Nos. 15-3912, 16-1203, 16-1408

(Consolidated with Nos. 15-3909, 16-1245)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

In re Target Corporation Customer Data Security Breach Litigation,

Leif A. Olson,
Objector-Appellant,

v.

Consumer Plaintiffs,
Plaintiff-Appellee,

Target Corporation,
Defendant-Appellee.

———————————————

On Appeal from the United States District Court
for the District Of Minnesota –No. 0:14-md-02522-PAM
District Judge Paul A. Magnuson

Supplemental Reply Brief of Leif A. Olson

Theodore H. Frank
Melissa A. Holyoak
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street NW, 7th Floor
Washington, DC 20005
Phone: (202) 331-2263
E-mail: ted.frank@cei.org
E-mail: melissa.holyoak@cei.org

Attorneys for Objector-Appellant Leif A. Olson

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Introduction

This month's Equifax data breach, exposing personally identifying information of over 140 million Americans to lifelong risk of identity fraud, demonstrates the importance of adhering to *Amchem* and enforcing Rule 23(a)(4). When different class members have different competing interests, they require separate *counsel*; it violates the law to have a lump-sum settlement for a single conglomerated class with a single class counsel who then unilaterally divvies up the proceeds for the various interests. Olson Supplemental Brief ("OSB") 5-18. The district court and class counsel simply fail to substantively address the need for separate counsel.

And even if the single class counsel's choice of division of settlement proceeds is a plausibly "adequate" settlement for the various subgroups under Rule 23(e), that does not provide the subclasses adequate *representation*. OSB16-17. As the first time around, the district court and plaintiffs confuse Rule 23(a)(4) with 23(e). This problem is especially true here, where several causes of action for statutory damages were waived without financial compensation, despite surviving motions to dismiss. California provides different rights and protections to its citizens than Alabama, and it runs roughshod over those material legal differences to treat their claims identically just to ensure that class counsel won't have to share fees with counsel for appropriately represented subclasses.

Argument

1. The district court's conclusion that there was no intraclass conflict was based on a clearly erroneous finding that the zero-recovery subgroups (those with

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only future-damages or statutory-damages claims) would actually receive a portion of the settlement remainder. SA10-11. Plaintiffs argue that, contrary to the plain language in the remand order, the district court meant the opposite of what it said. *See* Plaintiffs' Supplemental Brief ("PSB") 4. This is wrong.

First, plaintiffs point to the court's 2015 order (reversed by this Court) as demonstrating that the court understood that the subgroups received no compensation under the Settlement. PSB4. But prior to this appeal the district court refused to even consider an intraclass conflict or the zero-recovery subgroups. A20. Thus the 2015 order sheds no light on the court's view of those subgroups' rights under the Settlement.

Second, plaintiffs cite to the remand order, PSB4 (quoting SA3), but the quotation they rely on only *confirms* the error: "And, ***once all claims*** and class representative service awards ***are paid***, the settlement funds will be distributed on a pro-rata basis to individuals who do not have any documented proof of loss." SA3 (emphasis added). The district court believed that after claimants were paid (those who could file a claim for an out-of-pocket loss), the Settlement would compensate those that could not file claims (the excluded subgroups).

Indeed, the district court repeats this error multiple times in concluding that there is no intraclass conflict. The court distinguishes *Amchem* and *Ortiz*, reasoning that the subgroups' future injuries are unlikely and thus "the possible pro-rata share of the remaining settlement fund, constitutes all of the relief they could hope to reap from this litigation." SA10. The district court also found that because the "no

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demonstrable injury" plaintiffs would "receive a pro-rata share of any remaining settlement fund," there was no conflict between the "no-injury Plaintiffs" and the "demonstrable-injury Plaintiffs" because both were "fully compensated." SA11. The district court's error also led it to conclude incorrectly that any conflict was not "fundamental" because the Settlement "does not reduce any group's compensation to the benefit of another group's." SA18. The district court's intraclass conflict ruling requires reversal because it is based on a fundamental misunderstanding of the Settlement.

2. Adequacy fails under Rule 23(a)(4) because, contrary to plaintiffs' assertions, there was no named representative for the disfavored subgroups. Plaintiffs argue that class members with only future-damages claims were adequately represented because there were some class representatives that allegedly "could not" file claims. PSB8. But plaintiffs' assumption—that a named representative "could not" file a claim simply because that representative did not plead losses—is contradicted by the evidence. OSB7. As plaintiffs concede, many of those representatives *actually* filed claims. Indeed, adequacy of representation must be based on affirmative evidence not on an assumption (that is contradicted by the evidence). *Target,* 847 F.3d at 612.

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More importantly, while plaintiffs devote pages to arguing that the named representatives were adequate, plaintiffs have no response to Olson's argument (SB8-9) that separate legal counsel was required. As Olson repeatedly argued,

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whether or not there were named representatives that could represent the subgroups, adequacy was not satisfied because separate legal counsel was required. SA104-06; SA128-29; OSB8. To resolve intraclass conflicts, the class must be divided "into homogeneous subclasses under Rule 23(c)(4)(B), ***with separate representation*** to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) (emphasis added). "The rationale is simple: how can the value of any subgroup of claims be properly assessed without independent counsel pressing its most compelling case?" *In re Literary Works*, 654 F.3d 242, 253 (2d Cir. 2011). Adequacy was not satisfied here because separate legal counsel was required to present the subgroups' most compelling case in negotiations.

This is also why plaintiffs' argument—that adequacy is satisfied because *all* class members have potential future injuries and wanted to maximize recovery for those injuries—fails. PSB9, PSB18. "The force of *Amchem* and *Ortiz* does not depend on the mutually exclusivity of the classes; it is enough that the classes [do] not perfectly overlap." *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 827 F.3d 223, 235 (2d Cir. 2016). *Literary Works* also rejected the notion that representatives with overlapping categories of claims could represent multiple categories of class member. 654 F.3d at 252. A global representative has a natural incentive to shift the settlement value into the category with fewer claims. *Id.* The subgroup with only future-damages claims needed their own representative and their own legal counsel to make their most compelling case. Without separate

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representation, the Settlement was negotiated to favor the present-damages claims and freeze out those class members with only future-damages claims.

3. **The intraclass conflicts based on separate statutory causes of action also required separate subclassing and separate legal counsel.** Plaintiffs argue that Olson's argument that a fundamental conflict exists because of differing legal claims lacks support. PSB16.[1] But Olson cited *Literary Works*, which is directly on point. OSB10-12. There, the Second Circuit found intraclass conflicts because the three subclasses each had separate statutory claims. 654 F.3d at 252. Plaintiffs' only response to *Literary Works* is a footnote that the settlement there "disfavored one category of claims by saddling that category alone with all the risk that the total claims might exceed the overall settlement amount." PSB20 n.13. That distinction cuts against this certification, because ***the settlement structure here is worse***. While the Category C claims in *Literary Works* bore some *risk* of decreased compensation, the subgroups here have *zero* possibility of compensation.

Plaintiffs argue that Olson provides no support that some statutory claims are "stronger than others." PSB17. But the point is obvious: some survived motions to dismiss and others didn't. OB5. Morover, because each of the statutory claims provides different amounts of statutory damages (SB10), and each of the statutory

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[1] Plaintiffs argue waiver, PSB16, but Olson preserved an objection to intraclass conflict based on different statutory claims. OB30-34; A314-15. Regardless of the district court's finding, it is the province of this Court, not the district court, to determine which issues Olson preserved for appeal. *U.S. Dept. of Labor v. Rapid Robert's Inc.*, 130 F.3d 345, 348 (8th Cir. 1997).

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claims has different "substantial barriers" (PSB17) to recovery, the statutory claims have different *settlement* values. *Literary Works*, 654 F.3d at 252-53. Even with similar strengths and weaknesses, a claim for $1,000 statutory damages (California) obviously has a higher settlement value than a claim for $200 statutory damages (Rhode Island). OSB10. It insults federalism to treat these state legislatures' different policy choices as irrelevant. But as in *Literary Works*, Olson need not prove the extent of each claim's weaknesses or settlement value. 654 F.3d at 252-53. Instead, *Literary Works* demonstrates that each subclass requires separate counsel to make their most compelling case and negotiate maximum recovery based on the respective strengths and weaknesses of different causes of action. *Id.* at 253.

In re Uponor, Inc. does not prove otherwise; it affirmed approval of a class action involving defective brass plumbing fittings where the court had certified two subclasses: those with present-damages claims and those with future-damages claims. 716 F.3d 1057, 1061 (8th Cir. 2013). *Uponor* did not involve an intraclass conflict but an objector's challenge that the named representatives were inadequate because they failed to allege a California statutory claim. *Id.* at 1064. The Court found that objectors "failed to demonstrate that a legal remedy would be available under the California statute which is not afforded by the settlement terms." *Id.* at 1064. But this settlement entirely waives without compensation statutory damages claims that survived a motion to dismiss. Nothing in *Uponor* contradicts *Literary* or permits intraclass conflicts of subclasses with different statutory-damages claims. Instead,

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Uponor reaffirms the propriety of subclasses for present- and future-damages claims like *Amchem* and *Ortiz*.

Finally, plaintiffs note that there were class representatives from "virtually every state." PSB7 n.4. Yet there were no class representatives for Rhode Island or Washington, D.C., jurisdictions where plaintiffs alleged statutory damages that survived a motion to dismiss. OB5.

4. The competing interests between class members with damages before July 2015 and those with damages after the deadline resulted in the exclusion of the subgroups from compensation under the Settlement. Plaintiffs mischaracterize the intraclass conflicts, arguing that the subgroups' exclusion from Settlement relief is only "theoretical" and "rank speculation" of a conflict. PSB3, 11. But exclusion from relief is a manifestation of the dangers of the conflicts. The conflicts exist *ex ante* because of the subgroups' competing interests. Class members with present-damages would like maximum recovery for the losses they have *already* sustained while class members with only future-damages claims seek terms to adequately compensate them for the *risk* of future injuries or at least to preserve their future-damages claims. The fact that class members with only post-July-2015 claims received nothing under the Settlement merely shows that the conflict resulted in the worst case scenario for that subgroup.

Plaintiffs attempt to distinguish Supreme Court precedent that requires separate representation for present and future-damages claims by their subject matter. PSB14. But Rule 23(a)(4) is not limited to asbestos cases, nor cases with "multifarious

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and physical harms." SA88-89. Indeed, *Amchem* and *Ortiz* show that 23(a)(4) cannot permit a unitary resolution of disparate claims even to relieve the "massive impact of asbestos-related claims on the federal courts." *Ortiz*, 527 U.S. at 865 (Rehnquist, J., concurring).

Petrovic v. Amoco Oil Co., 200 F.3d 1140 (8th Cir. 1999), offers no aid to plaintiffs. Unlike this case (and *Amchem* and *Ortiz*), *Petrovic* was not faced with subgroups with varying legal claims, nor with a packaged certification and settlement. 200 F.3d at 1146. *Petrovic* class members possessed the *same* legal claim and received immediate monetary recovery. *Id.* Like *Amchem* and *Ortiz*, this case has an unrepresented subgroup of class members with post-July 2015 claims who have an exclusive interest in seeking relief for those claims but receive nothing under the Settlement.

Plaintiffs mistakenly argue that *Dewey v. Volkswagen AG* shows that subclassing is not necessary for class members with present-and future-damages claims. PSB18-19. The Third Circuit avoided a finding of conflict only because of a waiver by the appellants, and noted that the conflict between class members who experienced leakage before the claims cutoff and class members who experienced leakage after the claims cutoff was "indistinguishable" from the intraclass conflict that required reversal. 681 F.3d 170, 185 n.14 (3d Cir. 2012). Like *Dewey,* there is a fundamental conflict between class members who incurred out-of-pocket losses before the July 2015 claims deadline and those who incurred out-of-pocket losses afterwards.

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Plaintiffs maintain that the excluded subgroups receive a benefit under the Settlement because they have the "opportunity" for credit monitoring. PSB3, 10, 13, 19.[2] This is both factually incorrect—the Settlement does not provide credit monitoring to class members—and legally irrelevant. The Settlement *reimburses* class members who had *already* purchased credit monitoring before July 2015. A355. Credit monitoring is just one of the several categories of *past* losses that the Settlement reimburses. More important, plaintiffs' focus on the Settlement relief to excuse the intraclass conflict wrongly replaces the adequacy-of-representation analysis (Rule 23(a)) with a Rule 23(e) fairness assessment. SB16. Plaintiffs argue that separating these analyses is Olson's attempt to evade *Marshall*.[3] PSB20. But Olson is simply following *Amchem*: settlement fairness cannot substitute for adequacy of representation. 521 U.S. at 622. Settlement relief (or, in this case, lack thereof) cannot resolve the conflict between those who incurred past losses and those who manifest damages after July 2015.

Plaintiffs argue that Olson has offered "no evidence" of what the disfavored subclass should receive, PSB12. But under Rule 23(a)(4), Olson has no obligation to

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[2] Plaintiffs also argue that all class members received injunctive relief. PSB3, 10, 19. This does not resolve the 23(a)(4) conflict. *Payment Card*, 827 F.3d 223 (2d Cir. 2016).

[3] Unlike *Marshall*, not all class members may pursue claims for royalties. Those who did not suffer out-of-pocket loss before July 2015 get nothing. *Compare Marshall v. NFL*, 787 F.3d 502, 509 (8th Cir. 2015) *with* SA22 (discussing eligibility rules for claim submission).

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prove recovery any more than the *Literary Works* Group C had an obligation to prove separate counsel could have recovered more. That class counsel cannot contemplate recovery for class members with no out-of-pocket losses shows that the excluded subgroups deserve independent separate legal counsel that can. In any event, Target plainly thought the statutory-damages claims had some litigation value above zero, or they would not have wasted money unsuccessfully trying to dismiss them.

Finally, plaintiffs defend the district court's conclusion that subclasses were not needed based on the weakness of the future-damages claims. PSB12 (citing SA10). Again, this clearly erroneously ignores the fact that the Settlement spurns class members who suffered damages after July 2015, and ***plaintiffs acknowledged claims were filed after the deadline***. *Compare* A355, A386-87; SB17 *with* PSB6 (falsely claiming Olson never claimed post-July 2015 injuries existed).

Plaintiffs repeat the court's speculation that there is no risk of future injuries because all compromised credit cards have been replaced. PSB2; PSB12. But personally identifying information ("PII") was also stolen during the data breach. A10. In *In re Supervalu, Inc.*, this Court noted the potential for future injury when PII is stolen, distinguishing it from mere stolen credit-card information. ---F.3d---, 2017 WL 3722455, *5-6 (8th Cir. Aug. 30, 2017). If class members lack standing because they did not sufficiently allege future injury, those class members should be excised from the class definition so their unripe claims are not released. *Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010).

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Conclusion

This Court should vacate the class certification order and hold that the single settlement class is improper.

Dated: September 15, 2017

Respectfully submitted,

/s/ Melissa A. Holyoak

Theodore H. Frank
Melissa A. Holyoak
COMPETITIVE ENTERPRISE INSTITUTE
CENTER FOR CLASS ACTION FAIRNESS
1310 L Street, 7th Floor
Washington, DC
Phone: (202) 331-2263
E-mail: ted.frank@cei.org
E-mail: melissa.holyoak@cei.org

Counsel for Objector-Appellant Leif A. Olson

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Dated: September 15, 2017

Respectfully submitted,

/s/ Melissa A. Holyoak
Melissa A. Holyoak

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I hereby certify that on September 15, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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Mr. Michael J. Agoglia
Alston & Bird LLP
560 Mission Street, Suite 2100
San Francisco CA 94105-0912

John A. Yanchunis
MORGAN & MORGAN
201 N. Franklin Street
Tampa, FL 33602

/s/ Melissa A. Holyoak
Melissa A. Holyoak

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