests that we should only have people that have the same injury in a class action?

Ms. MOORE. Well, I think it is important to remember that whatever legislation might be passed would not only affect some washing machine case, but it would also affect employment discrimination cases. In fact, one of the reasons the Supreme Court struck down the certification of the *Walmart v. Dukes* class was because it argued that you could not say that all of these women had been discriminated against. That was not the premise of that suit at all as believed by the Supreme Court.

And so, if you start saying, well, you are going to have to show us you were discriminated against, or you are going to have to show us there is something wrong with your washing machine before you can even walk into the door, that is contrary to our entire system of justice, which says, you know, two people have two sides of a story. And our traditional way of deciding that was to have a jury or another trier of fact decide it. So this is a way to move these merits decisions closer and closer to the beginning of the case.

Mr. COHEN. So you are saying that her proposed remedy sounds good, but does not fit a lot of cases maybe?

Ms. MOORE. I think that in the first place, I do not agree that class actions are being certified that have people in them that have literally had no injury. And even if we believe that and we try to have legislation that would just deal with that issue, it is bound to spill over into other class actions, like discrimination class ac-

tions, which, by the way, are very, very hard to maintain in Federal court today.

Mr. COHEN. Mr. Sweeney and Mr. Pincus, do you have any suggested remedies to the problems with CAFA and certification that would not affect employment discrimination, or gender, or race issues, how to distinguish those?

Mr. PINCUS. Well, I think one of the problems that CAFA did not get at is there are some fundamental incentive problems in the system today. I think it is important to recognize that, you know, the fact that there is a problem does not mean plaintiffs' lawyers are bad, or defense lawyers are bad, or courts are necessarily doing the wrong thing. Everyone is responding to the incentives that they now have, and those incentives for plaintiffs' lawyers and the class members are often not appropriately lined, as many, many commentators have recognized.

The rational defendant, there is a reason why in my study and in almost every other study class actions that survive a motion to dismiss are settled, because everybody at that point has an interest in settlement. The plaintiff's lawyer, often settlement maximizes the hourly rate of return in terms of his investment in the case. The defendant is looking to avoid costs of litigation, and if the settlement cost is not going to be much more or less than the cost of the litigation, why not settle? And the judge says, I have a lot of work to do, I am happy to get this case off my docket.

The protection there is supposed to be judges looking at settlements, but I think what we have learned is judges really need an adversary process. And when both parties before the court are saying this is a great settlement, it is awfully hard, even for a judge who wants to get behind that, to have the information to do it. Only in the last couple of years where we have had objectors coming into court and pointing out problems in settlements have there begun to be, mostly at the appellate level, settlements that are looked at and set aside.

But there is one additional problem in the current system. A judge cannot say I do not like this settlement because the defendant should not settle. I think this case is bogus. That is not an option for a judge today, but that is often a problem in a lot of these cases. In fact, there are some cases, albeit in New York State court, in which a judge just turned down a settlement in a case involving a challenge to a merger because the judge said I think this settlement is unfair to the corporation's shareholders. They are being asked to pay money to these plaintiffs who do not have a good claim. I am going to force the defendant to litigate the case because that is the only option I have.

So we have a system that does not quite have the tools or the incentive alignment to produce the kind of results we want.

Mr. COHEN. Thank you.

Mr. SWEENEY. Mr. Chairman, if I may respond?

Mr. FRANKS. Briefly, Mr. Sweeney.

Mr. SWEENEY. I started my career——

Mr. FRANKS. Sir, would you turn that microphone on?

Mr. SWEENEY. I started my career at the United States Securities and Exchange Commission in the post-Watergate era. I know something about the power of the civil injunction to require Amer-

ican business to comply with the law. I also know something about the power of the class action where consumers have been injured to correct injustice.

But in 30 years in private practice representing American business, I have not seen many of those class actions in practice. And what I see are class actions that squander transactional costs and do not provide a significant benefit to consumers. And what we need is a law which says if you are not injured, you do not need to be in the class action.

Mr. FRANKS. Thank you, sir. And I would now recognize the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman, and I want to thank all of our witnesses. And, Ms. Miller, I especially appreciate your giving the examples of the washing machines and the roofers. And I would say in response to Ms. Moore's point that we want to use our civil justice system to allow people to get into court, and claim injuries, and have that decided by the process. But that is not what happens with class action lawsuits where somebody is brought into court without having even consented to doing that.

In a traditional case, the plaintiff makes a decision in consultation with their attorney whether or not they want to go into court and seek relief for a harm they have had. But in a class action, that is not what happens. Someone else makes that decision. In fact, those same people make the decision in conjunction with the defendants and with the consent of the court to settle the case without ever consulting that plaintiff. So if there is no injury on the part of an individual, I think we need to look at making sure that that happens.

So, Ms. Miller, I wonder if you would comment on this. Would placing restrictions on no injury class actions eliminate the deterrent effect of no injury cases and allow corporations to violate the law with impunity?

Ms. MILLER. I do not think it would. I think, if I may, and I am not sure I am answering your question exactly. But I think one thing that has sort of been lost here today is a very fundamental concept in U.S. justice, and that is due process. And we were talking earlier about how both sides, there are two sides to every story. The problem with the class action of the type that we are describing today is that the other side of the story never gets told to the jury because the jury only sees that named plaintiff. The jury does not see everybody else.

And so, there is no due process, and there is no fairness to a trial where you have one person sitting before the jury, millions of people that the jury never sees and never hears from, who all never had a problem with the product. So there is no fairness in that process.

In terms of deterrence, I understand that there is concern, oh, if we do not have class actions, we will not be deterring companies from acting improperly. But if a company acted improperly, if a company made bad roofing shingles, then everybody would have problems. Lots of people would have problems. If a company made bad shingles, right, then you would be able to bring a class action under this proposed legislation because the named plaintiff's experiences would be typical of those of the absent class members.

What we are talking about here are products that do not have any widespread problems, services that are not causing lots of people problems. So I am not really sure what you deter by having a class action where most of the class members——

Mr. GOODLATTE. Got it. Let me turn to Mr. Pincus and ask if he wants to comment on that same question about placing restrictions on no injury class actions. Would that eliminate the deterrent effect of no injury cases and allow corporations to violate the law with impunity? And then I have a follow-up question for you as well, Mr. Pincus, and that is, what cost do class actions that give more benefits to the plaintiffs' attorneys than to the actual class members impose on society as a whole? So give us your cost benefit analysis here.

Mr. PINCUS. Well, Mr. Chairman, to take your first question first, I think if there is no injury, first of all, it is hard to see what we are deterring. There is sort of a statutory violation in the air that seems a much more appropriate role for law enforcement or a government enforcement agency if it is a significant enough problem, rather than——

Mr. GOODLATTE. And law enforcement can also be a civil regulatory agency as well.

Mr. PINCUS. Yes, civil regulatory if it is bad, but if it was bad you would think there would be some injury, some other government agency. But it seems very odd to give sort of a roving deputization to, you know, what is in the real world, cases that are put together by plaintiffs' lawyers to sort of say, gee, there is no injury here, but I think it is a bad thing. I am going to bring this lawsuit, trigger all of these costs.

Mr. GOODLATTE. Okay. Now, shift to my second question because I am running out of time.

Mr. PINCUS. So with respect to your second question, it is sort of relates to the first. I think one of the problems in the current system, the incentive alignment that I was talking about, is either in the bringing of the case or the negotiation of the settlement, the class action lawyer and the class have somewhat different interests because they are both going to be paid out of the same pot. And we do not really have a very good system for supervising how that works. And as a result, we have these settlements, as I talked about in my testimony, where a disproportionate amount of money goes to the lawyers.

Mr. GOODLATTE. I am going to go back to Ms. Miller for one more question. In either of the two examples you gave or other examples, can you speak to this issue of the disproportionate benefit of attorneys' fees to what benefitted the plaintiffs in particular cases?

Ms. MILLER. Well, I think that pretty much happens in every class action. As I noted in the appellate class action, only one-half of 1 percent of class members participated in the settlement, and that is pretty typical.

Mr. GOODLATTE. What did the attorneys get in that case?

Ms. MILLER. Several million, hundreds of millions, I believe.

Mr. GOODLATTE. Lots of money relative to very little gain for all the people who are brought into court.

Ms. MILLER. And, you know, some people say, oh, it was an unfair settlement because the consumers got so little and the lawyers

got so much. But really I have a hard time saying that because the consumers really had no injury. They did not want the money, so it is not like the consumers were harmed in this. It is just really a shakedown.

Mr. GOODLATTE. Thank you.

Mr. FRANKS. And I thank the gentleman, and I now recognize Mr. Conyers for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman. Professor Moore, Mr. Pincus cites a study conducted by his firm that suggests that class actions do not really benefit class members, only class counsel. Do you have a comment about that?

Ms. MOORE. Yes, Congressman. As I mentioned in my opening remarks, it would take me far more than 5 minutes to describe the methodological flaws of this study. They candidly admit that it is not a random sample. When you do a study and you try to argue from the sample that you find that this is true of the whole population that is out there, you must have a sample that is statistically random and valid, and this is nothing of the kind.

We know even though we have very little data on the number of class actions that are filed, we know that more than 3,000, probably 4,000 class actions per year are filed in Federal court. They say, well, we went to these reporters, BNA and Mealey's, and found, you know, some cases that were there that they thought were important to put on there. And so, we thought they were important to include, too, and then, you know, they ignore everything else.

I can tell you that the percentage of consumer class actions that they found in their 188 cases is way larger than what real statistical studies show is the percentage of consumer class actions.

Mr. CONYERS. Thank you. Let me——

Mr. PINCUS. Can I respond, Congressman?

Mr. CONYERS. Just a moment. I have got a couple of questions and only 5 minutes. You know, there is a claim that the courts are certifying class actions when there is allegedly no injury, and, therefore, these courts have violated our Article 3 standing requirement. Do you want to elaborate on that a little bit?

Ms. MOORE. Sure. There are so many restrictions on the filing, the maintenance of class actions and the settlement of class actions. In fact, the whole reason that—well, one of the reasons that the proponents of CAFA wanted to be in Federal court was that they said that Federal judges were much tougher on class certification that State court judges. And, you know, we dispute whether that might have been the case, but that is certainly what they believed.

In fact, Mayer Brown's study actually, you know, to the extent you look at what it found, it actually shows how hard it is for class actions to succeed. And so, there are so many road blocks in the way of the successful pursuit of a class action. There are cases out there all over the place that turn down class actions in Federal court because they do not meet ascertainability requirements.

And so, this goes back to my point about the lack of data. You know, you pick one case out out of 4,000 and say, oh, here is this terrible case. We need a broader understanding of what is out there.

Mr. CONYERS. I am sympathetic to that. But why is it problematic, Professor, that there are no publicly-available court data on class actions, and how does it relate to the claims made by some of the majority witnesses?

Ms. MOORE. Okay. If we had even access to the data that the administrative office of the courts has, we could go in and we could run a list of all the cases that have been filed this year that say that they are class actions. We could then take a random sample of that whole universe and go, you know, look at 200 cases randomly selected, and go look at those. That would give us a much more valid basis for saying here is a good sample of what is going on. We can infer from that to the larger population.

Mr. CONYERS. Thank you, Mr. Chairman.

Mr. FRANKS. And I thank the gentleman, and now recognize the gentleman from Iowa, Mr. King.

Mr. KING. Thank you, Mr. Chairman, and I thank the witnesses, and I appreciate your testimony here. First, I wanted to comment, as I picked up the opening statements along the way, I think I merged two of them together. But the phrase came out in my mind as I listened, "entrepreneurial attorneys pursuing parasitic settlements." I think that summarizes what we are talking about here.

But I wanted to turn to Mr. Pincus first and ask, in this discussion, are you also considering when government is involved as a defendant?

Mr. PINCUS. The cases that we looked did not look at government defendant cases. These were private cases.

Mr. KING. Yes. So you have not considered them? Do you have any experience with that?

Mr. PINCUS. I have some, and, you know, I think to some extent, you know, some cases against the government are really parallels of private actions, but some are often brought to vindicate other kinds of rights, privacy rights and things that are sort of unique to the government context and may present a different situation.

Also, it is important to note that in most cases against the government, damages are not available, right, because the government has sovereign immunity. So they are cases for injunctive relief for the most part, not entirely, obviously not in the employment context. But that changes the incentives that surround the cases to a pretty significant degree.

Mr. KING. I am going to go with parallel cases and leave that component at that. But I want to turn to Mr. Sweeney, and I think you made the strongest statements about standing in your testimony, and that is a bedrock prerequisite for access to the court, and yet we are having a discussion here whereby any logical observation of damage, there would not be standing in the entire class.

What is the rationale that the judges are using when they grant standing to a class where no one in the class has been injured?

Mr. SWEENEY. Usually what happens at the certification stage is the court punts the question down the road without demanding of the proponents of the class, the class counsel, proof of harm to all the members of the punitive class. They go ahead and they certify a class. That leaves the American business in a horrible situation.

Very, very, very few class certification rulings are permitted interlocutory appeal in our circuit courts under Rule 23(f). When that

was originally passed in 1998, about a little more than a third of all interlocutory appeals were permitted. It is down to less than a quarter now. So in every case that I have tried to get a certification ruling heard on interlocutory appeal, it has been turned down, which means there is no accountability, unless the corporation takes the claim to verdict.

What happens then? When you have a verdict that is potentially against a large class of unharmed individuals, the amount in question can be astronomic, and that presents two huge problems for American business. One, can they even afford an appeal bond? 10 percent of a billion dollars is going to bankrupt most companies. They cannot afford to appeal that adverse ruling.

And even if they can appeal it, if they are a publicly-held company, an astronomic verdict like that has a huge depressive effect on their stock value. So is there any wonder that they settle these claims, claims which are not meritorious, prior to a verdict like that?

Mr. KING. Well, do you, Mr. Sweeney, have any experience with a class where the list is sealed by the courts, or a negotiated settlement that seals that list of class members?

Mr. SWEENEY. Well, I do not know about sealing lists per se, but most settlements are confidential.

Mr. KING. Yes.

Mr. SWEENEY. And one of the reasons why it is so difficult to garner any data in this area is precisely because of that, and for good reason. What company which has been extorted into paying settlement money where they did not think they did anything wrong is going to want that to be on the public record?

Mr. KING. Okay. I am running out of time, Mr. Sweeney, so I would like to turn to, and I thank you. I would like to turn to Ms. Miller. And, you know, we see cases here often where there is a plaintiff or a class of plaintiffs, and more likely, a plaintiff, that has a legitimate claim, but they have great difficulty achieving standing. And so, is it your opinion that if we saw those cases and Congress decided to write standing into legislation, do we have the constitutional authority to define "standing" in our legislation so that the courts would react to that and grant the standing?

Ms. MILLER. Well, I think the answer to that question is yes because I think what we are talking about is completely consistent with Article 3 standing notions. And if I could have 1 second, I just want to clarify an answer I gave earlier, that Pella settlement would have given $11 million to the attorneys.

Mr. KING. Thank you. And if I could just do a general quick question.

Mr. FRANKS. I thank the gentleman——

Mr. KING. Does anybody disagree with the response of Ms. Miller on the standing and Congress' authority to draft and write standing into legislation?

[Nonverbal response.]

Mr. KING. I see nobody said no. Then I am going to take that as Ms. Miller's response stands, and I thank you all, and yield back, Mr. Chairman.

Mr. FRANKS. I thank the gentleman, and we are going to try to get these last two in before votes, so I am going to ask everyone

to stick close to the 5 minutes. And with that, I recognize Mr. Nadler.

Mr. NADLER. Thank you. Let me start by asking Ms. Moore, I have been sitting here listening puzzled because what I have been hearing from the three witnesses against class actions is that the courts ignore Article 3 and ignore standing requirements, and allow people with no injury at all to be plaintiffs in lawsuits. I hear from Mr. Sweeney when he is asked how do they get away with that, he says, well, they punted down the case, then they get a verdict. But he did not explain how they get a verdict without considering that question first. He then goes into interlocutory appeals.

Ms. Moore, is it the case that a court will never rule on the question of injury? And if that is not the case, why are we talking about no injury plaintiffs? Do courts not enforce the case in the controversy stand of Article 3?

Ms. MOORE. Well, of course. I do not think anyone is arguing with the abstract proposition that if you have suffered no injury, you should not get compensation. But that is not what is happening here, and we are hearing about hypothetical cases.

Mr. NADLER. We are hearing about hypothetical cases where allegedly people suffered no injury get compensation. Is that real?

Ms. MOORE. No.

Mr. NADLER. It is nonsense. It does not happen.

Ms. MOORE. There are so many restrictions on cases. There is so much case law has developed as to what is standing, and who should get compensation, and what a makes a class cohesive enough to certify. That, you know, this discussion is proceeding as if there is no case law out there that guides and restricts the things that are being talked about.

Mr. NADLER. So in other words, this is just as much nonsense when we hear from the Chamber Institute for Legal Reform. It is just as much nonsense as it was when they assured this Committee 10 years ago that if we pass the then pending, which we did Bankruptcy Act, every American would get a $400 reduction in interest rates from his bank. That turned out to be not true, and this is equally nonsense?

Ms. MOORE. Well, that is not my area of expertise, Congressman, but I take your point.

Mr. NADLER. This is also nonsense. Now, let me ask you a second question. I do not think even Mr. Sweeney, Mr. Pincus, and Ms. Miller would maintain that there are not people who are, in fact, injured. But I do take it from the gravamen of their testimony, they would like to eliminate class actions all together. No?

[Nonverbal response.]

Mr. NADLER. No, okay. I am glad to hear that because I do not understand how we would, A, get compensation to people who are truly injured, and B, how we would hold the General Motors of the world who think it is okay to hide the fatal defects in automobiles as more people get killed if we did not have class action suits to bring that out. Mr. Moore, how would we?

Ms. MOORE. I do not think there is a good way of deterring that kind of abuse.

Mr. NADLER. Let me ask you a last question. Well, maybe a last question. Has the CAFA, the law that we are talking about now

in 10 years, how has that harmed legitimate plaintiffs and the public safety?

Ms. MOORE. That is a very hard question to answer because, of course, the theory is that Federal judges and State judges are both trying to do the right thing. To the extent that Federal judges and Federal court procedural rules are more tough on plaintiffs than are State court rules, then plaintiffs have been harmed.

Mr. NADLER. And by "more tough," you mean harder to certify a class.

Ms. MOORE. Not just for class actions. There is a whole panoply of procedural rules that favor defendants, and over the last 20, 30 years have gradually more and more favored defendants over plaintiffs in Federal court, and that is one of the reasons they want to be in Federal court. It goes well beyond class actions.

Mr. NADLER. And finally, given what you just said, what are the implications for the ongoing development of state law if State courts are routinely deprived of the opportunity to address certain areas, and the Federal courts are asked almost exclusively to say what the state courts would say about interpretation of state law, and are barred, I think, from ongoing development of common law on State grounds?

Ms. MOORE. I think it shows perhaps a disrespect for State law and for State judges to say, well, you know, they have made up this law for statutory damages, and we do not really think that that is very important. So we want to have some legislation that we do not have to follow that.

Mr. NADLER. And lastly on that point, what would you say about the contention that we cannot trust State judges, or we have to bring it into the Federal courts, they do a better job, from people who generally support States' rights?

Ms. MOORE. I think that there is no empirical evidence that State court judges are not tough on class actions.

Mr. NADLER. And this is certainly an anti-States' rights——

Mr. FRANKS. The gentleman's time has expired.

Mr. NADLER. Would you answer that last question, please? This is certainly an anti-states' rights——

Mr. FRANKS. The gentleman time has expired. I will now recognize Mr. Gohmert.

Mr. NADLER. Would you answer the question, please? You did not cut anybody else off like this.

Mr. FRANKS. The gentleman's time has expired. I told you I would hold everybody to 5 minutes.

Mr. NADLER. Yes, only for the last two.

Mr. FRANKS. The gentleman's time has expired.

Mr. NADLER. She could have finished answering that question by now.

Mr. FRANKS. She finished the last question. Mr. Gohmert?

Mr. GOHMERT. Thank you, and I appreciate you being here. And we do have a vote that is about to expire, and so I appreciate your patience this morning. I may come at this issue from a little different perspective than most having been a judge that was asked by my State to take over what was called the lawsuit from hell that had existed for 11 years, been through five or six judges that had been reamed by PR firms that went after them that were hired.

And most people blamed the plaintiffs, and they certainly included thousands of plaintiffs perhaps that did not have similar injuries, Ms. Miller.

But what I also found was the defendants had a distinct pecuniary interest in delaying the outcome of the litigation as much or more than the plaintiffs because they were working hourly. And within 6 months, I dismissed, I think, 200 or 300 defendants. And one of the lawyers was waiting for me for some of the defendants when I went into the clerk's office after the hearing, and he said, Judge, I have been sitting here talking to some other folks. We do not know what we are going to do. I put two kids through college and law school on this case. I do not know what I am going to do.

But what I found was that if you have a judge that properly does his or her homework, finds that on the Daubert issue you do not have to have months of hearings on someone's qualifications as an expert, that unless the law has changed since I ruled on this and set a scheduling order, you do not have to take live testimony at trial. You put a discovery order in place, scheduling order, and you are not deviating, and you better get all of the questions asked that you need asked to prove expertise or to show a lack of it.

And you do not have to have months' long hearings over expertise. You just say we are taking no live testimony. Same on venue issues, other things. There are no requirements, at least they did not use to exist, that there be live testimony. And so, there are ways to get around that. So I think there are things that judges could do in a more activist role to police themselves that is not being done. And by the way, that whole litigation was disposed of basically in 2 years.

But, Ms. Miller, I am intrigued by your suggestion that we limit litigants to having the same injury. And I am wondering, like, for example, say you have got a products issue of an accelerator sticking, and perhaps some plaintiffs had that same problem, but they only had property damage and were not actually injured, no medical records, nothing to show in the way of dollars, pain and suffering. But then you have others who were killed or had dramatic injuries.

If we use the injury rule, then you might say, well, gee, these have property damage, these have personal injury, so the property damage does not count when actually they were injured by the same thing. I am wondering if perhaps it might be more appropriate to look at having the same proximate cause or having the same specific issue out of the lawsuit from hell that I took over outside my district. You know, there were some very legitimate cases, but there were some that should never have been brought. So I am wondering, what brought you to exclude the possibility of us limiting to specific proximate cause or specific items that did the injury.

Ms. MILLER. Well, I think if you have somebody, using your example. You talked about somebody who was killed, so there are a couple of things I would note. First of all, if you have a serious personal injury like that, everybody says, oh, we need class actions because people with small injuries, you know, cannot recover. If you have somebody who is killed or has a serious physical injury, as you know from watching late night TV, that person's family will be

barraged by thousands of lawyers who want to represent a person who's been injured.

So class actions are not typically used in a situation where somebody has suffered a severe injury like those. Those suits would proceed alone. The problem with——

Mr. GOHMERT. Well, some of them have been sucked up into class actions sometimes kicking and screaming, but that has been an issue.

Ms. MILLER. So most Federal courts would not include personal injury cases with non-personal injury cases.

Mr. GOHMERT. It has been years ago, but some have been.

Ms. MILLER. Right.

Mr. GOHMERT. Could I just ask——

Mr. FRANKS. The gentleman's time has expired.

Mr. GOHMERT [continuing]. Every witness to provide your thoughts on the issue of limited——

Mr. FRANKS. The gentleman's time has expired. We are over time.

Mr. GOHMERT. I am asking unanimous consent that we allow the witnesses to respond to that answer after the hearing.

Mr. FRANKS. Without objection for the record.

Mr. GOHMERT. Thank you.

Mr. FRANKS. And I now recognize the gentleman from Florida, Mr. DeSantis.

Mr. DESANTIS. Mr. Pincus, are no injury class actions consistent with Article 3 of the Constitution, which requires a discreet case or controversy?

Mr. PINCUS. No, Congressman, they are clearly not.

Mr. DESANTIS. So how are courts getting around that standing requirement?

Mr. PINCUS. Well, what some courts say if the named plaintiffs have standing, that that is enough. And so, they will certify cases, for example, nationwide classes where the plaintiffs have zero chance of recovering under the law of some States. They may have under others, the classes nationwide, and it all sort of gets smooshed together. Sometimes this happens in the settlement context. Sometimes it happens in the litigation context.

The other way that this happens it that some courts say that statutory damages can be a substitute for actual injury instead of merely substitute for quantifying actual injury.

Mr. DESANTIS. Ms. Miller, do you see a conflict between Article 3 of the Constitution and no injury class actions?

Ms. MILLER. I believe there is a conflict between Article 3 and no injury class actions, as well as over broad class actions. Both class actions present a problem because in the over broad class actions, the absent class members have no standing. And in those cases, that just never gets litigated in reality because what happens is the case settles, or the court says, well, you know, everybody over paid for this washing machine by like 50 cents because of this problem, so we are going to say everybody has standing.

Mr. DESANTIS. Great. Well, I have some time left, but we are going to vote. I really appreciate the Chairman moving this along so I could just get in that question. I think it is an important issue.

Mr. FRANKS. Well, I thank the gentleman very much.

Mr. DESANTIS. I yield back the balance of my time.

Mr. FRANKS. I thank the gentleman very much, and I thank the witnesses, and I thank the Members here. This will conclude today's hearing, and thanks to all of our witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

And, again, I thank the witnesses, and the Members, and the audience, and this hearing is adjourned.

Mr. SWEENEY. Thank you, Mr. Chairman.

Ms. MOORE. Thank you, Mr. Chairman.

Ms. MILLER. Thank you, Chairman.

[Whereupon, at 10:40 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Material submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on the Constitution and Civil Justice

February 26, 2015

Hon. Trent Franks, Chairman
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Hon. Steve Cohen, Ranking Member
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Franks and Ranking Member Cohen:

The undersigned organizations believe that class actions are critically important to compensate victims of illegal behavior and to deter corporate law-breaking. We strongly object to the placement of any further limits on the ability to bring class actions or to recover damages.

When a company practices a pattern of discrimination or receives a large windfall through small injuries to large numbers of people, a class action lawsuit is the only realistic way harmed individuals can afford to challenge this wrongdoing in court. As Justice Stephen Breyer, writing for four dissenting Justices in *AT&T v. Concepcion*, said, "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." Without the class action tool, corporations and businesses can ignore the law far more easily and operate with impunity. Class actions are also important for regulatory agencies, which often rely on information uncovered in class action lawsuits to pursue public enforcement actions against corporate law-breakers.

Class actions have led to changes in corporate behavior that protect us all from many types of illegal conduct, from employment and civil rights violations to price-fixing and consumer fraud to automotive defects to health care abuses. Class actions have led to important recoveries for victims of predatory and discriminatory lending, like illegal auto finance and mortgage loan mark-ups, payday loans, and unlawful practices targeting Servicemembers. Class actions have remedied race and gender employment discrimination. Class actions have led to substantial recoveries for small businesses who have been victims of illegal price-fixing cartels.

We urge Congress stop companies from prohibiting class actions in the fine print of contracts, and to otherwise protect class actions, as they are among the most powerful mechanisms used to secure justice in America.

Sincerely,

Alliance for Justice
Center for Justice & Democracy
Citizen Works
Committee to Support the Antitrust Laws
Connecticut Center for Patient Safety
Consumer Action
Consumer Federation of America
Consumer Watchdog
Consumers for Auto Reliability and Safety (CARS)
Homeowners Against Deficient Dwellings
Home Owners for Better Building
National Association of Consumer Advocates (NACA)
National Consumer Law Center (on behalf of its low income clients)
National Consumer Voice for Quality Long-Term Care
National Consumers League
National Employment Lawyers Association
Public Citizen
U.S. PIRG

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

February 25, 2015

The Honorable Trent Franks, Chairman
The Honorable Steve Cohen, Ranking Member
House Judiciary Subcommittee on the Constitution and Civil Justice
Washington, DC 20515

Re: Hearing titled "The State of Class Action Ten Years After the Enactment of the Class Action Fairness Act," February 27, 2015

Dear Chairman Franks and Ranking Member Cohen:

We write to share our views for the hearing, titled "The State of Class Action Ten Years After the Enactment of the Class Action Fairness Act," scheduled for February 27, 2015 before the House Judiciary Subcommittee on the Constitution and Civil Justice. The current state of class actions is dire for consumers and employees. The subcommittee should use the hearing to address the restrictions on individuals' access to justice.

In the last decade, it has become increasingly difficult for American consumers and employees to access the courts to seek remedies for predatory and illegal business practices, and particularly via class actions. Meanwhile, reckless business practices and slack corporate accountability caused a national crisis, including a record number of foreclosures, widespread unemployment and the unprecedented failure of longstanding financial institutions.

The subcommittee members should consider the detrimental impact that further restrictions on class actions in an already challenging system would have on their constituents and the American marketplace.

"Class Actions Are On the Ropes."
- Myriam Gilles, Professor of Law

Over the last decade, consumers' ability to band together to seek remedies in court has been stifled by a widespread corporate practice: terms in everyday non-negotiable employment contracts and consumer contracts—including cell phone service, nursing home admission, credit card accounts, banking, home construction, auto loans and leases, ecommerce—that require disputes to be settled in private arbitration instead of in open court. Because forced mandatory arbitration clauses are ubiquitous in these form

contracts, individuals have no choice but to accept the terms or relinquish the product, service, or job altogether.

In recent years, corporations expanded forced arbitration clauses in contracts to block consumers and employees from bringing class actions, forcing them to arbitrate disputes on an individual basis. Some courts tried to preserve class actions for consumers and employees under various state laws. But the U.S. Supreme Court's 2011 decision *AT&T Mobility v. Concepcion* (2011) held that the Federal Arbitration Act (FAA) preempts state laws that prohibit class action bans. Thus, corporations increasingly included class-action bans with forced arbitration clauses in their consumer and employment contracts.

Class actions are often the only economically feasible way for consumers and employees to seek redress, due to the small size of the individual claims such as illegal fees on monthly cell phone or cable bills; interest rates on loans that violate usury laws; or systemic discriminatory employment practices. Class actions also boost government enforcement of critical consumer protection laws without burdening the taxpayers. Indeed, the mere prospect of class actions deters unscrupulous and predatory conduct.

On the other hand, with class action bans, corporations are able to sidestep valid legal claims and evade answering for practices that cheat consumers, victimize employees and damage the American economy. The subcommittee must seriously consider the consequences of restricting class actions in any way, because without this critical consumer protection, corporations do not fear the repercussions of their risky business practices that ultimately affect us all.

Sincerely,

Public Citizen, Congress Watch division

Christine Hines
Consumer and Civil Justice Counsel

Lisa Gilbert
Director

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