

Testimony of Andrew Trask¹
Before the Subcommittee on the Constitution and Civil Justice of the
Committee on the Judiciary
United States House of Representatives

The Distorting Effects of No-Injury Class Actions

Good afternoon Chairman Franks, Ranking Member Cohen and Members of the Subcommittee. Thank you for the opportunity to testify on behalf of Lawyers for Civil Justice (“LCJ”). LCJ promotes the interests of the business community with respect to proposed changes to the Federal Rules of Civil Procedure and works proactively to achieve specific rule reforms by galvanizing corporate and defense practitioners and legal scholars to offer consensus proposals to the rule makers.

My testimony today focuses on the Fairness in Class Action Litigation Act of 2015 (“FICALA” or the “Act”), which was introduced in the House earlier this month. In addition to my experience defending numerous class actions, I spend a significant amount of time writing about class actions from a strategic standpoint. My legal writing requires me to look at the tactics used by both plaintiffs and defendants, and how they are affected by rulings in various courts.

While I am here in my capacity as a representative of LCJ, I would like to note that the perspective I take in these remarks is that of someone concerned with promoting the proper use of the class action. Class actions are a device which, used properly, can serve the interests expressed in Rule 1 of the Federal Rules of Civil Procedure: promoting the “just, speedy, and inexpensive determination of every action and proceeding.”² When specific class actions result in violations of due process, interminable proceedings, or undue expense, they serve no one’s interest and detract from the fair administration of civil justice. I also believe—and these remarks reflect—that interpretations of Rule 23 work best when they seek to promote the interests of those parties who have not elected to participate in the class action, but are instead forced into the process by the plaintiff’s bar: the defendant and the average absent class member. I have written frequently about how the interests of these two parties often converge.³

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² Fed. R. Civ. P. 1.

³ See, e.g., *The Strategic Dilemma of Bad Settlements - Mirfasihi v Fleet Mortgage, Class Action Countermeasures*, Aug. 24, 2010 (available at <http://www.classactioncountermeasures.com/2010/08/articles/settlement/the-strategic-dilemma-of-bad-settlements-mirfasihi-v-fleet-mortgage/>); *When Plaintiffs Sell Out Absent Class Members - Thatcher v. Hanover Insurance Group, Class Action Countermeasures*, Nov. 8, 2011 (available at <http://www.classactioncountermeasures.com/2011/11/articles/motions-practice/when-plaintiffs-sell-out-absent-class-members-thatcher-v-hanover-insurance-group/>); *The Cause Lawyer and the Class Action, Class Action Countermeasures*, Feb. 9, 2012 (available at

From that perspective, looking at the interests of both the defendant and the absent class member, “no-injury” class actions are, quite simply, a very poor idea. The reason for this is that no-injury class actions distort the substantive law underlying the claims, encourage tactics that undermine the interests of the absent class members, and impose often tremendous and undue costs on corporate defendants.

A no-injury class action is a case where the class members (or at least a majority of them) have not actually experienced the harm the complaint alleges. It is a longstanding principle of the American legal system that courts only decide actual cases or controversies, and, as the Seventh Circuit Court of Appeals stated more than a decade ago in reversing a problematic certification of a no-injury class, “No injury, no tort, is an ingredient of every state’s law.”⁴

Adventuresome plaintiffs’ lawyers have developed a number of tactics for obscuring the no-injury nature of these cases in the class action context. They will frame their case in terms of exposure to future injury (which in most cases would require dismissal on ripeness grounds); they will allege an unspecified “diminution in value” or “premium paid” for an allegedly non-defective product; or they will recruit a named plaintiff with an idiosyncratic “actual injury” to represent a class that includes mostly non-injured class members. These classes are sometimes certified for trial purposes, but are almost never litigated to a final judgment. Nonetheless, allowing allegations like these to proceed even to the certification stage impose significant burdens for both the court and the defendant that would be better spent protecting against actual harms.

These no-injury cases are most common in the products liability sphere, but they can also appear in other areas. Environmental class actions seeking “medical monitoring” damages for asymptomatic exposure to an allegedly toxic substance are one example.⁵ “Consumer fraud” cases that attack advertisements or communications that were not seen or relied on by significant percentages of the proposed class are yet another example. Similarly, “data breach” class actions tend to follow a different model, asserting “fear of injury” theories: in other words, the plaintiff claims that she fears she may be injured by the revelation of her personal data.⁶

<http://www.classactioncountermeasures.com/2012/02/articles/lawyers/the-cause-lawyer-and-the-class-action/index.html>); *Selling Out Absent Class Members - Dewey v. Volkswagen Aktiengesellschaft*, *Class Action Countermeasures*, Jun. 5, 2012 (available at <http://www.classactioncountermeasures.com/2012/06/articles/certification-1/selling-out-absent-class-members-dewey-v-volkswagen-aktiengesellschaft/index.html>); *How to Get a Settlement Denied - Tijero v. Aaron Bros., Inc.*, *Class Action Countermeasures* Jan. 8, 2013 (available at <http://www.classactioncountermeasures.com/2013/01/articles/settlement/how-to-get-a-settlement-denied-tijero-v-aaron-bros-inc/>); *The Real Problem with Settlement-Only Class Actions*, *Class Action Countermeasures* Apr. 4, 2013 (available at <http://www.classactioncountermeasures.com/2013/04/articles/settlement/the-real-problem-with-settlementonly-class-actions/index.html>).

⁴ *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002).

⁵ See, e.g., *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011).

⁶ According to one study, 78% of data-breach class actions involved incidents that had resulted in no financial loss. See Sasha Romanosky, et al., *Empirical Analysis of Data Breach Litigation*, Temple University Legal Studies Research Paper No. 2012-30, Apr. 6, 2013, at 12, available

No-injury class actions distort the outcome of litigation.

No-injury class actions distort the outcomes of cases based on state law because they remove an essential element of state law causes of action. If each class member does not have to prove she was actually injured, then she is absolved of demonstrating injury or damages, and may also be absolved of demonstrating causation as well. This contravenes the requirements of due process. To the extent these class actions remove the requirement to either allege or prove these elements, they violate the proscriptions of the Rules Enabling Act.⁷ This is not a theoretical problem. As several plaintiffs' attorneys themselves have pointed out: "Numerous courts have certified plaintiff classes even though the plaintiffs have not been able to use common evidence to show harm to all class members."⁸

Allowing these cases to proceed deprives the defendants of due process through the pretrial stage of the class action. During that time, the defendant faces liability for actions for which it may have valid individualized defenses. For example, an idiosyncratic manufacturing defect can suddenly provide the basis for nationwide class liability, despite the plaintiff's lack of evidence that the defect reached any further than herself.

Moreover, the classwide pleadings can mask the fact that a plaintiff does not have an actual theory of the case; something that may become clear only when class certification is finally briefed, particularly in courts where the class certification motion is scheduled prior to summary judgment proceedings, an all too often occurrence. In many instances, the plaintiff may have no theory of how an alleged defect actually causes any harm to other class members.⁹

From a policy standpoint, this can lead to a number of bad outcomes. Compensation for no-injury cases will deter legitimate behavior by the defendant. Indeed, a number of scholars have pointed out that private enforcement of regulation is simply not reliable, tends to overdeter legitimate behavior, and can hamstring governmental attempts to effectively regulate public risks.¹⁰

It can also disrupt the balance regulatory agencies strive to achieve through regulation and enforcement. And it can create windfall income for uninjured claimants, much of which may be absorbed into attorneys' fees, or rolled into

at <http://ssrn.com/abstract=1986461> (last viewed Apr. 26, 2015).

⁷ *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 546 (2011) (quoting 28 U.S.C. § 2072(b)); *Corder v. Ford Motor Co.*, No. 3:05-CV-00016, 2012 U.S. Dist. LEXIS 103534, *20 (W.D. Ky. Jul. 24, 2012) (Rules Enabling Act requires "a full litigation of [element] of the cause of action, and for each putative class member no less").

⁸ Joshua P. Davis, et al., *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 859 (2014).

⁹ See, e.g., *Burton v. Chrysler Group LLC*, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720, *13 (D.S.C. Dec. 21, 2012).

¹⁰ David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 633-37 (2013).

increased costs for consumers.¹¹ As several federal judges have noted, conducting these pseudo-regulatory works to no one's benefit but the class attorneys'.¹²

No-injury cases distort substantive legal doctrine.

One of the reasons that no-injury cases can distort litigation outcomes is that the sheer size of the cases presented can warp the substantive law applied.¹³ As the American Law Institute warned in its PRINCIPLES OF AGGREGATE LITIGATION:

Aggregate treatment is ... possible when a trial would allow for the presentation of evidence sufficient to demonstrate the validity or invalidity of all claims with respect to a common issue under applicable substantive law, without altering the substantive standard that would be applied were each claim to be tried independently and without compromising the ability of the defendant to dispute allegations made by claimants or to raise pertinent substantive defenses.¹⁴

In other words, class actions are an appropriate procedural device when they operate under the same substantive law as an independent, single-plaintiff lawsuit.

No-injury class actions change the substantive standard courts apply. They require the jury to look not at the specific facts of a specific incident, which requires proof of duty, breach of duty, causation, and resulting injury, but only at—at most—duty and breach of duty. As one trial court described the difficulty in trying a proposed no-injury automotive class action: “A personal injury case is ... tethered to the discrete facts of an identifiable accident involving specific individuals.”¹⁵ By contrast, a no-injury case “presents a more difficult and amorphous case for the jury.”¹⁶ As a result, plaintiffs will often resort to using “composite” or “averaged” evidence to prove their case, instead of focusing on actual incidents or actual claims.¹⁷

Indeed, the United States Supreme Court has long recognized that mixing injured and uninjured class members in the same case frequently creates

¹¹ See, e.g., *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991) (Wisdom, J.).

¹² See, e.g., *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (“A representative who proposes that high transaction costs (notice and attorneys’ fees) be incurred at the class members’ expense to obtain a refund that already is on offer is not adequately protecting the class members’ interests.”).

¹³ Among other reasons, the magnitude of class action cases can affect a judge’s ability to make legal rulings in an unbiased manner. See Alexandre Biard, *Iudex non calculat?: Judges & the Magnitude of Mass Litigation from a Behavioural Perspective*, Working Paper at 7, available at <http://ssrn.com/abstract=2517882> (last viewed Apr. 26, 2015).

¹⁴ PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 cmt. d, at 89 (2010).

¹⁵ *Lloyd v. Gen. Motors Corp.*, No. L-07-2487, 2011 U.S. Dist. LEXIS 63436, *26-27 (D. Md. Jun. 16, 2011).

¹⁶ *Id.*

¹⁷ *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266 (3d Cir. 2011) (noting and disapproving of use of “composite” or averaged evidence).

insurmountable conflicts within the class: those class members with manifest current injuries will have different incentives in pursuing relief than those class members who face only the possibility of future harm, yet both are often represented by both the same named plaintiffs and the same counsel.¹⁸

To see that conflict in action in litigation, one only needs to look at the recent trial in *Glazer v. Whirlpool Corporation*. After the United States Court of Appeals for the Sixth Circuit affirmed certification of a class that included both named plaintiffs who had encountered difficulties with their washing machines and many more class members who had not,¹⁹ the case went to trial. The trial court issued an instruction that—given the abstract nature of the plaintiffs’ “inherent defect” theory—the jury would have to consider whether all twenty washing machine models at issue were defective in a single yes-or-no determination.²⁰ Were the jury to find even one model was not defective, it would have to find for Whirlpool. Not surprisingly, the jury found no liability, although it is not clear whether it did so because it believed none of the machines were defective, or only some of them. (The plaintiffs, of course, have appealed the verdict, arguing that requiring them to prove that each model they claimed was defective had actually encountered problems was prejudicial.)²¹

No-injury class actions encourage plaintiffs’ attorneys to waive legitimate claims.

Plaintiffs’ attorneys are well aware that certification of the class is the decisive battle in class action litigation.²² They adopt no-injury theories in large part because doing so allows them to certify larger classes on theories that elide the difficult individualized questions of causation and damage that frequently preclude certification.

But, in doing so, plaintiffs’ lawyers often forgo meritorious theories that could win in court in order to sweep uninjured class members into their cases. In the process, they basically waive better claims on behalf of injured class members. In automotive class actions, for example, plaintiffs will often allege that the alleged defect poses grave safety concerns, but then specifically disclaim any personal injury claims, and shy away from proposing any technical solutions.²³ Instead of focusing on actual present harm, which may vary wildly, they focus on potential harm, which they argue is uniform.²⁴ Doing so allows them to claim a “common issue,” but it also

¹⁸ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1996); see also *Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012) (rejecting class settlement because of intra-class conflict).

¹⁹ See generally *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013).

²⁰ *Glazer v. Whirlpool Corp.*, No. 1:08-wp-6500-CAB, Doc. #485-1 at 29 (S.D. Ohio Oct. 29, 2014) (attached as Ex. 1).

²¹ *Glazer v. Whirlpool Corp.*, 14-4184, Doc. 19, Brief of Appellants at 29 (6th Cir. Feb. 12, 2015) (attached as Ex. 2).

²² See generally BRIAN ANDERSON & ANDREW TRASK, *THE CLASS ACTION PLAYBOOK* § 5.01 (2015 ed.).

²³ See, e.g., *Lloyd*, 2011 U.S. Dist. LEXIS 63436 at *26-27.

²⁴ For a vivid recent example, see *Cahen v. Toyota Motor Corp.*, No. 3:15-cv-01104, Doc. 1 Complaint (N.D. Cal. Mar. 10, 2015) (attached as Ex. 3). *Cahen* alleges that various automotive manufacturers have manufactured vehicles that are “susceptible to hacking” (¶ 6), but has not alleged that any

means that should the class prevail at trial (or settle), individual class members who are later harmed by the alleged defect will be precluded from bringing their claims of *actual* injury. For example, if relief is split between monetary damages (some lump-sum payment) and injunctive relief (a judicially-ordered repair), it is very likely that uninjured class members will opt for the lump-sum payment rather than the repair. In doing so, they may preclude themselves from receiving further relief should they actually become injured later.²⁵ In lawyers' parlance, this practice is referred to as "claim-splitting," and it is very common in no-injury cases.

A more practical problem also arises. As most of us know from experience, notices of a class settlement are often long and opaque, and enter trash cans unread. A class member who receives a minor payment or obscure injunctive relief as part of a no-injury settlement may have a very difficult time later establishing that she was unaware of her rights problem should she face an actual manifestation of a defect, or actual harm from a data breach. Technically this is different than claim-splitting, but that difference is for lawyers, not class members.

No-injury class actions frequently lead to problem settlements.

Since most class actions end in settlement, these problems in defining relief result in problematic class settlements that harm absent class members as much as they do defendants. Since the value of a no-injury class action is difficult to ascertain, attorneys often rely on questionable injunctive relief and *cy pres* relief (charitable donations to third parties who may bear some relation to the subject of the lawsuit) to create enough apparent value to justify releasing the claims against the defendant and paying the fees the plaintiffs' attorneys require.²⁶ The result is that the bulk of any monetary relief goes not to the members of the class, but to third parties that were not harmed either. Indeed, as several class action plaintiffs' attorneys have conceded, "A distinctive aspect of [*cy pres*], at least in many cases, is that it awards a recovery to class members that the court knows could not possibly have been harmed."²⁷

These tactics have led to concrete grounds for reversing real class settlements.

- In *In re Dry Max Pampers Litig.*,²⁸ a settlement of an unsubstantiated claim of diaper rash resulting from gel in diapers resulted in attorney's fees of \$2.7 million for achieving injunctive relief requiring the implementation of a 1-800 line to answer questions about diaper rash. A *cy pres* monetary award of \$250,000 was earmarked to fund pediatric residencies and a research program on skin care. The settlement was finally overturned on appeal, on the grounds that the

automobile owner, not even the named plaintiffs, has suffered a hacking attempt.

²⁵ *Lloyd v. Gen. Motors Corp.*, No. L-07-2487, 2011 U.S. Dist. LEXIS 63436, *26-27 (D. Md. Jun. 16, 2011) (allowing uninjured class members to collect monetary relief for alleged automotive defect would defeat purpose of exception to economic loss doctrine for safety defects).

²⁶ For an extended discussion of these issues, see *Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (Posner, J.).

²⁷ Davis, et al., *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. at 878.

²⁸ 724 F.3d 713 (6th Cir. 2013).

settlement had no real value for the class members.²⁹

- In *Eubank v. Pella Corp.*,³⁰ the United States Court of Appeals for the Seventh Circuit reversed a settlement of product liability claims against a window and door manufacturer in part because provisions included to protect the defendant's due process right to challenge worthless individual claims significantly reduced the value of the settlement. The appellate court estimated that the settlement as originally approved would have provided at most \$8.5 million in relief to the class, versus \$11 million to the plaintiffs' attorneys.³¹
- In *Jones v GN Netcom, Inc.*,³² the United States Court of Appeals for the Ninth Circuit vacated a settlement alleging economic loss from headphones that were alleged to potentially cause hearing loss. As the court noted, "[t]he settlement agreement approved in this products liability class action provides the class \$100,000 in *cy pres* awards and zero dollars for economic injury, while setting aside up to \$800,000 for class counsel."³³
- In *Pearson v. NBTY, Inc.*, the United States Court of Appeals for the Seventh Circuit reversed a settlement of food labeling claims against vitamin manufacturers. The settlement alleged that the [manufacturers](#) had made questionable claims about the vitamins' efficacy in preventing joint problems. The settlement resulted in \$865,284 to class members, \$1.13 million in *cy pres* relief to the Orthopedic Research and Education Foundation, and more than \$2 million in attorneys' fees and expenses.³⁴

In each of these cases, the attempt to settle a no-injury case resulted in terms that were favorable to attorneys but not the members of the class. It is no coincidence that these settlements occurred in the jurisdictions that have allowed some of these cases to proceed. Class action settlements in general remain problematic, but they are especially so in no-injury cases because it is extremely difficult to quantify the value of any relief when many of the class members have not been harmed to begin with.³⁵ Moreover, it is certain that these are not the only questionable settlements in these jurisdictions: these are only the settlements that drew objectors with the commitment and financial resources to both object to the settlement and appeal when their objections were rejected by the trial court.³⁶

²⁹ 724 F.3d at 721.

³⁰ 753 F.3d 718, 721 (7th Cir. 2014).

³¹ *Id.* at 726.

³² 654 F.3d 935 (9th Cir 2011).

³³ 654 F.3d at 938.

³⁴ *Pearson*, 772 F.3d at 780.

³⁵ *See, e.g., Eubank*, 753 F.3d at 726.

³⁶ For more on the difficulty of appealing settlement objections, *see* ANDERSON & TRASK, CLASS ACTION PLAYBOOK § 8.04[7] (discussing use of appeal bonds to dissuade objectors).

The consistent use of *cy pres* relief in no-injury class actions indicates another problem as well: when no one has suffered a tangible harm, it is next to impossible to identify those who are entitled to participate in the settlement, and many are not interested enough to actually claim any funds. Instead, the parties wind up donating the proceeds of the settlement to third parties. (In litigation parlance, these settlements have a low “take rate.”)

The proposed legislation.

Many of the distorting effects I have described above are the result of disguising the lack of injury in no-injury class actions with a plaintiff who has arguably suffered a tangible harm. By focusing on whether the injury suffered by the named plaintiff is the same as that suffered by the absent class members, the proposed legislation focuses on the most problematic no-injury cases, and the ones likeliest to lead to settlements that do not compensate the average class member.

Specifically, this bill would prevent entrepreneurial counsel from taking an idiosyncratic manufacturing defect, an isolated incident resulting from a data breach, or an unusual reading of a marketing document and turning it into a multi-million dollar case that will take years and hundreds of thousands of dollars to defend. Instead, counsel will either have to show that everyone suffered a similar harm, or present the case as a naked no-injury claim which a court can assess on its individual merits. (Courts frequently reject no-injury class actions when they are brought by uninjured plaintiffs.)

At the same time, cases involving a uniform intangible harm—such as a uniform violation of civil rights, violation of a Congressionally-enacted statute like the Truth in Lending Act or Federal Credit Reporting Act, or a case seeking an injunction to prevent a harm from occurring—will still be able to proceed. In those cases, while the reality of the harm may be debatable, there would be no question that the named plaintiff and the remainder of the class were all in similar factual situations.

Class action litigation works best when judicial interpretation and Congressional action filter out the worst abuses of the device. The proposed legislation serves as just such a filter.