Nos. 23-1666

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JODI TAPPLY, JEANNETTE BUSCHMAN, MICHAEL PARTIPILO, BARBARA LESTER, and VICKI MEYERHOLZ, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants

v.

WHIRLPOOL CORPORATION,

Defendant-Appellee

Appeal from the United States District Court
Western District of Michigan at Grand Rapids
Case No. 1:22-cv-00758 (JMB)

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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Dated: September 10, 2025

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Sixth Circuit Case Numbers: 23-1666

Case Name: Tapply, et al. v. Whirlpool Corporation

Name of counsel: Philip S. Goldberg

Amici National Association of Manufacturers and Product Liability Advisory Council, Inc. make the following disclosure:

1. Is either *amici* a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation, not a party to the appeal or an *amicus*, that has a financial interest in the outcome?

   None known.

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the National Association of Manufacturers (NAM) and Product Liability Advisory Council, Inc. (PLAC).

The NAM is the largest manufacturing association in the United States, representing small and large manufacturers in all fifty states and in every industrial sector. Manufacturing employs nearly 13 million people, contributes $2.9 trillion to the economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation, fostering the innovation that is vital for this economic ecosystem to thrive. The NAM is the voice of the manufacturing community and leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

PLAC is a nonprofit professional association of corporate members representing a broad cross-section of product manufacturers who seek to contribute to the improvement and reform of the law, with emphasis on the law governing the liability of product manufacturers and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership

[1] No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amici curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 1,200 *amicus curiae* briefs on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel's ruling below must be corrected. It opens the courthouse doors to consumer fraud class litigation over theoretical product defects based on nothing more than a handful of unverified complaints forwarded to a company by a federal agency, here the Consumer Product Safety Commission (CPSC). In this case, Plaintiffs are dissatisfied with their ranges because the knobs turn more easily than assumed. However, they do not allege the ranges are defective in product liability or should be subject to a recall or other customer satisfaction program. Instead, they turned their dissatisfaction into an assertion that Whirlpool *defrauded* them and others into buying their ranges. Using these few complaints, Plaintiffs allege Whirlpool "knew" about and "concealed" the knob's "defect" and "safety risks." The trial court properly dismissed this suit; Plaintiffs did not plead any real fraud.

Federal Rules of Civil Procedure 8 and 9 are supposed to protect manufacturers from these types of specious fraudulent concealment claims. They

require plaintiffs to plead facts showing, among other things, a safety defect existed, the defendant knew about it and its safety risk, the defendant concealed this information, and plaintiffs relied on this omission when buying their products. In overturning the trial court's ruling, the panel allowed Plaintiffs to survive a motion to dismiss without pleading this basic, required information. Government transmittal of one or more consumer complaints is not pre-sale knowledge of defect and safety risks. These complaints are commonplace and not vetted for accuracy. That the CPSC forwarded eight complaints over five years involving a small number of ranges is not, alone, sufficient to plead fraudulent concealment.

For this reason, as the dissent explained, the panel's holding contradicts *Smith v. General Motors, LLC*, 988 F.3d 873 (6th Cir. 2021). In *Smith*, the Court held that merely being in possession of consumer complaints does not create knowledge of a defect and safety risk. *See id.* at 885. The quality and quantity of complaints must be assessed before a manufacturer can be said to have had this knowledge and concealed it. Further, turning these complaints into fodder for consumer fraud litigation is a misuse of the CPSC database. It invites manipulation of the database and weaponizes earnest exchanges between governing agencies and regulated industries. Finally, this ruling removes one of the few remaining hurdles holding back an explosion of speculative class actions. Regardless of how specious or few the complaints, entrepreneurial lawyers will turn them into massive class

actions alleging broad bases of consumers were defrauded into purchasing products.

For these reasons, *amici* urge the court to grant this petition. Under federal pleading standards and *Smith*, Plaintiffs never crossed the threshold for seeking any type of judicial remedy. The panel's ruling needs to be corrected to prevent product manufacturers from having to defend against these unfounded claims.

ARGUMENT

I. THE COURT MUST NOT ALLOW THE CPSC'S TRANSMITTAL OF A FEW UNVETTED COMPLAINTS TO GIVE BIRTH TO WIDESPREAD CONSUMER FRAUD LITIGATION.

For Plaintiffs to plausibly plead fraudulent concealment, they must plead facts showing Whirlpool knew the way the knobs turn constituted a "defect" and there were specific, unreasonably dangerous safety risks associated with this "defect." This makes sense. If Whirlpool did not know the knobs were defective and unsafe, it could not have fraudulently concealed this information. *See Smith*, 988 F.3d at 882 ("It is difficult to understand how GM would have known, or had reason to know, that Plaintiffs were entering into a transaction under a mistake as to the existence of a safety risk unless GM somehow knew about a safety risk."). Rather than impose this requirement, the panel established a novel rule that allowed Plaintiffs to satisfy the "knowledge of a defect" element based solely on

the existence of eight consumer CPSC complaints because the agency by law was required to forward them to Whirlpool.

This ruling misappropriates the purpose and nature of information submitted to the CPSC. The CPSC gathers information about products in two ways: through its "clearinghouse" and its website, saferproducts.gov. *See* 15 U.S.C. §§ 2054(a)(1), 2055a. The clearinghouse includes information gathered from the Commission's 1-800 number, materials mailed to the agency or collected from other government agencies and consumer advocacy organizations, even newspaper clippings. *See* U.S. Consumer Product Safety Comm'n, Clearinghouse, https://www.cpsc.gov/Research--Statistics/Clearinghouse-Online-Query-Tool (last visited Sept. 9, 2025). Similarly, saferproducts.gov, a database established by the Consumer Product Safety Improvement Act of 2008, Pub. Law. 110-314, allows consumers, government agencies, healthcare professionals, and others to post their experiences with consumer products online. *See* 15 U.S.C. § 2055a(b).

Information submitted to the CPSC through the clearinghouse or saferproducts.gov is not typically investigated or vetted for accuracy. In fact, when Congress established the CPSC database, it was concerned courts might put legal weight on these complaints. Congress required the CPSC to provide "clear and conspicuous notice" that "the Commission does not guarantee the accuracy, completeness, or adequacy of the contents of the database." *Id*. § 2055a(b)(5).

Accordingly, saferproducts.gov includes such a disclaimer and emphasizes that it is particularly applicable "to information submitted by people outside of CPSC." *See* U.S. Consumer Product Safety Comm'n, saferproducts.gov (last visited Sept. 9, 2025). Thus, the mere fact someone outside the CPSC submits information to the Commission or posts a complaint on saferproducts.gov and CPSC forwards it to the manufacturer is not indicative of any actual problem, let alone a design defect with known safety implications.

Nevertheless, the panel invoked CPSC's transmittal as *the line* for giving CPSC complaints legal weight and distinguishing them from other complaints a manufacturer may see or receive. Complaints submitted to the CPSC are no more valid than those posted to a manufacturer's website, called into a customer service center, or posted on internet forums or other third-party sites. It also does not matter if the manufacturer saw or responded to the posts or the third party is a government regulator. That is why this Court in *Smith* did not give legal weight to the existence of complaints, whether with the National Highway Traffic Safety Administration or in possession of an auto manufacturer. *See Smith*, 988 F.3d at 885 (explaining in *Roe v. Ford Motor Co.*, No. 2:18-cv-12528, 2019 WL 32564589 (E.D. Mich. Aug. 6, 2019), that complaints made to Ford "did not show Ford's knowledge of a defect"). Further, CPSC complaints are publicly available; no complaints were concealed from any consumer who sought this information.

For these reasons, courts have broadly held the mere existence of consumer complaints to the CPSC do not qualify as pre-sale knowledge of a defect. *See, e.g.*, *Olmos v. Harbor Freight Tools USA, Inc.*, No. 18-cv-04986-SK, 2018 WL 8804820, at *7 (N.D. Cal. Dec. 24, 2018) (pre-sale knowledge "based on consumer complaints received by the CPSC" are insufficient to plead consumer fraud); *accord In re Samsung Galaxy Smartphone Mktg. & Sales Pracs. Litig.*, No. 16-cv-06391-BLF, 2020 WL 7664461, at *7–9 (N.D. Cal. Dec. 24, 2020) (handful of CPSC complaints "do not plausibly show Defendants had pre-sale knowledge of the alleged defects"); *Wallace v. SharkNinja Operating, LLC*, No. 18-cv-05221-BLF, 2020 WL 1139649, at *8–10 (N.D. Cal. Mar. 9, 2020) (same). Along this same vein, courts have also found that adverse event reports to the Food and Drug Administration do not show actionable risk. *See, e.g.*, *Gayle v. Pfizer, Inc.*, 452 F. Supp. 3d 78, 88 (S.D.N.Y. 2020). As these courts correctly held, more is needed.

Allowing lawyers to weaponize these complaints would have adverse consequences. It would allow government databases to be seeded and manipulated for litigation. And, if possessing a complaint is equated to knowledge of a defect, manufacturers would be encouraged to avoid receiving, reviewing or responding to product-based complaints, despite potential benefits to consumers when manufacturers engage with them and the government over product safety.

II. TURNING A HANDFUL OF UNVETTED COMPLAINTS INTO "KNOWLEDGE OF A DEFECT" DIRECTLY CONTRADICTS THIS COURT'S JURISPRUDENCE.

The panel's bright-line rule regarding the transmittal of CPSC complaints directly contradicts *Smith*. In *Smith*, the Court held that for consumer complaints to demonstrate a manufacturer fraudulently concealed safety implications of a defect, the plaintiffs must plausibly plead that the quantity and nature of the complaints were sufficient to allow such an inference. Here, the panel erred in several ways.

First, the panel wrongly distinguishes *Smith*'s assessment of the frequency, source, and number of complaints as speaking only to whether a manufacturer has constructive knowledge of complaints on *third-party* websites—not those it receives. However, the quantity of complaints, whatever their source, also is indicative of whether a defendant can be said to be on notice of an actual defect and its safety implications. Courts have explained that a few sporadic complaints do not suggest the product contains a design defect. The complaints must be "so frequent" and of an "unusually high number" before their mere possession can rise to the level of knowledge of a defect for fraudulent concealment purposes. *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1026 (9th Cir. 2017); *see also Baba v. Hewlett-Packard Co.*, No. C 09-05946 RS, 2011 WL 317650, at *3 (N.D. Cal. Jan. 28, 2011) ("Awareness of a few customer complaints ... does not establish knowledge of an alleged defect."). It should be clear that, here, eight is not enough.

Second, the panel disregards the need to vet the complaints substantively, both to determine if the complaints sufficiently allege a plausible defect and that the manufacturer "knew about the safety implications." *See Smith*, 988 F.3d at 885. With respect to the latter, *Smith* explained that a defendant cannot have knowledge of a safety risk for purposes of fraudulent concealment if the risk "never occurred." *Id.* Otherwise, any lawyer could conjure a scenario linking a product feature to an imagined safety concern and bypass the requirement to allege specific facts establishing this element of the claim. There is no indication in the CPSC or other complaints here that anyone was harmed by the way the knobs turn. Plaintiffs used the complaints to merely speculate that someone might get hurt.

Third, the panel contradicted *Smith* in setting aside Plaintiffs' burden to show Whirlpool knew of the defect and safety risks through testing or otherwise analyzing the CPSC complaints. In *Smith*, the Court held, "[w]ithout supporting facts that GM *engaged with* or received complaints about the defective dashboard and its safety risk, the consumer complaints are insufficient to allege that GM knew about the defective dashboard under the 12(b)(6) pleading standard." *Id*. at 885 (emphasis added). The Court further stated that without "specific allegations" of a company's testing or handling of complaints, its operations are not subject to discovery. *Id*. at 884. Here, the panel erred in finding that a handful of complaints without more can justify opening the door to discovery and years of litigation.

Finally, Plaintiffs did not allege facts showing the mechanism for turning the knobs was material to their individual purchases, or that they or the putative class of consumers relied on the alleged fraudulent omission in buying their ranges. These errors must be corrected or they will allow plaintiffs without viable individual claims to hide behind Rule 23.

III. THE COURT SHOULD ENFORCE FEDERAL PLEADING STANDARDS TO PREVENT BASELESS CONSUMER FRAUD CLASS ACTIONS FROM SURVIVING A MOTION TO DISMISS.

The Court should grant the petition to reaffirm that Rule 8 and 9 pleading standards cannot be compromised. The Sixth Circuit should join its sister courts in distinguishing cases where plaintiffs have plausibly pleaded fraud from those that recast a "product liability claim into a non-existent breach of contract claim." *Penrod v. K&N Eng'g, Inc.*, 14 F.4th 671, 674 (8th Cir. 2021). "While the evidentiary burdens placed on a plaintiff at the pleading stage are minimal," plaintiff must "do more than simply pair a conclusory assertion of money lost with a request that a defendant pay up." *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278, 287 (3d Cir. 2018).

The problems with specious class actions are well known, which is why the Supreme Court has cautioned that, with class actions, "courts must be more careful to insist on the formal rules." *Arizona Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011). The pleading requirements and plausibility standard protect

the parties and court from prolonged litigation, settlements that provide no benefits to the class, and outcomes inconsistent with substantive areas of law. *See, e.g.*, *B&G Towing, LLC v. City of Detroit*, 828 Fed. Appx. 263, 266 (6th Cir. 2020) ("While the pleading standards are not onerous, they unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.") (cleaned up); *Changizi v. Dept. of Health & Human Servs.*, 82 F.4th 492, 498 (6th Cir. 2023) ("[F]ederal courts will not unlock the doors of discovery" based on "speculative assertions.").

If threadbare class claims are allowed to proceed past a motion to dismiss, it can make "the Court's class certification decision all the more unwieldy." *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 971–72 (N.D. Cal. 2016). It also may "increase the defendant's potential damages liability and litigation costs that he may feel it economically prudent to . . . abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978). Plaintiffs must not be allowed to "extort settlements from innocent companies." *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 149 (2008).

Putative class actions like this one undermine respect for the judicial system and waste judicial resources. The Court should grant the Petition so manufacturers do not have to litigate potentially massive fraudulent concealment class actions based on a small number of unvetted complaints, regardless of the source.

CONCLUSION

For these reasons, the Court should grant the petition for rehearing and reverse the ruling of the panel majority.

Respectfully submitted,

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Dated: September 10, 2025

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 2,597 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Times New Roman 14-point proportional type.

/s/ Philip S. Goldberg
PHILIP S. GOLDBERG

September 10, 2025

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of September 2025, I electronically filed the foregoing Brief with the Clerk of the Court using the CM/ECF system. I certify that service will be accomplished by the CM/ECF system for all participants in this case who are registered CM/ECF users.

/s/ Philip S. Goldberg
PHILIP S. GOLDBERG

September 10, 2025