Case No. 08-1590

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

STEVEN J. THOROGOOD, INDIVIDUALLY AND
ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff-Appellee,
v.
SEARS, ROEBUCK AND CO.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 06-cv-1999
(The Honorable Harry D. Leinenweber)

BRIEF OF THE ASSOCIATION OF HOME APPLIANCE MANUFACTURERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT SEARS, ROEBUCK AND CO.

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Fed. R. App. P. 26.1 and Cir. R. 26.1 Disclosure Statement

1. Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, *Amicus* Association of Home Appliance Manufacturers ("AHAM") hereby states that it has no parent corporation and there is no publicly held corporation owning 10% or more of its stock. Jenner and Block, LLP and Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, PC are the only law firms whose partners and associates are appearing or are expected to appear on AHAM's behalf in this proceeding.[1/] AHAM is not using a pseudonym.
2. Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, *Amicus* National Association of Manufacturers ("NAM") hereby states that it has no parent corporation and there is no publicly held corporation owning 10% or more of its stock. Jenner and Block, LLP and Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, PC are the only law firms whose partners and associates are appearing or are expected to appear on NAM's behalf in this proceeding. NAM is not using a pseudonym.

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1/ At the outset of the case in the district court, Jenner & Block briefly appeared on behalf of defendant Sears, Roebuck & Co. ("Sears"). Jenner & Block filed the notice of removal, moved for an extension of time to answer or otherwise plead, and then filed a motion to withdraw as counsel that the court granted. Jenner & Block has not represented Sears or any party in this litigation since June 2006.

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Interest Of *Amici Curiae*

1. AHAM is a not-for-profit trade association representing 76 manufacturers of home appliances. Electrolux, the manufacturer of the clothes dryers that are the subject of the underlying lawsuit, is a member of AHAM. Products manufactured by the members of AHAM are sold in all 50 states and in the District of Columbia. AHAM is an Illinois corporation. It was headquartered in Illinois for over thirty years, and is now located in Washington, D.C.

2. The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

3. The members of AHAM and NAM rely on the federal courts for the reasonable interpretation of the laws governing class certification. The certification of classes in cases in which common issues of fact and law do not predominate has an improper coercive effect and often compels businesses to settle claims without regard to their merit. *See Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999). The Court's resolution of the issues presented in this case will determine the standards in the Seventh Circuit governing certification of consumer class actions advancing claims subject to the laws of multiple states. The decision of this Court has the potential to set a persuasive precedent for courts nationwide, thereby

significantly affecting the national business activities of the members of AHAM and NAM. For these reasons, the *amici* have sought leave to file this brief.

Argument

I. The District Court's Approach To Class Certification Undermines The Intent Of Congress That The Class Action Fairness Act Would Foster The Adjudication Of Multi-State Class Actions In Courts That Respect Principles of Federalism.

In certifying a multi-state class here, the district court found the absence of any substantive differences in the consumer protection statutes of 29 different jurisdictions. This holding disregarded law that, until now, was well-settled in this Circuit: "State consumer-protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) (citation omitted). The district court, however, papered over material state law distinctions in a manner closely resembling the approach employed by state courts in jurisdictions such as Madison County, Illinois, which acquired a reputation for certifying multi-state class actions without regard to differences in the state laws applicable to class members. It was in reaction to the practices of such "magnet courts" (so-called because their lenient approach to class certification attracted disproportionate numbers of class action filings) that Congress enacted the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2 (2005).

By providing for federal jurisdiction over multi-state class actions, CAFA was intended to ensure the litigation of such disputes before courts that would be unlikely to impose a single, inapposite legal standard on a nationwide basis. As

CAFA's legislative history demonstrates, Congress recognized that to leave things as they were would risk precisely the types of mischief that would result from affirming the district court decision now on appeal to this Court:

- Courts certifying multi-state classes in disregard of state law differences "freely issue rulings in class action cases that have nationwide ramifications, sometimes overturning well-established laws and policies of other jurisdictions." S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6.

- "The problem with such broad claims" being asserted in multi-state class actions "is that the entire lawsuit proceeds on a lowest common denominator basis. As a result, persons with legitimate injuries will be lumped in with the 'average,' often meritless claims and will not be given individual attention for their grievances." *Id.* at 24.

- Magnet courts were engaging in "judicial usurpation, in which one state's courts try to dictate its laws to 49 other jurisdictions, [a practice that has] been duly criticized by some congressional witnesses as 'false federalism.'" *Id.* at 26.

- "Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution in that State and local courts are ….(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States" H.R. Rep. No. 109-7, at 3 (2005).

Because of these and other abuses, CAFA conferred jurisdiction over multi-state class actions on federal courts that could be trusted to respect the values of federalism and recognize the differences between the laws of the states. *See* S. Rep. No. 109-14, at 64 ("the passage of the Class Action Fairness Act will end the 'false federalism' game that is occurring in the state court class action arena"). That Congressional purpose will be frustrated if the class here is permitted to stand, with the consequence that substantive legal rights and obligations will be improperly altered in ways described more fully below.

II. A Decision Affirming The District Court's Misapplication of Principles Of Federalism Will Improperly Alter Substantive Rights And Liabilities Under State Consumer Protection Laws.

A. The District Court's Approach To State Law Differences Deprives Manufacturers Of Notice As To What The Law Is And Expands Substantive Liability Beyond Limits Established Under State Law.

The improper substitution of a hybrid federal legal standard for purposes of certifying a multi-state class unmoors consumer protection law from the express provisions of the very consumer protection statutes under which plaintiffs purport to bring such claims. Doing so alters substantive rights in a manner that (a) deprives states of the right to develop their own substantive laws; (b) deprives parties of notice as to what laws will apply in the states in which they do business; and (c) unfairly expands both consumers' rights of action and defendants' exposure to consumer claims.

Notice of what law applies is fundamental to doing business in any jurisdiction. If, for example, a manufacturer chooses to do business in a particular way in Montana, it can reasonably be assumed to be on notice that the law of Montana will apply to any complaint made by consumers in Montana about the way in which the manufacturer has acted. That manufacturer cannot reasonably be said to be on notice that the law of Illinois – or some hybrid legal standard adopted solely for the purposes of a given class action – will apply. That result, however, is precisely what occurred here. The district court's ruling failed to take account of the distinctive provisions of the consumer protection laws of the states in which class members reside, thus displacing the known legal standards that otherwise would have applied.

By displacing known legal standards, the district court unfairly expanded both consumers' rights of action and defendants' exposure to consumer claims. To avoid the individualized issues inherent in proof of reliance, the district court held that reliance on the alleged misrepresentation could be "presumed" as a matter of law. *See* Opinion at 4. That conclusion of law, however, directly conflicts with many of the specific state consumer protection acts implicated by the certified class, as state courts applying those acts have concluded that the statutes either expressly require proof of reliance or otherwise incorporate a causation requirement that makes relevant the extent to which the alleged deception motivated the consumer's purchase of the product.[3/] These are meaningful, substantive state law requirements. By reading reliance and causation requirements out of the relevant state statutes so as to create the appearance of commonality and facilitate class certification, the trial court effectively appropriated the authority to modify state laws, altered the legal landscape on which manufacturers had depended in developing and marketing their products, and fundamentally altered the substantive rights of all parties involved.

Recent decisions in the "light" cigarette cases effectively demonstrate the critical impact of substantive differences in state consumer protection law regarding the

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[3/] *See*, *e.g., Stevenson Lumber Co.-Suffield, Inc. v. Chase Assoc., Inc.*, 932 A.2d 401, 406-07 (Conn. 2007) (applying Connecticut Uniform Trade Practices Act, Conn. Gen. Stat. § 42-110b(a)); *Lloyd v. General Motors Corp.*, 916 A.2d 257, 277 (Md. 2007) (applying Maryland Consumer Protection Act, Md. Code Ann., § 13-101 *et seq.*); *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001) (applying Minn. Stat. § 8.31).

reliance requirement. Each such case is based on the same set of facts – alleging that the term "light cigarettes" is deceptive because, when smoked in the ordinary fashion by individuals, such cigarettes do not deliver the reduced tar and nicotine that is obtained in laboratory testing. Despite the identical fact patterns, the state courts have reached very different results because of substantive differences in the text and application of the different consumer protection laws. In *Aspinall v. Philip Morris Cos., Inc.*, 813 N.E.2d 476, 486-90 (Mass. 2004) the Massachusetts Supreme Judicial Court held that the uniform use of the descriptor "light cigarettes" was sufficient to permit certification of a plaintiff class under the Massachusetts Consumer Protection Act, Mass. Gen. L. ch. 93, § 9, irrespective of whether individual consumer relied on the "light" cigarettes designation. Conversely, in *Philip Morris USA Inc. v. Hines,* 883 So. 2d 292, 294-95 (Fl. Dist. Ct. App. 2003), *review denied sub nom. Hines v. Philip Morris USA, Inc.*, 974 So. 2d 386 (2008), the Florida District Court of Appeals concluded that individualized questions as to whether plaintiffs were motivated by the allegedly false representation of products as "light" cigarettes precluded class certification under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"), Fl. Stat. Ann. § 501.204. The very different outcomes of those identical claims flowed directly from the difference between the Massachusetts and Florida statutes on the requirement of reliance. If courts may ignore these substantive state law differences in the name of the administrative convenience of class certification then basic principles of federalism are violated and

the parties' substantive rights will be improperly and unfairly altered, in violation of the *Erie* doctrine.[4/]

The issue of reliance is hardly the only substantive difference among the various state consumer protection laws. Plaintiffs here, and in many of the growing number of product claims under state consumer protection statutes, proceed under a "fraud on the market" theory that presumes – without requiring proof of reliance, causation, or even the existence of an efficient market – that alleged "deceptive" acts inflate the purchase price for a product. Such claims seek recoveries for consumers who have not, and will not, ever have a problem with the subject product. The great majority of states simply have not yet fully addressed the situations (if any) under which their consumer protection statutes will countenance such claims, or how those claims intersect with well-settled product liability and warranty law.

By ignoring substantive differences in state law, the decision below effectively used the procedural device of Rule 23 to make the policy choice to afford a cause of action under multiple states' laws to multi-state consumers who suffered no injury to person or property by reason of the alleged product defect. Doing so violated the

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[4/] *See, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1012 ("Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in the court"); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.,* 313 F.3d 385, 390 (7th Cir. 2002) (under the *Erie* doctrine, a "federal court is not authorized to apply a different substantive law . . . in a diversity case from the law that a state court would apply were the case being litigated in a state court instead").

Rules Enabling Act, 28 U.S.C. § 2072, which forbids the application of federal procedural rules to "enlarge or modify any substantive right." The choice of whether to adopt such a policy is reserved to the states. The legislature and courts of each state have made decisions about the exact type of consumer-protection laws that will best promote the overall welfare of that state's citizens, including companies incorporated there and companies with principal places of business there. The approach used by this decision in this case substitutes the views of a federal court for each state's judgments. This is the antithesis of the fundamental and long recognized concept of federalism applied in federal courts. It makes not federal law, but Illinois law applied by a federal court, the supreme law of the land.

B. The Mischief Flowing From A Policy Countenancing No-Injury Claims Counsels Forcefully Against Allowing Federal Courts To Impose Such A Policy On States That Have Not Affirmatively Adopted It.

Recognizing class claims on behalf of persons who have not suffered injury to person or property inflates class membership by converting legitimate product development activities into potential grounds for economic theories of damages. Such claims allow what amounts to a windfall recovery to product purchasers who have never, and likely will never, have any problem or suffer any harm from their product and, thus, received exactly what they bargained for. In the absence of any requirement to prove injury to person or property, such actions will not even require any allegation of a product defect, and may instead target engineering trade-offs or other internal decisions that allegedly should have been disclosed to consumers. The effect will be to chill the product review process, causing detriment to manufacturers and consumers alike. Recognition of this theory of liability also

threatens to stifle innovation; by focusing on the evolution of product lines to fabricate purported "defects" in early models of a product that were addressed in subsequent models, the "no injury" theory of liability may harm manufacturers and consumers by discouraging product improvements. A federal court should not be permitted under the guise of Rule 23 to impose these consequences by fiat on states that have not made the affirmative decision to recognize such claims under their consumer protection statutes.

C. The District Court's Approach Has The Potential To Harm Consumers.

Application of a uniform legal standard that ignores differences in state consumer protection statutes in some instances may cause consumers to lose substantive rights. For example, if the hybrid standard does not provide for multiple damages, then consumers who live in states with consumer protection statutes that do allow for multiple damages may be prejudiced by the diminution of their recoverable damages. Similarly, the election to proceed under a theory that disclaims recovery for personal injury or property damages deprives consumers of the ability to recover for legitimate claims, such as service repair bills, unless they opt out of the class. Absent an opt-out, such class members are stuck with a class "remedy" that typically does not fully compensate them. As these examples demonstrate, the failure to respect federalism is a sword that cuts both ways, further underscoring the unfairness of disregarding material distinctions in state consumer protection laws to facilitate class certification. Accordingly, this Court should uphold Seventh Circuit precedent recognizing the differences in the various state consumer protection laws and reverse the trial court's certification order.

III. A Decision Affirming The District Court's Order Would Transform The Courts Of The Seventh Circuit Into "Magnet Courts" That Would Expose Manufacturers To A Growing Tide of Coercive Consumer Class Action Litigation.

A. State Consumer Protection Statutes Are Increasingly The Vehicle Of Choice For Targeting Manufacturers In Class Action Litigation.

The question of whether plaintiffs properly may pursue nationwide class actions, under one or more state consumer protection statutes, is of increasing importance. As the *National Law Journal* recently reported, "[p]laintiffs' lawyers are filing an increasing number of class actions under state consumer-protection laws in conjunction with, or in place of, traditional personal injury class actions, which have become too difficult in recent years to certify." Amanda Bronstad, *Consumer Class Actions Usurping Personal Injury Claims*, Nat'l Law J., Jul. 11, 2007, at 1. Plaintiffs' lawyers interviewed for the *National Law Journal* article confirmed that they were indeed turning to consumer protection claims as vehicles for class action litigation against manufacturers, and the article cites numerous product-related cases that had been brought as consumer protection class actions, including:

- Actions concerning alleged health risks associated with Teflon cookware;
- Lawsuits concerning alleged damage to hearing caused by use of the Apple iPod and Motorola's Bluetooth wireless headsets;
- Claims relating to alleged undisclosed health risks of the antidepressant drug, Paxil;
- Class actions against Coca Cola and Pepsi concerning the alleged presence of improper levels of benzene in their beverage products; and
- Actions against Bausch & Lomb concerning the alleged risk of eye injury caused by contact lens solution.

See id. Each of these actions relies on alleged violations of state consumer protection acts in an attempt to advance a "fraud on the market" theory of liability, pursuant to which class counsel seek economic recoveries on behalf of putative class members who cannot allege or prove that they relied on the allegedly misleading product description or suffered any resulting injury. *See id.*

This trend is not limited to personal injury cases that are being brought as consumer protection actions. The following additional cases illustrate the types of "no reliance"/ "no injury" consumer protection claims that plaintiffs are now bringing against manufacturer defendants in products cases that do not involve claims for personal injuries:

- *Solowski v. BMW of North America, LLC*, No. 07-2543 (D.N.J. filed May 31, 2007). Plaintiff brought suit under the New Jersey Consumer Fraud Act and "the applicable Consumer Fraud Acts, however titled or described, of every state in the United States of America" for a "Statutory Consumer Fraud" cause of action.
- *Yarkony v. Volkswagen of America, Inc.*, No. 07-679 (N.D. Ill. filed Feb. 5, 2007). Plaintiff sued under the Illinois Consumer Fraud and Deceptive Business Practices Act and "similar state statutes."
- *Castillo v. General Motors Corp.*, No. 07-02142 (E.D. Cal. filed Jan. 14, 2008). Plaintiff asserts claims under the consumer protection laws of 13 states.

AHAM's membership has experienced firsthand the growing use of consumer protection class actions to assert product related claims. Survey results for just eight members of AHAM (excluding Electrolux, the manufacturer of the clothes dryers at issue in this case) show that they have been sued in *42* separate class actions since 2005 that allege violations of state consumer protection laws in connection with alleged product defects.

This growth in consumer protection class actions is also documented in statistics compiled by the Federal Judicial Center. Just this month, the fourth interim report on the impact of CAFA disclosed that the average number of consumer protection and consumer fraud class actions instituted per month in the federal courts has more than tripled since February 2005, increasing from an average of 2.81 filings per month pre-CAFA to 9.82 per month for the entire post-CAFA period. Emery G. Lee III & Thomas E. Willging, Fed. Judicial Ctr., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, *Fourth Interim Report* 11 (2008). Although some of that growth likely is a consequence of the expansion of federal jurisdiction under CAFA, the burgeoning use of multi-state class actions under state consumer protection statutes almost certainly drives part of this increase.

The increasing pursuit of such consumer protection actions highlights the broader significance of the issues at stake in this appeal. The Seventh Circuit's decision in the present case will affect the many putative consumer protection class actions pending in this circuit and elsewhere.

B. Affirming The District Court's Approach Will Create Federal Magnet Courts That Will Unfairly Expose Manufacturers To Extortion By Litigation.

A natural consequence of a precedent that allows trial courts to ignore substantive differences in state laws to certify multi-state classes will be the proliferation of class action litigation designed to pressure defendants into settlements without regard to the merits of individual class members' claims. The potential for such coercion is substantial. This Court has repeatedly recognized that "a grant of class status can put considerable pressure on the defendant to settle,

even when the plaintiff's probability of success on the merits is slight." *Blair*, 181 F.3d at 834. As this Court has noted, the eminent Judge Friendly "called settlements induced by a small probability of an immense judgment in a class action 'blackmail settlements.'" *In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

Of course, "blackmail settlements" were the stock in trade of class counsel who frequented pre-CAFA class action magnet courts for the purpose of bullying defendants into quick and profitable settlements for plaintiff's counsel, with little chance that claims of class members would ever be resolved on the merits. *See also Blair*, 181 F.3d at 834 (observing that the class device has been used "to wring settlements from defendants whose legal positions are justified but unpopular," noting further that "[e]mpirical studies of securities class actions imply that this is common.") (citations omitted). If the decision below is affirmed, one ironic consequence will be that this case, removed from state court under CAFA, will become a beacon to class counsel, encouraging them to pursue in federal court precisely the kind of "blackmail settlement" class actions that CAFA was intended to prevent. If this Court endorses the district court's abandonment of principles of federalism, the resulting sea change will invite a flood of coercive class action jurisprudence, especially in the courts of this Circuit, but also in courts nationwide.

The resulting flood would wash over the membership of AHAM and NAM. The plaintiffs' class action bar has made it clear that it already has manufacturers in its

sights for precisely these types of state law consumer class actions. A decision that removes a legitimate barrier to the certification of unfairly coercive multi-state class actions would inappropriately tip the balance in each and every case that is already under way, and spur even more such actions to be filed.

Further, basic economics dictate that it is the consumers who ultimately will bear the burden of these coercive settlements. The amounts that manufacturers are coerced into paying to plaintiff consumers and their counsel in attorneys' fees drive up the manufacturers' costs of doing business, and therefore ultimately will be passed back to the consumer in the form of higher prices. In other words, while consumers may receive a *de minimus* recovery via the perversion of Rule 23, those amounts, plus all of the attorneys' fees, will be recouped by manufacturers through higher prices. Accordingly, the proliferation of frivolous class actions stemming from insufficient scrutiny of the Rule 23 requirements for certification will turn the consumer protection laws on their head, resulting in a net harm to consumers by increasing the costs of products to future consumers by an amount that will far exceed any modest recoveries obtained by existing consumers.

The Court should not permit such a result to occur. Adhering to principles of federalism will avoid the *in terrorem* effect of certifying an artificial national class under a fictive legal standard, thereby appropriately limiting use of the class action device to those individuals who are entitled to the protection of specific state laws that countenance such claims.

Conclusion

For all of the above-stated reasons, *amici* respectfully request that this Court reverse the district court's class certification order.

Respectfully submitted,

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(The Honorable Harry D. Leinenweber)

CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e)(1), a full version of the brief. Executed on April 28, 2008.

Barry Levenstam

CERTIFICATE OF SERVICE

Barry Levenstam, an attorney, hereby certifies that he caused an original and fifteen copies and an electronic version of the foregoing Brief of the Association of Home Appliance Manufacturers and the National Association of Manufacturers as *Amici Curiae* in Support of Defendant-Appellant Sears, Roebuck and Co., to be transmitted to the Court for filing via hand delivery, and two copies and an electronic disk version of the Brief, to be served on the parties below, *via* the methods indicated, on April 28, 2008.

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