

**Testimony of Jessica Miller<sup>1</sup>**  
**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.<sup>2</sup>

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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<sup>2</sup> 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.”<sup>3</sup> 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.”<sup>4</sup> “[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.’”<sup>5</sup>

This core objective has largely been fulfilled. “[F]orum shopping in state court ‘judicial hellholes’ has been reduced” as a result of CAFA.<sup>6</sup> For example, in the two years following

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<sup>3</sup> 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.”).

<sup>4</sup> 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).

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

<sup>6</sup> 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.<sup>7</sup>

## **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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup> 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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<sup>7</sup> 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.”).

<sup>8</sup> *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).

<sup>9</sup> See, e.g., *Galloway v. Kan. City Landmen, 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).

<sup>10</sup> *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. Ill. 2014).

grossly disproportionate to the award of damages to the class.”<sup>11</sup> Of the millions of class members who received notice of the class settlement, only 83,000 submitted a claim for a coupon.<sup>12</sup> Judge Richard Posner, writing for the court, explained that “the law quite rightly requires more than a judicial rubber stamp” to class-action settlements.<sup>13</sup> 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.”<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.”<sup>18</sup> 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.”<sup>19</sup> 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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<sup>11</sup> *Id.* at 632.

<sup>12</sup> *Id.* at 628.

<sup>13</sup> *Id.* at 629.

<sup>14</sup> *Id.* at 635.

<sup>15</sup> *Id.* at 630.

<sup>16</sup> *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).

<sup>17</sup> *Id.*

<sup>18</sup> *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011).

<sup>19</sup> *Id.*

relevant law.”<sup>20</sup> *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.<sup>21</sup> Thus, CAFA has had great success in achieving one of its primary goals: curtailing abusive nationwide class actions.<sup>22</sup>

## **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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<sup>20</sup> *Id.* at 948 (internal quotation marks and citation omitted).

<sup>21</sup> *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.”).

<sup>22</sup> 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 product 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.”<sup>23</sup> 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.<sup>24</sup>

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

<sup>24</sup> 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.”<sup>25</sup> As these courts have explained, “class definitions should be tailored to exclude putative class members who lack standing”<sup>26</sup> because “Article III still does not give individuals without standing a right to sue.”<sup>27</sup>

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.<sup>28</sup>

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.<sup>29</sup> 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.<sup>30</sup> 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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<sup>25</sup> *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).

<sup>26</sup> *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).

<sup>27</sup> *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402, 419 (D. Me. 2010).

<sup>28</sup> *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”).

<sup>29</sup> *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).

<sup>30</sup> *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."<sup>31</sup> 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.<sup>32</sup> 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."<sup>33</sup> 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.<sup>34</sup>

## 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."<sup>35</sup> As the Supreme Court

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<sup>31</sup> Cal. Bus. & Prof. Code § 17204.

<sup>32</sup> *In re Tobacco II Cases*, 46 Cal. 4th 298, 324-26 (2009).

<sup>33</sup> *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).

<sup>34</sup> 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).

<sup>35</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

explained, “Rule 23 does not set forth a mere pleading standard.”<sup>36</sup> To the contrary, the Court held, a plaintiff must “affirmatively demonstrate his compliance with the Rule.”<sup>37</sup>

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).<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> 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.<sup>42</sup> 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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<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

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

<sup>39</sup> *Id.* at 1432-33.

<sup>40</sup> *Id.* at 1433-34.

<sup>41</sup> 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).

<sup>42</sup> *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.<sup>43</sup>

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.”<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.”<sup>47</sup>

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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<sup>43</sup> *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”).

<sup>44</sup> *Glazer*, 722 F.3d at 860.

<sup>45</sup> *Id.*

<sup>46</sup> *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).

<sup>47</sup> *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.<sup>48</sup>

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.<sup>49</sup> According to the Seventh Circuit, the settlement, which consisted of a fee of \$11

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<sup>48</sup> *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.”).

<sup>49</sup> *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014).

million, was “inequitable – even scandalous.”<sup>50</sup> 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.”<sup>51</sup> 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.”<sup>52</sup> 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.”<sup>53</sup> 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.<sup>54</sup>

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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<sup>50</sup> *Id.* at 721.

<sup>51</sup> *Id.* at 723-24.

<sup>52</sup> *Id.* at 726.

<sup>53</sup> *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> The settlement also provided for limited injunctive relief that required minor changes to the products’ labeling.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.”<sup>60</sup> 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.”<sup>61</sup>

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.<sup>62</sup> 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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<sup>55</sup> *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014).

<sup>56</sup> *Id.* at 780.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 787.

<sup>60</sup> *Id.* at 784.

<sup>61</sup> *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).

<sup>62</sup> See *Marek v. Lane*, 134 S. Ct. 8 (2013).

practice.<sup>63</sup> 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*.<sup>64</sup> 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.<sup>65</sup> 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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<sup>63</sup> *Id.* at 9.

<sup>64</sup> *See id.* (citing Redish, 62 Fla. L. Rev. at 653-56).

<sup>65</sup> 28 U.S.C. § 1712(a).