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BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

ON BEHALF OF THE
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL (IADC)

IN SUPPORT OF H.R. 1927,
THE "FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015"

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TESTIMONY OF MARK A. BEHRENS
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ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, thank you for inviting me to testify on behalf of the International Association of Defense Counsel (IADC) in support of H.R. 1927, the "Fairness in Class Action Litigation Act of 2015."

The IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

My testimony focuses on the emergence of overly broad, "no injury" class actions.[1] These are cases in which a named plaintiff with a concrete injury brings a lawsuit seeking to represent a class that includes countless others that have suffered no genuine injury at all. Typically, the cases involve a product that has malfunctioned for the named plaintiff and that has the potential to malfunction for others, but has not actually caused any problems for most of the class members. The theory is that the plaintiffs all paid a premium in light of the product's potential to malfunction or the product has diminished in value as a result of the alleged defect. "No injury" class actions can also arise in other contexts, such as employment, antitrust, privacy/data breach, and labeling and advertising cases, among others.[2]

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1 My partners Victor Schwartz and Cary Silverman have referred to "no injury" class actions as a form of "empty suit" litigation. They thoroughly discuss the subject in a forthcoming *Brooklyn Law Review* article. *See* Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation*, 80 Brook. L. Rev. – (forthcoming 2015).

2 *See* Edward Sherman, *"No Injury" Plaintiffs and Standing*, 82 Geo. Wash. L. Rev. 834 (2014).

"No injury" class actions game the legal system, incentivize litigation involving claims that are either premature (because no genuine injury has occurred yet) or actually meritless (because it never will), result in higher prices for all consumers, and put a strain on our economy.

The "Fairness in Class Action Litigation Act of 2015" is modest and targeted legislation that deals specifically with these problems. The legislation provides that a federal court may not certify a proposed class unless the party seeking the class action 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." The named plaintiff's injury must be *typical* of the class, as many courts already interpret Rule 23 to require. There is precedent for federal class action reform and public support for the proposal in the bill.

I. OVERLY BROAD, "NO INJURY" CLASS ACTIONS ARE A PROBLEM

There are many legal and policy problems created by overly broad class actions in which named plaintiffs with concrete injuries represent class members without genuine injuries.

First, these types of cases circumvent Article III and Rule 23. Plaintiffs' theory in these cases is that the named plaintiff and the class members share a common "injury"—e.g., alleged overpayment of the product they purchased. In reality, these cases involve a named plaintiff whose claim is highly *atypical* of the class because the named plaintiff has suffered an *actual* harm while the class members merely have a *speculative* economic harm. Unlike the named plaintiff, whose product has malfunctioned, the class members' products may never malfunction.

Second, "no injury" class actions stray far from the laudable underpinnings of Rule 23. Class actions were developed mainly for civil rights litigants seeking injunctive relief in discrimination cases. Over time the use of the class action spread to other types of litigation. Through the class action, courts are able to resolve in one action many small claims that would not be brought individually because the cost of any particular suit would exceed the possible

benefit to the claimant. There is, however, an ocean of difference between bundling together meritorious small claims to provide relief to those affected and using the class action as a mechanism to pay class members who would never recover if they filed suit individually.

Third, overly broad class actions are unfair because class members that *have* an actual harm may be "forced to sacrifice valid claims in order to preserve the lesser claims that everyone in the class can assert," potentially leading to "substantial under-compensation for consumers who have suffered an actual harm."[3] Such actions are also unfair to defendants because of the "settlement pressure imposed by an artificially enlarged class."[4] Class certification imposes substantial pressure on defendants to settle, typically obviating further proceedings on the merits. Defendants are forced to overcompensate class members with no genuine harm, giving them free money because they would never be able to recover individually against the defendant.

Fourth, class members often see little benefit in these cases. Many of these types of cases are not successful and, when they do produce a settlement, there is usually little interest among class members in participating. As one commentator has explained:

> Billed as "consumer protection" measures, these cases allege causes of action under the auspices of both product liability and consumer fraud. However, these so-called "no-injury" actions are very often nothing more than an attempt by creative plaintiffs' lawyers to cash in on the class action concept—the plaintiffs themselves, if successful, would each be entitled to a relatively minimal amount of money, while their attorneys would collect millions upon millions of dollars in fees.[5]

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[3] *The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (Feb. 27, 2015) (statement of the Hon. Bob Goodlatte).

[4] *The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (Feb. 27, 2015) (statement of Andrew Pincus, Mayer Brown LLP, on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform).

[5] Scott L. Haworth, *Dismissing No-Injury Class Actions*, For The Def., Dec. 2010, at 47.

The Subcommittee recently heard testimony on this issue from Andy Pincus of Mayer Brown LLP on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform.[6] His firm performed an empirical analysis of a neutrally selected sample set of putative consumer and employee class actions filed in or removed to federal court in 2009. They found that class members received *nothing* in two-thirds of the cases sampled and only *paltry* benefits in the rest:

- Just under one-third (31%) of the cases were dismissed on the merits.[7]
- A little more than one-third (35%) were dismissed voluntarily by the plaintiff, meaning "a payout to the individual named plaintiff and the lawyers who brought the suit—even though the class members receive nothing."[8]
- One-third (33%) of the cases were settled on a class basis, but some of those resulted in payment to a charity or injunctive relief with no monetary payment to class members and other settlements "delivered funds to only miniscule percentages of the class: .000006%, .33%, 1.5%, 9.66%, and 12%."[9]

Lastly, overly broad "no injury" class actions create enormous costs on companies, even in the vast majority of cases that are resolved with no settlement or just tiny payments to class members. The legal fees alone can be enormous. These costs are passed on to all consumers and place a strain on the economy.[10]

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6 *See supra* note 4 (statement of Andrew Pincus).

7 *See id.* at 5.

8 *Id*.

9 *Id*. at 6.

10 *See* 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) ("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,

II. EXAMPLE: THE "WASHING MACHINE" CASES

Class actions brought against front-loading washing machine manufacturers illustrate the phenomenon of the overly broad "no injury" class action. In a number of nearly identical class actions against Whirlpool, Bosch, Electrolux, LG, Samsung, and other appliance manufacturers and retailers, plaintiffs seeking to represent more than 10 million consumers alleged that all high-efficiency front-loading clothes washers emit moldy odors due to laundry residue and are therefore defective—even though Consumer's Union annual reliability surveys showed that less than 1% of all washer owners reported any odor issue during the first four years of service.

In one bellwether case, *Glazer v. Whirlpool Corp.*,[11] the Sixth Circuit affirmed a district court's decision to create a liability class consisting of some 200,000 Ohio residents who bought a Whirlpool-brand front loading washer beginning in 2001, leaving damages for innumerable individual trials. The case consisted of two named plaintiffs who experienced mold issues in their washers; few of the class members had experienced any such problems with their washers. The Sixth Circuit theorized that each class member might show an injury as a consequence of paying a "premium price" for the product at retail, "even if the washing machines purchased by some class members have not developed the mold problem"[12]—and never will. In a virtually

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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).

[11] *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (Glazer v. Whirlpool Corp.)*, 678 F.3d 409 (6th Cir. 2012), *cert. granted, judgment vacated sub nom*, *aff'd*, 722 F.3d 838 (6th Cir. 2013).

[12] *Id*. at 420.

identical case from Illinois, *Butler v. Sears, Roebuck and Co.*,[13] the Seventh Circuit "agree[d] with the Sixth Circuit's decision."[14]

The Supreme Court of the United States granted *certiorari* and summarily vacated these rulings and remanded the cases for further consideration. In doing so, the Court appeared to send a message that it expected lower courts to more closely evaluate whether damages claimed in a putative class action fit the alleged harm.[15] On remand, however, both circuit courts reaffirmed their earlier rulings. The Supreme Court denied further review.[16]

Rather than settle, Whirlpool fought on, resulting in a rare class action trial in federal district court. After just two hours of deliberation, the Cleveland jury returned a defense verdict. Whirlpool's chief litigation counsel said, "There was no doubt the jury wasn't buying what they were selling. Nobody's been injured, and only 1 to 2 percent of the owners have any complaints. This is lawyer driven, not customer driven. The evidence showed that customers love these machines."[17]

While Whirlpool received a favorable result at trial, the company had to spend millions of dollars litigating these cases for the past nine years and ultimately vindicating itself at trial. Whirlpool and its tens of thousands of shareholders and employees will never get their money

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13 *See Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *reinstated*, 727 F.3d 796, 802 (7th Cir. 2013).

14 *Id.* at 363.

15 *See* John H. Beisner et al., *From Cable TV to Washing Machines: The Supreme Court Cracks Down on Class Actions*, Bloomberg Law-BNA, May 8, 2014, *available at* http://www.bna.com/from-cable-tv-to-washing-machines-the-supreme-court-cracks-down-on-class-actions/.

16 *See Sears, Roebuck and Co. v. Butler*, 134 S. Ct. 1277 (2014); *Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014).

17 *See* James F. McCarty, *Federal Jury Rejects Class-Action Lawsuit Brought Against Whirlpool Front-loading Washing Machines*, Cleveland Plain Dealer, Oct. 31, 2014, *available at* http://www.cleveland.com/court-justice/index.ssf/2014/10/federal_jury_rejects_class-act.html.

back. Instead, these litigation costs were likely passed on to the very consumers that were happy with their machines and never had a problem with them.

And the litigation is not over yet. After the verdict, plaintiffs' counsel said, "This is not the end of this fight, it is the end of the beginning," telling *Forbes* he would appeal.[18] Thus, even when defendants win a no-injury class action, they are not done with their expenditures. Also, class action plaintiffs' lawyers can file copycat or tag-along actions on behalf of consumers in each of the fifty states and the District of Columbia. This is a war of attrition on manufacturers aimed at prying pretrial settlements from them.

Not all federal circuits embrace the liberal class certification procedures of the Sixth and Seventh Circuits.[19] The need for uniformity in the law among the circuits provides another reason for Congress to enact "no injury" class action reform legislation.

III. THE FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015 IS A MODEST BUT EFFECTIVE SOLUTION TO OVERLY BROAD CLASS ACTIONS

As explained, the "Fairness in Class Action Litigation Act of 2015" provides a modest and targeted solution to the problem of overly broad "no injury" class actions. The bill simply requires a party seeking class certification in federal court to prove that "each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives." State court class actions are not affected.

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18 *See* Daniel Fisher, *Whirlpool Wins First Round of 'Smelly Washer' Litigation But More Trials Loom*, Forbes, Oct. 30, 2014, *available at* http://www.forbes.com/sites/danielfisher/2014/10/30/whirlpool-wins-first-round-of-smelly-washer-litigation-but-more-trials-likely/.

19 *See, e.g., Avritt v. Reliastar Life Ins. Co.,* 615 F.3d 1023, 1034 (8th Cir. 2010) ("a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.").

The legislation certainly does not ban class actions, even those that involve claims that individually might have little value. The bill simply requires that the name plaintiff's injury is typical of the class members the named plaintiff purports to represent.

H.R. 1927 will allow courts and defendants to focus their resources on legitimate cases where genuine injury has occurred and better align the interests of named plaintiffs and class members.

IV. THERE IS FEDERAL PRECEDENT AND PUBLIC SUPPORT FOR REFORM

Congress has acted to rein in other class action abuses when they have arisen. Years ago when reports surfaced about abusive "coupon settlements" and certain magnet state courts setting nationwide policy (sometimes in conflict with the laws of the states where class members resided),[20] Congress enacted the Class Action Fairness Act of 2005 ("CAFA") to fix those problems. CAFA has worked well, as this Subcommittee heard in a recent hearing.[21]

But class action litigation has not remained static over the last decade. Over time the litigation has evolved and new problems have emerged. The rise of overly broad, "no injury" class actions is an example. The Congress of 2015 should fix the problems of today just as the Congress of 2005 enacted CAFA to fix the problem of that era.

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[20] *See* Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Forums Should Decide Multistate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483 (2000); John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case of It…In State Court*, 25 Harv. J.L. & Pub. Pol'y 143 (2001).

[21] *See The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (Feb. 27, 2015) (statements of Jessica Miller, Skadden, Arps, Slate, Meagher & Flom LLP; Andrew Pincus, Mayer Brown LLP, on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform; and John Parker Sweeney, President of DRI-The Voice of the Defense Bar).

There is also widespread public support for reform, as DRI President John Parker Sweeney recently told the Subcommittee.[22] According to Mr. Sweeney, a recent DRI National Poll on the Civil Justice System found that 78% of Americans would support a law requiring a person to show that they were actually harmed by a company's products, services, or policies to join a class action, rather than just showing the potential for harm.[23]

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

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22 *See id*. (statement of John Parker Sweeney).

23 *See id*. at 6.