Statement of the U.S. Chamber of Commerce

ON: **THE FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015**

TO: **U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE**

BY: **JOHN H. BEISNER, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP**

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

"The Fairness in Class Action Litigation Act of 2015"

Good afternoon Chairman Franks, Ranking Member Cohen and Members of the Subcommittee. Thank you for the opportunity to testify on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform ("ILR"). ILR is an affiliate of the U.S. Chamber of Commerce. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.

My testimony today focuses on the Fairness in Class Action Litigation Act of 2015 ("FICALA" or the "Act"), which was introduced in the House earlier this month. This legislation would put an end to "overbroad" or "no-injury" class actions, which have become increasingly prevalent in our federal courts. Generally speaking, an overbroad, no-injury class action is a lawsuit brought by a named plaintiff who allegedly experienced a problem with a product or service and then seeks to represent every other individual who purchased the product or paid for the service, ***regardless of whether they experienced any problems with it***. At least in some courts, the law has developed to the point where one disgruntled customer – or, more likely, one enterprising plaintiff's lawyer – can distort the value of an idiosyncratic product defect by a multiple of many thousands, even though few others have had the same problem with that product.

Overbroad class actions create a chain reaction of problems. First, they threaten the due process rights of defendants who are forced to defend against hundreds of thousands of claims based on the unique experiences of a handful of people. Second, overbroad, no-injury class actions 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. And third, because most defendants cannot risk the economic threat of a massive lawsuit even if it is frivolous, these suits almost always settle. At the end of the day, however, because the great majority of class members are perfectly satisfied with the product or service that is being challenged, very few class members actually claim their portion of the settlement, and the only people who benefit are the lawyers who brought the suit. The

[1] John Beisner is head of the Mass Torts and Insurance Litigation Group at Skadden, Arps, Slate, Meagher & Flom LLP. He represents defendants in a number of areas, including the pharmaceutical, tobacco, automobile and financial-services industries. He has testified numerous times on class action and claims aggregation issues before the U.S. Senate and House Judiciary Committees.

result is that overbroad class action lawsuits undermine justice and put a strain on our economy, on productivity and on innovation.

FICALA offers a simple and effective solution: limit certification to those class actions where all of the class members claim to have suffered the same type of injury as the named plaintiff. Thus, for example, if the named plaintiff brings a lawsuit claiming that his vehicle malfunctioned in a certain way, he or she cannot represent a class that includes everyone who purchased the same model vehicle without regard to whether they all encountered the same malfunction. Instead, to be considered for certification, any class would have to be limited to those individuals who encountered the same problem.

This is very modest legislation. Indeed, several federal courts have interpreted Federal Rule of Civil Procedure 23's typicality requirement to impose this very sort of limitation already. But other courts have applied looser standards, leading to an uptick in overbroad, no-injury class actions, especially in those jurisdictions where federal courts of appeal have put out a welcome mat to these sorts of cases. FICALA will restore consistency in the federal courts' treatment of overbroad class actions and in the process promote fairness in the litigation of class actions and the U.S. economy.

I. RECENT CASELAW CERTIFYING OVERBROAD, NO-INJURY CLASS ACTIONS

The past few years have witnessed a growing embrace of overbroad, no-injury class actions by various federal courts. Defendants have long argued that such class actions are illegitimate because the plaintiffs are essentially seeking a windfall – they want to recover damages for a risk that has not materialized and may never materialize over the life of a product.

For many years, courts agreed that no-injury class actions are not viable. Initially, these cases were resolved at the motion-to-dismiss stage because they were typically brought by plaintiffs who themselves had experienced no problem with the product, allowing the courts to conclude that the plaintiff was not injured and thus could not state a claim. Presumably in reaction to these rulings, plaintiffs' attorneys began recruiting named plaintiffs whose products actually manifested the alleged defect at issue in the litigation, making disposal of the claims at the motion-to-dismiss stage more difficult. But as most courts appropriately recognized, these lawsuits were just another variant of no-injury class actions because while the named plaintiffs may have suffered some injury – e.g., their vehicle actually malfunctioned – the overwhelming majority of the absent class members had not. According to these courts, this new variant of the no-injury class action was not amenable to classwide treatment for a variety of reasons, including that the claims of the named plaintiff were not typical of the absent class members – a fundamental requirement for class certification. The reasoning of these decisions was probably best expressed in the Seventh Circuit's pronouncement in the Ford Explorer/Firestone tire litigation in 2002 that "[n]o injury, no tort, is an ingredient of every state's law."[2] In that litigation, which involved allegations of defective tires, the Seventh Circuit decertified a nationwide class, recognizing that adjudication of varying consumer-fraud and breach-of-

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

warranty law would be utterly unmanageable. As part of its decision, the Seventh Circuit noted that "[i]f tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation."[3]

Some of the more illustrative decisions in this line of cases are summarized below, beginning with motion-to-dismiss rulings:

- *Lee v. General Motors Corp.*, 950 F. Supp. 170 (S.D. Miss. 1996). In *Lee* the plaintiffs sued General Motors, alleging that the detachable fiberglass roofs on certain vehicles did not meet GM's safety inspection standards.[4] All of the vehicles had over 100,000 miles; none of the plaintiffs had sustained any personal injuries; and the alleged defect had not been associated with any accidents.[5] Nevertheless, the plaintiffs sought to recover on behalf of a putative class under a variety of legal theories. The court dismissed all of the plaintiffs' claims on the ground that they had failed to plead sufficient damages. As the court explained, the vehicles in question operated without any problems or difficulties for multiple years, making it impossible for plaintiffs to establish that they had been injured by the alleged defect in the roofs.[6]

- *Yost v. General Motors Corp.*, 651 F. Supp. 656 (D.N.J. 1986). In *Yost*, the plaintiff brought a putative class action against the defendant car manufacturer, asserting claims for breach of warranty and fraud. Plaintiff alleged that oil and water and/or coolant tended to mix in the crankcase in certain of defendant's engines.[7] Plaintiff further averred that defendant knew of this alleged defect but failed to disclose it.[8] The defendant moved to dismiss the complaint, and the court granted that motion. According to the court, "[t]he basic problem in this case [was] that plaintiff Yost ha[d] not alleged that he ha[d] suffered any damages. . . . All he [was] able to allege [was] that the potential leak [was] '***likely***' to cause damage and '***may***' create potential safety hazards."[9] Because "[d]amage [was] a necessary element of both counts – breach of warranty and common law fraud," and plaintiff had not alleged such damage, the court dismissed the claims.[10]

- *Yu v. IBM*, 732 N.E.2d 1173 (Ill. App. Ct. 2000). In *Yu*, a physician brought a putative class action arising out of the sale of a bundled computer system that was

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3 *Id.*

4 *Lee*, 950 F. Supp. at 171-72.

5 *Id.*

6 *Id.* at 174.

7 *Yost*, 651 F. Supp. at 657.

8 *Id.*

9 *Id.* (emphases added).

10 *Id.* at 658.

supposedly not year 2000 (Y2K) compliant.[11] The plaintiff brought the suit even though he had taken advantage of a free "fix" of the defect that could be downloaded from the internet or by receiving a CD Rom.[12] The defendants moved to dismiss the class action complaint on the ground that plaintiff had suffered no injury as a result of the alleged defect. The trial court granted the defendants' motion and denied the plaintiff's motion for class certification, and the appellate court affirmed those rulings. At bottom, the fact that the plaintiff had obtained the fix meant he had no injury beyond speculation that something could go wrong in the future.[13]

Examples of class-certification rulings vindicating the same principle include the following:

- *Burton v. Chrysler Group LLC*, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720 (D.S.C. Dec. 21, 2012). In *Burton*, the court denied certification of a proposed class of "[a]ll persons and entities who purchased a new 2007-2009 Dodge Ram 2500 or 3500 truck in the United States."[14] Asserting breach-of-warranty claims, the plaintiffs alleged that "each Dodge Ram truck [was] equipped with an 'inherently and permanently defective' exhaust system which fail[ed] to 'effectively rid itself of diesel particulates, causing soot to accumulate in the DPF, turbocharger, EGR valve, oxygen sensors, and other associated parts.'"[15] The court denied the motion for class certification on multiple grounds, including typicality. In challenging typicality, Chrysler provided evidence that just a small percentage of potential class members experienced any problems with their trucks and were actually interested in being part of the class.[16] The court was persuaded, recognizing that the proposed nationwide class "would . . . include those persons and entities who ***never*** experienced problems" with their vehicles.[17] This "problem . . . highlight[ed] the lack of . . . typicality among putative class members."[18] In reaching this conclusion, the court noted that a plaintiff seeking to recover on a breach-of-warranty cause of action in his individual capacity would have to come forward with evidence that his vehicle actually

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11 *Yu*, 732 N.E.2d at 1175.

12 *Id.* at 1176.

13 *Id.* at 1177-78. Numerous other courts followed the same approach. *See, e.g., Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99 (S.D.N.Y. 1997) ("It is well established that purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own.") (internal quotation marks and citation omitted); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 629 (Ala. 1998) (reversing denial of summary judgment with respect to fraud claims in putative class action where "[t]he plaintiffs acknowledge that their vehicles, like the overwhelmingly vast majority of Bronco IIs, have never manifested the alleged defect in such a way as to be caused to roll over").

14 *Burton*, 2012 U.S. Dist. LEXIS 186720, at *7 (internal quotation marks and citation omitted).

15 *Id.* at *3 (citation omitted).

16 *Id.* at *20 n.4.

17 *Id.* at *20 (emphasis added).

18 *Id.* at *21.

manifested the alleged defect giving rise to the lawsuit.[19] That fundamental requirement, the court implicitly recognized, did not change by dint of the class action device.

- *Kachi v. Natrol, Inc.*, No. 13cv0412 JM(MDD), 2014 U.S. Dist. LEXIS 90987 (S.D. Cal. June 19, 2014). In *Kachi*, the plaintiff initiated a putative class action against the manufacturer of certain fitness supplements. The plaintiff alleged that the products were deceptively advertised as, *inter alia*, increasing the formation of Nitric Oxide in the blood, improving male sexual performance and strengthening immunity.[20] One of the primary allegedly false statements by the defendant was that "L-Arginine 3000 helps support vasodilation to enhance blood flow to tissues . . . promotes healthy blood vessels and supports vascular health."[21] The plaintiff sought to certify a national class of purchasers of the products, or alternatively, a California class. The court denied the plaintiff's bid for class certification under the commonality and typicality prongs of Rule 23. According to the plaintiff, the central common question in the case was whether "an oral arginine supplement metabolize[s] into nitric oxide ('N.O.') in the body as does endogeneous and naturally produced arginine?"[22] The plaintiff submitted expert evidence in support of his claim that oral arginine supplementation does not increase levels of N.O. "in healthy populations."[23] However, the defendant submitted conflicting expert testimony demonstrating increased levels of N.O. in certain "unhealthy populations."[24] As the court explained, the plaintiff did not account for the class of unhealthy individuals, "who arguably actually received benefits from Natrol's products."[25] As a result, the court concluded, 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."[26] Even if the alleged misstatements were uniform, the court reasoned, "the injuries suffered by the two groups (healthy vs. unhealthy) [were] distinct and not capable of resolution by uniform proof[.]"[27] The court therefore concluded that the commonality and typicality requirements of Rule 23(a) had not been satisfied.

- *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982). In *Feinstein*, the plaintiffs in three consolidated putative class actions sought to recover

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19 *Id.* at *20.

20 *Kachi*, 2014 U.S. Dist. LEXIS 90987, at *3-4.

21 *Id.* at *4 (internal quotation marks and citation omitted).

22 *Id.* at *11 (internal quotation marks and citation omitted).

23 *Id.* at *11-12 (internal quotation marks and citation omitted).

24 *Id.* at *12.

25 *Id.* at *13.

26 *Id.* at *14 n.2.

27 *Id.* at *14.

with respect to defective tires.[28] The litigation arose out of a series of failures of Firestone-manufactured steel belted radial tires, which prompted various government investigations and ultimately a voluntary recall program. The plaintiffs brought suit under warranty theories, even though some of them did not experience any difficulties with their vehicles.[29] The court denied the motion for class certification due in large part to the fact that the vast majority of class members' vehicles performed satisfactorily. The court reasoned that, "[s]ince it appears that the majority of the putative class members have no legally recognizable claim, the action necessarily metastasizes into millions of individual claims. That metastasis is fatal to a showing of predominance of common questions."[30] Proceeding to a class trial would not be administratively feasible, the court explained: "Those class members whose tires had performed as warranted would have to be identified and eliminated from the action. Myriad questions would confront the survivors, including the manner in which the alleged breach of warranty manifested itself, and other possible causes of the problem encountered."[31] In short, "[t]his situation simply does not lend itself to class treatment."[32]

Over the last several years, however, a number of courts have departed from the long line of decisions rejecting no-injury class actions. These courts are certifying such cases, even where it is clear that many class members have never encountered any problem with the subject product – and likely never will. Some of the most notable decisions are summarized below:

- *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010). Plaintiffs sought certification of a class of purchasers of Jaguar vehicles that contained a defect resulting in premature tire wear.[33] 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.[34] The Ninth Circuit reversed, however, holding that "proof of the manifestation of a defect is not a prerequisite to class

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28 *Feinstein*, 535 F. Supp. at 598-99.

29 *Id.* at 601-02.

30 *Id.* at 603 (footnote omitted).

31 *Id.*

32 *Id.* A number of other federal decisions are in accord. *See, e.g.*, *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) ("Oshana's claims were not typical of the putative class" because "[m]embership . . . required only the purchase of a fountain Diet Coke" and "[s]uch a class could include millions who were not deceived and thus have no grievance under the ICFA."); *Trunzo v. Citi Mortg.*, No. 2:11-cv-01124, 2014 U.S. Dist. LEXIS 43056, at *40-42, *45 (W.D. Pa. Mar. 31, 2014) (striking class allegations in consumer-fraud case where plaintiffs did not suffer the complained-of injury and, thus, their claim "could not be typical of the purported class claims for the purpose of class-wide adjudication under Rule 23(a)(3)"); *Cunningham Charter Corp. v. Learjet, Inc*., 258 F.R.D. 320, 327-29 (S.D. Ill. 2009) (denying certification of warranty claims because the proposed class definition included product owners who never made a warranty claim during the warranty period, much less had a claim denied, and therefore had not suffered any injury), *rev'd on other grounds*, 592 F.3d 805 (7th Cir. 2010).

33 617 F.3d at 1170.

34 *Id.* at 1171.

certification."[35] According to the Ninth Circuit, the issue of manifestation concerned the merits of the underlying claims, which could not be considered at the certification stage.

- *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), *cert. denied*, 134 S. Ct. 1273 (2014). The court certified a class of purchasers of front-load washing machines with an allegedly defective design resulting in "a propensity to develop biofilm, mold, mildew, bacteria and foul odors."[36] The court held that plaintiffs "need not prove that the undesirable condition . . . ***actually*** developed in every product," because the harm at issue was defendant's failure to disclose the washing machine's "***propensity*** to develop" bacteria and mold.[37] In other words, it was irrelevant for class-certification purposes whether class members' washing machines actually developed the problem that brought about the lawsuit.

- *Bruno v. Quten Research Institute, LLC*, 280 F.R.D. 524 (C.D. Cal. 2011). Plaintiff initiated a putative class action arising out of misrepresentations defendants supposedly made concerning the absorption rate of their liquid dietary supplement.[38] Defendants argued that the case should not proceed because neither the named plaintiff nor unnamed class members had suffered a concrete injury.[39] According to defendants, their product was more expensive than competitors' products because of its "***form***, not the representation that Defendants' product is six times more effective than its competitors."[40] The court certified the class, holding that plaintiff had suffered a cognizable injury because of the premium she paid for the product, especially where "Plaintiff's allegations of a premium are supported by her expert."[41] The court reached the same conclusion with respect to unnamed class members. In so doing, the court determined that the central issue in the case was whether defendants' alleged misrepresentations were objectively misleading, and it refused to consider the class members' actual experience with the product.

- *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011). Minnesota homeowners brought a class action alleging that the brass fittings used in defendant's plumbing system were inherently defective.[42] The district court certified warranty and negligence claims for class treatment. The company appealed, arguing in part that those class members whose pipes had not yet leaked – the "dry plaintiffs"

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35 *Id.* at 1173.

36 289 F.R.D. at 471.

37 *Id.* at 479.

38 280 F.R.D. at 528.

39 *Id.* at 530.

40 *Id.* at 530 n.2.

41 *Id.*

42 644 F.3d at 608.

– had suffered no injury.[43] The Eighth Circuit affirmed the district court's finding that the dry plaintiffs had alleged a "current harm" because they claimed the brass fittings contained a defect upon installation in breach of Minnesota warranty law.[44] Because the plaintiffs alleged that the brass fittings exhibited a defect at the moment they were installed, the court concluded that they had sufficiently alleged injury.

- *Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2014 WL 4652283 (N.D. Cal. Sept. 18, 2014). Plaintiffs sought to certify a class of California purchasers of Jamba Juice Smoothie Kit products that were allegedly mislabeled as "All Natural."[45] The plaintiffs did not allege that they experienced any problems with the juice. Indeed, the named plaintiffs sometimes consumed other products containing the same allegedly unnatural ingredients. And when one of the named plaintiffs was asked during a deposition if she thought she was harmed from purchasing and consuming the smoothie kit, she answered "no."[46] The court nonetheless granted the motion, certifying the class for purposes of determining liability.[47]

- *Banks v. Nissan North America, Inc.*, 301 F.R.D. 327 (N.D. Cal. 2013). Plaintiffs brought this product-liability class action as a result of problems they allegedly experienced with the brake systems in their Nissan vehicles.[48] The court relied on *Wolin*, 617 F.3d 1168, in finding that the requirements of class certification were satisfied, even though the named plaintiffs' experienced "isolated" problems that were not common to the class members.[49] Quoting *Wolin*, the court held that overbreadth did not serve as an obstacle to class certification because "'proof of the manifestation of a defect is not a prerequisite to class certification.'"[50]

- *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192 JSW, 2011 U.S. Dist. LEXIS 60608 (N.D. Cal. June 7, 2011). Plaintiff brought a putative class action on behalf of walnut purchasers who alleged that certain walnut products were deceptively marketed as being good for the heart.[51] The suit was brought even though the named plaintiff continued to purchase the walnuts after filing suit and testified that he would continue to purchase the walnuts, belying any real claim of injury.[52] The court nonetheless found that the plaintiff had suffered an economic injury and certified the class. The

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43 *Id.* at 616.

44 *Id.* at 616-17.

45 2014 WL 4652283, at *1.

46 *Id.* at *7.

47 *Id.* at *11.

48 301 F.R.D. at 329-30.

49 *Id.* at 334.

50 *Id.* at 335 (quoting *Wolin*, 617 F.3d at 1173).

51 2011 U.S. Dist. LEXIS 60608, at *1.

52 *Id.* at *10-12.

parties subsequently entered into a $3.45 million class action settlement that was approved in 2012.

- *Thurston v. Bear Naked, Inc.*, No. 11-CV-2985-H (BGS), 2013 WL 5664985 (S.D. Cal. July 30, 2013). Plaintiffs brought this class action on behalf of consumers who had purchased a Bear Naked food product, alleging that defendants had used deceptive and misleading labeling and advertisements.[53] Defendants argued that the class must be "defined in such a way that anyone within it would have standing," and that the definition currently included members who were unaffected by – or unexposed to – the alleged misrepresentations, and thus suffered no injury.[54] The court held that in the Ninth Circuit, standing under California's Unfair Competition Law is satisfied if at least one named plaintiff meets the requirements of standing, injury and causation.[55] The court found that this requirement had been satisfied given that the named plaintiffs claimed they purchased the Bear Naked products at least in part because of representations that the products were natural, and that they would have paid less for the products or purchased other products if they knew the representations were false.[56]

- *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). Purchasers of defendant's front-loading washing machine, the Duet, alleged that the washing machine's design led to the growth of mold and mildew in the machine.[57] 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.[58] Indeed, a majority of the class members did not have a mold problem with their washing machines.[59] 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, suffered economic damages by paying an inflated price for their washing machines. The court went on to hold that "[i]f Whirlpool can prove that most class members have not experienced a mold problem . . . then [it] should welcome class certification."[60]

- *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (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). Plaintiffs, purchasers of washing machines

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53 2013 WL 5664985, at *1.

54 *Id.* at *3 (internal quotation marks and citation omitted).

55 *Id.*

56 *Id.*

57 722 F.3d at 844.

58 *Id.* at 849.

59 *Id.*

60 *Id.* at 857.

sold by Sears, brought this class action alleging defects in the machines that caused mold growth and sudden stoppages.[61] 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."[62] In other words, whether large swaths of the absent class members experienced any problems with their allegedly defective washing machines was irrelevant to class certification.

- *Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264 (C.D. Cal. Apr. 9, 2014). Plaintiffs initiated a putative nationwide consumer-fraud and warranty class action, alleging that the defendants' homeopathic cold and flu products were defective and deceptively marketed.[63] The defendants argued that the products "worked for some individual class members" and that a number of class members were actually satisfied with the products.[64] According to the court, these arguments did not defeat class certification because they concerned the merits of the underlying claims.

- *In re IKO Roofing Shingle Products Liability Litigation*, 757 F.3d 599 (7th Cir. 2014). Purchasers of organic asphalt roofing shingles brought this class action alleging that defendant falsely told customers that the shingles met industry standards.[65] Plaintiffs argued two theories of damages: (1) that every purchaser of a tile is injured by delivery of a tile that does not meet quality standards, regardless of actual injury or failure of the product; and (2) purchasers whose tiles actually failed are entitled to recover actual damages.[66] The district court denied the motion for class certification, and the Seventh Circuit reversed. The Seventh Circuit ruled that it did not matter that certain class members' roofing shingles did not manifest the alleged defect.[67]

- *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014). Plaintiffs asserted various claims arising out of allegedly defective windows that caused leaking.[68] The Seventh Circuit recognized that many members of the class experienced no problems with their windows, raising individualized issues with respect to causation and injury. The Seventh Circuit nonetheless ruled that certification was proper, even though the product defect had not yet manifested for many members of the class. The parties

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61 702 F.3d at 360-61.

62 *Id.* at 362.

63 2014 WL 1410264, at *1-2.

64 *Id.* at *12 (internal quotation marks and citation omitted).

65 757 F.3d at 599-600.

66 *Id.* at 603.

67 *Id.*

68 753 F.3d at 719.

then entered into a settlement that the Seventh Circuit recently vacated as being "inequitable – even scandalous."[69] Even though 225,000 notices 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."[70] One obvious reason for the low claims rate – and the windfall reaped by the plaintiffs' lawyers – was that the class action previously endorsed by the Seventh Circuit included large numbers of consumers who were satisfied with the product at issue and therefore had zero motivation to obtain compensation.

Overbroad, no-injury class actions have also seeped into the antitrust arena, where courts are certifying classes even though the absent class members lack any cognizable antitrust injury. A prime example of this is the price-fixing context, in which a number of federal courts have presumed classwide injury in the face of evidence showing that numerous class members suffered no injury. For example, the plaintiffs in *In re Urethane Antitrust Litigation*, industrial purchasers of polyurethane chemicals, asserted class claims under federal antitrust laws, alleging that Dow Chemical conspired with other polyurethane manufacturers to fix prices by issuing coordinated price increase announcements.[71] Plaintiffs and their expert contended that these announcements artificially inflated the baseline price for all market participants, even though the undisputed evidence demonstrated that a great number of absent class members avoided these price increases by negotiations or by switching to substitute products.[72] The Tenth Circuit held that class certification was proper by presuming classwide injury based on the theory that the conspiracy artificially inflated the baseline for price negotiations.[73] Relying on that presumption, the Court of Appeals concluded that injury was a common issue that could be tried on a classwide basis.[74] In so doing, the Tenth Circuit deepened a division between the federal courts on this issue, joining the Third Circuit and some district courts that have improperly presumed classwide injury in price-fixing cases where the evidence reveals that numerous class members were not injured.[75]

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69 *Id.* at 721.

70 *Id.* at 726.

71 *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3725 (U.S. Mar. 9, 2015) (No. 14-1091).

72 *Id.* at 1254-55.

73 *Id.*

74 *Id.*

75 *See, e.g.*, *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151-52 (3d Cir. 2002) (applying presumption of classwide impact "[e]ven if the variation in price dynamics among regions or marketing areas were such that in certain areas the free market price would be no lower than the conspiratorially affected price") (internal quotation marks and citation omitted); *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 409-10 (S.D. Ohio 2007) (rejecting argument that "undisputed facts preclude [p]laintiffs from proving impact on every class member through common proof" because "[w]here, as here, [p]laintiffs have alleged a conspiracy to fix prices and allocate markets, courts have presumed class-wide impact").

Overbreadth was also an issue in the *Nexium* litigation, in which the plaintiffs alleged that AstraZeneca improperly paid three generic manufacturers to delay entry into the market of generic equivalents to Nexium, the manufacturer's heartburn drug. In opposing class certification, the defendants argued that the class was overbroad because it failed to account for "brand loyalists" – in essence, patients who refuse to take generic drugs and therefore could not have been injured. The district court rejected this argument, certifying a class, and the U.S. Court of Appeals for the First Circuit affirmed.[76] In its ruling, the Court of Appeals acknowledged that "a proper mechanism for exclusion of brand-loyalist consumers has not yet been proposed," but believed that absent class members could "establish injury through testimony by the consumer that, given the choice, he or she would have purchased the generic" and that such testimony could be provided "in the form of an affidavit or declaration."[77] In a strongly worded dissent, Judge William Kayatta expressed concern that the district court and the majority had improperly "kicked the can down the road" by assuming that it would be possible later in the litigation to determine who was injured and who was not.[78] Judge Kayatta also noted that class member affidavits would not be a proper way to establish injury because the defendant would have no feasible means of refuting them.[79]

Overbroad, no-injury class actions raise a number of serious concerns. For starters, many of these cases are based on the mistaken premise that under Rule 23(c)(4) – which governs issues classes – the court can get around the fact that many class members are not injured by certifying the question of liability as long as common questions predominate as to that issue alone, and leaving damages questions for another day. That was the case in *Butler v. Sears, Roebuck & Co.* and *Glazer v. Whirlpool Corp.*, both of which are summarized above. However, issues classes are 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 – for example, in the washing-machine cases, one significant defense is that consumer misuse can cause the odor problems that form the core of the plaintiffs' complaints.[80] 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. If the issues of injury and damages are left for later determination in individual proceedings, there has to be some way to instruct the juries in those subsequent proceedings not to redecide any issue decided by the first "liability" jury – a difficult task given the overlapping nature of the questions whether a product is defective and whether it injured the class member. To use the washing machine cases again as an example, even if there were a plaintiff verdict in the liability phase, a second jury might well question whether the mere

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[76] *In re Nexium Antitrust Litig.*, Nos. 14-1521 & 14-1522, 2015 WL 265548 (1st Cir. Jan. 21, 2015).

[77] *Id.* at *7.

[78] *Id.* at *18 (Kayatta, J., dissenting).

[79] *Id.* at *19.

[80] *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).

propensity to develop odor is really a "defect" when the class member before it has never had a problem with his machine. In short, 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."[81]

Another problem with the issues-class approach embraced by the Sixth and Seventh Circuits is that it sanctions the use of a dubious procedure that no one actually wants to litigate. For plaintiffs, the promise of the class action device is significantly compromised because victory in the common phase does not generate any cash for their pockets; damages, if any, would only be awarded in follow-on proceedings, which would potentially have to be litigated on an individual basis, and often for small sums of money that would never cover the costs of trying the case. Defendants likewise will often prefer to settle such matters because doing so is 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. Only a few recent decisions have recognized these problems. As one court put it, "allowing myriad individual damages claims to go forward [after a class trial on liability] hardly seems like a reasonable or efficient alternative, particularly in a case" with a low ceiling on each class member's potential damages.[82] Most courts, however, have not even attempted to address this concern.

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 rare defense verdict. While some may argue that Whirlpool's victory vindicates the view that defendants can win issues trials, Whirlpool should not have had 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.

Beyond these problems, overbroad class actions also undermine the proper administration of justice and put a strain on our economy. Unlike Whirlpool, most defendants opt for settlement following class certification, regardless of the merits of the underlying claims. Indeed, it is well known that "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."[83] 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.[84] In addition to existing

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

82 *Rahman v. Mott's LLP*, No. 13-cv-03482-SI, 2014 WL 6815779, at *9 (N.D. Cal. Dec. 3, 2014).

83 Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition).

84 *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[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 *(cont'd)*

pressures to settle substantively meritless claims, defendants are increasingly facing settlement pressures from wildly overbroad cases – in which only a fraction of class members are even conceivably affected by the alleged misconduct giving rise to the litigation. Classwide settlements in such cases indisputably result in overcompensation by sending free money to class members who would never be able to recover (or even think to bring suit) individually against the defendant.[85] In essence, overbroad class actions are nothing more than a mechanism for obtaining a windfall for uninjured class members and, more often, the attorneys who claim to represent their interests.

In reality, however, overcompensation is as much a problem for consumers as it is for business. As Judge Minor Wisdom once explained, damages paid in litigation to those consumers who are actually injured "are presumably incorporated into the price of the product and spread among" all purchasers.[86] But when compensation is potentially available to all consumers – injured and uninjured alike – manufacturers will act to include those costs in the price as well.[87] The result is that, "instead of spreading a concentrated loss over a large group, each [consumer] would cover his own [potential recovery] (plus the costs of litigation) by paying a higher price . . . in the first instance."[88] Echoing this same logic, Judge Easterbrook explained in a footnote in the Seventh Circuit's decision in *Bridgestone/Firestone* that allowing even modest compensation for uninjured class members could easily double a defendant's total liability for a product that rarely malfunctions and injures anyone, a result that "overcompensates buyers and leads to excess precautions" by manufacturers.[89] It is precisely this sort of economic distortion – which Judge Wisdom saw "little reason to adopt" – that the courts described above have encouraged by endorsing overbroad class actions.

II. THE FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015 WOULD ELIMINATE THESE MERITLESS CLASS ACTIONS

The growing embrace of no-injury consumer class actions among certain federal courts raises serious legal and public-policy concerns. To reverse this trend, Congress should enact the Fairness in Class Action Litigation Act of 2015. Under that legislation, "[n]o Federal court shall certify any proposed class unless the party seeking to maintain a class action affirmatively

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the probability of an adverse judgment is low.") (citation omitted).

85 *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").

86 *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991).

87 *See id.*

88 *Id.*; *see also, e.g.*, Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004) ("Class actions have had an economic impact as well. . . . Businesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices.") (internal quotation marks and citation omitted).

89 288 F.3d at 1017 n.1.

demonstrates through admissible evidentiary proof that each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives."[90]

The legislation imposes a simple requirement: class actions are only allowed to proceed in federal court if all of the class members claim to have suffered the same type of injury as the named plaintiff. Thus, for example, if the named plaintiff brings a lawsuit claiming that his vehicle malfunctioned in a certain way, he or she cannot represent a class that includes everyone who purchased the same model vehicle regardless of whether or not it malfunctioned. The legislation also requires the named plaintiff to come forward with "admissible evidentiary proof" to satisfy this requirement – i.e., expert and fact evidence. To obtain this evidence, plaintiffs would have at their disposal all of the usual discovery tools that the Federal Rules already provide. For example, to ascertain the extent of the alleged problem (if any), the plaintiff could propound discovery on the defendant seeking information regarding incidence of failure in testing or the number of complaints received regarding the claimed defect at issue in the litigation. The plaintiff could then rely on that information in demonstrating that he or she suffered the same type of injury as others in the proposed class.[91] Expert testimony would then be required to show that there is a uniform defect common across the class. Similarly, in a case involving allegedly deceptive labeling, the plaintiff would have to establish that all class members were exposed to the alleged misrepresentations and could do so by showing that all of the products in question contained the same supposed misstatement on the label – also a fact that could be gleaned during discovery. In any case, the plaintiff would remain free to revise the proposed class definition to attempt to conform it to whatever is learned during discovery, narrowing it as needed to ensure that any class is limited to individuals who sustained the same type and extent of injury as the plaintiff.

Adoption of the proposed legislation would not mark a radical change in federal class action law. After all, as already explained, federal and state courts had widely rejected these types of cases until recent years. In effect, FICALA would do no more than enforce the existing Rule 23 requirement of typicality – i.e., that the claims of the named class representative be representative of the claims of the absent class members. As previously explained, several federal courts have already interpreted Federal Rule of Civil Procedure 23's typicality requirement as precluding overbroad class actions; FICALA would ensure that the same rule would be applied consistently by all federal courts.

FICALA is also consistent with the Supreme Court's seminal commonality ruling in *Wal-Mart Stores, Inc. v. Dukes*.[92] There, the Supreme Court added heft to the long-glossed-over

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90 Fairness in Class Action Litigation Act of 2015, H.R. 1927, 114th Cong. § 2 (2015).

91 *Cf. In re Canon Cameras Litig.*, 237 F.R.D. 357, 359 (S.D.N.Y. 2006) (denying motion for class certification because plaintiffs "have not shown that more than a tiny fraction of the cameras in issue malfunctioned *for any reason*. Specifically, in response to defendants' showing that fewer than two-tenths of one percent of the cameras here in issue have been reported as having even arguably malfunctioned, plaintiffs have been unable to adduce any evidence to the contrary[.]").

92 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

requirement of commonality under Rule 23(a) by holding that the key inquiry is not whether a question is "common" to the class, but rather whether the classwide proceeding will "'generate common *answers* apt to drive the resolution of the litigation.'"[93] While *Dukes* was primarily a decision about commonality, it noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[94] The proposed legislation would merely effectuate what the Supreme Court implicitly recognized in *Dukes*. After all, the claims of a named plaintiff whose product actually malfunctioned as a result of the defendant's alleged conduct can hardly be "so interrelated [with those of the absent class members whose products performed satisfactorily] that the interests of the class members will be fairly and adequately protected in their absence."[95]

Because FICALA merely clarifies what the Supreme Court and certain other federal courts have already explicitly and implicitly recognized, the legislation would not signal a sea change in federal class action law. Rather, it would simply codify the requirement of typicality, forcing all federal courts to take this Rule 23 prerequisite seriously and delivering important benefits to the judicial system, our economy and American consumers.

I appreciate the Subcommittee allowing me to testify today, and I look forward to answering any questions that the Members of the Subcommittee may have.

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93 *Id.* at 2551 (citation omitted).

94 *Id.* at 2550-51 & n.5 (internal quotation marks and citation omitted).

95 *Id.* (internal quotation marks and citation omitted).