

1 Theodore H. Frank (SBN 196332)
2 **COMPETITIVE ENTERPRISE INSTITUTE**
3 **CENTER FOR CLASS ACTION FAIRNESS**
4 1310 L Street, NW, 7th Floor
5 Washington, DC 20005
6 Voice: (202) 331-2263
7 Email: ted.frank@cei.org
8 *In pro per*

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN JOSE DIVISION

12 In Re Online DVD Rental Antitrust Litigation

13
14 Case No. 4:09-md-2029-PJH

15 Theodore H. Frank,
16 Objector.

17 **DECLARATION OF BRIAN WOLFMAN IN**
18 **SUPPORT OF MOTION TO DISCLOSE**

19 Date: April 11, 2018
20 Time: 9:00 a.m.
21 Courtroom: 3, 3rd Floor
22 Judge: Hon. Phyllis J. Hamilton

1 I, Brian Wolfman, declare as follows:

2 1. I have personal knowledge of the facts discussed below, and, if called as a witness, I
3 would testify competently to them.

4 2. My business address is Georgetown University Law Center, 600 New Jersey Avenue,
5 NW, Suite 312, Washington, D.C. 20001. My telephone number is (202) 661-6582. My email address
6 is wolfmanb@georgetown.edu.

7 3. I am a 1984 graduate of Harvard Law School and am currently an associate professor at
8 Georgetown University Law Center and director of the school's Appellate Courts Immersion Clinic.
9 From 2014 to 2016, I was a Professor of the Practice of Law and Co-Director of Stanford Law
10 School's Supreme Court Litigation Clinic. From 2009 to 2014, I was Director of the Civil Rights
11 section of Georgetown Law's Institute for Public Representation, a student clinic that handles
12 complex trial and appellate litigation focused on civil rights and other public-interest litigation.
13 Before Georgetown, I spent nearly twenty years at the national public interest law firm Public
14 Citizen Litigation Group, serving the last five years as the Group's Director. I was an Advisor to the
15 American Law Institute's Principles of the Law of Aggregate Litigation, have authored a variety of
16 articles about class actions and class-action settlements, and have repeatedly testified before
17 Congress about class actions. A copy of my CV is attached as Exhibit A.

18 4. Class counsel accuses Mr. Frank of seeking transparency of the redemption data as part
19 of an "agenda" against class actions. I disagree with Mr. Frank and the Competitive Enterprise
20 Institute in many respects: about the value of class actions generally and over various public-policy
21 debates surrounding class actions, *ex pres*, and tort litigation. But I agree with Mr. Frank that
22 disclosure of the coupon redemption rates in this case would be a good thing and that disclosure of
23 claims and redemption rates generally is a good thing that courts should require as a matter of
24 course.

25 5. Shedding more light on settlement outcomes will reveal which types of settlements work
26 and which do not. Judges will learn which practices—with regard to notice, type of relief, claim
27 procedures, and the like—benefit class members and which do not. Anecdotes about greedy

1 plaintiffs' lawyers and corporate wrongdoers buying *res judicata* on the cheap do not make good
2 policy. But arming the general public; policy makers; and researchers at the Federal Judicial Center,
3 in academia, and in private think-tanks with information necessary to drive informed research and
4 policy judgments will.

5 6. Disclosing redemption rates and claims rates will also incentivize plaintiffs' attorneys to
6 do the right thing in future cases. If class counsel know that they will be held to account for a
7 settlement that fails to provide meaningful relief to a class, they will be more likely to take steps to
8 ensure that class members can obtain meaningful relief in future cases.

9 7. The American Law Institute's *Principles of the Law of Aggregate Litigation* suggests that
10 courts "should, absent special circumstances, require the parties to submit to the court a final
11 accounting describing the amount and distribution of all benefits to class members, other
12 beneficiaries, and counsel." Section 3.13(e).

13 8. Over the last two decades, I have frequently represented class members and others
14 objecting to class-action settlements. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Koby v.*
15 *ARS Nat'l Servs. Inc.*, 846 F.3d 1071 (9th Cir. 2017); *Day v. Persels & Assocs., LLC*, 729 F.3d 1309
16 (11th Cir. 2013); *Hecht v. United Collection Bureau*, 691 F.3d 218 (2d Cir. 2012); *In re Community Bank of*
17 *N. Va.*, 418 F.3d 277 (3d Cir. 2005). Public data about the redemption rates of the Wal-Mart "gift
18 cards" in this case would be useful in judging the fairness of future settlements that propose to use
19 similar instruments to settle class-action litigation.

20 9. In 2015, along with seven scholars across the nation and political spectrum, I proposed
21 an amendment to Rule 23 that would require parties to make the kinds of disclosures requested by
22 Mr. Frank here. It is based on a model statute on the same topic that I had drafted earlier. A copy of
23 this Rule 23 proposal is attached as Exhibit B. Nothing prohibits a district court from requiring
24 disclosures of these sorts now, and, indeed, I believe a district court following "best practices"
25 would always want to require these disclosures, absent highly compelling circumstances pointing in
26 the other direction. It is simply intolerable for courts to approve class-action settlements without
27 requiring the parties to inform the public how those settlements actually worked out. In my

1 judgment, disclosures would also be useful to the academic work of the scholars who signed the
2 Rule 23 proposal.

3 I declare under penalty of perjury under the laws of the United States of America that the
4 foregoing is true and correct.

5 Executed on March 26, 2018, in Washington, DC.

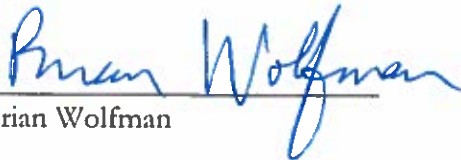
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7 Brian Wolfman
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EXHIBIT A

BRIAN WOLFMAN
(202) 661-6582; (301) 814-2138
wolfmanb@georgetown.edu

FULL-TIME LEGAL EMPLOYMENT

Georgetown University Law Center, Washington, DC 2016-present
Associate Professor of Law
Director, Appellate Courts Immersion Clinic
Direct student clinic that handles public-interest cases in appellate courts
Course: *Appellate Courts*

Stanford Law School, Stanford, CA 2014-2016
Professor of the Practice of Law
Co-Director, Supreme Court Litigation Clinic
Co-directed student clinic that handles cases in the U.S. Supreme Court

Georgetown University Law Center, Washington, DC 2009-2014
Visiting Professor of Law
Co-Director, Institute for Public Representation
Headed civil rights and general public-interest law student clinic that handles trial and appellate litigation
Courses: *Federal Courts and the Federal System* and *Appellate Courts*

Public Citizen Litigation Group, Washington, DC 1990-2009
Director, *Litigation Group*, 2004-2009
General Counsel, *Public Citizen*, 2004-2009
Staff lawyer, *Litigation Group*, 1990-2004
Practice areas: Public interest Supreme Court and appellate litigation; consumer health and safety; drug and medical device regulation; federal preemption; class actions; access-to-the-courts litigation; freedom of information and open government law; poverty law

Legal Services of Arkansas, Little Rock, AR 1985-1990
Staff lawyer for rural legal services program
Represented poor people in all areas of poverty law in state and federal courts and before administrative agencies

U.S. Court of Appeals for the Eleventh Circuit, Macon, GA 1984-1985
Law clerk to Judge R. Lanier Anderson, III

PROFESSIONAL APPOINTMENTS

Institute of Medicine of the National Academies 2010-2011
Member, Committee on the Public Health Effectiveness of the FDA 510(k)
Clearance Process
Wrote report entitled “Medical Devices and the Public’s Health—The FDA
510(k) Clearance Process at 35 Years”

American Law Institute, Philadelphia, PA 2004-2009
Advisor on the “Principles of the Law of Aggregate Litigation”
Member of expert panel of advisors regarding creation of comprehensive ALI
treatise on the law of class actions and other aggregate litigation

Clients’ Security Fund of the District of Columbia Bar 1999-2004
Trustee, appointed by D.C. Court of Appeals for five-year term
Chair of Fund, 2003-2004; Vice-Chair, 2002-2003
Investigated and ruled on claims that D.C. Bar members took money or other
property entrusted to them by clients and others

Wasserstein Public Interest Fellow, Cambridge, MA November 1993
Advised students at Harvard Law School on careers in public interest law

ACADEMIC APPOINTMENTS (ADJUNCT)

Harvard Law School, Cambridge, MA 2004-present
Visiting Associate Professor of Law (2017-present)
Lecturer in Law (2004-2017)
Teach course on appellate courts

Vanderbilt University Law School, Nashville, TN November 2008
Adjunct Professor and Distinguished Visiting Practitioner of Law
Taught course on public interest litigation

Washington College of Law, Washington, DC 1997-2005, 2009
Adjunct professor
Taught course on appellate courts and advocacy

Stanford Law School, Palo Alto, CA January 2001
Irvine Visiting Lecturer in Law
Taught appellate courts seminar

Georgetown University Law Center, Washington, DC Fall 1995, Fall 1997
Adjunct professor
Taught courses on professional responsibility and appellate advocacy

EDUCATION

Harvard Law School, J.D., 1984
University of Pennsylvania, B.A., 1978

PUBLICATIONS

“*Mutual Pharmaceutical Co. v. Bartlett* and Its Implications,” 82 U.S.L.W. (BNA) 627-635, 667-676 (Oct. 29 & Nov. 5, 2013), and 41 Prod. Safety & Liab. Rptr. 1236 (BNA) (Oct. 14, 2013) (lead author)

“Judges! Stop Deferring to Class-Action Lawyers,” 2 U. Mich. J.L. Reform (online) 80A (2013)

“*PLIVA v. Mensing* and Its Implications,” 39 Prod. Safety & Liab. Rptr. (BNA) 972 (Sept. 5, 2011) (lead author)

“*Wyeth v. Levine* and Its Implications,” 37 Prod. Safety & Liab. Rptr. (BNA) 550 (May 11, 2009), and 24 Toxics Law Rptr. (BNA) 619 (May 21, 2009)

“Foreword: The National Association of Consumer Advocates—Standards and Guidelines for Litigating and Settling Consumer Class Actions (Second Edition),” 255 F.R.D. 215 (2009)

“Why preemption proponents are wrong,” 43 *Trial* 20 (March 2007)

“What the *Shutts* Opt-Out Right Is and What It Ought to Be,” 74 U. Mo. K.C. Law Rev. 729 (2006) (lead author)

“The FDA’s Argument for Eradicating State Tort Law: Why It Is Wrong and Warrants No Deference,” 21 Toxics Law Rptr. (BNA) 516 (May 25, 2006), and 34 Prod. Safety & Liab. Rptr. (BNA) 308 (Mar. 27, 2006) (co-author)

“*Bates v. Dow Agrosciences*: Will the Lower Courts Finally Start Listening?” 3 Prod. Safety & Liab. Rptr. (BNA) 949 (Sept. 26, 2005) (co-author)

“Preventing the Subversion of *Devlin v. Scardelletti*,” 6 Class Action Litigation (BNA) 453 (June 24, 2005)

“A Section-by-Section Analysis of the Class Action ‘Fairness’ Act,” 6 Class Action Litigation (BNA) 365 (May 27, 2005) (co-author)

“Let a Hundred Cases Wither: Proposal to require opt-in class actions would weaken consumers’ weapon, freeing companies to cheat again,” *Legal Times* 58 (May 9, 2005) (co-author)

“A real pick-up fix: Response to Thornburgh,” *Legal Times*, Aug. 6, 2001, A25

Monograph, *Preemption Under the National Traffic and Motor Vehicle Safety Act of 1966: Strategies for Plaintiffs’ Lawyers in Vehicle-Defect Cases* (Independent Counsel Resources 1998) (lead author)

“Preempting the preemption defense,” 34 *Trial* 54 (July 1998) (lead author)

“Preserving the Class Action by Fighting its Abuse,” 4 *The Consumer Advocate* 10 (May/June 1998)

“Foreword: National Association of Consumer Advocates—Standards and Guidelines for Litigating and Settling Consumer Class Actions,” 176 F.R.D. 370 (1998)

“Class actions for the injured classes,” *San Diego Union Tribune*, Nov. 14, 1997, B-11 (also published in *San Francisco Daily Journal* and *Los Angeles Daily Journal* on October 17, 1997)

“Representing the Unrepresented in Class Action Settlements,” 71 N.Y.U. Law Rev. 439 (1996) (lead author)

“Litigating Pre-emption Issues After *Medtronic v. Lohr*,” 11 *Toxics L. Rptr.* (BNA) 296 (Aug. 1996), and 24 *Prod. Safety & Liab. Rptr.* (BNA) 832 (Sept. 1996) (abridged and amended versions also published in various state trial bar periodicals) (lead author)

“*Medtronic v. Lohr*: Its Effect on Breast Implant Litigation,” Vol 4, No. 8, *Med. Legal Aspects of Breast Implants* (July 1996)

“Child Care, Work, and the Federal Income Tax,” 3 Am. Journ. Tax Pol. 153 (1984)

Contributions to *ALSSC Reporter*, the newsletter of the Arkansas Legal Services Support Center, and op-ed pieces

CASEWORK

United States Supreme Court

(Not listed: extensive certiorari-stage work, including approximately 20 petitions for certiorari and 30 oppositions to certiorari on which I was the lead lawyer)

Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652 (2017) (whether ERISA plans maintained, but not established, by certain church affiliates are “church plans” and thus exempt from ERISA’s retiree protections) (lead counsel for amicus national employment law organization)

Andrew F. v. Douglas County Sch. Dist., 137 S. Ct. 988 (2017) (establishing definition of “free appropriate public education” under the federal special-education statute, the Individuals with Disabilities Education Act) (principal co-counsel)

Green v. Brennan, 136 S. Ct. 1769 (2016) (when administrative filing period commences for a Title VII constructive discharge claim) (lead counsel)

Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591 (2015) (whether federal Natural Gas Act preempts state antitrust claims regarding market manipulation of retail natural gas sales) (co-counsel)

McBurney v. Young, 133 S. Ct. 1709 (2013) (whether state statute limiting right of access to public records to citizens of the state violates Article IV’s Privileges and Immunities Clause and the dormant commerce clause) (principal co-counsel).

U.S. Airways, Inc. v. McCutchen, 133 S. Ct. 1537 (2013) (whether ERISA contact abrogates equitable common-fund doctrine) (lead counsel for consumer amicus)

National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012) (whether the Anti-Injunction Act barred suit seeking to enjoin operation of the Affordable Care Act) (principal co-counsel for amici former commissioners of the Internal Revenue Service)

Elgin v. Department of Treasury, 132 S. Ct. 2126 (2012) (whether the Civil Service Reform Act precludes a federal district court from granting a federal employee equitable relief on a constitutional claim against that employee's federal employer) (principal co-counsel)

Minneci v. Pollard, 132 S. Ct. 617 (2012) (whether *Bivens* authorizes a damages suit for violations of the Eighth Amendment against employees of a private prison corporation operating a federal prison) (principal co-counsel)

Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) (whether New York's ban on class actions in certain civil cases applies in federal court under *Hanna* and *Erie*) (principal co-counsel)

Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100 (2009) (whether a district court's rejection of an attorney-client privilege claim is immediately appealable under the collateral-order doctrine) (principal co-counsel)

Richlin Security Service Co. v. Chertoff, 553 U.S. 571 (2008) (whether paralegal services are reimbursable at market rates under the Equal Access to Justice Act) (lead counsel)

Taylor v. Sturgell, 553 U.S. 880 (2008) (regarding federal common law and due process limits on *res judicata*, particularly in "public law" litigation) (principal co-counsel)

Warner-Lambert Co., LLC v. Kent, 552 U.S. 440 (2008) (equally divided court) (whether state statute authorizing liability arising from prescription drugs, where manufacturer deceived FDA in gaining marketing approval, is preempted by federal law) (principal co-counsel)

Riegel v. Medtronic, Inc., 552 U.S. 312 (2008) (whether federal law preempts state-law products liability claim arising from medical device that has received FDA pre-market approval) (principal co-counsel)

Jones v. Flowers, 547 U.S. 220 (2006) (whether government has obligation, under due process clause, to take additional reasonable steps to attempt notice

to homeowner before selling her property when mailed notice of tax sale is returned unclaimed) (principal co-counsel)

Lockhart v. United States, 546 U.S. 142 (2005) (whether Debt Collection Act permits federal government to offset a debtor's social security benefits to collect student loan debt that has been outstanding for more than 10 years) (lead counsel)

Scarborough v. Principi, 541 U.S. 401 (2004) (whether statute of limitations under fee-shifting statute applicable in actions against the federal government, the Equal Access to Justice Act, is jurisdictional or, rather, is subject to common-law equitable exceptions) (lead counsel)

Barnes v. Gorman, 536 U.S. 181 (2002) (whether punitive damages are available under Title II of the Americans With Disabilities Act and section 504 of the Rehabilitation Act) (principal co-counsel)

Devlin v. Scardelletti, 536 U.S. 1 (2002) (whether an absent class member may appeal approval of class action settlement to which he had timely objected without first having intervened in action) (principal co-counsel)

Norfolk Southern Railway Company v. Shanklin, 529 U.S. 344 (2000) (whether federal railroad laws and regulations preempt state-law tort claims alleging inadequate warnings at railroad crossings) (principal co-counsel)

Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598 (2001) (whether "catalyst theory" authorizes recovery of attorney's fees under federal statutes that authorize awards to the "prevailing party") (lead counsel for amici Public Citizen and American Civil Liberties Union)

Buckman Co. v. Plaintiffs' Legal Committee, 531 U.S. 341 (2001) (whether federal law preempts a state-law damages claim alleging injury from a regulated entity's fraud on a federal agency) (principal co-counsel for amicus Public Citizen)

El Paso Natural Gas Co. v. Neztosie, 526 U.S. 473 (1999) (case concerning the preemptive breadth of the Price Anderson Act amendments to the Atomic Energy Act) (lead counsel for amici Public Citizen et al.)

Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (whether class action

settlement seeking to resolve future asbestos personal-injury claims against large segment of asbestos industry can withstand Rule 23, due process, and justiciability challenges), *affg Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996) (lead counsel for respondent labor union, asbestos worker, and advocacy group litigants)

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) (whether federal medical device laws preempt state-law product liability claims) (lead counsel)

Ticor Title Ins. Co. v. Brown, 511 U.S. 117 (1994) (per curiam dismissal of writ) (whether Rule 23 and due process require a right to opt out of a damages class action) (co-counsel for amicus Public Citizen)

Shalala v. Schaefer, 509 U.S. 292 (1993) (procedural issue under federal attorney's fees statute) (lead counsel)

Ardestani v. INS, 502 U.S. 129 (1991) (whether federal fee-shifting statute applies to certain administrative deportation proceedings) (principal co-counsel)

Melkonyan v. Sullivan, 501 U.S. 89 (1991) (precursor to *Schaefer* above) (lead counsel)

Connecticut v. Doehr, 501 U.S. 1 (1991) (due process challenge to state statute permitting *ex parte* attachment of real property) (principal co-counsel)

United States Courts of Appeals

Balbed v. Eden Park Guest House, 881 F.3d 285 (4th Cir. 2018) (concerning circumstances under which employees who live and work on employers' premises are entitled to minimum wage and overtime pay under the Fair Labor Standards Act and state wage-and-hour laws) (lead counsel)

M.R. v. Ridley Sch. Dist., 868 F.3d 218 (3d Cir. 2017) (in what circumstances may parents of a child with a disability be awarded attorney fees under the Individuals with Disabilities Education Act for enforcing the Act's "stay-put" provision) (principal co-counsel)

Koby v. ARS Nat'l Servs., Inc., 846 F.3d 1071 (9th Cir. 2017) (whether, and in what circumstances, under the Magistrates Act and Article III, a non-Article III magistrate judge may enter a final appealable judgment approving a class-

action settlement) (lead counsel on those issues)

Freeman v. Dal-Tile Corp., 750 F.3d 413 (4th Cir. 2014) (concerning the standard for imputation of liability to employer based on third-party sexual and racial harassment under Title VII) (principal co-counsel)

Day v. Persels & Assocs., LLC, 729 F.3d 1309 (11th Cir. 2013) (same issues as *Koby* above) (sole counsel on relevant issues)

Hecht v. United Collection Bureau, 691 F.3d 218 (2d Cir. 2012) (whether to allow a collateral attack on a class-action settlement on the basis of constitutionally inadequate notice)

McBurney v. Young, 667 F.3d 454 (4th Cir. 2012) (whether a state freedom of information statute that gives only that state's citizens the right to obtain public records violates Article IV's Privileges and Immunities Clause and the dormant Commerce Clause) (principal co-counsel)

Klier v. Elf Atochem North America, Inc., 658 F.3d 468 (5th Cir. 2011) (whether and in what circumstances the cy pres doctrine may be used to distribute left over class-action settlement funds) (lead counsel)

McBurney v. Cuccinelli, 616 F.3d 393 (4th Cir. 2010) (whether plaintiffs had standing to bring constitutional challenge to Virginia law limiting use of Virginia's FOIA to Virginia citizens) (principal co-counsel)

Public Citizen, Inc. v. Office of Management and Budget, 598 F.3d 865 (D.C. Cir. 2010) (whether Freedom of Information Act requires release of unredacted versions of documents relevant to question of which government agencies were permitted to bypass OMB's legislative and budgetary clearance processes) (principal co-counsel)

Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010) (whether New York's lawyer advertising restrictions violate the First Amendment) (principal co-counsel)

Fellner v. Tri-Union Seafoods, L.L.C., 539 F.3d 237 (3d Cir. 2008) (whether FDA's statements concerning the risks of eating tuna preempts state-law claims for damages from mercury poisoning) (principal co-counsel)

Del Campo v. Kennedy, 517 F.3d 1070 (9th Cir. 2008) (whether private debt collector working under contract with prosecutors was an "arm of the state")

entitled to Eleventh Amendment immunity) (principal co-counsel)

Owner-Operator Independent Drivers Ass'n, Inc. v. Federal Motor Carrier Safety Admin., 494 F.3d 188 (D.C. Cir. 2007) (second challenge to Department of Transportation regulations on commercial truck drivers' hours of service) (principal co-counsel)

Peoples v. CCA Detention Centers, 422 F.3d 1090 (10th Cir. 2005), *effectively aff'd by equally divided en banc court*, 449 F.3d 1097 (10th Cir. 2006) (whether *Bivens* authorizes an Eighth Amendment claim against a prison guard employed by a private prison corporation under contract with the federal government) (principal co-counsel)

Advocates for Highway and Auto Safety v. Federal Motor Carrier Safety Admin., 429 F.3d 1136 (5th Cir. 2005) (challenge to Department of Transportation regulation on entry-level training for commercial truck drivers) (principal co-counsel)

In re Community Bank of Northern Virginia, 418 F.3d 277 (3d Cir. 2005) (whether and in what circumstances district courts have authority to abrogate class members' previously exercised opt-outs to bar opt-out clients from consulting with their individually retained lawyers) (lead counsel)

Public Citizen v. Federal Motor Carrier Safety Admin., 374 F.3d 1209 (D.C. Cir. 2004) (first challenge to Department of Transportation regulations on commercial truck drivers' hours of service) (principal co-counsel)

In re Orthopedic Bone Screw Prods. Liab. Litig. (Custer), 350 F.3d 360 (3d Cir. 2003) (whether defendant may be indemnified by class action settlement for costs of defending and settling collateral attacks on that settlement) (lead counsel)

Martin v. Medtronic, Inc., 254 F.3d 573 (5th Cir. 2001) (whether federal medical device laws preempt state-law product liability claims) (lead counsel)

In re Orthopedic Bone Screw Prods. Liab. Litig. (Sambolin), 246 F.3d 315 (3d Cir. 2001) (whether notice and registration deadline in mass-tort class action settlement comported with Rule 23 and due process) (lead counsel)

In re Telectronics Pacing Systems, Inc., 221 F.3d 870 (6th Cir. 2000) (whether non-opt-out class action settlement comported with Rule 23 and due process)

(principal co-counsel)

Hart v. Bayer Corp., 199 F.3d 239 (5th Cir. 2000) (whether Federal Insecticide, Fungicide and Rodenticide Act completely preempts state-law product liability claims and thus establishes federal jurisdiction) (lead counsel)

Mitchell v. Collagen Corp., 126 F.3d 902 (7th Cir. 1997) (whether federal law preempts state-law tort claim arising from medical device that has received FDA pre-market approval) (lead counsel on remand from Supreme Court)

Dillon v. United States, 184 F.3d 556 (6th Cir. 1999) (en banc) (whether Federal Rule of Appellate Procedure 3(c)'s requirement that notice of appeal name the court to which appeal is taken is jurisdictional) (lead counsel for amicus)

Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1 (1st Cir. 1999) (whether class members in class action that has been settled can enter into side-settlement of their claims without disclosure to, or approval by, district court under Federal Rule of Civil Procedure 23) (lead counsel)

In re Prudential Ins. Co. of America Sales Practices Litig., 148 F.3d 283 (3d Cir. 1998) (justiciability and class certification challenge to nationwide class action insurance fraud settlement) (lead counsel for arguing amicus Public Citizen)

Roberts v. Florida Power & Light, 146 F.3d 1305 (11th Cir. 1998) (whether state-law-based tort claims are preempted by Price Anderson Act amendments to the Atomic Energy Act) (lead counsel)

Bowling v. Pfizer, Inc., 132 F.3d 1147 (6th Cir. 1998) (challenge to fee award methodology for post-settlement monitoring in common-fund class action) (lead counsel)

Bowling v. Pfizer, Inc., 102 F.3d 777 (6th Cir. 1996), *aff g Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261 (S.D. Ohio 1996), *recon. denied*, 927 F. Supp. 1036 (S.D. Ohio 1996) (challenge to \$33 million fee request in class action settlement regarding defective heart valve implanted in 80,000 patients) (lead counsel)

Arent v. Shalala, 70 F.3d 610 (D.C. Cir. 1995) (challenge to regulations concerning labeling of fresh fish and produce) (lead counsel)

In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.) (striking down class action settlement concerning 5.7 million owners of allegedly defective GM trucks), *cert. denied*, 516 U.S. 824 (1995) (lead counsel for objectors in Third Circuit; lead counsel in opposition to certiorari)

Jones v. Brown, 41 F.3d 634 (Fed. Cir. 1994) (interpretation of 1992 statute applying fee-shifting statute to Court of Veterans Appeals) (follow-up to *Karnas* below) (lead counsel)

Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993) (whether state-law tort claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (principal co- counsel)

Benavides v. Bureau of Prisons, 995 F.2d 269 (DC Cir. 1993) (whether federal regulation denying access to certain medical records is lawful under the Privacy Act and Freedom of Information Act) (lead counsel)

Lidy v. Sullivan, 911 F.2d 1075 (5th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991), *on remand*, No. 92-1035 (5th Cir.) (due process challenge to federal regulation denying right to cross-examine author of adverse medical report in social security disability hearing) (lead counsel in Supreme Court and on remand)

Miles v. Metropolitan Dade County, 916 F.2d 1528 (11th Cir. 1990), *cert. denied*, 502 U.S. 898 (1991) (challenge to housing authority policy imposing costs on tenants in non-meritorious eviction proceedings) (lead counsel in Supreme Court)

Johnson v. Sullivan, 919 F.2d 503 (8th Cir. 1991) (challenge to below-market attorney's fees recoveries in social security cases) (sole counsel)

United States District Courts

Bloche v. Dep't of Defense, ___ F. Supp. 3d ___, 2017 WL 4174404 (D.D.C. 2017) (lead counsel) (availability under the Freedom of Information Act of records concerning government's use of medical professionals to perform "enhanced interrogation" in the War on Terror) (lead counsel)

Batson v. Branch Banking and Trust Co., 2012 WL 4479970 (D. Md. 2012) (religious accommodation and discrimination case under Title VII of the Civil Rights Act of 1964) (lead counsel)

Nicholls v. U.S. Office of Personnel Management, 863 F. Supp. 2d 4 (D.D.C. 2012) (concerning the scope of agency responsibilities to respond to requests for public records under the Freedom of Information Act) (sole counsel)

Benavides v. Bureau of Prisons, 774 F. Supp.2d 141 (D.D.C. 2011) (concerning availability of digital recordings of inmate-lawyer phone calls under Freedom of Information Act) (sole counsel)

Brigham v. Office of Workers Compensation Programs, 477 F. Supp.2d 160 (D.D.C. 2007) (whether Energy Employees Occupational Illness Compensation Program Act applies to clean-up efforts at nuclear and other facilities operated by or under contract with Department of Energy) (principal co-counsel)

In re American Historical Ass'n, 49 F. Supp.2d 274 (S.D.N.Y. 1999) (whether Alger Hiss grand-jury records should be made public in light of Federal Rule of Criminal Procedure 6(e)) (principal co-counsel)

Duhaime v. John Hancock Mut. Life Ins. Co., 2 F. Supp.2d 175 (D. Mass. 1998) (whether and under what circumstances fees can be awarded to objectors to class action settlement if their efforts improve the settlement for class as a whole) (lead counsel for objectors)

Duhaime v. John Hancock Mut. Life Ins. Co., 989 F. Supp. 375 (D. Mass. 1997) (whether fees to class action plaintiffs' counsel should be staged to align interests of lawyers and clients) (principal co-counsel for objectors)

Public Citizen v. Shalala, 932 F. Supp. 13 (D.D.C. 1996) (challenge to FDA exemption for restaurant menus under nutrient-content and health claims provisions of federal food labeling law) (lead counsel)

In re Ford Motor Co. Bronco II Prods. Liab. Litig., 1995 U.S. Dist. Lexis 3507 (E.D. La. 1995) (challenge to class action settlement in case affecting owners of rollover-prone Bronco II vehicle) (lead counsel for objectors)

South Dakota v. Madigan, 824 F. Supp. 1469 (D.S.D. 1993), *appeals dismissed*, Nos. 93-2869, et al. (challenge to federal policy adversely affecting food stamp benefits of low-income housing residents) (lead counsel)

Bowling v. Pfizer, Inc., 143 F.R.D. 141 (S.D. Ohio 1992) (represented objector Public Citizen in seeking improvements to worldwide class-action settlement concerning defective heart valve implanted in 85,000 patients) (lead counsel)

Larry v. Yamauchi, 753 F. Supp. 784 (E.D. Ark. 1990) (precursor to *South Dakota v. Madigan*) (lead counsel)

Tolson v. Sheridan School Dist., 703 F. Supp. 766 (E.D. Ark. 1988) (whether termination of public employee violated Fourteenth Amendment's Due Process Clause) (sole counsel)

Williams v. Patterson, 1988 WL 124742 (E.D. Ark. 1988) (class action challenge to regulation that included recoupments of public benefit overpayments as "income" to food stamp recipients) (sole counsel)

Other reported federal cases

Scarborough v. Nicholson, 19 Vet.App. 253 (Vet.App. 2005) (attorney's fees litigation on remand from Supreme Court) (lead counsel)

In re Kissinger, 106 B.R. 180 (E.D. Ark. Bankr. 1989) (whether debtor met standards for non-discharge of consumer debt in bankruptcy on ground of fraud) (sole counsel)

Representative state-court cases

Texas Riogrande Legal Aid, Inc. v. Education and Workforce Development Cabinet of Ky., 2010 WL 4316924 (Ky. Cir. Ct. 2010) (whether state regulation barring public access to records of growers who employ migrant workers is invalid under state and federal law) (lead counsel)

Conte v. Wyeth, Inc., 168 Cal.App.4th 89 (Cal.App. 2008) (whether name-brand prescription drug manufacturers have a duty of care to patients who are prescribed the generic version of their drugs) (lead counsel)

In re Hager, 812 A.2d 904 (D.C. 2002) (bar disciplinary case regarding ethical obligations of lawyers in class action-like setting, in particular regarding whether ethical rules demand disgorgement of ill-gotten attorney's fees) (lead counsel for Public Citizen)

R.F. v. Abbott Laboratories, 745 A.2d 1174 (N.J. 2000) (whether federal law preempts state-law claim that defective HIV screening test resulted in plaintiff's HIV infection) (lead counsel)

R.T., et al. v. Patterson, 301 Ark. 400 (1990), *on remand*, No. 87-2689 (Pulaski Cty., Ark. Chancery, 3rd Div.) (challenge to operation of various aspects of Arkansas foster care system) (co-counsel for class)

Garibaldi v. Dietz, 25 Ark. App. 136 (1988) (*en banc*) (standards for termination of parental rights of mentally ill, but medically controlled, parent) (sole counsel)

Representative unreported litigation

Eley v. Gov t Printing Office, No. 09-2158 (D.D.C.) (Title VII challenge to race- and retaliation-based non-promotion)

Briggs v. United States, No. CV-07-5760 (N.D. Cal.) (class action challenge to government agency's practice of debt collection beyond the applicable statute of limitations) (co-counsel for class)

Hayden v. Atochem North America Inc., No. 99-20249 (5th Cir. Feb. 21, 2000) (challenge to mandatory personal-injury class action concerning arsenic exposure) (lead appellate counsel for objectors)

Karnas v. Derwinski, No. 92-7046 (Fed. Cir.) (appeal concerning whether attorney's fees are available to prevailing claimants in cases before new Court of Veterans Appeals) (lead counsel)

People With AIDS Health Group v. Burroughs Wellcome Co., No. 91-574-JGP (D.D.C) (consumer challenge to validity of AZT patent) (lead counsel)

Gulley v. Patterson, No. LR-C-88-563 (E.D. Ark.) (class action challenge to Arkansas policies regarding the child support "pass through" for AFDC recipients) (sole class counsel)

Blundell v. Sharp, No. PB-C-86-268 (E.D. Ark.) (class action challenge to operation of housing project for violations of right to privacy and other constitutional, statutory, and common-law rights) (sole class counsel)

Public Citizen, Inc. v. Shiley Incorporated, No. C755862 (Los Angeles Sup. Ct.), *aff'd*, No. B051171 (Cal. Ct. App., 2d Dist.) (case under California consumer protection laws seeking worldwide notification of patients implanted with defective heart valve) (lead counsel)

PRESENTATIONS AT ACADEMIC AND EDUCATIONAL SEMINARS

The Georgetown Journal of Legal Ethics 2018 Symposium, “Hard Issues in Public Interest Law—Ethical Issues Arising from Changing Practice Structures in Public Interest Law” (moderator), March 3, 2018

National Consumer Law Center, Consumer Rights Litigation Conference, Class Action Symposium, “Hot Topics in Ethical Class Action Practice” (moderator), Washington, D.C., November 19, 2017

National Academy for IDEA Administrative Law Judges and Impartial Hearing Officers, “*Endrew F*: Facts, Issues, Arguments, Opinion” and “*Endrew F*: Application—How to Determine FAPE,” Washington, D.C., July 13, 2017

Education Writers Association, 70th EWA National Seminar, “High Stakes for Schools in High Court Actions,” Washington, D.C., May 31, 2017

American Academy of Appellate Lawyers, Spring Conference, “Legal Scholarship and Appellate Advocacy,” Boston, April 8, 2017

District of Columbia Bar, Continuing Legal Education Presentation, U.S. “Supreme Court in Focus: *Endrew F. v. Douglas County School District*,” Washington, D.C., March 27, 2017

West Coast Progressive Lawyering Conference, “Translating Native Values into Legal Terms: Working with and through NAGPRA,” Stanford, CA, October 17, 2015

The Impact Fund, 13th Annual Class Action Conference, “Protecting Your Plaintiffs and the Class: Rule 68 and Other Pick-Off Tactics,” Berkeley, CA, February 27, 2015

National Consumer Law Center, Consumer Rights Litigation Conference, Class Action Symposium, “Ethics Update: The 2014 Edition of the NACA Consumer Class Action Guidelines” and “The Economics of Objecting for All the Right Reasons,” Tampa, November 8, 2014

National Consumer Law Center, Consumer Rights Litigation Conference, “How Appellate Developments and Strategies Will Affect Your Practice,” Tampa, November 7, 2014

Court of Appeals for Veterans Claims Bar Association, Annual Conference, "Attorney Fees Panel," Washington, D.C., June 6, 2014

National Consumer Law Center, Consumer Rights Litigation Conference, "Class Action Developments and Roundtable" and "How Appellate Developments and Strategies Will Affect Your Practice," Washington, D.C., November 7, 2013

National Consumer Law Center, Consumer Rights Litigation Conference, "Recent Appellate Decisions That Will Affect Your Practice," Seattle, October 26, 2012

Egyptian American Rule of Law Association (and others), "Rule of Law: Rhetoric vs. Reality in Egypt's Transition to Democracy" (discussing comparative open government law), Washington, D.C., October 10, 2012

Association of the Bar of the City of New York, "Supreme Court - A Year in Review," New York, July 18, 2012

National Association of Appellate Court Attorneys, "When Should Judges Raise Issues Sua Sponte," Washington, D.C., July 17, 2012

The District of Columbia Bar, Antitrust and Consumer Law Section, "Recent Developments in Mandatory Arbitration," Washington, D.C., April 3, 2012

The Food & Drug Law Inst., "An FDLI Dialogue: A First Look at the IOM Study of the 510(k) Clearance Process," Washington, D.C., August 4, 2011

Association of the Bar of the City of New York, "Supreme Court - A Year in Review," New York, July 20, 2011

George Washington University Law School, "Can the Google Books Settlement Be Fixed? - A Roundtable Discussion Among Experts," Washington, D.C., June 15, 2011

George Washington University Law School, "The Future of Arbitration: Channeling Class Actions into Single Claims Arbitrations," Washington, D.C., March 17, 2011

Georgetown Consumer Law Society & the American Constitution Society, "AT&T v. *Concepcion*: Supreme Court Oral Argument Recap & Panel Discussion" (moderator), Washington, D.C., November 10, 2010

Uniform Law Commission and George Washington University Law School, "Federalism, Preemption and State Law: Legislating Areas of Shared Federal and State Interest," Washington, D.C., October 29, 2010

Georgetown University Law Center, Supreme Court Institute Annual Press Briefing, "Anticipating the Supreme Court's October Term 2010: What to Expect," Washington, D.C., September 20, 2010

Association of the Bar of the City of New York, "Supreme Court - A Year in Review," New York, July 21, 2010

National Center for State Courts, General Counsel Business Meeting, "Regulatory Preemption: Erosion of State Tort Law or Protection of the National Economy," Washington, D.C., November 19, 2009

University of Maryland School of Law, Emerging Issues in Food & Drug Law, A National Conference for Lawyers, Policy-Makers, and Corporate Leaders, "Preemption and the Impact of *Riegel v. Medtronic* and *Wyeth v. Levine* on Drug and Device Labeling," Baltimore, November 16, 2009

American Bar Association, Section of Litigation, Current Issues in Pharmaceutical and Medical Device Litigation, "Preemption: What's Happening in Congress to Change the Landscape?," Kenilworth, NJ, November 12, 2009

National Consumer Law Center, Consumer Rights Litigation Conference, Class Action Symposium, "*Shady Grove* and Naked Class Action Bans: The Emerging Conflicts Between Federal and State Laws on Class Certification, Multistate Classes and Choice of Law Issues," Philadelphia, October 25, 2009

National Consumer Law Center, Consumer Rights Litigation Conference, "Class Action Roundtable," Philadelphia, October 22, 2009

National Foundation for Judicial Excellence, Fifth Annual Judicial Symposium, "Mapping the Legal Frontier: The Uncertain Boundary Between Federal and State Law, The Role of State and Federal Courts in Federal Preemption Cases—A Spirited Discussion Between Adversaries at the Bar," Chicago, July 11, 2009

American Constitution Society Annual Convention, "The Future of the Civil Jury System," Washington, D.C., June 19, 2009

Biotechnology Industry Organization Annual Convention, "Preemption of Product Liability Litigation on FDA-Regulated Products," Atlanta, May 19, 2009

Bureau of National Affairs Audio Conference, "Planning for a Post-*Levine* World: Implications and Strategies for Manufacturers, U.S. Consumers and the Courts," May 12, 2009

The Federal Circuit Bar Association, Horizons Seminar Series, "The Equal Access to Justice Act: History, Principles and Practice," Washington, DC, October 22, 2008

Stanford Law School Chapter of American Constitution Society, "Social Justice on Appeal: Progressive Appellate Litigators in the 21st Century," Stanford, CA, September 3, 2008

University of Arkansas School of Law, "Public Interest Advocacy Before the U.S. Supreme Court," Fayetteville, AR, March 3, 2008

American Enterprise Institute, "Federal Preemption and the Supreme Court," Washington, D.C., February 21, 2008

New York State Bar Association, Annual Meeting of the Food, Drug and Cosmetic Law Section, Panel on "Preemption (Drug and Device), Understanding Tort Preemption Claims," New York, January 31, 2008

National Consumer Law Center, Class Action Symposium, Panel on Whether Reliance is an Element in UDAP Cases, Washington, DC, November 11, 2007
National Consumer Law Center, Consumer Rights Litigation Conference, "Class Action Roundtable," Washington, D.C., November 8, 2007

American Bar Association, "The Supreme Court: Good for Business?" (national teleconference), October 17, 2007

Environmental Law Institute, "Access to Courts After *Massachusetts v. EPA*: Who Has Been Left Standing?", Washington, D.C., May 3, 2007

National Association of Attorneys General, 2007 Consumer Protection Seminar, “The Nuts and Bolts of Briefing Preemption Cases,” Washington, D.C., May 1, 2007

George Washington University Law School, Consumer Class Action Symposium, “Consumer Class Actions: Perspectives, Opportunities and Problems,” Washington, D.C., March 28, 2007

National Association of Attorneys General, Administrative Law and Preemption: Administrative Law for State Attorneys Handling Preemption Cases, “Practical Advice on Litigating Preemption Cases Involving Federal Agencies,” Washington, D.C., March 7, 2007

National Consumer Law Center, Class Action Symposium, “*Shutts*, Rule 23, and Other Class Action Issues,” Miami, November 13, 2006

National Consumer Law Center, Consumer Rights Litigation Conference, “Litigating Consumer Cases in the Supreme Court,” Miami, November 12, 2006

American Bar Association, Section of Administrative Law and Regulatory Practice, Annual Meeting, “Federal Agency Preemption of State Tort Law,” Washington, D.C., October 26, 2006

University of Missouri at Kansas City, Symposium Commemorating 20th Anniversary of *Phillips Petroleum v. Shutts*, The Right to Opt Out and Rule 23 Reform, Kansas City, MO, April 7, 2006

National Consumer Law Center, Class Action Symposium, Panel on the Class Action Fairness Act of 2005, Minneapolis, October 30, 2005

National Hispanic Bar Association National Convention, “The Class Action Fairness Act of 2005: How Does It Affect Your Practice” (moderator), Washington, D.C., October 18, 2005

American Bar Association, Section of Litigation, The 9th Annual National Institute on Class Actions, “Class Actions in the Marble Palace: What if the Supremes Took on Rule 23(b)(2)?” (argued objector-petitioner’s position in moot court before panel of federal judges and lawyers), Chicago and San Francisco, September 23 and October 7, 2005

Association of Trial Lawyers of America, National College of Advocacy, "The Class Action 'Fairness' Act: What Does This Mean For Your Practice," National Electronic Seminar, March 3, 2005

National Consumer Law Center, Consumer Rights Litigation Conference, "Class Action Settlements in Mortgage Lending Cases: Ethical Responsibilities and Practical Considerations," Washington, D.C., November 7, 2004

Federal Trade Commission, Protecting Consumer Interests in Class Actions, "Special Ethics Concerns in Class Action Litigation," Washington, D.C., September 13, 2004

American Bar Association, Section of Litigation, The 7th Annual National Institute on Class Actions, "Who Moved My Rule 23?" Washington, D.C., November 7, 2003

National Association of Attorneys General, 2003 Fall Consumer Protection Seminar, Class Actions and the *Hager* Case, Washington, D.C., October 22, 2003

Virginia Trial Lawyers Association Conference, 2003 Products Liability and Accident Prevention Retreat, "Class Actions, the FDA, and Federal Preemption," Williamsburg, VA, October 17, 2003

District of Columbia Bar, Annual Conference, "Secret Settlements: Should the Ground Rules Be Changed?" Washington, D.C., March 28, 2003

National Association of Insurance Commissioners, State Insurance Regulation: Successes, Challenges, and Opportunities, "Class Action Litigation Panel," Washington, D.C., February 27, 2003

American Bar Association, Section of Litigation, The 6th Annual National Institute on Class Actions, "Overlapping and Competing Class Actions," New York and Chicago, November 1 and 15, 2002

National Consumer Law Center, Consumer Class Action Seminar, "Class Action Management and Attorneys Fees" (Attorney Fee Auctions), Baltimore, Maryland, October 29, 2001

Advisory Committee on Civil Rules, Class Action Conference, "Settlement Review," Chicago, October 22-23, 2001

Harvard Law School—Harvard Journal on Legislation, “Social Reform Through the Class Action,” Cambridge, MA, March 14, 2000

FDLI 43rd Annual Educational Conference, “Should Compliance With FDA Requirements Bar Recovery Of Tort Damages For Harm Resulting From The Use Of An FDA-Regulated Product?” Washington, D.C., December 17, 1999

FDLI Law Symposium, “Regulatory Compliance: Should It Be A Bar To Tort Liability?” (commenter on series of papers), Georgetown University Law Center, Washington, D.C., October 8, 1999

National Grants Management Association Annual Meeting, Panel Discussion on Ethics of Government Lawyers, Bethesda, MD, May 12, 1999

The Federalist Society, 1998 National Lawyers Convention, “Class Action Litigation: Is Reform Needed Before American Business is Strangled?” Washington, D.C., November 13, 1998

ABA Annual Meeting, “Hot Issues in Class Action Litigation” (argued objector-appellant’s position in moot court before panel of federal appellate judges), Toronto, Ontario, August 4, 1998

FDLI Medical Device Update ‘98, “FDC Act Preemption & FDA’s Proposed Regulation,” Washington, D.C., June 24, 1998

ABA General Liability and Consumer Law Committee, “Emerging Issues in Motor Vehicle Product Liability Litigation” (Class Actions), Phoenix, April 3, 1998

ABA Toxic Tort and Environmental Law Committee, “Mass Tort and Environmental Litigation: Hot Issues in Class Actions,” Charleston, SC, March 14, 1998

FDLI 41st Annual Educational Conference, “The Implications of FDA’s Tobacco Regulations for FDA Regulated Industry, and Possible New Directions of the Food, Drug, and Cosmetic Act,” Washington, D.C., December 9, 1997

Trial Lawyers Association of Metropolitan Washington, “David v. Goliath: Litigating for Plaintiffs in the ‘Tort Reform’ Era—Procedural Pitfalls in Class Action Litigation,” Washington, D.C., March 21, 1997

“Mealey’s Drug and Medical Device Litigation Conference: Preemption and the *Lohr* Case,” West Palm Beach, Florida, November 22, 1996

Association of Trial Lawyers of America, “*Gore* and More: How to Survive Recent Supreme Court Decisions,” Washington, D.C., July 18, 1996

National Employment Law Project, Unemployment Compensation Advanced Litigation Training: “Recovery of Attorney & Expert Witness Fees,” Washington, D.C., June 6, 1995

The Institute for Judicial Administration, New York University School of Law, Research Conference on Class Actions and Related Issues in Complex Litigation, New York, April 21-22, 1995

CONGRESSIONAL AND JUDICIAL TESTIMONY

Testimony on Proposed Amendments to Federal Rule of Civil Procedure 23 Before the Advisory Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Washington, DC, November 3, 2016

Testimony on H.R. 1996, The Government Litigation Savings Act, Before the House Judiciary Committee, Subcommittee on Courts, Commercial and Administrative Law, October 11, 2011

Testimony on H.R. 5, the Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2011, Before the House Committee on Energy and Commerce, Subcommittee on Health, April 6, 2011

Testimony on H.R. 1115, The Class Action Fairness Act of 2003, Before the House Committee on the Judiciary, May 15, 2003

Testimony on Proposed Amendments to Federal Rule of Civil Procedure 23 Before the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Washington, DC, January 22, 2002

Testimony Before the Third Circuit Task Force on the Selection of Class Counsel, Philadelphia, June 1, 2001

Testimony on H.R. 1875, The Interstate Class Action Jurisdiction Act of 1999, Before the House Committee on the Judiciary, July 21, 1999

Testimony on H.R. 1283, The Fairness in Asbestos Compensation Act, Before the House Committee on the Judiciary, July 9, 1999

Testimony on H.R. 2112, The Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999, Before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, June 16, 1999

Testimony on S. 353, The Class Action Fairness Act of 1999, Before the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, May 4, 1999

Testimony on H.R. 3789, The Class Action Jurisdiction Act of 1998, Before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, June 18, 1998

Testimony at oversight hearing on “Class Action Lawsuits: Examining Victim Compensation Attorneys’ Fees,” Before the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, October 30, 1997

Testimony on H.R. 4558, Regarding Reform of the Equal Access to Justice Act, Before the House Committee on the Judiciary, Subcommittee on Administrative Law and Governmental Relations, October 5, 1994

March 2018

EXHIBIT B

March 17, 2015

Prof. Richard Marcus
Associate Reporter to the Advisory Committee on Civil Rules
UC Hastings College of Law
200 McAllister, San Francisco, CA 94102

Re: *Mandatory Disclosure Provision for Fed. R. Civ. P. 23*

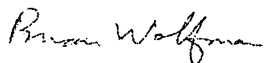
Dear Prof. Marcus:

Complaints about class actions are driven by a perception that class members are not obtaining adequate relief in class cases. Yet we lack good data on the quality of results in class-action settlements. See William B. Rubenstein & Nicholas M. Pace, *Shedding Light on Outcomes in Class Actions*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 20 (Joseph W. Doherty, Robert T. Reville & Laura Zakaras eds., Oxford University Press, 2012).

We propose a revision to the class action rule requiring parties to file information describing the distribution of money to class members, other beneficiaries, and counsel. More light on settlement outcomes will reveal which types of settlements work and which do not. Judges will learn which practices – with regard to notice, type of relief, claim procedures, and the like – benefit class members and which do not. Anecdotes about greedy plaintiffs’ lawyers and corporate wrongdoers buying res judicata on the cheap do not make good policy. What does? Arming rule makers and researchers at the FJC, in academia, and in private think-tanks with information necessary to drive informed research and policy judgments. This proposal is similar to that found in the ALI Principles of the Law of Aggregate Litigation § 3.13 (e) (where monetary relief is awarded, courts “should, absent special circumstances, require the parties to submit to the court a final accounting describing the amount and distribution of all benefits to class members, other beneficiaries, and counsel.”)

It is crucial for society, the judiciary, and the integrity of the legal profession that this information be revealed. For this reason, we urge the committee to consider the adoption of the attached proposed amendment. Thank you in advance for your attention to this proposal.

Sincerely,



Brian Wolfman
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
(650) 498-8229



Alexandra D. Lahav
University of Connecticut School of Law
55 Elizabeth Street
Hartford, CT 06117
(860) 570-5217

Kevin M. Clermont
Cornell Law School
204 Myron Taylor Hall
Ithaca, NY 14853-4901

Geoffrey P. Miller
New York University School of Law
40 Washington Square South
New York, NY 10012

Brian Fitzpatrick
Vanderbilt Law School
131 21st Ave. South
Nashville, TN 37203-1181

Nicholas M. Pace
Institute for Civil Justice
RAND Corporation
1776 Main Street
Santa Monica, California 90401

Deborah R. Hensler
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305

Charles Silver
University of Texas School of Law
272 East Dean Keeton Street
Austin, TX 787705

Proposed Class Action Disbursement Disclosure Rule

New Rule 23(i)

(i) Filing of Settlement and Judgment Information

(1) In any action certified under Rule 23 in which damages, restitution, disgorgement, back-pay, or other monetary relief is sought or awarded, the court must, as a condition of approving any settlement, voluntary dismissal, or compromise under Rule 23(e), and in entering any judgment in the action, order the parties to file information describing the amount and distribution of benefits (including non-cash benefits) distributed to class members, other beneficiaries, and counsel. This filing must be available to the public and, at a minimum, must include

(A) the total value of any monetary judgment or settlement available for distribution to the class members;

(B) the number of class members (or, if the exact number is not available, the best estimate thereof), the number of class members who sought monetary relief, the number of class members who received monetary relief, and, except as provided in Rule 23(i)(3), the amount each class member received;

(C) where class members are entitled to non-monetary relief, such as discount coupons or debit cards or similar instruments, the number of class

members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests;

(D) the amount and timing of monetary and non-monetary benefits disbursed to each of the representative parties;

(E) the amount distributed, under cy pres or other similar principles, to each beneficiary other than class members, including non-profit organizations, and the identity of each such beneficiary; and

(F) the amount of attorney's fees, costs, and expenses disbursed to each counsel or law firm representing class members, the date of each such disbursement, and an explanation of the relationship, if any, between the amount of the award and the amount of relief available or disbursed to the class members.

(2) In meeting the requirements of Rule 23(i)(1)(B), the court may issue any order necessary to protect the identities of individual class members to the extent that the disclosure of their identities would constitute a clearly unwarranted invasion of their personal privacy.

(3) In meeting the requirements of Rule 23(i)(1)(B), if, and only to the extent that, the court finds that it is impractical to require the filing of the amount disbursed to each class member, the court must require the parties to

file information so that the range of distribution of benefits, and the number of beneficiaries at various levels of distribution, is fully disclosed.

(4) The information required to be filed with the court under Rule 23(i)(1) must be filed as soon as practicable after the information is available, but in no case more than 2 years after the settlement or judgment in the action is final and no longer appealable. If, after such 2-year period has expired, the information required to be filed under Rule 23(i)(1) is not available in full, the court must require that all available information be filed at that time and that a full report containing all of the required information be filed as soon as it is available.

[3/17/2015]