Testimony of John H. Beisner[1]
Before the Committee on the Judiciary
United States Senate

The Impact of Lawsuit Abuse on American
Small Businesses and Job Creators

Good morning Chairman Grassley, Ranking Member Feinstein and Members of the Committee. Thank you for the opportunity to testify on behalf of the U.S. Chamber Institute for Legal Reform ("ILR"). ILR is an affiliate of the U.S. Chamber of Commerce ("the Chamber") dedicated to making our nation's overall civil litigation system simpler, fairer, and faster for all participants. The Chamber 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 it is dedicated to promoting, protecting and defending America's free enterprise system.

A little more than a decade ago, Congress passed the Class Action Fairness Act ("CAFA"), which was an important first step to creating a more just and effective civil justice system. The hallmark of that landmark legislation was expansion of federal diversity jurisdiction over interstate class actions. Prior to CAFA, a class action could only be removed to federal court if all the plaintiffs and defendants were from different states and every plaintiff sought $75,000 in damages. Since class actions typically involve small individual claims, this made it virtually impossible to remove the typical class action to federal court. By moving numerous class actions of national importance from state to federal court, CAFA helped eliminate magnet state court jurisdictions that were once a haven for frivolous and vexatious class action lawsuits. CAFA also sought to address one aspect of mass tort abuse by allowing removal to federal court of mass actions with more than 100 plaintiffs.

While CAFA has been instrumental in improving the civil justice landscape in the United States, problems remain, which are harming American businesses and consumers. Most notably, class actions are increasingly being used by plaintiffs' attorneys to enrich themselves rather than compensate those supposedly aggrieved by a defendant's alleged misconduct. This trend can be seen in a growing number of consumer class action settlements that provide little or nothing to consumers, while rewarding class counsel with millions of dollars. Abusive settlements are fostered by the attitudes of certain federal courts, which 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. The result is that American businesses are forced to settle frivolous claims involving consumers who did not suffer any real injury. Given these and other troubling developments in federal class action practice, it is not surprising that the U.S.

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Court of Appeals for the Seventh Circuit recently urged "the courts, and Congress . . . to be on the lookout for ways to correct class action abuses."[2]

The past decade has also seen a growing number of troubling developments in the context of mass tort litigation. Specifically, enterprising plaintiffs' lawyers have been able to evade federal diversity jurisdiction by joining disparate product liability claims in a single complaint, effectively resulting in state coordinated proceedings that rival federal multidistrict litigation proceedings. This has occurred because under current law, a non-class action case can generally be removed to federal court only if ***all*** the plaintiffs are diverse from all the defendants, a rule that creates significant opportunity for jurisdictional shenanigans. Plaintiffs have also engaged in jurisdictional gamesmanship by joining local in-state small businesses against whom the plaintiffs have no reasonable possibility of success, rendering them fraudulently joined. At the same time, multidistrict litigation – a pre-trial mechanism for coordinating overlapping cases – has been transformed into a magnet for advertising-driven and poorly investigated personal injury claims. These mass tort proceedings, which now account for more than one-third of all federal civil cases pending in U.S. courts, are too often populated by claims that should never have been filed and, thus, impose unfair burdens on courts and defendants.[3] And because MDL judges are increasingly viewing settlement as the only successful outcome of an MDL proceeding, some of these courts subject defendants to unfair and unrepresentative multi-plaintiff trials that feature questionable legal and evidentiary rulings that are not immediately appealable, dragging out litigation, contrary to the interests of all involved parties.

The developments described above do not bode well for American businesses. After all, according to a 2013 study conducted by NERA Economic Consulting, the U.S. already has the world's costliest legal system as a share of its economy.[4] Specifically, the U.S. legal system costs over ***150%*** more than the Eurozone average, and over ***50%*** more than the United Kingdom. And high litigation costs are not confined to Fortune 500 companies. Tort costs for U.S. small businesses are particularly high in proportion to revenues. For example, according to an earlier NERA Economic Consulting study, in 2008, the tort liability price tag for U.S. small businesses with less than $10 million in revenue was ***$105.4 billion***.[5] One approach to understanding the influence of the liability system on small businesses is to ask companies' management about their response to litigation. An August 2010 survey conducted by Public Opinion Strategies and Douglas Schoen interviewed 1,000 small business leaders and found that 65% of the respondents found frivolous lawsuits to be "very serious" and another 29% found them to be "somewhat

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2 *Manistee Apartments, LLC v. City of Chi.*, 844 F.3d 630, 635 (7th Cir. 2016).

3 According to a report conducted by the Duke Law School Center for Judicial Studies, "these MDL cases ma[d]e up 36% of the civil caseload" in 2014, up from 16% in 2002. *Standards & Best Practices for Large and Mass-Tort MDLs*, Duke Law Center for Judicial Studies, at *x* (2014); *see also* H.R. Rep. 115-25, at 33 (2017) ("Astoundingly, there are around 120,000 lawsuits pending in th[e]se MDL proceedings. That's 35% of all civil lawsuits currently pending in all Federal courts nationwide (which number about 342,000).").

4 David L. McKnight & Paul J. Hinton, NERA Economic Consulting, *International Comparisons of Litigation Costs, Europe, the United States and Canada*, U.S. Chamber Institute for Legal Reform, at 1 (May 2013).

5 Paul J. Hinton & David L. McKnight, NERA Economic Consulting, *Creating Conditions for Economic Growth: The Role of Legal Environment, How improving the legal environment in individual states could reduce tort costs and promote business activity and employment*, U.S. Chamber Institute for Legal Reform, at 6 (October 2011).

serious."[6] And in a November 2006-February 2007 survey, Harris interviewed more than 1,000 owners and managers of small business and found that the threat of frivolous or unfair lawsuits had caused ***almost two-thirds*** of the respondents (62%) to make business decisions potentially detrimental to consumers and employees.[7] For instance, 61% of those interviewed stated that the threat of frivolous or unfair lawsuits made their products or services more expensive, while others noted that such litigation had forced cuts in employee benefits or layoffs.[8] In addition, particularly given that litigation costs in the U.S. are much higher than in other industrialized countries, the current legal environment is adversely impacting the nation's competitiveness. In short, the economic impact of our civil justice system (particularly on small businesses) is well documented – and is certain to worsen if the abuses in the aggregate litigation arena continue to go unchecked.

In light of the serious problems and economic costs discussed above, the time is ripe for robust action by Congress. The House of Representatives recently passed the Fairness in Class Action Litigation Act of 2017 ("FICALA"), a comprehensive legal reform bill that would address a number of the abuses mentioned above. The House also passed the Furthering Asbestos Claim Transparency ("FACT") Act of 2017, which will increase transparency and accountability in asbestos bankruptcy trusts by requiring the trusts to report quarterly on who files claims. There are various other measures making their way through Congress as well, including the Lawsuit Abuse Reduction Act ("LARA"), which would strengthen Rule 11, and the Innocent Party Protection Act ("IPPA"), which seeks to curtail the vexatious practice of fraudulent joinder. I am hopeful that the concerns raised in this hearing will encourage the Committee to move forward to address ongoing abuse in civil litigation in our federal courts.

I. THE CURRENT CLASS ACTION SYSTEM PROMOTES ABUSIVE CLASS ACTION SUITS.

CAFA had a limited purpose of allowing more interstate class actions into federal court and tightening requirements for class action settlements. While CAFA's purposes have largely been fulfilled, some other abusive aspects of federal class action practice continue to harm consumers, businesses, and the economy as a whole. First, federal courts are increasingly approving consumer class action settlements in which the bulk of the money the defendant pays goes to the plaintiffs' lawyers and/or some uninjured third-party charity, a scenario not addressed by CAFA. Second, third-party litigation funding ("TPLF") – the practice in which companies "invest" in litigation – has seeped into federal class action practice, undermining the rights of class members, as well as defendants. Third, courts are continuing to embrace dubious "no injury" class actions in which a plaintiff who has experienced a problem with his or her product seeks to represent a class of individuals, many of whom were satisfied with the product and were uninjured by it. Fourth, certain federal courts are circumventing the rigors of Fed. R. Civ. P. 23 by certifying so-called "issues" class actions that are not only highly inefficient, but also violate defendants' due process rights. Fifth, the prospect of ruinous liability based on unlimited statutory damages under various federal laws has led to unjustified settlements. Finally,

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6 *Id.* at 7.

7 *Id.*

8 *Id.*

American businesses are increasingly having to engage in costly discovery before motions to dismiss and other threshold motions are resolved by federal courts, requiring them to waste important resources that would otherwise be targeted toward economic growth.

A. Lawyers Are Reaping Most Of The Benefits Of Consumer Class Actions.

The first problem I would like to discuss is fee-centric class action settlements and *cy pres* settlements in which money unclaimed by the class members is donated to third-party charities and the only "winners" in the suit are the lawyers. Members of the plaintiffs' bar frequently claim that the class device effectively compensates large swaths of purportedly injured individuals.[9] While it is true that certain class action settlements do provide meaningful benefits to class members, most do not. Indeed, "every study that has" looked at consumer and employee class action settlements "reached the same conclusion: The overwhelming majority of [such] class actions deliver ***nothing*** to class members."[10] According to one of those studies, which analyzed putative consumer and employee class action lawsuits filed in or removed to federal court in 2009, nearly 35% of the class actions resolved were dismissed voluntarily by the plaintiff, likely "meaning a payout to the individual named plaintiff and the lawyers who brought suit – ***even though the class members receive nothing***."[11] Notably, a study by the Consumer Financial Protection Bureau found that, of its sample of 562 cases, 87% of resolved class actions resulted in no benefit to absent class members – i.e., they were either dismissed by the court or settled with the named plaintiff only.[12] Even settled class actions typically fail to provide meaningful benefits to class members.[13] Indeed, even those who defend class actions are forced to admit that "the class action is not known for its success at delivering compensation to class members: sometimes it does it well . . . but, in the ***run-of-the mill case, only a small percentage of victims are made whole***."[14] This is nowhere truer than in cases in which the resulting class action settlements only authorize injunctive relief as opposed to compensation for the class. Class actions that do attempt to earmark money for class members rarely put money into actual class members' hands because of miniscule participation rates.[15]

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9 Gary Mason, *The Proper Measure of the Value of Class Actions*, Law360, Aug. 16, 2017, https://www.law360.com/articles/954049/the-proper-measure-of-the-value-of-class-actionshttps://www.law360.com/articles/954049/the-proper-measure-of-the-value-of-class-actions.

10 Andrew Pincus, *Assessing The Value of Class Actions*, Law360, Aug. 22, 2017, https://www.law360.com/articles/956215 (emphasis added).

11 Mayer Brown, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, U.S. Chamber Institute for Legal Reform, at 1-2 (Dec. 11, 2013).

12 Consumer Fin. Protection Bureau, *Arbitration Study: Report to Congress 2015*, at section 6, p. 37 (2015), http://www.consumerfinance.gov/data-research/research-reports/arbitration-study-report-to-congress-2015.

13 *See* Andrew Pincus, *Unstable Foundation, Our Broken Class Action System and How to Fix it*, U.S. Chamber Institute for Legal Reform, at 4 (October 2017) ("Settled Cases Deliver Benefits to Only a Handful of Class Members[.]").

14 Brian T. Fitzpatrick, *Do Class Actions Deter Wrongdoing?*, at 1 (Sept. 12, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3020282 (emphasis added).

15 Pincus, *supra* note 13, at 4 ("[T]he overwhelming majority of class members do not file claims to obtain payment from these settlement funds.").

One recent class action settlement involving Subway's "footlong" sandwiches illustrates this problem. The litigation began in January 2013 after an Australian teenager tweeted a "not-quite-footlong Subway Footlong sandwich," which "spawn[ed] nine U.S. lawsuits that were eventually centralized in federal court in Milwaukee."[16] After nine years of negotiations regarding class counsel's fee award, the parties agreed to a settlement under which Subway would require franchisees to keep a measuring tool on their premises, require monthly inspections of the bread and adoption of other practices designed to ensure that the sandwiches would be twelve inches long.[17] "Although the parties wouldn't exactly let on, it is a good bet that Subway implemented most if not all of these practices well before the parties settled."[18] As part of the settlement, Subway also agreed to provide $525,000 in cash; however, "***every cent of that amount ended up with class counsel and the class's 10 named representatives. The majority of the class got nothing***."[19] In approving the class action settlement, the district court reasoned that "the settlement in the present case does not make any class member worse off."[20]

This decision was not well received by the U.S. Court of Appeals for the Seventh Circuit, which recently overruled the district court's ruling, calling the settlement "utterly worthless."[21] In addition, the circuit court noted that early discovery in the case confirmed that the plaintiffs' claims were "factually deficient" and "extinguished any hope of certifying a damages class."[22] The appellate court further noted that Subway was nonetheless forced to defend against these claims for several years.[23] Rather than "'be[ing] dismissed out of hand'" – which the Seventh Circuit concluded should have been the outcome – the lawsuit culminated in a "racket" by plaintiffs' attorneys that "'seeks only worthless benefits for the class' and 'yields [only] fees for class counsel.'"[24] Notably, in late October, a handful of plaintiffs in this litigation voluntarily dismissed their claims, underscoring what a waste of resources the entire litigation had been.[25]

The problem of fee-focused class settlements was also on full display in *Eubank v. Pella Corp.*, in which the parties entered into a proposed settlement arising out of claims involving allegedly defective windows that caused leaking.[26] According to the Seventh Circuit, the

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16 Adam Schulman, *Subway Footlong Sandwich Settlement Now on Appeal*, Competitive Enterprise Institute, Mar. 30, 2016, https://cei.org/blog/subway-footlong-sandwich-settlement-now-appeal.

17 *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 316 F.R.D. 240, 242-44 (E.D. Wis. 2016), *rev'd*, 869 F.3d 551 (7th Cir. 2017).

18 Schulman, *supra* note 16.

19 *Id.* (emphasis added).

20 *In re Subway*, 316 F.R.D. at 249.

21 *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, 869 F.3d 551, 557 (7th Cir. 2017).

22 *Id.* at 554.

23 *Id.* at 552.

24 *Id.* at 553 (citation omitted).

25 Stipulation of Dismissal, *In re Subway Footlong Sandwich Mktg. & Sales Practices Litig.*, No. 2:13-md-2439, ECF No. 84 (E.D. Wis. filed Oct. 24, 2017).

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

settlement, which consisted of a fee of $11 million, was "inequitable – even scandalous."[27] 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."[28] 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."[29] The Seventh Circuit therefore invalidated this settlement as one-sided.

Other examples of fee-centered settlements abound:

- In *In re Vioxx Products Liability Litigation*, the MDL judge previously approved a settlement of consumer fraud claims asserted by individuals alleging economic injuries stemming from their purchase of the drug at issue, Vioxx.[30] The settlement allocated a common benefit fund of up to $23 million, from which consumer class members could obtain recovery for their out-of-pocket provable costs for purchasing Vioxx. "Despite Herculean efforts" to maximize payments to class members throughout the United States, the number of filed claims only totaled 8,757, and the total amount paid to claimants was $698,767.22 – a tiny fraction of the $23 million. Despite the measly claims rate, class counsel requested attorneys' fees of $7,174,419.09, arguing that the fee award should be based on 32% of the entire potential settlement amount, rather than limited to a percentage of the actual funds paid to claimants. The district court recently agreed that the percentage should be based on the entire settlement amount, because such an approach "deter[red] future conduct" by the defendant. However, the district court lowered the requested percentage amount, noting that "it [could] not be ignored that the amount of actual recovery in this case was low." Accordingly, in the end, the court awarded attorneys' fees of 17.5% of the entire settlement amount, or $4,025,000 – still a grossly disproportionate amount when compared to the money that ended up in the class members' pockets.

- In *In re Motor Fuel Temperature Sales Practices Litigation*, the district court approved several settlements arising out of the sale of motor fuel.[31] The protracted litigation began in 2006, when plaintiffs sued retailers for selling

[27] *Id.* at 721.

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

[29] *Id.* at 726.

[30] *In re Vioxx Prods. Liab. Litig.*, No. 2:05-md-01657-EEF-DEK (E.D. La. filed Sept. 1, 2017). John Beisner is counsel to the defendant in this litigation.

[31] *In re Motor Fuel Temperature Sales Practices Litig.*, 868 F.3d 1122, 1130 (10th Cir. 2017), *pet. for en banc review pending*.

gasoline by volume, alleging that such sales failed to account for fuel expansion and contraction with temperature and constituted consumer fraud. The cases were consolidated in the District of Kansas in an MDL proceeding, and the parties ultimately negotiated settlements providing plaintiffs' attorneys with ***nearly $19 million, while absent class members received nothing***. Not only do the settlements fail to provide any money to class members, but some of them also impose an unprecedented requirement on defendants that they lobby for consumer-unfriendly modifications to the regulation of gasoline sales. The Tenth Circuit recently affirmed the lower court's approval of the settlements, agreeing with the district court that the settlements "provide class members with a potential informational benefit: 'accuracy and consistency of fuel measurement for their fuel dollar.'"[32]

- In *Perez v. Asurion Corp.*, the court approved a settlement in which only ***1.1 percent*** of class members submitted claims for compensation.[33] The litigation arose out of plaintiffs' dissatisfaction with the wireless phone protection plans in which they enrolled to insure their cellular phones. The defendants agreed to provide monetary relief to approximately 10.3 million class members. Defendants agreed to provide each member of the nationwide class with a Settlement Phone Card with a face value of at least $5 and to distribute a minimum of $1.5 million worth of those cards. Notice was mailed to class members by postcards, and notice was also published in periodicals and other media. Of the approximately 10.3 million class members, 118,663 people, or 1.1 percent, had filed claims at the time of the court's final approval ruling. The most recent claims report indicates that approximately 120,000 class members will receive phone cards with face value of approximately $10 to $12.[34] The court granted class counsel's request for $1.6 million in fees, which significantly eclipsed the monetary relief provided to the class members.

- In *Spillman v. RPM Pizza, LLC*, which involved allegations that the defendant pizza company violated the federal Telephone Consumer Protection Act, the court gave final approval to a class settlement that produced a claims rate of ***less than one percent***.[35] The essential components of the notice plan were print publication, internet, the settlement website and press releases. The settlement created a common fund of $9,750,000. However, at the time of the fairness hearing, only 770 claims had been filed on the settlement website, which was

32 *Id.* at 1147 (citation omitted).

33 *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1377-78 (S.D. Fla. 2007).

34 Settlement Order ¶ 48(c), ECF No. 167, *Perez v. Asurion Corp.*, No. 1:06-cv-20734-PAS (S.D. Fla.).

35 *Spillman v. RPM Pizza, LLC*, No. 3:10-cv-00349-BAJ-SCR, 2013 WL 2286076, at *2 (M.D. La. May 23, 2013).

"less than one percent of the total class."[36] By contrast, attorneys received $2.535 million in fees and costs.[37]

- In *Volz v. Coca Cola Co.*, the plaintiffs initiated a putative class action suit against Coca Cola for allegedly implying that a product called "Vitaminwater" was healthy in its advertising.[38] The parties reached a preliminary settlement in 2014 under which Coca Cola agreed to modify its vitaminwater marketing strategies. In return, plaintiffs' lawyers requested $1.2 million in fees. The nonprofit group Truth in Advertising requested leave to file an *amicus curiae* brief in opposition to final approval of the settlement, arguing that the limited injunctive relief enumerated in the agreement did not justify a fee award of $1.2 million. The organization argued that the agreement to tweak certain marketing practices in the future would provide zero benefit to those who have already been harmed and that the resulting $1.2 million fee award must therefore be invalidated. The district court was unpersuaded and granted final approval on March 30, 2015, authorizing a fee award of $1.2 million.[39]

To be sure, the settlements described above were a bonanza for plaintiffs' lawyers and offered no meaningful benefits for the class. But one obvious reason for that result, which courts have 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. In response to this growing reality in consumer class actions, some 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."[40] 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 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.[41] The following examples illustrate this trend:

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36 *Id.*

37 Final Distribution Order ¶ 7, ECF No. 245, *Spillman v. RPM Pizza, LLC*, No. 3:10-cv-00349-BAJ-SCR (M.D. La. 2013).

38 *Volz v. Coca Cola Co.*, No. 1:10-cv-00879 (S.D. Ohio 2014).

39 *See* Final Approval Order, ECF No. 70, *Volz v. Coca Cola Co.*, No. 1:10-cv-00879 (S.D. Ohio 2015).

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

41 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).

- In *In re Living Social Marketing & Sales Practice Litigation*, the court approved a consumer class action settlement involving the sale of deal vouchers with expiration dates, even though the claims rate was only ***0.25 percent***.[42] Plaintiffs alleged that defendants marketed and sold gift certificates, marked as "Deal Vouchers," with limited expiration periods in violation of a variety of federal and state laws. Defendants agreed to a $4.5 million settlement. Each class member could obtain a "one-time cash payment equal to the purchase price . . . of unredeemed, expired LivingSocial Deal Vouchers, up to a maximum of 100%." Notice of the settlement was mailed to 10.9 million class members. The court approved the settlement, even though "26,830 valid claims ha[d] been submitted, representing a mere .25% of the purported class of 10.9 million." A residual amount of $2,551,244.86 remained after payment of all claims, which was donated as *cy pres* to the National Consumers League and Consumers Union.[43]

- In *Poertner v. Gillette Co.*, the plaintiffs commenced a putative class action, alleging that defendants violated the Florida Deceptive and Unfair Trade Practices Act by deceptively claiming that their Ultra Advanced Batteries would last longer than Duracell CopperTop batteries.[44] The parties reached a settlement under which defendants agreed at the outset that they would donate $6 million worth of battery products to various unnamed charitable organizations. Defendants also agreed to pay claimants between $6.00 and $12.00 per household, depending on whether they submitted proof of purchase. Because there was no limit on the total amount payable by the defendants under the agreement, defendants could have theoretically ended up paying $50,000,000 to the class. However, a mere 55,346 claims out of 7.2 million proposed class members were filed, with a total payout of $344,850. In other words, the settlement yielded a ***0.76%*** claims rate, leaving the overwhelming majority of class members unpaid. By contrast, the plaintiffs' attorneys were awarded $5,407,724.40 in fees, plus $272,275.60 in expenses. The court justified the substantial fee award based on defendants' $6 million in-kind contribution of batteries to various charitable organizations and certain marginal injunctive relief offered by the defendants – i.e., an agreement to stop selling the Ultra batteries. On appeal, the Court of Appeals affirmed, rejecting an objector's argument that class counsel's "slice of the settlement pie [was] too large" in light of the "substantial nonmonetary benefit and the cy pres award."[45]

A 2013 decision by the Third Circuit demonstrates that the use of *cy pres* promotes class actions as primarily lawyer-driven lawsuits. In *In re Baby Products Antitrust Litigation*, the Third Circuit vacated the district court's orders approving a class action settlement consisting of a substantial *cy pres* award in an antitrust class action brought against toy retailers and baby

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42 *In re LivingSocial Mktg. & Sales Practice Litig.*, 298 F.R.D. 1, 19 (D.D.C. 2013).

43 *See* Settlement Agreement & Release § 2.3, ECF No. 24-1, *In re LivingSocial Mktg. & Sales Practices Litig.*, MDL 2254 (D.D.C.).

44 *Poertner v. Gillette Co.*, No. 6:12-cv-803-Orl-31DAB, 2014 U.S. Dist. LEXIS 116616 (M.D. Fla. Aug. 21, 2014), *aff'd*, 618 F. App'x 624 (11th Cir. 2015), *cert. denied sub nom.*, *Frank v. Poertner*, 136 S. Ct. 1453 (2016).

45 618 F. App'x at 630.

product manufacturers.[46] There, the defendant agreed to pay $35.5 million into a settlement fund, with any unclaimed funds being paid to specified charities. The trial court approved the settlement, which included payment of $14 million in attorneys' fees and expenses. In the wake of the district court's approval of the class settlement, it became clear that a measly $3 million of the settlement fund was actually claimed by class members, leaving $18.5 million to be paid to charities.[47] In other words, the attorneys received nearly ***five times*** the amount that actually ended up in the pockets of their clients. The Third Circuit reversed the class settlement, making several observations, including that *cy pres* awards reinforce the lawyer-driven nature of class actions. In particular, the Third Circuit explained that "inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys' fees, without increasing the direct benefit to the class."[48] This ruling is a refreshing confirmation that some courts are finally starting to recognize that the propriety of class settlements should be tied to what class members actually receive.[49]

Other appellate courts, however, have not been as vigilant as the Seventh Circuit on this issue. In *Lane v. Facebook, Inc.*, which arose out of alleged privacy violations by Facebook, the Ninth Circuit affirmed a *cy pres* award aimed at establishing a new charity organization called the Digital Trust Foundation ("DTF") whose purpose it is to "fund and sponsor programs designed to educate users, regulators, and enterprises regarding critical issues relating to protection of identity and personal information online through user control, and the protection of users from online threats."[50] In addition to spending $6.5 million on the foundation, Facebook agreed to pay class counsel ***$3 million***.[51] In a withering dissent, Judge Kleinfeld observed that "Facebook users who had suffered damages . . . got no money, not a nickel from the defendants . . . [while] [c]lass counsel, on the other hand, got millions."[52]

The Ninth Circuit denied a petition for rehearing *en banc*, but several judges dissented, explaining that the *cy pres* award was not "reasonably certain to benefit the class" and did not "advance the objectives of the [privacy] statutes relied upon in bringing suit."[53] Because the newly created charity has "***no*** record of service," the judges noted, its asserted commitment to "funding 'programs' regarding 'critical issues' says ***absolutely nothing*** about whether class

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46 *In re Baby Prods. Antitrust Litig.*, 703 F.3d 163 (3d Cir. 2013).

47 *Id.* at 169-70.

48 *Id.* at 173.

49 In the wake of the Third Circuit's ruling, the parties restructured the settlement to "cure the low claims rate and provide for maximum direct distribution to the class." *McDonough v. Toys "R" Us, Inc.*, 80 F. Supp. 3d 626, 636 (E.D. Pa. 2015). Under the new settlement, the parties used purchase records from Babies "R" Us to identify more than 1.1 million class members. *Id.* These individuals would not be required to submit claims or submit any proof of purchase; they would automatically receive checks following final approval of the settlement. *Id.* The new settlement also eliminated the *cy pres* provision. *Id.* The restructured settlement, which provided more direct benefits to class members, received final approval in January 2015. *Id.*

50 *Lane v. Facebook, Inc.*, 696 F.3d 811, 817 (9th Cir. 2012).

51 *Id.*

52 *Id.* at 828-29 (Kleinfeld, J., dissenting).

53 *Lane v. Facebook, Inc.*, 709 F.3d 791, 793 (9th Cir. 2013).

members will truly benefit from this settlement."[54] In addition, the dissenting judges were unconvinced that the *cy pres* award would actually advance the objectives of the privacy statutes underlying the lawsuit, most of which prohibited the "***unauthorized*** access or disclosure of private information."[55] According to these judges, because the class claims concerned "***misconduct*** by Internet companies" – and not "users' lack of 'education'" – the DTF had virtually nothing to do with the basis of the lawsuit, which was further grounds for invalidating the settlement.[56]

The decision in *Lane* appears to have made the Ninth Circuit a haven for dubious *cy pres* settlements that offer no actual benefit to class members. Indeed, relying on *Lane*, the Ninth Circuit recently affirmed a class action settlement involving supposed privacy violations by Google under analogous circumstances.[57] While the parties settled for an $8.5 million fund, none of that money will actually be distributed to any of the 129 million absent class members. Instead, all of the money remaining after the plaintiffs' attorneys are paid and administration costs are covered will be distributed to six charities that agreed to promote privacy on the Internet.[58] Notably, at least five of those charities were affiliated with either Google, class counsel or both.[59] The district court agreed with objectors that the settlement "doesn't pass the smell test"; however, it proceeded to approve the settlement because "the identity of potential *cy pres* recipients was a negotiated term included in the Settlement Agreement and therefore not chosen solely by" individuals with preexisting relationships to the charities.[60] The Ninth Circuit affirmed the lower court ruling, reasoning that there was no obligation to distribute funds to the millions of class members because such a distribution would be "*de minimis*."[61] Further, the Court of Appeals concluded that the relationships between the *cy pres* recipients and Google and class counsel were not fatal to the adequacy and fairness of the class action settlement because there was a sufficient "nexus" between the subject matter of the litigation and the privacy-education missions of the organizations.[62] The objectors recently filed a petition for rehearing *en banc*, underscoring the implications of the panel's ruling.

Given the disparate treatment of fee-centered *cy pres* settlements across the circuits, the U.S. Supreme Court may itself weigh in on this issue in the near future. While the Supreme Court declined to review the Facebook settlement in *Lane*, 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.[63] Recognizing that *cy pres* is a "growing feature" of

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54 *Id.* at 794.

55 *Id.*

56 *Id.*

57 *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737 (9th Cir. 2017).

58 *Id.* at 740.

59 *Id.* at 743-44.

60 Pet. for Rehearing *en banc* at 5, *Gaos v. Google, Inc.*, No. 15-15858 (9th Cir. filed Sept. 5, 2017) (citation omitted).

61 *In re Google*, 869 F.3d at 742 (quoting *Lane*, 696 F.3d at 820-21).

62 *Id.* at 743-44.

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

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 practice.[64] 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*.[65] The Chief Justice's reliance on that article, which theorizes that *cy pres* violates fundamental constitutional principles, could be a precursor to a serious assessment of *cy pres* by the Supreme Court. Moreover, the Advisory Committee on Civil Rules has repeatedly 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.

It bears noting that various opponents of legal reform in this area have attempted to defend fee-centered and *cy pres* settlements on the ground that they deter future misconduct by defendants.[66] But this policy argument is deeply flawed. Class actions are procedural devices designed to make litigation more efficient when certain requirements are satisfied. Using the class action device to achieve policy goals would effectively transform Rule 23 into a private attorney general statute. This would contravene the Rules Enabling Act, which states that federal procedural rules cannot be used to achieve substantive changes in the law.[67]

In any event, I am aware of no valid empirical evidence suggesting that class action settlements are in fact deterring supposed misconduct. Instead, what little evidence does exist strongly suggests that plaintiffs' lawyers are increasingly demanding named-plaintiff-only settlements that essentially pay off the lawyers so the litigation will go away. As previously discussed, according to one study of putative consumer and employee class actions filed in or removed to federal court in 2009, more than one-third of the class actions that were resolved were dismissed voluntarily by the plaintiff.[68] "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***."[69] Similarly, with regard to injunctive-relief settlements that are supposed to benefit the class, the injunctive relief is very often "window-dressing, neither necessary to stop wrongful conduct nor significantly altering the defendant's practices."[70] "The Seventh Circuit identified that problem in the settlement in the *Subway* case, concluding that the injunctive relief provisions 'd[id] not benefit the class in any meaningful way.'"[71]

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64 *Id.* at 9.

65 *See id.* (citing Redish, *supra* note 41 at 653-56).

66 *See* Fitzpatrick, *supra* note 14.

67 *See* 28 U.S.C. § 2072(a)-(b) ("general rules of practice and procedure . . . shall not abridge, enlarge or modify any substantive right").

68 Mayer Brown, *supra* note 11, at 1.

69 *Id.* (emphases added).

70 Pincus, *supra* note 13, at 16.

71 *Id.* (alteration in original) (quoting *Subway*, 869 F.3d at 557). When used properly, class actions can be an efficient mechanism for obtaining meaningful injunctive relief – for example, in civil rights or environmental cases in which a company changes its practices in a meaningful manner to the benefit of the class. The problem is that class actions are often used improperly, as elaborated in text.

In sum, consumers in many class action lawsuits are not receiving the benefits of these kinds of lawsuits. Rather, the bulk of the money ends up going to lawyers and uninjured third-party organizations, or both. Given this troubling trend, Congress might consider legislation mitigating the problems associated with *cy pres* and fee-focused settlements. Various provisions of FICALA attempt to address this nettlesome issue. For example, one provision would require class counsel to affirmatively demonstrate that it is administratively feasible to distribute monetary relief to a "substantial majority of class members," while another provision would tether fee awards to the amount of money actually distributed to the class members.

That latter provision is certainly no radical change. Indeed, the Federal Judicial Center's own Manual for Complex Litigation has for many years recommended that in class settlements, courts wait to determine attorneys' fees until class members have made claims and been paid, all to ensure a rational relationship between the amount of the fee award and the benefits actually received by class members:

> Compensating counsel for the actual benefits conferred on the class members is the basis for awarding attorney fees. The "fundamental focus in the result actually achieved for class members." ***That approach is premised on finding a tangible benefit actually obtained by the class members. . . .***
>
> In cases involving a claims procedure or a distribution of benefits over time, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, ***the fee award should be based only on the benefits actually delivered.*** It is common to delay a final assessment of the fee and award and to withhold all or a substantial part of the fee until distribution is complete.[72]

Unfortunately, most federal courts are not following these recommendations, as illustrated by the settlement cases previously discussed. Instead, those courts tend to grant fee awards before class benefits are distributed. They determine the fee award based on a false premise that all available funds will be claimed by and paid to class members, making no effort to confirm that assumption. FICALA would effectively codify the approach recommended by the Manual for Complex Litigation.

B. Third-Party Litigation Funding Is Also Harmful To Consumers.

Another problematic trend in aggregate litigation is TPLF – in which companies "invest" in a lawsuit by providing funding in return for a share of any proceeds. Notably, funders often enter into an agreement with plaintiffs' lawyers that is not disclosed to class members or to the court, ***even though the agreement typically requires that portions of any recovery by the class be paid to the funder***. The increasing prevalence of TPLF arrangements in class actions raises serious questions about the named plaintiffs' adequacy of representation, as funders seek to

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[72] Manual for Complex Litigation, Fourth § 21.11 (2004) (citations omitted; emphases added); *see also In re Baby Prods. Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013) (invalidating settlement where attorneys received nearly ***five times*** the amount obtained by class members; determining "actual [class] benefit" "may require [district court] 'to delay a final assessment of the fee award . . . until the distribution process is complete") (citation omitted).

maximize their own pecuniary interest in the litigation through their control of key litigation decisions.

This problem is evidenced by *Gbarabe v. Chevron Corp.*, a putative class action arising out of an explosion on a drilling rig off the coast of Nigeria. The funding agreement in *Gbarabe*, which was ultimately submitted to the presiding court pursuant to court order, contains several key provisions that suggest the funder's desire to influence the course of the litigation. Specifically, the agreement refers to a "Project Plan" for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only identified experts.[73] The agreement expressly prohibits the lawyers from engaging any co-counsel or experts "without [the funder's] prior written consent[.]"[74] Further, the agreement requires that counsel "give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim."[75]

Gbarabe underscores that the issue of funder control over litigation strategy is particularly acute in putative class actions. As Judge Susan Illston explained in ordering the disclosure of the TPLF arrangement at issue in that litigation, the "funding agreement is relevant to the adequacy [of representation] determination [required for class certification] and should be produced to [the] defendant."[76] Judge Illston's concerns proved well-founded. In addition to the provisions described above, the funding agreement provides that the lawyers shall endeavor to "recover the ***maximum possible*** Contingency Fee,"[77] a requirement that may conflict with class member interests. Further, counsel agree that the funder will be repaid its $1.7 million investment in the case by way of a "success fee" of six times that amount ($10.2 million) to be paid from attorney's fees – ***plus*** 2% of the total amount recovered by the putative class members. Thus, apparently without their knowledge or approval, putative class members will have to hand over part of their recovery to the litigation funder.

Another example of substantial control by a funder was the elaborate funding agreement utilized in litigation against Chevron filed in an Ecuadorian court alleging environmental contamination in Lago Agrio, Ecuador. The litigation was financed in part by $4 million from Burford Capital, one of the largest TPLF companies in the world. The funding agreement at issue in that case "provide[d] control to the Funders" through the "installment of 'Nominated Lawyers'" – lawyers "selected by the Claimants with the ***Funder's approval***."[78] The law firm of Patton Boggs LLP had been selected to serve in that capacity, and the execution of engagement

73 Litigation Funding Agreement ("*Gbarabe* Litigation Funding Agreement"), Ex. 13, §§ 1.1, 10.1, ECF No. 186-4, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI (N.D. Cal. Sept. 16, 2016).

74 *Id.* § 10.1.

75 *Id.* § 10.2.4.

76 *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594, at *6 (N.D. Cal. Aug. 5, 2016).

77 *Gbarabe* Litigation Funding Agreement § 3.1.3 (emphasis added).

78 Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (emphasis added).

agreements between the claimants and Patton Boggs, "a firm with close ties to the Funder, [was] a condition precedent to the funding."[79] "In addition to exerting control, it [was] clear that the Nominated Lawyers, who among other things control[led] the purse strings and serve[d] as monitors, supervise[d] the costs and course of the litigation."[80]

These kinds of provisions inappropriately vest the funder with substantial control over key litigation decisions, undermining the primacy of the attorney-client relationship. In addition, these arrangements also undermine the adequacy of representation requirement under Rule 23, which requires that attorneys adequately represent the interests of class members in order to advance a case as a class action. One way to ensure that these concerns are addressed is to require disclosure of TPLF arrangements at the outset of civil litigation. Indeed, the Northern District of California has now issued a rule mandating the disclosure of TPLF in all class and representative actions,[81] providing an important precedent for making the practice more transparent.

C. A Number Of Courts Are Employing A Lax Approach To Class Certification.

1. Courts Continue To Embrace "No Injury" Class Actions.

Another troubling aspect of federal class actions is the continued tendency of some federal courts to certify "no injury" classes – lawsuits brought by named plaintiffs who allegedly experienced a problem with a product or service and then seek to represent every other individual who purchased the product or paid for the service, ***regardless of whether they experienced any problems with it***. The most notorious of these cases have been the "moldy washer" cases in which a few plaintiffs who claim their front-load washing machines exhibited odors have sought to bring class actions on behalf of all owners of the machines at issue, even though most consumers who purchase these machines never experience the supposed problem.

For example, in *Glazer v. Whirlpool Corp.*, purchasers of the defendant's front-load washing machine, the Duet, alleged that the washing machine's design led to the growth of mold and mildew in the machine.[82] The defendant argued that the class was overbroad, as the definition included Duet owners who had not experienced a mold problem and other purchasers who were pleased with their Duets, unlike the named plaintiffs. Indeed, a majority of the class members did not have a mold problem with their washing machines. The Sixth Circuit issued two decisions in the case, both times holding that all class members, including those who had not experienced a mold problem, could recover economic damages as a class for allegedly paying an inflated price for their washing machines.

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79 *Id.*

80 *Id.* at 473.

81 Ben Hancock, *Northern District, First in Nation, Mandates Disclosure of Third-Party Funding in Class Actions*, The Recorder, Jan. 23, 2017, http://www.therecorder.com/id=1202777487488/Northern-District-First-in-Nation-Mandates-Disclosure-of-ThirdParty-Funding-in-Class-Actions?slreturn=20170101100404.

82 *Glazer v. Whirlpool Corp.*, 722 F.3d 838, 844 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014).

Likewise, in *Butler v. Sears, Roebuck & Co.*, the plaintiffs, purchasers of washing machines sold by Sears, brought a class action alleging that defects in their front-load washing machines caused mold growth and sudden stoppages.[83] The Seventh Circuit held that defendant's argument that "most members of the plaintiff class did not experience a mold problem" was not an argument against certification, but rather an argument in favor of certifying the class and then "entering a judgment that will largely exonerate Sears."[84] Essentially, the court concluded that whether large swaths of the absent class members experienced any problems with their allegedly defective washing machines was irrelevant to class certification. And the court's cavalier suggestion that the defendant roll the dice on a class trial is simply not realistic for many companies that cannot afford to risk bankruptcy in a class trial on principle.[85]

And in *Wolin v. Jaguar Land Rover North America, LLC*, the plaintiffs sought certification of a class of purchasers of Jaguar vehicles that contained a defect resulting in premature tire wear.[86] The district court had refused to certify the class, in part because a majority of the class members had not experienced the alleged problem with their vehicles. The Ninth Circuit reversed, however, holding that whether class members' products manifested the alleged defect was a merits issue irrelevant to the question of class certification.

As these and other cases illustrate, named plaintiffs whose products malfunctioned or exhibited an alleged defect are proposing – and some courts are certifying – class actions encompassing a bevy of class members whose products performed as intended. These overbroad class actions are problematic for a variety of reasons. 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. Under the Rules Enabling Act, a rule of procedure (like Rule 23, which governs class actions) may not "abridge, enlarge or modify any substantive right,"[87] which is precisely what overbroad class actions are doing in courts throughout our country. And third, these suits almost always settle because of the exorbitant costs to defendants of litigating these massive lawsuits. And 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. Thus, the only people who benefit are the lawyers who brought them. In short, overbroad class action lawsuits undermine justice and put a strain on our economy, on productivity and on innovation.

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83 *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 360-61 (7th Cir. 2012), *cert. granted*, *judgment vacated*, 133 S. Ct. 2768 (2013), *judgment reinstated*, 727 F.3d 796 (7th Cir. 2013) and *cert. denied*, 134 S. Ct. 1277 (2014).

84 *Id.* at 362.

85 As Justice Ginsburg recognized, "[e]ven in the mine-run case, a class action can result in 'potentially ruinous liability.' A court's decision to certify a class accordingly places pressure on the defendant to settle even unmeritorious claims." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (citation omitted).

86 *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1170 (9th Cir. 2010).

87 28 U.S.C. § 2072(b); *see also In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1105 (D.N.M. 2012) (Rule 23 does not create a "free-standing device to do justice").

The House first sought to eliminate these unfair and abusive class actions by enacting the Fairness in Class Action Litigation Act of 2016 (H.R. 1927), recognizing that a named plaintiff in a class action cannot be "typical" of absent class members as required by Rule 23 if he or she experienced a problem that the absent class members did not. This important provision is also a key component of the 2017 version of FICALA, which passed the House in March of this year. While some courts have properly enforced the typicality requirement,[88] many others have not, underscoring the need for legislation in this area.

2. Class Action Standards Are Being Circumvented Through The Use Of "Issues Classes."

Rule 23, and the Supreme Court's recent interpretations of the Rule in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend*, recognize that class actions are an exception to the ordinary rules of litigation, and that the class action device may be used only when the Rule's requirements are satisfied, including the requirement that issues common to all class members predominate over individualized issues that must be resolved on a plaintiff-by-plaintiff basis. However, some lower courts, encouraged by plaintiffs' lawyers, are circumventing Rule 23 and the Supreme Court's recent rulings by permitting the certification of so-called "issues classes" in which a single legal or factual issue may be determined even though the claims are dominated by individualized issues.

The genesis of "issues classes" is Federal Rule of Civil Procedure 23(c)(4), which provides that, "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues."[89] Plaintiffs' attorneys have seized on this language, arguing that it permits courts to identify particular questions that are common to a proposed class – for example, whether a product has a design defect – and order a classwide trial that would resolve only those inquiries. This reading of the rule would allow courts to authorize class actions even where the plaintiffs' claims involve highly individualized questions that cannot possibly be answered in a classwide setting based on common evidence.

Historically, courts have been skeptical of such an approach on the ground that certification of issues for class treatment where predominance is lacking as to the case as a whole is inconsistent with Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members."[90] Accordingly, some courts, including the U.S. Court of Appeals for the Fifth Circuit, have held that Rule 23(c)(4) is a mere "housekeeping rule" that may only be applied if predominance is first satisfied as to the entire cause of action.[91] As the Fifth Circuit explained in *Castano v. American Tobacco Co.*,

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[88] *See, e.g.*, *Kachi v. Natrol, Inc.*, No. 13cv0412 JM(MDD), 2014 U.S. Dist. LEXIS 90987, at *14 n.2 (S.D. Cal. June 19, 2014) (concluding that the proposed class was "woefully overbroad and c[ould not] be maintained as proposed because it incorporate[d] class members who suffered injury and those that did not"); *Burton v. Chrysler Grp. LLC*, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720, at *20-21 (D.S.C. Dec. 21, 2012) (proposed nationwide class "would . . . include those persons and entities who never experienced problems" with their vehicles; this "problem . . . highlights the lack of . . . typicality among putative class members").

[89] Fed. R. Civ. P. 23(c)(4).

[90] Fed. R. Civ. P. 23(b)(3).

[91] *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996).

"[r]eading [R]ule 23(c)(4) as allowing a court to sever issues . . . would eviscerate the predominance requirement of [R]ule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended."[92]

More recently, however, some federal courts have embraced Rule 23(c)(4) as a means to facilitate class certification in cases where individualized issues would otherwise predominate. This trend is evident in *Butler v. Sears, Roebuck & Co.* and *Glazer v. Whirlpool Corp.*, two cases (summarized above) involving allegations that defendants manufactured or sold front-load washing machines with a design defect that makes them prone to accumulation of mold.[93] 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 U.S. Courts of Appeals for the Sixth Circuit (in *Glazer*) and Seventh Circuit (in *Butler*) concluded that class certification was nevertheless appropriate because the question of defect could be resolved in a common trial with all other issues – ***including the critical question whether the class members actually experienced a problem with their machines*** – to be addressed (if at all) in later individualized proceedings. In the wake of these decisions, other courts have followed suit, often citing *Butler* and *Glazer* as the leading authority on the propriety of the issues-class approach.[94]

The lax approach to "issues" class certification embraced by the Sixth and Seventh Circuits presents myriad problems. For one thing, 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.[95] An "issues" phase that focuses exclusively on a product's alleged defect, for example, does not tell the whole story because although the plaintiff himself might complain of a problem with his or her product, the jury will not hear from the many absent class members who are entirely satisfied with their product and have never encountered the alleged defect. 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."[96]

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92 *Id.*

93 *Glazer*, 722 F.3d at 844; *Butler*, 727 F.3d at 798.

94 *See, e.g.*, *Leonard v. Sears, Roebuck & Co.*, 115 F. Supp. 3d 934, 940 (N.D. Ill. 2015) (relying on *Glazer* and *Butler* in certifying liability-only class of purchasers of allegedly defective washing machines even though many proposed class members' products did not manifest the mold defect); *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600, 618 (D. Kan. 2014) (relying on *Butler* in certifying class of purchasers of allegedly defective railing products, many of which did not manifest the defect, and holding that "the more appropriate course of action would be to bifurcate a damages phase," which "is consistent with Rule 23(c)(4)") (citation omitted); *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 244 (N.D. Cal. 2014) (relying on *Glazer* and *Butler* in certifying liability-only class of purchasers of smoothies deceptively advertised as "all natural").

95 *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).

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

A final problem with the issues-class approach embraced by the Sixth and Seventh Circuits is that it is highly inefficient.[97] This is so because 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 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.[98]

For these reasons, liberal use of issues-class certification will likely increase the filing of class actions and promote settlements in amounts that greatly exceed the real problem posed by the defendant's alleged conduct. For example, where a plaintiffs' attorney previously might have thought twice about bringing a class action based on an alleged product defect that affected only a handful of consumers, there would be no reason not to bring such a case if an issues class will likely be certified, exerting intense pressure on the defendant to settle.[99] And any ensuing settlement is likely to overcompensate because such settlements are generally premised on the notion that the alleged defect affected the entire class, but only consumers who have encountered actual problems with the product – often only a small fraction of the class – seek to participate in the settlement. And because the defendants must pay for these settlements through future revenue, such settlements will often result in higher product prices, arguably leaving consumers worse off than if no class (or if a more limited class) had been certified.[100]

In short, certain federal courts are circumventing the Supreme Court's "rigorous" approach to class certification by misperceiving the import of Rule 23(c)(4) – a mere "housekeeping rule" – to certify classes fraught with individualized and complex issues. This abuse too should be addressed by Congress.

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97 *See In re Genetically Modified Rice Litig.*, 251 F.R.D. 392, 400 (E.D. Mo. 2008) (refusing to certify issues class because it would "lead to procedural difficulties," "would not resolve any individual plaintiff's claims," and "would do little if anything to increase the efficiency of this litigation").

98 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.

99 As the Supreme Court has recognized, "even a small chance of a devastating loss" inherent in most decisions to certify a class produces an "in terrorem" effect that often forces settlement independent of the merits of a case. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Castano*, 84 F.3d at 746 ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.") (citation omitted).

100 *See Supreme Laundry List*, Wall St. J., Oct. 9, 2012 ("Without the governor of common injury required by *Wal-Mart*, product liability suits and consumer class actions become the tool of plaintiffs['] lawyers who gin up massive claims in the hope that companies will settle").

3. Appellate Review Of Class Certification Orders Is Increasingly Rare, Allowing Erroneous Class Certification Rulings To Stand.

One explanation for the continued filing of meritless class actions is the rarity with which class certification decisions receive interlocutory review under Fed. R. Civ. P. 23(f). In 1998, subdivision (f) was added to Rule 23, which allows for permissive interlocutory appeal of orders denying or granting class certification.[101] A driving impetus behind this amendment was to alleviate the coercive effect of class certification rulings on defendants. As the Advisory Committee's notes accompanying this provision make clear, "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[102] That is why federal judges consistently characterize class certification as "in effect, the whole case."[103] As one commentator put it, "certification is the whole shooting match" in most cases, and defendants faced with carelessly certified, meritless lawsuits are often pressured into settling claims regardless of their merit.[104] Thus, meaningful interlocutory review of improvidently certified class actions is an essential safeguard against unwarranted class settlements.

The available data reveal that federal courts are growing increasingly reluctant to grant 23(f) review. A study of class certification appeals filed over seven years (from October 31, 2006 through December 31, 2013) found that ***less than 25%*** of the petitions to appeal were granted – a one-third decline in the grant rate from the prior eight-year period.[105] And the grant rate varied dramatically among the circuits, from 5.4% to 46.4%.[106]

Promoting correctness and uniformity of class certification decisions is essential given the critical role of certification in these lawsuits, and the differing treatment by appellate courts based on geographic location is unacceptable. Unless class certification decisions are made automatically appealable (or at least appealable with greater frequency), federal appeals courts are likely to continue their infrequent grant of 23(f) petitions. As a result, plaintiffs' lawyers will continue to mount class actions of enormous scope and questionable merit in the hopes that district court judges sympathetic to their position will certify such actions, forcing defendants to settle before trial, and that lax class certification rulings will thereby evade judicial review.

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101 *See* Fed. R. Civ. P. 23.

102 Fed. R. Civ. P. 23 advisory committee's note to 1998 amendments.

103 Hon. Diane Wood, Circuit Judge, Remarks at the FTC Workshop: Protecting Consumer Interests in Class Actions (Sept. 13-14, 2004), in Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate," 18 Geo. J. Legal Ethics 1197, 1213 (2005).

104 *See* David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions*, LJN'S Product Liability Law & Strategy (Feb. 2009).

105 *See* John H. Beisner, Jessica D. Miller & Geoffrey M. Wyatt, Skadden, Arps, Slate, Meagher & Flom LLP, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* at 1 (Apr. 2014), https://www.skadden.com/insights/study-reveals-us-courts-appeal-are-less-receptive-reviewing-class-certification-rulings.

106 *Id.*

D. <u>The Current System Has Generated Abusive Billion-Dollar Claims Based On Aggregated Statutory Damages.</u>

Another abusive feature of current federal class action practice is the aggregation of statutory damages in numerous cases that bear no rational relationship to the amount of harm inflicted on the proposed class members. When Congress creates a private cause of action, it sometimes provides that a plaintiff can recover either actual damages or a fixed amount of "statutory damages." Statutory damages, as the Supreme Court has explained, provide "some guaranteed damages, as a form of presumed damages not requiring proof of amount."[107] "It is . . . common knowledge that in statutory damages cases, courts have all noticed that the class recovery may be unrelated to any actual harm to the class."[108]

The Telephone Consumer Protection Act ("TCPA"), for example, sets statutory damages at $500 per violation.[109] "Just considering the base damages amount of $500 per violation available under the TCPA, it is easy to see how those damages can multiply, especially when the damages are set at a flat $500 for prohibited autodialed or prerecorded calls or facsimiles"[110]:

> Twenty informational calls made in error over the course of two years to the cell phone of someone with whom the company actually has no relationship . . . can turn into a claim seeking $10,000 in statutory damages; one promotional text message sent in minutes to 80,000 people who used cell phones to place earlier orders for services could lead to a class allegation that the company is liable for $40 million in statutory damages; a collections campaign making three total call attempts over the course of a week to each of the 2 million customers who failed to pay their bills on time could spawn a class claim seeking *$3 billion* in statutory damages[.][111]

More than a dozen federal statutes have similar provisions, including the Fair Credit Reporting Act ("FCRA"), the Video Privacy Protection Act, the Real Estate Settlement Procedures Act, and the Fair and Accurate Credit Transactions Act.

Statutory damages make sense in individual actions. But plaintiffs' lawyers have seized on the tactic of bringing mammoth class actions seeking statutory damages on behalf of hundreds of thousands or millions of alleged class members. Indeed, a recent study of TCPA cases revealed that of the 3,121 TCPA cases filed between August 1, 2015 and December 31, 2016, "over 1,000 of the cases examined – more than one-third of the total lawsuits reviewed – were

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107 *Doe v. Chao*, 540 U.S. 614, 625 (2004).

108 1-III Federal Class Action Deskbook § 3.24 (2017).

109 47 U.S.C. § 227(b)(3).

110 Becca J. Wahlquist, *The Juggernaut of TCPA Litigation*, at 2, U.S. Chamber Institute for Legal Reform (October 2013), http://www.instituteforlegalreform.com/uploads/sites/1/TheJuggernautofTCPALit_WEB.PDF.

111 *Id.*

brought as ***nationwide*** class actions."[112] One federal judge recently noted in a TCPA case that "a $500 award for a phone call, which could be trebled up to $1,500, is wholly disproportionate to the harm suffered," raising the question of whether aggregating such a disproportionate remedy on a classwide basis violates a defendant's due process rights.[113]

"[M]ost courts confronted with the issue of grossly excessive statutory damages sought in class actions have engaged in a quintessential judicial punt: declining to consider any due process limit until after the class has been certified and a verdict entered."[114] "As a practical matter, this means that the court will never reach the due process issue."[115] This is so because the risk of potentially ruinous liability forces defendants to settle, even when the underlying claim is entirely meritless.[116] "When assessing how quickly the damages can pile up, it becomes clear why so many companies have been settling TCPA lawsuits early on, for significant millions of dollars, rather than risk the fight (even with legitimate defenses) against claims alleging literally billions of dollars in statutory damages."[117] In the past few years alone, companies and financial institutions such as AT&T Mobility,[118] Bank of America,[119] Capital One,[120] Caribbean Cruise Line[121] and US Coachways[122] have been forced to settle enormous TCPA claims for millions of dollars. Similarly, national charter bus company US Coachways recently agreed to pay $49.9 million to settle claims seeking between $500 and $1,500 for each

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112 Becca Wahlquist, *TCPA Litigation Sprawl*, U.S. Chamber Institute for Legal Reform, at 3 (August 2017) (emphasis added).

113 *Hannabury v. Hilton Grand Vacation Co., LLC*, 174 F. Supp. 3d 768, 776 (W.D.N.Y. 2016).

114 Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 104 (2009).

115 *Id.*

116 *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.").

117 Wahlquist, *supra* note 112, at 3; *see also, e.g.*, *Mey v. Frontier Commc'ns Corp.*, No. 3:13-cv-01191 (MPS) (D. Conn. Jan. 26, 2017) (order granting preliminary approval of settlement for $11 million); Pl.'s Mot. for Prelim. Approval of Class Settlement, *ARcare, Inc. v. Cynosure, Inc.*, No. 1:16-cv-11547-DPW (D. Mass. Jan. 26, 2017) (motion seeking preliminary approval of settlement for $16 million); Pl.'s Mot. for Preliminary Approval of Class Settlement, *Melito v. Am. Eagle Outfitters, Inc.*, No. 1:14-cv-02440-VEC (S.D.N.Y. Dec. 21, 2016) (motion seeking preliminary approval of settlement for $14.5 million).

118 *Hageman v. AT&T Mobility LLC*, No. CV 13-50-BLG-RWA, 2015 WL 9855925 (D. Mont. Feb. 11, 2015) (approving TCPA settlement for $45 million).

119 *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358 (N.D. Cal. Aug. 29, 2014) (approving TCPA settlement for $32 million).

120 *In re Capital One Tel. Consumer Protection Act Litig.*, 80 F. Supp. 3d 781 (N.D. Ill. 2015) (approving TCPA settlement for $75.5 million).

121 Pl.'s Mot. for Prelim. Approval, *Aranda v. Caribbean Cruise Line*, No. 1:12-cv-04069 (N.D. Ill. filed Sept. 26, 2016) (motion seeking approval of TCPA settlement for an amount between $56 million and $76 million).

122 *Bull v. US Coachways, Inc.*, No. 1:14-cv-05789 (N.D. Ill. Nov. 9, 2016) (order approving TCPA settlement for $49.9 million).

of the nearly 400,000 text messages it allegedly sent consumers soliciting business.[123] As one court put it, aggregating TCPA damages to award billions in liability goes "well beyond what Congress established."[124]

Importantly, the data show that these lawsuits rarely involve claims brought against spam telemarketers/texters or blast faxers that reach out to millions of unknown persons in an attempt to get someone to engage with them.[125] Rather, the lawsuits . . . for the most part[] seek aggregated statutory damages from legitimate American companies not engaged in the kinds of cold-call telemarketing the TCPA was designed to limit."[126] For example, in a 2016 decision, the Seventh Circuit upheld a verdict against a small digital hearing aid company located in Terra Haute, Indiana, for 32 facsimile ads.[127] While the Seventh Circuit affirmed the class action verdict, it noted the growing abuse of TCPA litigation: "We doubt that Congress intended the TCPA, which it crafted as a consumer-protection law, to become the means of targeting ***small businesses***. Yet in practice, the TCPA is nailing the little guy, while plaintiffs' attorneys take a big cut."[128]

Congress has recognized the problem of disproportionate statutory damages under some statutes, and placed limits on the amount of statutory damages that may be recovered in class actions under the Fair Debt Collection Practices Act (lesser of $500,000 or 1% of the debt collector's net worth),[129] and the Truth in Lending Act (lesser of $1 million or 1% of the defendant's net worth).[130] To prevent the rampant abuse now underway, Congress should consider imposing similar limits on recovery of statutory damages in any class action.

E. **Plaintiffs' Lawyers Are Increasingly Using Discovery To Coerce Unjustified Settlements.**

The discovery process imposes huge costs on American businesses – particularly because of the astronomical costs associated with discovery of electronic information, such as emails. Further, the reality for most civil litigation is that the defendants' obligation to bear these exorbitant discovery costs incentivizes plaintiffs to serve burdensome discovery requests on defendants with zero downside risk to themselves. The dramatic growth in electronic discovery costs over the past several years in U.S. commercial litigation is undeniable. In a 2012 case

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123 *See Bull v. US Coachways, Inc.*, No. 1:14-cv-05789 (N.D. Ill. July 29, 2014) (order granting preliminary approval of settlement); Compl., *Bull v. US Coachways, Inc.*, No. 1:14-cv-05789 (N.D. Ill. July 29, 2014).

124 *Birchmeier v. Caribbean Cruise Line*, 302 F.R.D. 240, 256 (N.D. Ill. 2014) (citation omitted).

125 Wahlquist, *supra* note 112, at 3 (citation omitted).

126 *Id.*

127 *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935 (7th Cir. 2016), *cert. denied*, 137 S. Ct. 200 (2016).

128 *Id.* at 941 (emphasis added).

129 15 U.S.C. § 1692k(a)(2)(B).

130 15 U.S.C. § 1640(a)(2)(B).

study of Fortune 500 companies, the RAND Institute found that the median total cost for electronic discovery among participants totaled $1.8 million per case.[131]

And these costs are asymmetric: defendants typically are subject to gigantic discovery costs because they are large organizations possessing vast amounts of data; plaintiffs, by contrast, have little information and therefore are subject to a very small financial burden. As Professor Martin Redish has explained, "the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request."[132] And because defendants seek to avoid these exorbitant costs, discovery is all too often used as a weapon to coerce settlement of claims, regardless of their merit.[133] Even the Supreme Court has recognized this problem, lamenting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" trial.[134]

For this reason, discovery conducted before a motion to dismiss or a motion to strike class allegations is decided is inherently unfair. Indeed, some federal courts routinely stay discovery and other pre-trial proceedings pending the resolution of a potentially dispositive motion to dismiss.[135] Unfortunately, however, other federal courts have taken a contrary approach, rejecting motions to stay even in cases where the defendant has asserted that responding to discovery during the pendency of a motion to dismiss would require it to "expend 'dozens and dozens of hours searching for responsive information and documentation while incurring tens of thousands of dollars in legal costs.'"[136] Forcing defendants to undertake such

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131 *See* Nicholas Pace & Laura Zakaras, Rand Institute for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, 17 (2012); *see also* Laura Hunt, *Trending: Proportionality in Electronic Discovery in Common Law Countries and the United States' Federal and State Courts*, 43 U. Balt. L. Rev. 279, 279 (2014) (similar).

132 Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603 (2001).

133 *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 549 (2010) ("Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended 'fishing expeditions' in the hope of coercing a quick settlement.").

134 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

135 *See, e.g.*, *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, No. 05-4294 (DRH) (ETB), 2006 U.S. Dist. LEXIS 94944, at *4-6 (E.D.N.Y. Mar. 31, 2006) (staying discovery where "the defendants raise substantial issues with regard to the viability of plaintiffs' complaint as against defendants CRH and Tilcon, Inc., and defendants' arguments do not appear to be frivolous or unfounded"); *In re Graphics Processing Units Antitrust Litig.*, MDL No. 1826, 2007 U.S. Dist. LEXIS 57982, at *16, *24 (N.D. Cal. July 24, 2007) (granting motion to stay discovery in putative class action and other cases pending resolution of motion to dismiss because "[i]f . . . the complaint proves to be so weak that any discovery at all would be a mere fishing expedition, then discovery likely will be denied"); *Dresser v. MEBA Med. & Benefits Plan*, No. 08-2662 SECTION "A" (3), 2008 U.S. Dist. LEXIS 55356, at *5 (E.D. La. July 10, 2008) (staying discovery because if motion to dismiss is granted, the "discovery . . . would be . . . for naught"); *Thompson v. Ret. Plan for Employees of S.C. Johnson & Sons, Inc.*, No. 07-CV-1047, 2008 U.S. Dist. LEXIS 96902, at *31 (E.D. Wis. Nov. 14, 2008) (staying discovery in putative class action, reasoning that "any discovery conducted prior to issuance of [] order [dismissing the complaint] would constitute needless expense and a waste of attorney time and energy").

136 *Red Barn Motors, Inc. v. Cox Enters., Inc.*, No. 1:14-cv-01589-TWP-DKL, 2016 U.S. Dist. LEXIS 57876, at *7 (S.D. Ind. May 2, 2016) (citation omitted); *see also, e.g.*, *Nye v. Burberry Ltd.*, No. 2:16-cv-00702-RFB-CWH,

burdensome actions before a case has even withstood a motion to dismiss is contrary to Supreme Court precedent holding that courts must carefully scrutinize motions to dismiss because "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct."[137]

Notably, Congress addressed this very same issue twenty years ago in the context of securities class actions under the Private Securities Litigation Reform Act ("PSLRA"). After finding that "[t]he cost of discovery often forces innocent parties to settle frivolous securities class actions,"[138] it enacted a provision limiting discovery prior to a decision resolving the legal sufficiency of the complaint in any putative securities class action.[139] The rationale underlying the PSLRA applies with equal force to class actions outside the securities context. Indeed, in a recent Seventh Circuit decision affirming the dismissal of a class action suit alleging that the City of Chicago unlawfully refused to release judgment liens until debtors paid attorneys' fees and costs, the Court of Appeals recognized that "nuisance" settlements are "a persistent problem for defendants in class action lawsuits" in general.[140] Because the concerns about vexatious discovery requests being used to coerce unjustified settlements applies more broadly to all class actions, Congress should consider enacting the same provision for class actions generally.

II. MASS TORT CASES ARE RIFE WITH SIMILAR ABUSES.

Over the past decade, it has also become clear that certain abusive aspects of mass tort litigation outside the class action context are ripe for reform. In particular, a growing number of federal courts have allowed plaintiffs' lawyers to evade federal diversity jurisdiction by joining the claims of a single non-diverse plaintiff with those of numerous diverse plaintiffs. This problem has been alleviated to some extent by the Supreme Court's recent ruling in *Bristol-Myers Squibb Co. v. Superior Court of California*, but it remains to be seen whether federal courts will uniformly apply *BMS* in a way that limits plaintiffs' ability to engage in fraudulent joinder.

Other problems abound as well. Some courts have permitted plaintiffs' lawyers to circumvent federal diversity jurisdiction through the practice of fraudulent joinder, in which a plaintiff drags a local in-state or non-diverse defendant into a lawsuit knowing full well that he or she has no reasonable possibility of prevailing against that nominal defendant under the applicable state law. In addition, plaintiffs' lawyers have had great success in using federal MDL proceedings as a vehicle for racking up meritless and poorly investigated lawsuits solely to pressure defendants into coming to the settlement table. These tactics, coupled with the

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2016 U.S. Dist. LEXIS 146848, at *10-11 (D. Nev. Oct. 24, 2016) (denying motion to say discovery under "stringent" standard); *Waste Away Consulting, LLC v. Environmental Waste Solutions*, No. 16-389-JWD-RLB, 2016 U.S. Dist. LEXIS 148009, at *4 (M.D. La. Oct. 26, 2016) (denying motion to stay discovery because the motion "does not identify any discovery conducted or sought by Plaintiff that would subject Defendants to ***undue burden*** or expenses.") (emphasis added).

137 *Twombly*, 550 U.S. at 588 n.8; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions").

138 H.R. Rep. No. 104-369 (1995) (Private Securities Litigation Reform Act).

139 15 U.S.C. § 78u-4(b)(3)(B).

140 *Manistee Apartments*, 844 F.3d at 635.

increasing tendency of MDL judges to issue questionable interlocutory rulings that are not immediately appealable, have made MDL proceedings prone to abuse.

A. Plaintiffs' Lawyers Have Created Nationwide Mass Tort Proceedings In New Magnet State Courts.

One troubling trend that has plagued mass tort cases outside the class action context is the improper joinder of dissimilar product liability claims to evade federal diversity jurisdiction. By creatively adding parties to block a defendant's right of removal, plaintiffs' lawyers have managed to establish what are effectively nationwide mass tort proceedings in state courts that compete with federal MDL proceedings.[141]

Here's how this stratagem typically works. Plaintiffs' lawyers find one plaintiff from a state that has plaintiff-friendly state courts, such as Missouri. Then, they file a lawsuit in state court in St. Louis that includes the Missouri plaintiff, dozens of plaintiffs from around the country, and one plaintiff from the same state as the defendant (in pharmaceutical cases, that is often New Jersey). There are two reasons why plaintiffs join all these cases together. First, it allows them to argue that as long as one plaintiff and one defendant are from the same state, the case must remain in state court because there is no federal diversity jurisdiction. Second, by joining out-of-state plaintiffs with in-state plaintiffs, plaintiffs have traditionally been able to avoid the doctrine of personal jurisdiction, which normally limits a plaintiff's lawsuit to two states: the state where she lives and the state where the defendant is based. As long as these mass joinder actions include fewer than 100 people and are therefore not subject to CAFA, it has been extremely difficult for defendants to remove the cases to federal court, and they have been "hometowned" over and over in state courts that apply plaintiff-friendly evidentiary rules and tilt the scales in favor of plaintiffs in pretrial rulings with no regard to whether the plaintiffs actually have any connection to the state where they sued.[142]

Defendants have basically made two types of arguments in seeking to remove these cases to federal court. First, they have argued that the plaintiffs are "fraudulently misjoined" and that federal jurisdiction should separately be considered for each individual plaintiff. Essentially, the gist of this argument is that because it would be improper to try the product liability claims of dozens of plaintiffs in one trial, these are sham joinder cases. Unfortunately, this argument has been rejected by most courts, including the Eighth Circuit, which covers Missouri, where most of the problems have arisen.[143]

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[141] *See* Neil Goldberg, Matthew S. Lerner & Brendan T. Fitzpatrick, *Combating Artful Pleadings Designed to Destroy Diversity* at 14, For the Defense (May 2015) ("Plaintiffs in mass-tort and product liability litigation frequently engage in procedural gamesmanship and engineer their pleadings for the sole purpose of frustrating the defendants' statutory right of removal.").

[142] For instance, Missouri Appeals Court Judge Kurt S. Odenwald recently observed that out-of-state plaintiffs flock to St. Louis City court because the "jury pool [is] much more friendly, and they see that the requirements for expert-witness testimony in Missouri is less than [that required by other jurisdictions under] *Daubert*." Oral Argument Tr. 52:13-18, *Fox v. Johnson & Johnson*, No. ED104580 (Mo. Ct. App. May 10, 2017).

[143] *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613, 617-18 (8th Cir. 2010).

The second argument defendants have made is that ***before*** deciding whether they have federal subject matter jurisdiction, federal courts should consider the personal jurisdiction question – i.e., whether the plaintiffs' claims belong in the forum state to begin with. Under this approach, a federal court in Missouri, for instance, would first be required to dismiss all the claims of out-of-state plaintiffs. At that point, all that would remain is a claim by one or a handful of Missouri plaintiffs against an out-of-state company, and the court would have diversity jurisdiction and deny remand.

For years, some federal courts rejected this argument as well, apparently assuming that as long as one plaintiff has sued in the right forum, the other plaintiffs can simply come along for the ride. But a recent decision by the Supreme Court has begun to alleviate the problem. In *Bristol-Myers Squibb Co. v. Superior Court of California*, more than 600 plaintiffs, most of whom were not California residents, sued Bristol-Myers ("BMS") in California state court, alleging that they had been injured by ingesting Plavix, a drug manufactured by BMS.[144] BMS moved to dismiss the nonresidents' claims on the ground that the court lacked personal jurisdiction. On appeal, the California Supreme Court concluded that the trial court did have specific personal jurisdiction over the claims in light of BMS's extensive contacts with California and the similarity between the claims of the California residents and those of the non-residents.[145] The U.S. Supreme Court reversed, explaining that the "mere fact that *other* plaintiffs were prescribed, obtained, and ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims. . . ."[146] In so doing, the Supreme Court made clear that a state court necessarily lacks specific personal jurisdiction over a defendant with respect to claims asserted by plaintiffs whose claims have no connection to the forum where an action is commenced, regardless of whether those plaintiffs join their claims with plaintiffs whose claims have some connection with the forum.

The Supreme Court's core personal jurisdiction holding has significant implications for federal subject matter jurisdiction. Indeed, several courts have already relied on *BMS* to do what defendants have been asking for years: first dismiss the out-of-state plaintiffs and then deny remand because the remaining parties are fully diverse.[147] However, the Supreme Court's emphatic 9-1 ruling has not stopped plaintiffs' lawyers from their jurisdictional gamesmanship, and one federal judge in California has ruled that personal jurisdiction exists over a pharmaceutical claim in California if the defendant conducted clinical trials of a drug there, a ruling that could potentially assist plaintiffs in ongoing forum-shopping efforts.[148] Rather, some

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144 *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781 (2017).

145 *Id.* at 1779.

146 *Id.* at 1781.

147 *See, e.g.*, *Jinright v. Johnson & Johnson, Inc.*, No. 4:17CV-1849, 2017 U.S. Dist. LEXIS 139270, at *15 (E.D. Mo. Aug. 30, 2017) ("Because the Court will grant dismissal of nonresident Plaintiffs' claims, the remaining Plaintiffs and Defendants are diverse from one another and the Court has subject matter jurisdiction."); *Siegfried v. Boehringer Ingelheim Pharm., Inc.*, No. 4:16 CV 1942 CDP, 2017 WL 2778107, at *1 (E.D. Mo. June 27, 2017) ("Based on [a] recent ruling[] from . . . the United States [Supreme Court in *Bristol-Myers*], [the court] concludes that Missouri lacks personal jurisdiction over these corporate defendants for claims brought by the non-Missouri plaintiffs," mandating their dismissal and creating complete diversity between the remaining parties).

148 *Dubose v. Bristol-Myers Squibb Co.*, No. 17-cv-00244, 2017 WL 2775034 (N.D. Cal. June 27, 2017).

plaintiffs' lawyers are continuing to file sprawling nationwide mass actions involving out-of-state plaintiffs in plaintiff-friendly state courts like Missouri in the hopes of defeating diversity jurisdiction. It remains to be seen how removal efforts in such cases will ultimately play out. Suffice it to say that while *Bristol-Myers* is an important step in the right direction on misjoinder, it is hardly the last word, cementing the need for Congressional action.

The kind of gamesmanship described above represents a growing effort to force cases involving thousands of plaintiffs with no connection to each other into a single state court, essentially creating consolidated state court proceedings to rival federal MDL proceedings. This is the same kind of abusive forum shopping that led Congress to expand federal jurisdiction over interstate class actions by way of CAFA more than 10 years ago – and similar reforms are needed for mass tort actions as well.[149]

B. <u>Plaintiffs' Lawyers Are Fraudulently Joining Local Small Businesses To Evade Federal Jurisdiction And Inclusion In Federal MDL Proceedings.</u>

Jurisdictional gamesmanship has also flourished through the practice of fraudulent joinder. The Constitution authorizes federal subject matter jurisdiction over controversies involving parties who are diverse – that is, citizens of different states.[150] As the Supreme Court recognized long ago, federal diversity jurisdiction was included in the Constitution "in order to prevent apprehended discrimination in state courts against those not citizens of the State."[151] However, under current law, plaintiffs' lawyers can block truly interstate cases involving diverse parties from federal court as long as they also sue a local defendant in the state in which they have filed the action.[152] "Not surprisingly, this body of law has been abused by trial lawyers who fraudulently sue local defendants, even though the plaintiff's claims against those defendants have little or no support in fact or law, because suing them allows the trial lawyers to keep their case in a preferred state court forum."[153]

This practice, known as fraudulent joinder, has plagued defendants in virtually every sector of American business. In cases alleging prescription drug defects, plaintiffs' lawyers often name a local pharmacist or pharmacy as a defendant in order to avoid federal jurisdiction, even though that defendant had no role in designing and testing the drug and the real target of the action is the out-of-state pharmaceutical manufacturer. Likewise, in automobile design defect cases, plaintiffs often name a local car dealer, even though it had no role in designing or testing the vehicle and the real target is the out-of-state motor vehicle manufacturer. This practice circumvents federal jurisdiction rules, harasses peripheral defendants and can threaten the very survival of small businesses. As beleaguered Mississippi drug store owner Hilda Bankston

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

[150] U.S. Const. art. III § 2.

[151] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938).

[152] 28 U.S.C. § 1441(b).

[153] H.R. Rep. No. 114-422, at 2-3 (2016).

testified before this very Committee when it was considering CAFA a decade ago, fraudulent joinder resulted in her being named in ***hundreds*** of lawsuits simply so the plaintiffs' lawyers could remain in state court.[154] While CAFA eliminated this abuse in the ***class action*** context, the abuse has been left to fester in non-class cases.

In one product liability suit, for example, the plaintiff sued a national company based on injuries allegedly caused by its medicinal drink, Phospho-Soda, which is used in preparation for a colonoscopy.[155] In addition to suing the national manufacturer of the product, the plaintiff also joined a resident local defendant health clinic, alleging that it negligently instructed the plaintiff to ingest the drink. The manufacturer removed the case to federal court and argued that the small business had been fraudulently joined because the claims against the clinic were time-barred by the statute of limitations, and there was therefore "no possibility" of recovery.[156] Despite agreeing that the possibility of relief against the local defendant was "remote" – and even though there was an existing MDL proceeding involving the product in question – the court remanded the case after emphasizing how difficult it is to establish fraudulent joinder under the prevailing law.[157] As the federal court predicted, all claims against the local defendant were later dismissed, but only after its presence in the lawsuit operated to evade a federal forum.[158]

Similarly, in *Baumeister v. Home Depot U.S.A., Inc.*, the plaintiff commenced a premises liability suit against Home Depot, seeking damages for injuries he sustained after slipping and falling on ice in a Home Depot parking lot in Colorado.[159] The day after Home Depot removed the case to federal court, the plaintiff amended his complaint to assert a new claim of negligence against a local business, which plaintiff alleged failed to maintain the store's parking lot. "Although [the court] agree[d] that the timing of the complaint [was] suspect," the court held that Home Depot had not met its "heavy burden" of showing fraudulent joinder because recovery against the small business was "possible."[160] Notably, just as in *Bendy*, once the case was remanded to state court, the plaintiff dismissed the innocent local defendant from the lawsuit, proving that joinder of that small business was for the sole purpose of forum shopping.[161]

The fraudulent joinder doctrine empowers a federal court to remedy this unfair result and disregard, for jurisdictional purposes, the citizenship of a non-diverse defendant. While federal courts universally recognize this doctrine, they are deeply divided on how to apply it. Some courts have erected such a high bar for finding fraudulent joinder that they remand cases to state as long as the plaintiff has just a "glimmer of hope" of recovering against the local business or

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154 *See* Testimony of Hilda Bankston Before the Senate Judiciary Committee (July 31, 2002), https://www.judiciary.senate.gov/meetings/class-action-litigation.

155 *Bendy v. C.B. Fleet Co.*, No. CCB-10-3385, 2011 U.S. Dist. LEXIS 32228, at *1-3 (D. Md. Mar. 28, 2011).

156 *Id.* at *11-12 (citation omitted).

157 *Id.* at *21.

158 *See* 162 Cong. Rec. H907 (daily ed. Feb. 25, 2016) (statement of Rep. Goodlatte).

159 *Baumeister v. Home Depot U.S.A., Inc.*, No. 10-cv-02366-LTB-MJW, 2011 U.S. Dist. LEXIS 19113, at *1-2 (D. Colo. Feb. 11, 2011).

160 *Id.* at *10-11.

161 *See* 162 Cong. Rec. H907-08 (daily ed. Feb. 25, 2016) (statement of Rep. Goodlatte).

individual whose presence defeats diversity.[162] Other courts have adopted a more reasonable standard, finding fraudulent joinder where the plaintiff has not stated a "plausible claim" against the non-diverse defendant, largely tracking the Supreme Court's pleading standards for withstanding a motion to dismiss.[163]

As the cases discussed above illustrate, even some of the courts that are remanding cases in which there is only a "remote" chance of success against a local small business acknowledge that doing so undermines judicial economy and encourages blatant forum shopping. The House has sought to address the checkerboard of disparate fraudulent joinder standards on multiple occasions over the past couple of years, first passing the Fraudulent Joinder Prevention Act of 2016 (H.R. 3624), and more recently passing the Innocent Party Protection Act (H.R. 725) earlier this year. Both pieces of legislation would require a federal court to find a local defendant to be fraudulently joined where state law would not plausibly impose liability on that defendant. Absent concrete action by Congress in this area, plaintiffs' lawyers will continue to game the system, depriving defendants of a federal and neutral forum – and in the process, unfairly burdening small businesses.

C. <u>MDL Proceedings Are Increasingly Being Used To Warehouse Meritless Claims And Coerce Unjustified Settlements.</u>

Another significant area of concern is that MDL proceedings are becoming black holes for large numbers of questionable cases – and some MDL judges, overwhelmed by huge numbers of cases, are engaging in questionable practices to spur settlement.[164] As one MDL judge put it, "the court does not intend to engage in the process of sorting through thousands of individual claims . . . to determine which claims have or have not been properly presented."[165] As a result, plaintiffs' counsel are "expand[ing] the number of plaintiffs beyond those with viable causes of action," thereby "distort[ing] the true scope of MDL litigation."[166]

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162 *Hartley v. CSX Transp., Inc.*, 187 F.3d 422, 426 (4th Cir. 1999).

163 *Int'l Energy Ventures Mgmt., L.L.C. v. United Energy Grp., Ltd.*, 818 F.3d 193, 208 (5th Cir. 2016).

164 More than 35% of the civil cases pending in the nation's federal courts are now consolidated in multidistrict litigation proceedings, up from just 15% a decade ago. *See* Table C, U.S. District Courts — Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2014 and 2015, September 30, 2012 and 2013, 2009 and 2010, 2007 and 2008, 2005-2006, 2003 and 2004, 2001 and 2002, and 1998 and 1999, Judicial Business of the United States Courts, Annual Reports of the Director, Administrative Office of the United States Courts; Cumulative Summary of Multidistrict Litigation: United States Judicial Panel on Multidistrict Litigation, Statistical Analysis of Multidistrict Litigation Fiscal Year 2015, 2013, 2011, 2009, 2007, 2006, 2004 and 2001.

165 *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 808 F. Supp. 2d 943, 965 (E.D. La. 2011), *aff'd on other grounds*, 745 F.3d 157 (5th Cir. 2041); *see also In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, MDL 2272, 2012 WL 3582708, at *4 (N.D. Ill. Aug. 16, 2012) ("With more than 549 individual actions . . . [t]he proper court to hear dispositive motions concerning the sufficiency of plaintiff-specific allegations is the transferor court.").

166 James Beck, *Multidistrict Litigation Reform: The Case for Earlier Application of Federal Pleading Standards* at 2, Washington Legal Foundation, No. 204, Sept. 2017.

Some MDL judges are managing these cases properly. Chief Judge Clay Land of the U.S. District Court for the Middle District of Georgia, who has been presiding over an MDL proceeding involving allegedly defective surgical-mesh devices, finally had "enough" with the number of meritless claims in that proceeding.[167] In particular, he stressed, some of the claims were barred by the statute of limitations, while others lacked evidence of specific causation.[168] Judge Land put plaintiffs' counsel on notice that they would be subject to sanctions in future orders granting summary judgment in cases in which there is no good faith basis for maintaining the action through the summary judgment stage.[169] "At a minimum," Judge Land declared, "[MDL] judges should be aware that they may need to consider approaches that weed out non-meritorious cases early, efficiently, and justly."[170]

In the silica litigation, Judge Janis Graham Jack similarly put a stop to frivolous claims. That MDL proceeding encompassed thousands of lawsuits alleging that the plaintiffs had been harmed by breathing in crystalline silica, a substance similar to sand, but smaller. "Because of silica's widespread use, some plaintiffs' lawyers viewed it as the source of the next big mass tort" after asbestos.[171] But in the end, Judge Jack, who presided over the silica MDL proceeding, recommended that all but one of the 10,000 claims on the MDL docket should be dismissed on remand because the diagnoses were fraudulently prepared.[172] In a harshly written ruling finding litigation screening fraud, Judge Jack resolved that the "'epidemic' of some 10,000 cases of silicosis 'is largely the result of misdiagnosis'" and that "the failure of the challenged doctors to observe the same standards for a 'legal diagnosis' as they do for a 'medical diagnosis' renders their diagnoses . . . inadmissible[.]"[173] According to Judge Jack, the diagnoses were . . . manufactured for money,"[174] and "in [the] hopes of extracting mass nuisance-value settlements because [defendants] are financially incapable of examining the merits of each individual claim in the usual manner.'"[175]

The cynical strategy bemoaned by Judge Jack has continued, producing one windfall after another for plaintiffs' counsel. In the name of "efficiency," defendants end up writing a bigger check than they would have if multidistrict proceedings had never been established, paying people to whom they would never be found liable.

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167 Order at 1, *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.* ("*In re Mentor* Order"), MDL 2004, ECF No. 1039 (M.D. Ga. Sept. 7, 2016).

168 *Id.*

169 *Id.* at 1-2.

170 *Id.* at 5.

171 Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. Times, Mar. 8, 2006, http://www.nytimes.com/2006/03/08/business/08silica.html?pagewanted=print&_r=0.

172 Victor E. Schwartz et al., *Getting the Sand Out of the Eyes of the Law: The Need for a Clear Rule for Sand Suppliers in Texas after Humble Sand & Gravel, Inc. v. Gomez*, 37 St. Mary's L.J. 283, 291 (2006).

173 *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 632, 634 (S.D. Tex. 2005) (citation omitted).

174 *Id.* at 635.

175 Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. Rev. 1221, 1316 n.512 (2008) (quoting *In re Silica*, 398 F. Supp. 2d at 676).

That appeared to be the case in the multidistrict litigation involving the prescription painkiller Vioxx, which plaintiffs alleged caused heart attacks and strokes.[176] After losing a verdict in the first case to go to trial, Merck won most of the remaining jury trials, prompting the parties to negotiate a global resolution of the personal injury claims.[177] The parties reached a settlement that required each party who had asserted a claim and was seeking payment to satisfy three basic "gate" requirements: (1) that he or she had a qualifying injury – i.e., a heart attack, an ischemic stroke, or sudden cardiac death; (2) that he or she used a minimum amount of Vioxx; and (3) that he or she took Vioxx within a proximate time of the alleged medical event.[178] However, 9,888, or 32.4% of the heart attack claimants, were unable to satisfy these rudimentary requirements, while 5,399, or 31.2% of the ischemic stroke claimants, failed to provide documentation of these requirements.[179] All told, 15,287 plaintiffs could not demonstrate the basic facts necessary to recover: that they had an injury; that they took at least 30 Vioxx pills; and/or that they took the drug within close proximity to the date of injury.[180]

The fact that nearly one-third of claimants failed to satisfy these most basic requirements strongly suggests that there were many unfounded claims in the Vioxx MDL proceeding. These claims were most likely not properly vetted before they were filed. And because, as in most MDL proceedings, there were no procedures in place requiring plaintiffs to come forward at the outset with basic medical evidence of exposure, injury and causation, these groundless claims were able to languish in the MDL proceeding for years, even though the parties produced more than 54 million pages of discovery and conducted more than 1,800 depositions.[181]

The increasing tendency of plaintiffs' counsel to simply "park" meritless lawsuits in MDL proceedings is also being fueled by a "new crop of companies called lead generators, which refer clients to plaintiffs['] law firms[.]"[182] These companies effectively market potential lawsuits and sell the names of potential claimants to plaintiffs' counsel.[183] "They provide the pipeline that connects claimants to lawyers – or vice versa."[184] "The aggressive advertisements by these companies 'are commonplace on television, often using trumped-up news headlines and

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176 Mr. Beisner discloses that he is counsel to Merck in ongoing litigation regarding Vioxx.

177 Alex Berenson, *Merck Agrees to Settle Vioxx Suits for $4.85 Billion*, N.Y. Times, Nov. 9, 2007, http://www.nytimes.com/2007/11/09/business/09merck.html?_r=0.

178 *In re Vioxx Prods. Liab. Litig.*, No. 05-1657, 2008 U.S. Dist. LEXIS 60269, at *10-11 (E.D. La. Aug. 7, 2008).

179 Vioxx Claims Administrator Court Report No. 29, No. 05-1657 (E.D. La. July 27, 2010).

180 *Id.*

181 Andrew K. Solow et al., *Sequenced Discovery in Mass Tort Litigation*, Kaye Scholer LLP, Jan. 15, 2015, http://www.lexology.com/library/detail.aspx?g=88462489-d102-44b8-9464-e22aebe75067.

182 Amanda Bronstad, *Ad Spending Up, Defense Bar Irked*, Nat'l L.J., Apr. 27, 2015.

183 Paul M. Barrett, *Need Victims for Your Mass Lawsuit? Call Jesse Levine*, Bloomberg Business Week, Dec. 12, 2013, http://www.bloomberg.com/bw/articles/2013-12-12/mass-tort-lawsuit-lead-generator-jesse-levine-has-victims-for-sale.

184 Bronstad, *supra* note 182.

listing a host of alarming effects from using a product.'"[185] These messages permeate many other modes of communication as well, including emails, text messages and websites.[186] "And they don't stop there. Lead generators go so far as to gather the names and personal data that consumers provide to websites and then directly contact them in the hopes that they will agree to commence litigation, even if they do not feel that they were aggrieved by the defendant in any way."[187]

An example from 2011 is illustrative. A Missouri resident named Linda Burke received a phone call from a woman named "Sarah."[188] "Burke didn't know Sarah, but that didn't stop the caller from asking some exceptionally personal questions," including whether "anyone in the Burke household died after taking a diabetes drug called Avandia?"[189] At the time of the call, GlaxoSmithKline was facing an avalanche of lawsuits alleging that the drug caused an increased risk of heart attack.[190] "Burke and scores of other Missouri residents wanted no part of the Avandia litigation, court records show," but that didn't stop these lead generation companies from aggressively promoting litigation.[191] These unscrupulous tactics have prompted House Judiciary Committee Chairman Goodlatte to look into these companies' practices.

The growth of TPLF in the mass tort arena threatens to exacerbate this problematic practice. Recent experience has shown that TPLF is being used in large product liability litigation where lawyers amass as many "faceless clients as possible" without adequately investigating the merit of the claims.[192] A lawsuit brought by a former plaintiffs' law firm employee in connection with the use of TPLF in litigation involving allegedly defective mesh products summarized the business model employed by the law firm:

> (i) borrow as much money as possible; (ii) buy as many television ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody for something; (iv) use those faceless clients to borrow even more money or buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and thousands of people its lawyers never met or had any interest in meeting; and (vii) lather, rinse, and repeat.[193]

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185 John H. Beisner, Jessica D. Miller & Jordan M. Schwartz, *MDL Proceedings, Eliminating the Chaff*, U.S. Chamber Institute for Legal Reform, at 6 (2015) (quoting Bronstad, *supra* note 182).

186 *Id.*

187 *Id.*

188 Barrett, *supra* note 183.

189 *Id.*

190 *Id.*

191 *Id.*

192 David Yates, *"Mass Tort Warehouse" Fires Fund Officer to Avoid Paying Him Millions for Acquiring 14,000 Mesh Claims, Suit Alleges*, SE Tex. Rec., Oct. 10, 2015, http://setexasrecord.com/stories/510642299-mass-tort-warehouse-fires-fund-officer-to-avoid-paying-him-millions-for-acquiring-14-000-mesh-claims-suit-alleges.

193 Compl. ¶ 76, *Shenaq v. Akin*, No. 2015-57942 (Tex. Dist. Ct. Harris Cty., filed Sept. 29, 2015).

As one article explained, the TPLF company's "investment in a claims-bundling firm, known not for trial work but for multimillion-dollar TV blitzes aimed at potential mass tort claimants, was a far cry from the funder's usual customers: companies with big business disputes for their Am Law 200 firms."[194] Such use of TPLF to aid personal injury firms in aggregating "faceless" claims contradicts the representations of some funders that they rigorously assess each case investment and would never finance frivolous or dubious claims.

At bottom, there can be no dispute that many MDL plaintiffs' lawyers simply do not vet all of their cases before filing them. Indeed, that is the essence of the business model on which a number of plaintiffs' law firms are based, including new entrants to the mass torts arena, who are being lured into this litigation by seminars touting how easy it is "to enjoy a ***major return*** on their investment" with "as little risk as possible."[195] This business model "produces the perverse result that an MDL, which was established in part to manage cases more efficiently to achieve judicial economy, becomes populated with many non-meritorious cases that must nevertheless be managed by the transferee judge – cases that likely ***never*** would have entered the federal court system without the MDL."[196] As one federal judge explained in severing numerous disparate product liability claims in litigation outside the MDL context, "Plaintiffs' counsel must be prepared to devote the resources needed to effectively litigate each client's claim, ***and should not file numerous lawsuits on behalf of dozens of clients if unable to do so***."[197] Plaintiffs' counsel's refusal to investigate the claims they are filing unfairly burdens our courts and unjustly pressures defendants into settling meritless claims and needs to be reversed.

One core provision of FICALA would go a long way towards accomplishing that goal. Under the provision, counsel for a plaintiff asserting a personal injury claim would have to demonstrate at the outset that there is some evidentiary support – i.e., medical records – for the factual allegations in the complaint regarding exposure to the alleged risk (e.g., use of an allegedly defective product), the alleged injury and the supposed cause of the injury. This submission would have to be made within 45 days after the lawsuit is transferred or directly filed in the MDL proceeding. Given that MDL judges are increasingly unwilling to "engage in the process of sorting through thousands of individual claims . . . to determine which claims" have merit, the onus should be on plaintiffs' counsel to make a threshold showing that they have adequately vetted the claims they are prosecuting. This kind of measure would further the

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194 Julie Triedman, *Arms Race: Law Firms and the Litigation Funding Boom*, The American Lawyer, Dec. 30, 2015, http://www.americanlawyer.com/id=1202745121381/Arms-Race-Law-Firms-and-the-Litigation-Funding-Boom.

195 Mass Tort Nexus Four Day Immersion Course, *Mass Tort Nexus*, https://www.masstortnexus.com/images/MTN_Course.pdf.

196 *In re Mentor* Order, *supra* note 167, at 4 (emphasis added).

197 *Jones v. Eli Lilly & Co.*, No. 1:15-cv-00701-JMS-MJD, 2015 U.S. Dist. LEXIS 141925, at *27-29 (S.D. Ind. Oct. 19, 2015) (emphasis added). Similarly, recent developments in the ongoing and sprawling tobacco litigation in federal and state courts in Florida are also telling. A panel of federal judges imposed sanctions on several plaintiffs' law firms for filing more than ***one thousand cases*** on behalf of plaintiffs "who were unwittingly or baselessly named[.]" Brandon Lowrey, *Why the Mammoth Engle Sanctions Order Is Likely to Stand*, Law360, Oct. 27, 2017. As the sanctions order put it, while the sanctions – $9.1 million, or $7,000 for each frivolous suit – were unprecedented, "'[e]qually unprecedented is a lawyer filing 1,250 frivolous lawsuits, followed by years of maintaining those cases through obfuscation and recalcitrance[.]'" *Id.* (quoting order).

efficiencies that MDL proceedings are supposed to promote and preclude plaintiffs from "distort[ing] the true scope of MDL litigation" through "unvetted inventory" cases.[198]

LARA, another piece of legislation that passed the House earlier last year, would also move the ball in the right direction and curb frivolous litigation even beyond the MDL context. Under Rule 11 of the Federal Rules of Civil Procedure, claims filed in federal court must be based on both law and fact.[199] However, as Rule 11 currently stands, the filing of a frivolous claim does not automatically result in sanctions. In the words of late Supreme Court Justice Scalia, the rule is completely "toothless," allowing parties "to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose."[200] Indeed, under the current 21-day "safe harbor" provision, "a plaintiff may be able to, with impunity, file a complaint for an improper purpose and then voluntarily dismiss it shortly thereafter."[201] LARA would eliminate the "safe harbor" provision that allows lawyers to file frivolous claims without the threat of sanction. And it would also add teeth to this important rule by making sanctions mandatory rather than discretionary.

D. MDL Judges Are Improperly Forcing "Bellwether" Trials To Unjustifiably Coerce Settlement.

Another abusive aspect of current MDL practice is the increasing frequency with which defendants are being forced by certain MDL judges to endure unrepresentative "bellwether" trials rife with questionable rulings that are not immediately appealable. The MDL statute provides only for consolidated ***pre-trial*** proceedings.[202] Indeed, the Supreme Court has made clear that an MDL court cannot transfer an MDL member case to itself for trial pursuant to that law.[203] Instead, the plain language of the statute requires the Judicial Panel on Multidistrict Litigation to remand ***every*** action "at or before the conclusion of . . . pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."[204] According to one commentator, "the source of an MDL judge's authority to try ***anything*** is quite questionable under the current language" of the statute.[205]

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[198] Beck, *supra* note 166, at 2.

[199] Fed. R. Civ. P. 11.

[200] Amendments to the Federal Rules of Civil Procedure, Dissenting Statement of Justice Scalia, 146 F.R.D. 507-08 (1993).

[201] *Kovacs v. Ford Motor Credit Co.*, No. 01-72324, 2001 U.S. Dist. LEXIS 27330, at *2 (E.D. Mich. Oct. 12, 2001).

[202] 28 U.S.C. § 1407(a) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated ***pretrial*** proceedings.") (emphasis added).

[203] *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

[204] *Id.* at 35.

[205] Bexis, *The Multi-District Litigation Statute Needs Rewriting*, Drug & Device Law Blog, Dec. 19, 2016, https://www.druganddevicelawblog.com/2016/12/the-multi-district-litigation-statute-needs-rewriting.html# (some emphasis added).

Some MDL courts are disregarding the plain language of the MDL statute and conducting unfair trials in the hopes of securing a fast and easy settlement – the proverbial "yardstick by which MDL judges" view their success in administering MDL proceedings.[206] Defendants in these proceedings are even "being forced to trial over their objections to personal jurisdiction."[207] Some MDL judges are also frequently issuing questionable pro-plaintiff rulings on pivotal issues that are not subject to immediate appellate review, including the admissibility of expert evidence and the appropriateness of multi-plaintiff trials. To make matters worse, some MDL courts have sometimes forced defendants to proceed with consecutive trials without the benefit of appellate review, even though the same pro-plaintiff judicial errors will likely be repeated. Judge Edith Jones of the Fifth Circuit recently recognized this problem, criticizing one MDL "court's repeated refusals to slow down its processes while the appeal of [cross-cutting] jurisdiction[al] [issues] in [a] . . . bellwether set of cases is taking place."[208]

Ongoing multidistrict litigation involving an allegedly defective metal-on-metal hip implant, manufactured by DePuy, a Johnson & Johnson subsidiary, illustrates these abuses. In that MDL proceeding, the defendants recently petitioned for a writ of mandamus, requesting that the Fifth Circuit order the MDL court to vacate its order finding that the defendants had waived their personal jurisdiction and venue objections to a Texas trial involving several plaintiffs from New York.[209] While a majority of the Fifth Circuit panel formally denied the petition on the ground that the defendants had an adequate remedy at appeal, another majority "request[ed] the district court to vacate its ruling on waiver and to withdraw its order for a trial beginning September 5, 2017" based on the finding that the district court committed "grave error" in finding waiver.[210] Remarkably, the MDL judge went forward with a multi-plaintiff trial in the face of the Fifth Circuit's finding that his waiver holding was erroneous. That is precisely the kind of "cowboy-on-the-frontier mentality" that scholarly commentary has recognized among some MDL judges' handling of multidistrict litigation.[211]

Other examples abound. In *In re C. R. Bard, Inc., Pelvic Repair System Products Liability Litigation*, the defendant, a manufacturer of allegedly defective transvaginal mesh products, was unable to secure a stay of future trials in the MDL proceeding pending the appeal of the MDL judge's rulings regarding the admissibility of FDA regulatory evidence.[212] Similarly, in *In re E. I. du Pont de Nemours & Co.*, the MDL judge recognized that "some issues

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206 *Id.*

207 *In re DePuy Orthopaedics, Inc.*, 870 F.3d 345, 356 (5th Cir. 2017) (Jones, J., concurring in part and dissenting in part). Mr. Beisner is counsel to the defendants in this proceeding.

208 *Id.* at 358.

209 *Id.*

210 *Id.* at 347-48, 351.

211 Abbe R. Gluck, *Unorthodox Civil Procedure: Modern Multidistrict Litigation's Place in the Textbook Understandings of Procedure*, 165 U. Pa. L. Rev. 1669, 1675 (2017).

212 *In re C. R. Bard, Inc., Pelvic Repair Sys. Prods. Liab. Litig.*, No. 2:10-CV-01224, 2013 WL 4508339, at *1 (S.D.W. Va. Aug. 22, 2013).

on appeal may impact the cases that are not yet tried in th[e] MDL."[213] Nonetheless, the court refused to stay further trials pending the resolution of the appeal, reasoning that bellwether "trials are meant not only for determination of the rights and obligations of the litigants, but for a special purpose . . . — information gathering that may lead to a global settlement."[214] This reasoning defies logic. After all, the information-gathering purpose of bellwether trials cannot be served by verdicts that rest on significant evidentiary and legal errors.

Unrepresentative, multi-plaintiff show trials are becoming too frequent in multidistrict litigation proceedings, which now encompass more than one-third of the civil cases pending in the nation's federal courts.[215] This is not what Congress intended when it enacted the MDL statute. Notably, certain provisions of FICALA are responsive to these growing challenges, including, for example, a provision that would confer appellate jurisdiction over interlocutory orders where "an immediate appeal from the order may materially advance the ultimate termination of one or more civil actions in the" MDL proceeding.[216] As Fifth Circuit Judge Jones recently explained in the DePuy hip implant MDL proceeding, "[r]epetition, or surely threatened repetition, of [a trial court's] error, manifestly deserves correction at the ***earliest*** moment."[217] Another provision would expressly bar MDL judges from conducting trials unless all parties to the particular case give their consent. Absent concrete reforms on this front, some MDL courts will likely continue to deprive defendants of their due process right to individual trials, as well as issue erroneous rulings that affect multiple cases in an MDL proceeding and which never see the light of day before a federal appeals court.[218]

III. ABUSIVE ASBESTOS LITIGATION CONTINUES TO HAUNT OUR JUDICIAL SYSTEM.

Finally, I wish to briefly address ongoing problems related to asbestos litigation.

Earlier I mentioned that the House has passed the Furthering Asbestos Claim Transparency ("FACT") Act of 2017. As with the other examples I have discussed, the manner in which asbestos claims are processed both within the tort system and outside it through the asbestos bankruptcy trusts suffers from the abuse inherent to its lack of oversight.

To put this in context, asbestos personal injury litigation is the largest and longest running mass tort litigation in history. Asbestos litigation had, as of 2002, processed the

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213 *Freeman v. E. I. du Pont de Nemours & Co.*, No. 2:13-md-2433, 2016 U.S. Dist. LEXIS 43337, at *1198 (S.D. Ohio Mar. 29, 2016).

214 *Id.* at *1198-99.

215 *See Standards & Best Practices for Large & Mass-Tort MDLs*, *supra* note 3, at 6.

216 H.R. Rep. No. 115-985, at 13 (2017).

217 *In re DePuy*, 870 F.3d at 358 (emphasis added).

218 Finally, some MDL judges permit plaintiffs' lawyers to file multi-plaintiff complaints and pay only one filing fee. The court then orders the court clerk to sever the claims to create individual actions for which no additional filing fee is required. This practice improperly reduces revenue for the federal courts – at a time of serious budget deficits. Moreover, "MDLs make work for court clerks, too, and filing fees should provide some recompense." Bexis, *supra* note 205.

claims of almost 750,000 individuals and consumed $49 billion in compensation and expenses.[219] Approximately 5,000 asbestos cases are filed across the country each year, each of which names 64 defendants on average.[220] The staggering costs associated with defending these cases has forced more than 100 asbestos defendants into bankruptcy. In fact, the most recent asbestos bankruptcy filing occurred just last week, when a subsidiary of Georgia-Pacific filed for bankruptcy in the Western District of North Carolina.

Asbestos bankruptcies are governed by a special provision of the Bankruptcy Code called Section 524(g). Under this section, a company can establish a trust to pay its asbestos liabilities, funded with a controlling stake in the company's shares, available cash, and insurance. The resulting trusts suffer from a lack of transparency and conflicts of interest. Members of the plaintiffs' bar sit on the trusts' governing bodies[221] and appoint the Future Claims Representatives who are supposed to look after the interests of future claimants who are not yet sick. The plaintiffs' attorneys who run the trusts write the terms under which claims are paid, ensuring that the trusts have lax medical and exposure criteria for payment on claims. More than 50 asbestos bankruptcy trusts have been established to date, with a total of more than $18 billion in currently available assets and an additional estimated $12 billion of outstanding obligations to existing trusts and expected funding for pending trusts. These trusts include all of the major asbestos suppliers and manufacturers of asbestos-containing products.

Under the guise of privacy concerns, both plaintiffs and trusts have resisted disclosing to defendants evidence of exposure to the products or premises of the bankrupt entities, information as to what claims had been or in the future would be asserted against the trusts, and the payment that plaintiffs would recover from the trusts.[222] The trusts refuse to share information not only with defendants, but also with each other. Each trust operates independently and without consideration of what other trusts are doing. A recent study that examined claims produced as part of the *Garlock Sealing Technologies* bankruptcy revealed serious discrepancies in the allegations made from trust to trust in 21% of the claims.[223]

This lack of transparency both from trust to trust and from the trusts to the tort system has led to a number of unfortunate outcomes. First, because trust claims containing information relevant to a plaintiff's exposure are not available at trial, a jury cannot accurately assess the responsibilities of all the parties that may be responsible for a given plaintiff's injury. Solvent defendants, the ranks of which have swelled with companies only peripherally related to

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219 Lloyd Dixon & Geoffrey McGovern, *Asbestos Bankruptcy Trusts and Tort Compensation*, at xi (RAND Corporation 2011).

220 Megan Shockley, *Transaction Costs in Asbestos Litigation*, http://riskybusiness.kcic.com/transaction-costs-asbestos-litigation/.

221 For example, 53% of all seats on Trust Advisory Committees are filled by members of five firms: Kazan, McClain, Lyons, Greenwood & Hartley; Baron & Budd; Motley Rice; Cooney & Conway; and Weitz & Luxenberg.

222 *Volkswagen of Am., Inc. v. Sup. Ct. of S. F.*, 43 Cal. Rptr. 3d (Cal. Ct. App. 1st Dist. 2006); *Negrepont v. A.C.&S., Inc.*, No. 120894/01 (NY Sup. Ct., Dec. 11, 2003); *In re: Motors Liquidation Co.*, No. 0950026 (Bankr. S.D.N.Y.).

223 James L. Stengel and C. Anne Malik, *Insights and Inconsistencies: Lessons from the Garlock Trust Claims* (U.S. Chamber of Commerce, Feb. 19, 2016).

asbestos, bear the brunt of this misallocation of fault, despite tenuous claims of causation and culpability.[224]

Second, there is no oversight mechanism in place to prevent "double dipping," where a plaintiff receives full value in the tort system and then subsequently proceeds to obtain trust compensation. Although the value of a mesothelioma claim in the tort system has been a subject of much debate, reliable sources have estimated it at between $900,000[225] and $1.4 million.[226] Yet, under the present siloed system, the same mesothelioma claim can now collect an additional $1.3 million in trust payments.[227] The trusts typically do not request set-offs for payments made by tort defendants.

Finally, the trusts' lax claiming standards and self-auditing create an environment conducive to fraudulent claiming. Fraud on the trusts is not merely speculative. For example, an Ohio court in *Kananian v. Lorillard Tobacco Company* found that a plaintiff had alleged exposure in his trust claims to products he denied having been exposed to in his lawsuit.[228] The plaintiff later stated that the claims were submitted without his knowledge by his attorney. The judge barred the plaintiff's counsel from appearing in the court, and observed: "I never expected to see lawyers lie like this . . . it was lies upon lies upon lies."[229] Likewise, the bankruptcy court in the *Garlock Sealing Technologies* bankruptcy found that some plaintiffs' firms had engaged in "suppression of evidence" when their clients were "unable to identify exposure in the tort case, but then later (and in some cases previously) [were] able to identify it in [t]rust claims."[230] A recent study of trust claims filed by plaintiffs who also sued Crane Company, an industrial and engineering company based in Connecticut, showed that 80% of those trust claim forms involved exposures not disclosed to Crane in a previous tort case.[231] Because every dollar that goes to compensate a fraudulent claim is unavailable in the future for later manifesting claims, this pattern of abuse harms the very people the trusts were established to compensate.

The FACT Act provides important tools to address these issues. The Act requires trusts to file regular reports on the claims they have received and paid. This will permit external auditing to ensure that fraudulent claims are not depleting the trusts' coffers. It also ensures that claimants' personal data is protected, by requiring full redactions of personal identifying

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224 James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Sur. of Am. L. 223, 236-37.

225 Stephen J. Carroll, et al. *Asbestos Litigation* (RAND Corporation 2005), note 7 at 95.

226 Charles E. Bates and Charles H. Mullin, *Show Me the Money*, Mealey's Litig. Rep. Asbestos Vol. 22, #21, at 1 (Dec. 3, 2007).

227 Charles E. Bates, et al., *The Naming Game*, Mealey's Litig. Rep. Asbestos, Sept. 2, 2009, at 6.

228 *Kananian v. Lorillard Tobacco Co*., No. CV-442750 (Ohio Ct. Comm. Pl. Cuyahoga Cty. Jan. 18, 2007) (order barring plaintiff's attorney from practicing law in the Ohio Court of Common Pleas).

229 James F. McCarty, *Judge Becomes National Legal Star* (Cleveland Plain Dealer, Jan. 25, 2007).

230 *In re Garlock Sealing Techs*., 504 B.R. 71, 86 (Bankr. W.D.N.C. 2014).

231 Peggy L. Ableman and Peter R. Kelso, *A Look Behind the Curtain: Public Release of Garlock Bankruptcy Discovery Confirms Widespread Pattern of Evidentiary Abuse Against Crane Co.*, 30-19 Mealey's Litig. Rep. Asbestos, Nov. 4, 2015.

information. The reporting contemplated by the FACT Act is the first step towards increased transparency and oversight of the asbestos bankruptcy trust system.

CONCLUSION

In sum, it has been more than a decade since Congress enacted CAFA, which was aimed at making aggregate litigation proceedings fairer. In the ensuing years, certain abusive aspects of class action and mass tort practice not addressed by that important legislation have metastasized. Most notably, class actions are increasingly being used to enrich class counsel rather than to compensate proposed class members – the only legitimate objective of the class device. In addition, a growing number of courts have failed to apply a "rigorous analysis" of the Rule 23 prerequisites to class certification, increasingly certifying meritless "no injury" class actions and "issues" classes that unfairly pressure defendants to enter into unjustified settlements. Similar abuses have also plagued mass tort cases, which are increasingly being kept out of federal MDL proceedings as a result of fraudulent misjoinder and fraudulent joinder. In addition, MDL proceedings are being stocked with thousands of poorly investigated and often meritless mass tort claims, which plaintiffs' lawyers have been able to leverage to secure unjustified settlements. These troubling aspects of class action and mass tort suits were not addressed by CAFA and are now ripe for reform. I appreciate the Committee allowing me to testify today, and I look forward to answering any questions that the Members of the Committee may have.