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# The Rise of "Empty Suit" Litigation. Where Should Tort Law Draw the Line?

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# The Rise of “Empty Suit” Litigation™

## WHERE SHOULD TORT LAW DRAW THE LINE?

Victor E. Schwartz† & Cary Silverman††

This article is dedicated to this generation’s Master of Tort law, Professor Aaron Twerski of Brooklyn Law School. We are all his students.

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INTRODUCTION

In the helter-skelter of daily life, we are constantly exposed to situations that may impact our physical health and emotional well-being. They vary from the mundane, such as inhaling a cloud of exhaust from a truck while crossing the street or a jostle by a fellow passenger in a crowded train, to the devastating, such as observing a close friend suffer from an illness. Tort law does not provide a means to financially recover for these types of common events or inconveniences that are an ordinary part of life.<sup>1</sup> Likewise, state consumer protection

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<sup>1</sup> See W. KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 23 (5th ed. 1984) [hereinafter PROSSER & KEETON] (recognizing that tort law does not provide a remedy for “unkindness” or violations of “the golden rule”).

statutes, while relaxing some elements required for common law fraud claims, were not intended to provide a refund to people whose purchase had no connection to an allegedly deceptive label or advertisement.<sup>2</sup>

Generally, a plaintiff must show a physical injury or demonstrate, in an objective and meaningful way, that he or she experienced a financial loss as a result of a defendant's conduct.<sup>3</sup> This is the case because, over time, the law has developed critical safeguards against claims that are either speculative or that courts are ill-equipped to address or compensate. Such foundational requirements ensure that the court system is not overwhelmed with lawsuits based on what might or could occur, diverting judicial time and the financial resources of those named in such suits from cases involving actual, current injuries. Tort and consumer law reserve liability to objectively verifiable, genuine harms. At a very minimum, Article III standing requires an "injury in fact," that the injury is "fairly trace[able]" to the actions of the defendant, and that the injury will "likely . . . [be] redressed by a favorable decision."<sup>4</sup>

The significance of making inroads on such threshold requirements is not lost on plaintiffs' lawyers who, like members of other professions, make their living by finding both new clients and new ways to expand their business. As a prominent plaintiffs' lawyer (who would want to remain anonymous) candidly told one of the authors:

If there were liability for every physical injury or actual economic harm that occurs in America, I still would be limited in my practice. There are only so many injuries. But if I were allowed to recover damages and attorneys' fees when there is no injury, my potential return is unlimited.

This experienced plaintiffs' lawyer and others may be on the way to fulfilling this goal. In recent years, plaintiffs' lawyers are increasingly asserting "no-injury" theories in the courts. These types of claims have become so frequent that the American Tort Reform Foundation coined the phrase "empty

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<sup>2</sup> Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 18-21, 50-54 (2005) (finding that most state consumer protection statutes or courts interpreting them require showing an ascertainable loss and some require a showing of reliance).

<sup>3</sup> See PROSSER & KEETON, *supra* note 1, at 165 ("Actual loss or damage resulting to the interests of another [is a necessary element of a negligence cause of action] . . . . The threat of future harm, not yet realized, is not enough.").

<sup>4</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (first alteration in original).

suit litigation”<sup>TM</sup> to describe them.<sup>5</sup> These are claims in which the harm to the attorneys’ clients (or class members) is illusory. They either seek recovery for speculative present or future “injuries” or rely upon a fictitious construct of an economic loss that is a creative invention of expert testimony.

This Article focuses on four variants of no-injury theories that are either emerging or experiencing a resurgence in the courts: (1) claims for recovery of emotional harm; (2) liability for the estimated costs of medical monitoring following exposure to a potentially harmful substance absent a physical injury; (3) class action litigation claiming that a product’s actual value was lower than the purchase price or that the resale value of a product diminished because of an alleged latent defect, even when the product functioned properly for most or all consumers; and (4) class actions challenging product labeling or advertising on behalf of all consumers where few, if any, of them were actually misled.<sup>6</sup> In each area, the Article reviews applicable tort law principles, examines how plaintiffs have attempted to circumvent or alter the traditional rule to proceed with no-injury lawsuits, and considers the judicial response to such claims.

The Article finds that some courts are slowly easing traditional requirements for recovery solely for emotional harm and a new Restatement is likely to advance this process. With respect to other types of claims, courts are largely rejecting empty suit litigation. When courts dismiss these types of claims, the ground for doing so varies significantly: lack of standing, failure to state a claim, federal preemption, and failure to meet class certification requirements are among the most common bases. It appears that while judges recognize that these claims violate fundamental principles of law, they are struggling to find a proper basis to dismiss them. Some lawsuits have settled for significant sums. For that reason and the persistence of lawyers who try to expand tort and consumer law, this litigation is likely to continue.

In its essence, this Article supports the view that the civil justice system should be reserved for individuals who have experienced real injuries and actual losses. Courts can discourage empty suit litigation by requiring objective proof of injury,

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<sup>5</sup> U.S. Trademark Application, Serial No. 86,338,065 (filed July 15, 2014), available at <http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4803:w70pvg.3.1>.

<sup>6</sup> Some data privacy claims present another example of emerging no-injury litigation. See, e.g., *Tabata v. Charleston Area Med. Ctr.*, 759 S.E.2d 459, 467 (W. Va. 2014) (reversing dismissal of data privacy class action where class members had “no evidence of unauthorized access of their personal and medical information, no evidence of actual identity theft, and no evidence of economic injury arising from the alleged wrongdoing”); see *id.* (Ketchum, J., dissenting) (referring to the case as a “typical example of a frivolous class-action lawsuit” and declaring “[n]o harm, no foul”).

carefully applying safeguards governing class certification and expert testimony, and, when warranted, sanctioning lawyers who knowingly file meritless claims. Government agencies should address safety concerns *before* injuries occur and provide clear rules for businesses on the use of marketing terms that can have different meanings for different people, such as "natural" ingredients. Regulators have the tools to be more efficient and effective than courts in responding to potential threats and developing public policy. When necessary, legislatures should step in to put the brakes on litigation that leads to unpredictable and inconsistent outcomes for businesses, harms consumers through higher prices, reduces consumer choice, and damages respect for the legal system.

#### I. LIABILITY FOR CLAIMS FOR EMOTIONAL HARM

Claims to recover for purely an emotional harm, i.e. in absence of physical injury or manifestation of harm, open the door to empty suit litigation. The reasons for this are easy to understand. Emotional harm, broadly construed, is quite subjective. Where this area of law lacks clear lines, it is easy to exaggerate or even imagine claims. Every day we are all subject to emotional harm, anxiety, grief, or distress. We narrowly avoid a car accident with a distracted driver. We slip and nearly fall down a wet stairway in a parking garage. At the end of the day, when we are finally at home, an announcement on the television tells us that a drug we take is now associated with a painful form of cancer. Although these incidents may cause us to feel genuine emotional distress, should such feelings or concerns be the predicate for a tort claim?

These events are a part of everyday life, but the last example highlights another problem with emotional harm cases. They can be widespread. In the drug example, assume that the product led to cancer in approximately a thousand patients, but over a million people who took the drug learned about the potential harm. Should all of those people have claims for negligent infliction of emotional harm? Bold and frightening advertising to recruit plaintiffs for lawsuits could itself cause emotional distress to some viewers who might otherwise be calm.

Professors William L. Prosser and John W. Wade, who wrote the Restatement (Second) of Torts, appreciated these concerns. They handled the issue of emotional harm in simple black letter. There was *no* recovery for negligent infliction of

emotional distress<sup>7</sup> (as contrasted with intentional infliction of emotional harm).<sup>8</sup>

There were historic exceptions to this black letter rule, but they were very limited in scope. A telegraph company (long before e-mail) might be subject to liability for negligent infliction of emotional harm if it transcribed a telegraph that had been sent by a hospital to a parent to say that a person's child "was well," but, through the negligence of the telegram operator, told the recipient parent of the telegram that his child was dead. The parent could successfully sue the telegraph company for emotional harm.<sup>9</sup> Another long-standing exception in this category recognized an independent claim for mental suffering against funeral directors and others if they mishandled a close relative's body, for example, if a coffin in a closed ceremony popped open in the middle of a service, or if the body in the coffin was not a loved one's relative, but a stranger.<sup>10</sup> These exceptions to the bar on recovery for pure emotional harm had a clear objective factual basis. There was little room for fraud, or abuse, of the tort system, or an influx of subjective claims that would consume the judicial system and deplete resources available for cases involving physical injuries or objectively measurable economic losses. The numbers of claims were tightly circumscribed by the facts.

The American Law Institute created the Restatement (Second) of Torts 50 years ago.<sup>11</sup> Since that time, courts have opened the door with respect to negligent infliction of emotional harm claims. The Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm (Restatement Third), displays a rainbow of rules as to when and how plaintiffs may have a viable claim for emotional harm.<sup>12</sup> As explained below, the Restatement Third's "window" for claims based on negligent infliction of

<sup>7</sup> See RESTATEMENT (SECOND) OF TORTS § 436 (1965).

<sup>8</sup> See *id.* § 46 (recognizing a cause of action for intentional infliction of emotional distress).

<sup>9</sup> See, e.g., *Mentzer v. W. Union Tel. Co.*, 62 N.W. 1, 6 (Iowa 1895) (recognizing claim for negligently failing to deliver a telegram notifying plaintiff of the death of his mother).

<sup>10</sup> See *Gray Brown-Service Mortuary, Inc. v. Lloyd*, 729 So. 2d 280, 285 (Ala. 1999) ("It has long been the law of Alabama that mistreatment of burial places and human remains will support the recovery of damages for mental suffering."); see also, e.g., *Lott v. State*, 225 N.Y.S.2d 434 (Ct. Cl. 1962) (recognizing claim for emotional distress where bodies of two women, one Jewish and one Catholic, who died during the same hour, were mistakenly switched, prepared in violation of religious beliefs, and presented to the family due to hospital error); cf. *Corso v. Crawford Dog & Cat Hosp., Inc.*, 415 N.Y.S.2d 182 (Civ. Ct. 1979) (awarding \$700 in damages for emotional distress where organization substituted dead cat in casket for beloved pet dog whose body was wrongfully disposed).

<sup>11</sup> See RESTATEMENT (SECOND) OF TORTS.

<sup>12</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM §§ 47-48 (2012).

emotional harm is a rather wide one, but it does place certain restrictions on the tort that represent sound public policy.

#### A. *Traditional Limits on Emotional Harm Claims*

As courts began to recognize claims for negligent infliction of emotional distress, they recognized that, without objective constraints, the tort had the potential to spiral out of control, providing a potential lawsuit to anyone with hurt feelings, fears, or anxieties. As the Supreme Court observed, "courts have realized that recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants."<sup>13</sup> For these reasons, courts developed a series of bright-line rules that limited duty as a matter of public policy. While such lines are inherently arbitrary, and are frequently criticized as such, some courts have long viewed them as essential to maintaining rational bounds on an expansive tort. Other courts have gradually relaxed these rules.

For example, for many years, in the jurisdictions that allowed claims based on negligent infliction of emotional harm, there had to be some contemporaneous physical contact between the defendant and the plaintiff related to that alleged harm. The physical impact, no matter how trivial and even if it caused no real harm, was the "magic formula" that opened the door to "the full joy of a complete recovery."<sup>14</sup> There remained no recovery for mere fright, even if it had serious consequences.<sup>15</sup> While this physical contact or impact rule was arbitrary in nature, it did provide an objective limit on the tort. The beginning of the end of the contact rule occurred in a well-known New York Court of Appeals case where a ski resort employee negligently placed a child in a chair lift without securing the child's safety belt and the child suffered emotional trauma.<sup>16</sup> The court allowed the claim, suggesting that whether or not a defendant had physical contact with a plaintiff was not a useful screen to discern between legitimate and non-legitimate emotional harm

<sup>13</sup> *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 546 (1994).

<sup>14</sup> See PROSSER & KEETON, *supra* note 1, at 363-64 (quoting Herbert F. Goodrich, *Emotional Disturbance as Legal Damage*, 20 MICH. L. REV. 497, 504 (1922) and providing examples of impacts found by courts to permit recovery for emotional harm). A famous example of such an "impact" is the case of a circus horse that "evacuated his bowels into [the plaintiff's] lap." *Christy Bros. Circus v. Turnage*, 144 S.E. 680, 680 (Ga. Ct. App. 1928).

<sup>15</sup> See, e.g., *Mitchell v. Rochester Ry. Co.*, 45 N.E. 354, 354 (N.Y. 1896) (requiring immediate personal injury for recovery for negligent infliction of emotional distress and finding that "nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle").

<sup>16</sup> *Battalla v. State*, 176 N.E.2d 729, 729 (N.Y. 1961) (overruling *Mitchell*, 45 N.E. 354).



cases.<sup>17</sup> While many jurisdictions followed this case in abandoning the contact rule, a few jurisdictions still maintain it.<sup>18</sup>

Courts that abandoned the contact rule did not leap into an open-ended standard for determining when claims might be allowed for negligent infliction of emotional harm. They formulated alternative rules that constrained direct emotional harm claims. Some courts allowed recovery for emotional harm where a person narrowly escaped a serious injury, but there was no impact, and suffered illness or mental trauma as a result.<sup>19</sup> This became known as the “zone-of-danger” test. Other courts did not require, or dropped the requirement of, a near miss, but required that a plaintiff prove that he or she suffered an objective physical injury or manifestation as the result of emotional distress that was proximately caused by the defendant’s negligent conduct.<sup>20</sup> This standard could be met, for example, by showing, through competent medical evidence, that the plaintiff developed an illness as a direct result of the incident.<sup>21</sup> A physical manifestation of the emotional harm serves as an “objective determination [that] provides reasonable assurance that the claim is not spurious.”<sup>22</sup>

Courts have placed, and continue to maintain, rigorous restrictions on recovery for fear of developing an illness due to potential exposure to a toxic substance. For example, the Maryland Court of Appeals recently found that to recover for emotional distress stemming from a fear of contracting a latent disease, a plaintiff must show that:

- (1) he or she was exposed actually to a toxic substance due to the defendant’s tortious conduct; (2) which led him or her to fear objectively and reasonably that he or she would contract a disease; and (3) as a result of the objective and reasonable fear, he or she manifested a physical injury capable of objective determination.<sup>23</sup>

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<sup>17</sup> See *id.* at 731 (reasoning that fraudulent accidents and injuries are just as easily feigned in “slight-impact cases” as “no-impact cases”).

<sup>18</sup> See, e.g., *Lee v. State Farm Mut. Ins. Co.*, 533 S.E.2d 82 (Ga. 2000); *Atl. Coast Airlines v. Cook*, 857 N.E.2d 989 (Ind. 2006).

<sup>19</sup> See, e.g., *Falzone v. Busch*, 214 A.2d 12, 17 (N.J. 1965) (pedestrian almost struck by automobile); *Sinn v. Burd*, 404 A.2d 672, 675-76 (Pa. 1979) (discussing the court’s abandonment of the “impact rule” in favor of the “zone of . . . danger” theory).

<sup>20</sup> See, e.g., *Green v. T. A. Shoemaker & Co.*, 73 A. 688, 691 (Md. 1909); *Daley v. LaCroix*, 179 N.W.2d 390, 390-91 (Mich. 1970).

<sup>21</sup> See, e.g., *Beynon v. Montgomery Cablevision Ltd. P’ship*, 718 A.2d 1161, 1184 (Md. 1998).

<sup>22</sup> *Id.* at 1184 (quoting *Belcher v. T. Rowe Price Found.*, 621 A.2d 872, 885 (Md. 1993)).

<sup>23</sup> *Exxon Mobil Corp. v. Albright*, 71 A.3d 30, 66 (Md. 2013) (reversing \$1.5 billion verdict).

The court drew these lines out of longstanding concern that "emotional distress may be feigned easily" and the need to have a "sufficient guarantee of genuineness that would otherwise be absent in a claim for mental distress alone."<sup>24</sup>

Almost all courts have drawn the line on emotional harm claims stemming from negligent destruction of property. In most states, there is no recovery for the emotional connection to property beyond its actual value.<sup>25</sup> One may have feelings about an heirloom, or even an office chair, that has been used for decades. Some people even give their automobiles personal names. Only a handful of states, however, have allowed recovery for the "intrinsic" or "special" value of property,<sup>26</sup> or allow owners to seek sentimental damages for the destruction of an heirloom.<sup>27</sup> When they do so, such considerations are used to arrive at an item's *economic* worth or actual value when the property's market value is difficult to discern, not to award emotional harm damages.<sup>28</sup> When recognized, these exceptions are tightly limited.<sup>29</sup> For example, in the most litigious area in which plaintiffs seek recovery for emotional harm stemming from property damage, an injury to a pet, most courts have taken this approach and not awarded damages for loss of companionship or other emotional harm.<sup>30</sup>

Another example of judicial line drawing has occurred with respect to claims by individuals who suffer grief or harm due to the injury or death of another. These are cases involving

<sup>24</sup> *Id.* at 59 (quoting *Vance v. Vance*, 408 A.2d 728, 732 (Md. 1979) (discussing *Green*, 73 A. 688 (Md. 1909)).

<sup>25</sup> *See, e.g.*, *Price v. High Pointe Oil Co.*, 828 N.W.2d 660, 665-67, 673 (Mich. 2013) (reversing \$100,000 award of emotional harm damages to plaintiff whose home was destroyed and adhering to traditional common law rule "that the measure of damages for the negligent destruction of property is the cost of replacement or repair").

<sup>26</sup> *See* Phil Goldberg, *Courts and Legislatures Have Kept the Proper Leash on Pet Injury Lawsuits: Why Rejecting Emotion-Based Damages Promotes The Rule of Law, Modern Values, and Animal Welfare*, 6 STAN. J. ANIMAL L. & POL'Y 30, 50-53 (2013).

<sup>27</sup> *See, e.g.*, *Campins v. Capels*, 461 N.E.2d 712 (Ind. Ct. App. 1984); *Brown v. Frontier Theaters, Inc.*, 369 S.W.2d 299 (Tex. 1963); *Bush v. State*, 79 P.3d 1178 (Wyo. 2003); *see generally* Goldberg, *supra* note 26, at 53-54.

<sup>28</sup> *See* *City of Tyler v. Likes*, 962 S.W.2d 489, 497 (Tex. 1997) ("The owner's feelings thus help determine the value of the destroyed item to the owner for purposes of property, not mental anguish, damages.").

<sup>29</sup> *See* *Strickland v. Medlen*, 397 S.W.3d 184, 190 (Tex. 2013) (recognizing that the heirloom exception applies only when the sentimentality exists "at the time a keepsake is acquired," is "based not on the item's attributes but rather on the nostalgia it evokes," and is "kept around chiefly to commemorate past events or passed family members").

<sup>30</sup> *See id.* While the reasoning of some courts in rejecting such claims is somewhat automatic (pets are property, therefore, claims are not allowed), other courts have been more expansive in their reasoning in explaining the adverse consequences, or ripple effect, to society that would flow from allowing such claims. For example, the cost of veterinary medicine would be sure to rise, and the cost of boarding animals could skyrocket, or not be available at all. *See generally* Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 PEPP. L. REV. 227 (2006).

indirect, rather than direct, harm.<sup>31</sup> Some courts have allowed recovery for emotional distress when a person contemporaneously observes the bodily injury or death of a close family member due to a defendant's negligence, known as the "bystander" rule.<sup>32</sup> Perhaps the most expansive decision in this area was from the Supreme Court of California. In *Dillon v. Legg*, the court allowed a claim by a mother who learned of an accident involving her child, suffered emotional harm, yet never witnessed the accident, or was in the zone of danger herself.<sup>33</sup> Courts soon learned the lesson of stretching emotional harm claims too far. As a result of *Dillon*, California courts were inundated with claims of people who learned about serious accidents to their loved ones after, or even well after, the time of the event. In *Thing v. La Chusa*, the Supreme Court of California took a step back by limiting indirect claims for emotional harm to close relatives that contemporaneously witnessed bodily injury to a loved one that had been negligently caused by the conduct of the defendant, an automobile driver.<sup>34</sup>

### B. *The Restatement Third Approach*

The Restatement Third adopts positions that, if adopted by courts following the traditional approaches, would relax the objective criteria needed to recover for pure emotional harm and other constraints on such claims applicable in several of these areas.

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<sup>31</sup> State wrongful death acts carefully restrict the action with respect to recovery for emotional harm. Most wrongful death acts limit an action to a spouse, parent, or child. A few extend to siblings. *See, e.g.*, ARK. CODE ANN. § 16-62-102(d)(1) (2010); DEL. CODE ANN. tit. 10, § 3724(a) (2014); W. VA. CODE ANN. § 55-7-6(b) (West 2014); *see also* MICH. COMP. LAWS § 600.2922 (1961) (including siblings and grandparents). Many are interpreted by courts or explicitly state that they do not permit recovery for the grief or anguish that naturally accompanies a loss. *See, e.g.*, IND. CODE ANN. § 34-23-1-2(c)(2)(A) (West 2014) (explicitly precluding recovery for grief); MINN. STAT. § 573.02(1) (2014) (limiting recovery to pecuniary loss); S.D. CODIFIED LAWS § 21-5-7 (2014) (same); *Lengel v. New Haven Gas Light Co.*, 111 A.2d 547, 551 (Conn. 1955); *Volk v. Baldazo*, 651 P.2d 11, 14 (Idaho 1982); *Pagitt v. City of Keokuk*, 206 N.W.2d 700, 703 (Iowa 1973); *Green v. Bittner*, 424 A.2d 210, 215 (N.J. 1980); *Gonzalez v. N.Y.C. Hous. Auth.*, 572 N.E.2d 598, 600-01 (N.Y. 1991); *Knowles v. Corkill*, 51 P.3d 859, 863-64 (Wyo. 2002).

<sup>32</sup> *See, e.g.*, *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (recognizing a cause of action for emotional distress on the part of a mother who had seen her child being struck and killed by a negligently operated automobile that did not endanger the mother and providing criteria for recovery in bystander suits). *But cf. Maloney v. Conroy*, 545 A.2d 1059, 1064 (Conn. 1988) (dismissing claim of plaintiff who claimed emotional disturbance from observing medical malpractice performed on mother, holding "there can be no recovery for nervous shock and mental anguish caused by the sight of injury or threatened harm to another" (quoting *Strazza v. McKittrick*, 156 A.2d 149 (Conn. 1959))).

<sup>33</sup> *See Dillon*, 441 P.2d at 912.

<sup>34</sup> *See Thing v. La Chusa*, 771 P.2d 814, 819 (Cal. 1989).

For example, the Restatement Third embraces an open-ended standard for negligent infliction of emotional distress, specifically stating that a plaintiff does not have to show objective physical consequences if he or she showed "serious emotional harm . . . in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm."<sup>35</sup> In so doing, it endorses a minority approach and discards the physical manifestation requirement.<sup>36</sup> The new Restatement will likely influence additional courts to take this approach.

The authors of the Restatement Third view the "test" as not overly subjective or open-ended.<sup>37</sup> They indicate that requiring that plaintiff show that the defendant's conduct is such that "a reasonable person would suffer serious [emotional] harm" is a sufficient threshold to weed out overly subjective claims.<sup>38</sup>

Nevertheless, that standard contains highly subjective words. What is "reasonable?" What is "serious?" What are the "specified categories" of activities, left unspecified by the black letter rule, to which this liability applies?<sup>39</sup> Moreover, the Restatement Third went further in tilting toward subjectivity and indicated that if the reasonable person threshold were met, "a person may recover for all harm subjectively suffered, even if that suffering is greater than an ordinary person's because of a predisposition or special vulnerability."<sup>40</sup> This is the so-called "thin skull" rule that may be fair when a plaintiff suffers a physical injury. When it is applied to emotional harm cases, however, it overreaches. To put this in graphic terms, if a defendant's negligent conduct causes serious emotional harm that might cause a "reasonable" person to have bad dreams, or be so traumatized that he misses a day or two of work, the Restatement could be interpreted to allow a highly subjective idiosyncratic individual to obtain damages who claims (with "expert" proof) that he is unable to work for the rest of his life.

With regard to fear of future injury, the Restatement Third cuts the baby in two. It suggests that courts allow claims

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<sup>35</sup> See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 47 (2012). The Restatement also incorporates the zone-of-danger test as a basis for recovery for emotional harm. *See id.* § 47(a).

<sup>36</sup> *See id.* § 47 cmt. j.

<sup>37</sup> *See id.*

<sup>38</sup> *Id.*

<sup>39</sup> The comments to the Restatement recognize that "[c]ourts have not provided clear guidelines to identify precisely which activities, undertakings, or relationships will support liability" and there is "considerable variation" even in areas "fraught with risk of emotional harm." *See id.* § 47 cmt. f.

<sup>40</sup> *Id.* § 47 cmt. l.

where the fear of future harm is short range in nature, such as HIV contact, where a person discovers soon after exposure whether he or she has contracted the disease.<sup>41</sup> The Restatement Third, however, does not allow emotional harm claims when the “fear” and reality are potentially years away, for example, where a person was exposed to asbestos.<sup>42</sup> Like other rules and comments on this general topic put forth by the Restatement Third (and some courts), the borderline potential of empty suit litigation becomes cloudy when applied to specific facts. What is long range and what is short range?

One area in which the Restatement Third continues to closely follow the traditional rule is with respect to emotional harm claims based on negligent harm to property. The Restatement Third draws a clear line, stating that “emotional harm resulting from negligently caused harm to personal property is not permitted,”<sup>43</sup> including injuries to pets.<sup>44</sup> While the Restatement recognizes that “pets are often quite different from other chattels in terms of emotional attachment” and that harm to pets “can cause real and serious emotional harm in some cases,” the Reporters understood that “lines—arbitrary at times—that limit recovery for emotional harm are necessary.”<sup>45</sup>

With respect to indirect claims for emotional harm, the Restatement Third follows the approach of *Thing v. La Chusa*. It limits claims to close relatives that contemporaneously witnessed bodily injury to a loved one that had been negligently caused by the conduct of the defendant.<sup>46</sup> At least eleven jurisdictions are more restrictive, however, and only allow bystander recovery when the plaintiff is in the zone of danger.<sup>47</sup>

### C. *Judges Can Avoid Expansion*

Emotional harm claims are in constant danger of entering the zone of empty suit litigation. Courts need to retain limits through objective rules of law even though they may have some arbitrariness about them. Manifestation of a physical injury exemplifies this type of limitation. Of equal

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<sup>41</sup> *Id.* § 47 cmt. k.

<sup>42</sup> *Id.*

<sup>43</sup> *See id.* § 47 cmt. m.

<sup>44</sup> *Id.* (concluding that “an actor who negligently injures another’s pet is not liable for emotional harm suffered by the pet’s owner”).

<sup>45</sup> *Id.*

<sup>46</sup> *See id.* § 48.

<sup>47</sup> *See id.* § 48, reporters’ note, cmt. a (citing case law of Arizona, Delaware, District of Columbia, Illinois, Maryland, Minnesota, Missouri, New York, North Dakota, Utah, and Vermont).

importance is the role of the judge in limiting expert testimony to those who are absolutely qualified to apply it in a specific case. While science has significantly advanced in determining mental illness and emotional suffering, undue flexibility with expert witnesses with respect to negligently caused emotional harm claims can flood our courts with litigation that exhausts assets that are best preserved for victims of serious physical harms. Judges should exercise the highest degree of oversight with respect to an "expert's" testimony who claims that a plaintiff suffers from a recognized medical condition and that the defendant's conduct or product caused that harm. Further, judges should exercise great scrutiny in determining the legitimacy of a claim, regardless of the particular legal rule that may allow such claims.

As the Restatement Third makes clear, "[d]etermination of which activities, undertakings, or relationships support recovery for stand-alone emotional harm is a matter of law for the court."<sup>48</sup> The role of the judge in emotional harm cases is, in part, to determine whether a particular category of relationships, for example, manufacturer of a drug and purchaser of that drug, is sufficient to support a claim for emotional harm. To avoid empty suit litigation, however, courts should do more than determine the "categories" where claims for negligent infliction of emotional harm should be allowed. Judges should also recognize that foreseeability alone should not be a predicate for emotional harm claims. As the Supreme Court of California wisely recognized in *Thing v. La Chusa*, "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury."<sup>49</sup> The Restatement Third echoes that caution in recognizing that "foreseeability cannot appropriately be employed as the standard to limit liability for emotional harm."<sup>50</sup>

As tort law marches to the future, the talisman of "foreseeability" is likely to be pressed by plaintiffs' lawyers who understandably wish to expand this tort. The "foreseeability" basis for emotional harm cases, however, is a paradigm of empty suit litigation. While such claims might be rejected by juries, with foreseeability as a standard, plaintiff's counsel can press for settlement in cases that never should be allowed to go to a jury.

<sup>48</sup> *Id.* § 47 cmt. g.

<sup>49</sup> *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989).

<sup>50</sup> RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 47 cmt. i.

## II. MEDICAL MONITORING AND INCREASED RISK OF HARM CLAIMS

Perhaps the most judicially analyzed examples of empty suit litigation are claims for medical monitoring. In medical monitoring claims, the plaintiff is not in any way ill, but *might* become sick in the future. The essence of a medical monitoring claim seeks future medical costs that might arise in an effort to detect the disease. If the disease does indeed arise, then the plaintiff can bring a separate claim for the costs of treating the actual injury, pain and suffering, and other available damages. Since many people are exposed to small amounts of potentially harmful substances in their water, air, soil, homes, and workplaces on a daily basis, open-ended liability for the cost of physician visits and medical tests to monitor for signs of development of a disease or condition can lead to massive class actions on behalf of people who are unharmed and may never experience an injury.<sup>51</sup> For this reason, most courts have rejected medical monitoring claims or imposed exacting safeguards on such actions.

### A. *Early Medical Monitoring Rulings*

In the 1980s and 1990s, a handful of state appellate courts permitted lawsuits seeking medical monitoring without a present physical injury.<sup>52</sup> While these court decisions allowed such claims, most did so based on strict criteria and through court-supervised funds that directly reimbursed verified medical testing costs.

#### 1. Establishment of Court-Supervised Funds

The New Jersey Supreme Court issued a landmark opinion in 1987 when it became the first state high court to recognize the viability of a request by uninjured plaintiffs for the costs of medical monitoring.<sup>53</sup> In that case, 339 people sued

<sup>51</sup> See Arvin Maskin et al., *Medical Monitoring: A Viable Remedy for Deserving Plaintiffs or Tort Law's Most Expensive Consolation Prize?*, 27 WM. MITCHELL L. REV. 521 (2000).

<sup>52</sup> See *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 823-24 (Cal. 1993); *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 106-07 (Fla. Dist. Ct. App. 1999); *Bourgeois v. A.P. Green Indus.*, 97-3188, (La. 7/8/98); 716 So. 2d 355, 360-61 (superseded by statute, LA. CIV. CODE art. 2315 (2001)); *Ayers v. Twp. of Jackson*, 525 A.2d 287, 311-12 (N.J. 1987); *Redland Soccer Club, Inc. v. U.S. Army*, 696 A.2d 137, 145-46 (Pa. 1997); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993).

<sup>53</sup> *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984), is often cited as the first case to adopt medical monitoring. In that instance, the D.C. Circuit upheld a district court order, applying District of Columbia law, requiring an aircraft maker to establish a \$450,000 fund to pay for the reasonable

their township, claiming that its operation of a nearby landfill had allowed toxic waste to contaminate their water.<sup>54</sup> Although these individuals had not developed an injury, they sought costs for annual doctors' visits to monitor for cancer and other diseases. A jury awarded the plaintiffs \$8.2 million for future medical surveillance, averaging about \$500 per year of life expectancy.<sup>55</sup> The New Jersey Supreme Court affirmed the viability of a medical monitoring claim and allowed the lump-sum award, but it announced new principles for prospective application in medical monitoring claims.<sup>56</sup> The high court found that the judiciary's equitable powers permit such relief, articulating a test that considers "the significance and extent of exposure to chemicals, the toxicity of the chemicals, the seriousness of the diseases for which individuals are at risk, the relative increase in the chance of onset of disease in those exposed, and the value of early diagnosis."<sup>57</sup>

In establishing what it viewed as a "new rule" for the future,<sup>58</sup> however, the court found the use of lump sum awards inadvisable for several reasons. It recognized that use of court-supervised funds "provide a more efficient mechanism for compensating plaintiffs" and "offers significant advantages" over a lump-sum verdict.<sup>59</sup> It also found that there are public interests present in mass exposure cases that are not present in conventional tort litigation. Use of a court-supervised fund encourages plaintiffs to visit their doctor and not spend the

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diagnostic examination expenses of forty Vietnamese orphans who survived a plane crash during "Operation Babylift." *See id.* at 819-20. While the court examined "whether tort law should encompass a cause of action for diagnostic examinations without proof of actual injury," there is an important distinction between *Friends for All Children* and pure no-injury cases seeking medical monitoring. *Id.* at 825. In *Friends for All Children*, the plaintiffs sought medical monitoring due to the risk of brain damage stemming from the rapid decompression of the plane. *See id.* Unlike the situation in modern medical monitoring cases in which a plaintiff with no present physical injury seeks recovery for exposure to a harmful substance, the orphans had suffered an objective, verifiable physical injury in an airplane crash. *See id.* Similar to a situation in which a motorcycle rider hits his head in an accident, it does not violate traditional principles of tort law to require a reimbursement of the costs of tests that are reasonably necessary to evaluate the potential harm. *See id.* The presence of an objective, physical impact reduces the potential for fraudulent or speculative claims.

<sup>54</sup> *Ayers*, 525 A.2d at 291.

<sup>55</sup> *See id.* at 313 n.13.

<sup>56</sup> *See id.* at 315 (declining to upset the jury's lump sum award for medical monitoring because the parties had tried the case conventionally, the defendant had not proposed use of a court-supervised fund until its appeal, and because the fund mechanism represented a novel approach).

<sup>57</sup> *Id.* at 312.

<sup>58</sup> *Id.* at 315.

<sup>59</sup> *Id.* at 313-14. The New Jersey Supreme Court limited *Ayers* in *Theer v. Philip Carey Co.*, 628 A.2d 724, 733 (N.J. 1993), which required medical monitoring plaintiffs to prove injury resulting from direct exposure to a toxic substance.



money for other purposes, limits a defendant's liability to amounts expended for that purpose, offsets liability to reflect collateral sources such as coverage of such tests by health insurance, prevents harm to public entities, and avoids the judiciary recognizing a novel cause of action.<sup>60</sup>

Several courts followed the reasoning of the New Jersey decision by allowing uninjured individuals to seek reimbursement for actual medical monitoring expenses through a court-supervised fund.<sup>61</sup> For example, in 1997, the Pennsylvania Supreme Court recognized a claim for medical monitoring in a case involving workers who excavated a former Army depot for use as a soccer field, residents who lived nearby and relatives who regularly visited them, and adults and children who played soccer on the field. The court found that a plaintiff may proceed with a common law claim seeking establishment of a medical monitoring trust fund if he or she can show, through presentation of expert testimony:

- (1) exposure greater than normal background levels;
- (2) to a proven hazardous substance;
- (3) caused by the defendant's negligence;
- (4) as a proximate result of the exposure, the plaintiff has a significantly increased risk of contracting a serious latent disease;
- (5) a monitoring procedure exists that makes the early detection of the disease possible;
- (6) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and
- (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.<sup>62</sup>

This test largely followed the Third Circuit's prediction of how the Pennsylvania Supreme Court would decide the existence of a medical monitoring claim in a case involving residents who claimed PCB exposure by people who worked or lived near a

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<sup>60</sup> See *id.* at 314-15. Evidence suggests that some of the *Ayers* plaintiffs used their awards for personal expenses, such as buying a home, and did not see their doctors any more frequently. See George W.C. McCarter, *Medical Sue-veillance: A History and Critique of the Medical Monitoring Remedy in Toxic Tort Litigation*, 45 RUTGERS L. REV. 227, 257 n.158 (1993).

<sup>61</sup> See, e.g., *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987) (citing *Ayers* with approval in establishing a court-supervised medical monitoring program for residents of land adjacent to asbestos-producing mill).

<sup>62</sup> *Redland Soccer Club, Inc. v. U.S. Army*, 696 A.2d 137, 145-46 (Pa. 1997).

railyard as well as an earlier Utah Supreme Court decision,<sup>63</sup> with one key difference. The Pennsylvania Supreme Court omitted a requirement that a plaintiff show that a treatment exists for the disease that is the subject of medical monitoring.<sup>64</sup> The Pennsylvania high court found that such a requirement "would unfairly prevent a plaintiff from taking advantage of advances in medical science."<sup>65</sup>

In 1999, a Florida appellate court adopted the Pennsylvania test, allowing a medical monitoring claim against the maker of the weight loss drug combination known as Fen-Phen.<sup>66</sup> After the plaintiffs made the required threshold showing, the trial court was required to take certain steps, involving significant hands-on management, to protect the integrity of the fund.<sup>67</sup> The trial court would appoint an administrator to manage the plan and assist the court in selecting advisory panel members, establishing procedures, and selecting a neutral group of examining physicians to perform the tests; establish notification procedures for individuals who may be eligible for monitoring; set a time frame for those eligible to obtain tests; and establish reporting requirements for physician findings and charges.<sup>68</sup> As the appellate court cautioned, "The trial judge must act in a businesslike manner, as concerns of time and money are the essence of this program because private industry should not be compelled to interminably defray the cost. The monitoring contemplated is not a social justice program."<sup>69</sup>

## 2. Cash Awards for Medical Monitoring

Although most of the early decisions permitting medical monitoring claims adopted a system where courts manage funds that would reimburse a plaintiff's examination costs, two state supreme courts went in a different direction in the late 1990s: Louisiana and West Virginia. The Louisiana decision

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<sup>63</sup> *In re Paoli R.R. Yard PCB Litig. (Paoli II)*, 35 F.3d 717, 788 (3d Cir. 1994) (supplementing the *Paoli I* criteria); *In re Paoli R.R. Yard PCB Litig. (Paoli I)*, 916 F.2d 829, 852 (3d Cir. 1990) (predicting that Pennsylvania would recognize a claim for medical monitoring in the absence of injury and providing what was then the most comprehensive articulation of requisite elements for a medical-monitoring claim); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993).

<sup>64</sup> *Redland Soccer Club*, 696 A.2d at 146 n.8.

<sup>65</sup> *Id.*

<sup>66</sup> *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 106-07 (Fla. Dist. Ct. App. 1999) (quoting *Redland Soccer Club*, 696 A.2d at 145-46).

<sup>67</sup> *Id.* at 107.

<sup>68</sup> *See id.*

<sup>69</sup> *Id.*

was overturned by the state's legislature, leaving West Virginia as the sole outlier.

Louisiana briefly allowed medical monitoring recovery absent physical injury following a 1998 ruling of its high court in *Bourgeois v. A.P. Green Industries, Inc.*<sup>70</sup> In *Bourgeois*, asymptomatic individuals who were exposed to asbestos sought compensation for the cost of regular medical examinations to detect the onset of potential latent diseases.<sup>71</sup> The Louisiana Supreme Court acknowledged that traditional tort law only permitted an award for medical expenses when there is a corresponding physical injury, a rule intended to avoid "an atmosphere of unlimited and unpredictable liability."<sup>72</sup> While not recognizing a new cause of action for medical monitoring, the court found that plaintiffs may recover medical monitoring costs as an element of damages when a defendant is liable under a traditional tort claim, such as negligence or strict liability.<sup>73</sup> The Louisiana high court did not decide whether such damages are available through a court-administered fund or as a lump-sum.<sup>74</sup> Nevertheless, its decision sparked a surge of litigation,<sup>75</sup> leading the state's legislature to preclude damages for future medical services or surveillance "unless . . . directly related to a manifest physical or mental injury or disease."<sup>76</sup>

It was West Virginia that boldly broke new ground in 1999, when the state's highest court recognized an independent cause of action for medical monitoring in which plaintiffs with no present physical injury could recover unrestricted damages.<sup>77</sup> The case involved individuals who claimed they were exposed to thirty toxic substances as a result of the defendant companies maintaining a pile of debris from making light bulbs.<sup>78</sup> The West Virginia Supreme Court of Appeals adopted a test that is expansive in both eligibility and available recovery. While its test is similar to that used by courts such as those in Pennsylvania,<sup>79</sup> the court found that a medical monitoring claim is viable even when

<sup>70</sup> *Bourgeois v. A.P. Green Indus.*, 716 So. 2d 355, 361-62 (La. 1998).

<sup>71</sup> *See id.* at 357.

<sup>72</sup> *Id.* at 358.

<sup>73</sup> *See id.* at 361.

<sup>74</sup> *See id.* at 362 n.16.

<sup>75</sup> *See* Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor Corp.: Sound Policy Should Be Restored to a Vague and Unsound Directive*, 27 ST. LOUIS U. PUB. L. REV. 135, 154 n.139 (2007) (citing cases).

<sup>76</sup> *See* LA. CIV. CODE art. 2315(B) (2001) (applicable to all causes of action accruing on or after July 9, 1999).

<sup>77</sup> *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431 (W. Va. 1999).

<sup>78</sup> *Id.* at 426-27.

<sup>79</sup> *See id.* at 432-33.

the amount of the exposure to a toxic substance is not a level sufficient to cause injury and there is no effective treatment for the disease.<sup>80</sup> "All that must be demonstrated," the court found, "is that the plaintiff has a significantly increased risk of contracting a particular disease relative to what would be the case in the absence of exposure."<sup>81</sup> The court allowed for medical monitoring based on "subjective desires of a plaintiff for information concerning the state of his or her health."<sup>82</sup> Unlike other states that require plaintiffs to apply for reimbursement of actual medical expenses through a court-administered fund, the West Virginia high court permitted an award of damages as a lump sum.<sup>83</sup>

As a result of this decision, plaintiffs who assert medical monitoring claims in West Virginia can recover cash awards, even when medical monitoring is not medically necessary or beneficial, and can spend the money as they choose. The ruling has been harshly criticized.<sup>84</sup> As the late Justice Elliot Maynard cautioned in dissent, the "practical effect of this decision is to make almost every West Virginian a potential plaintiff in a medical monitoring cause of action."<sup>85</sup> Anyone who comes in contact with hazardous substances "may be able to collect money as victorious plaintiffs without any showing of injury at all."<sup>86</sup>

The ruling has fueled litigation in the state.<sup>87</sup> For example, in 2011, DuPont settled a class action lawsuit brought by residents who lived near a zinc smelter that it had closed after operating for 27 years. The \$70 million settlement included \$4 million in payments to eligible residents for medical monitoring. While 6,700 people filed the paperwork to receive a \$400 payment for completing the forms, only about half that number actually obtained medical monitoring through the program.<sup>88</sup>

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<sup>80</sup> See *id.* at 433-34.

<sup>81</sup> *Id.* at 433.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see also *In re West Virginia Rezulin Litig.*, 585 S.E.2d 52, 71 (W. Va. 2003) (reversing trial court's denial of certification of medical monitoring class action).

<sup>84</sup> See generally Victor E. Schwartz, Sherman Joyce & Cary Silverman, *West Virginia as a Judicial Hellhole: Why Businesses Fear Litigating in State Courts*, 111 W. VA. L. REV. 757, 775-78 (2009) (examining how *Bower* has contributed to West Virginia's poor reputation for evenhanded civil justice); James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 845 (2002) (criticizing *Bower's* criteria as imposing "potentially crushing liabilities").

<sup>85</sup> *Bower*, 522 S.E.2d at 435 (Maynard, J., dissenting).

<sup>86</sup> *Id.*

<sup>87</sup> See Behrens & Appel, *supra* note 75, at 152 n.125 (citing medical monitoring litigation brought by coal plant workers, smokers, users of prescription drugs, and others).

<sup>88</sup> See *Who Would Turn Down a Quick \$400?*, CHARLESTON DAILY MAIL (Sept. 14, 2011), <http://www.charlestondaily.com/Opinion/Editorials/201109135102>.

As one local newspaper editorialized, “They are taking their \$400 and running.”<sup>89</sup>

*B. Supreme Court Rejection of Medical Monitoring Claims under Federal Law*

Some judges have found that characterizing these early decisions as a “trend” favoring medical monitoring claims would be “somewhat overstated.”<sup>90</sup> States quickly reversed course and reached a consensus view disfavoring such claims after the U.S. Supreme Court rejected medical monitoring recovery under a federal law governing compensation for railroad employee injuries in 1997.<sup>91</sup>

In *Metro-North Commuter R.R. v. Buckley*, the Supreme Court held that under the Federal Employers Liability Act, a pipefitter who was exposed to asbestos in the workplace but had no present physical symptoms could not bring “a new, full-blown, tort law cause of action” for medical monitoring to detect any future signs of an asbestos-related disease.<sup>92</sup> The Court recognized that modern life involves incidental exposure to so many toxic substances that “tens of millions of individuals” might qualify for “some form of substance-exposure-related medical monitoring.”<sup>93</sup> Coupled with “uncertainty as to the amount of liability” for medical monitoring, courts could face “both a ‘flood’ of less important cases (potentially absorbing resources better left available to those more seriously harmed) and the systemic harms that can accompany ‘unlimited and unpredictable liability’ (for example, vast testing liability adversely affecting the allocation of scarce medical resources).”<sup>94</sup>

In reaching its decision, the Court “canvassed the state-law cases that have considered whether the negligent causation of [mere exposure to a toxic substance] . . . by itself constitutes a sufficient basis for tort recovery,” and found that such a theory was “beyond the bounds of currently evolving common law.”<sup>95</sup> The Court was “troubled . . . by the potential systemic effects of creating a new . . . cause of action,” noting “the effects upon interests of other potential plaintiffs who are not before the court and who depend on a tort system that can distinguish

<sup>89</sup> *Id.*

<sup>90</sup> *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 439 (Nev. 2001).

<sup>91</sup> *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 444 (1997).

<sup>92</sup> *Id.* at 443-44.

<sup>93</sup> *Id.* at 442.

<sup>94</sup> *Id.* (internal citations omitted).

<sup>95</sup> *Id.* at 440 (citations and internal quotation marks omitted).

between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other."<sup>96</sup> The Court concluded that the "competing interests . . . at stake" weighed against creating a new cause of action for medical monitoring—especially because "those interests sometimes can be reconciled in ways other than simply through the creation of a full blown, traditional, tort law cause of action."<sup>97</sup>

### C. *Following Buckley, Most State Courts Rejected Medical Monitoring Claims*

After *Buckley*, a flurry of state supreme courts followed the U.S. Supreme Court's reasoning in rapid succession, including the high courts of Nevada (2001),<sup>98</sup> Alabama (2001),<sup>99</sup> Kentucky (2002),<sup>100</sup> Michigan (2005),<sup>101</sup> Mississippi (2007),<sup>102</sup> and Oregon (2008).<sup>103</sup> These claims were brought on behalf of plaintiffs who claimed exposure to toxins in the environment,<sup>104</sup> products containing hazardous chemicals,<sup>105</sup> prescription drugs with potential side effects,<sup>106</sup> and cigarette smoke.<sup>107</sup> In each of these contexts, courts described a common law cause of action for medical monitoring as "a novel, non-traditional tort and remedy."<sup>108</sup> They recognized that allowing a medical monitoring claim based on mere exposure would flout "well-established negligence requirements"<sup>109</sup> and constitute "an unprecedented and unfounded departure from the long-standing traditional elements of a tort action."<sup>110</sup>

These courts understood that the requirement that a plaintiff must experience a physical injury before bringing a tort claim is essential to objectively distinguishing between which

<sup>96</sup> *Id.* at 443-44.

<sup>97</sup> *Id.* at 444.

<sup>98</sup> *Badillo v. Am. Brands, Inc.*, 16 P.3d 435 (Nev. 2001).

<sup>99</sup> *Hinton v. Monsanto Co.*, 813 So. 2d 827 (Ala. 2001).

<sup>100</sup> *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002).

<sup>101</sup> *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005).

<sup>102</sup> *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007), *aff'd*, 483 F.3d 383 (5th Cir. 2007).

<sup>103</sup> *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181 (Or. 2008).

<sup>104</sup> *Hinton*, 813 So. 2d at 828; *Henry*, 701 N.W.2d at 685-86.

<sup>105</sup> *Paz*, 949 So. 2d at 2.

<sup>106</sup> *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 849 (Ky. 2002).

<sup>107</sup> *Badillo v. Am. Brands, Inc.*, 16 P.3d 435, 438 (Nev. 2001); *Lowe*, 183 P.3d at 182; *see also* *June v. Union Carbide Corp.*, 577 F.3d 1234, 1248-49 (10th Cir. 2009) (affirming dismissal of medical monitoring claims asserted by residents of former uranium and vanadium mining town under the Price Anderson Act of 1957 due to their lack of bodily injury).

<sup>108</sup> *Badillo*, 16 P.3d at 438.

<sup>109</sup> *Lowe*, 183 P.3d at 187.

<sup>110</sup> *Paz*, 949 So. 2d at 6; *see also* *Wood*, 82 S.W.3d at 856 (describing a medical monitoring claim as "uncharted territory" beyond "well-settled principles of tort law").

plaintiffs have stated a valid claim and which plaintiffs have not.<sup>111</sup> Abandoning this rule, as the Kentucky Supreme Court emphasized, “would force us to stretch the limits of logic and ignore a long line of legal precedent.”<sup>112</sup> The Alabama Supreme Court went so far as to describe medical monitoring claims on behalf of individuals with no present physical injury or illness as “stand[ing] Alabama tort law on its head in an attempt to alleviate . . . concerns about what *might* occur in the future.”<sup>113</sup> It concluded that “[t]o recognize medical monitoring as a distinct cause of action . . . would require this Court to completely rewrite Alabama’s tort-law system, a task akin to traveling in uncharted waters, without the benefit of a seasoned guide.”<sup>114</sup>

These courts also expressed concern that if the law permits uninjured individuals to recover damages for medical monitoring, those who are sick or may become sick in the future could be adversely affected because limited resources are diverted to those who are not sick and may never develop a disease as a result of their alleged exposure. As the Michigan Supreme Court noted, “a potentially limitless pool of plaintiffs” with “preinjury claims could drain resources needed to compensate those with manifest physical injuries and a more immediate need for medical care.”<sup>115</sup> Similarly, the Kentucky Supreme Court observed that “[s]pending large amounts of money to satisfy medical monitoring judgments will impair [defendants’] ability to fully compensate victims who emerge years later with actual injuries that require immediate attention.”<sup>116</sup> In such circumstances, imposing liability for medical monitoring in absence of a present injury would, as the Alabama high court found, subject defendants to enormous costs with little or no public benefit.<sup>117</sup>

#### D. *Recent Consideration of Medical Monitoring Claims*

Over the past seven years, the pendulum briefly swung back toward permitting medical monitoring claims with broad rulings in Missouri and Nevada, a fact-specific outcome in

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<sup>111</sup> *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 689-91 (Mich. 2005) (noting that the physical injury requirement “serves a number of important ends” such as reducing the risks of fraudulent claims and providing courts with a clear standard to determine whether plaintiffs have stated a valid claim).

<sup>112</sup> *Wood*, 82 S.W.3d at 854.

<sup>113</sup> *Hinton v. Monsanto Co.*, 813 So. 2d 827, 831 (Ala. 2001).

<sup>114</sup> *Id.* at 830.

<sup>115</sup> *Henry*, 701 N.W.2d at 694.

<sup>116</sup> *Wood*, 82 S.W.3d at 857.

<sup>117</sup> See *Hinton*, 813 So. 2d at 830 (finding that “a ‘cost-benefit’ analysis counsels against recognizing a cause of action for medical monitoring”).

Massachusetts, and a narrow decision in Maryland. Most recently, however, New York's highest court adhered to the traditional rule that the law does not recognize medical monitoring claims in absence of a present physical injury.

The Missouri Supreme Court began this swing in 2007, when it broadly permitted a class action seeking cash for medical monitoring on behalf of children allegedly exposed to lead released into the environment by the defendant's smelter.<sup>118</sup> The court embraced a radical concept: it found that "widely recognized tort law concepts premised on physical injury are ill-equipped to deal with cases involving latent injury."<sup>119</sup> The court found that once a plaintiff shows "a significantly increased risk of contracting a particular disease relative to what would be the case in absence of exposure,"<sup>120</sup> a plaintiff may recover for medical monitoring as an element of damages in a traditional tort claim.<sup>121</sup> The court allowed such recovery without present physical injury and regardless of the intensity of duration of the plaintiffs' exposure.<sup>122</sup>

In reaching its conclusion that "tort law has evolved over the years to allow plaintiffs compensation for medical monitoring,"<sup>123</sup> the court relied on pre-*Buckley* rulings, while failing to acknowledge the substantial body of precedent in more recent years rejecting medical monitoring claims absent a present physical injury and the policy reasons cautioning against such an approach.<sup>124</sup>

Massachusetts's highest court followed in 2009 in *Donovan v. Philip Morris USA, Inc.*, when it narrowly found that chronic smokers who had not developed any smoking-related illness, but could show damage to their lungs that may indicate a significantly heightened risk of developing cancer, could recover through a medical monitoring claim.<sup>125</sup> In that case, the court

<sup>118</sup> See *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 714 (Mo. 2007).

<sup>119</sup> *Id.* at 716.

<sup>120</sup> *Id.* at 718 (quoting *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 433 (W. Va. 1999)).

<sup>121</sup> See *id.* at 717-18.

<sup>122</sup> See *id.* at 719.

<sup>123</sup> *Id.* at 716.

<sup>124</sup> See *Behrens & Appel, supra* note 75, at 154-60 (exposing the flaws in the Missouri Supreme Court's reasoning and suggesting steps Missouri courts could take to "restore reasonableness" to the availability of medical monitoring claims in Missouri). Federal courts have declined to extend *Meyer* to claims for medical monitoring on behalf of uninjured people against manufacturers of allegedly defective products, finding that the Missouri Supreme Court's reasoning applies only to potential latent injuries resulting from exposure to toxic substances. See, e.g., *Ratliff v. Mentor Corp.*, 569 F. Supp. 2d 926, 929 (W.D. Mo. 2008).

<sup>125</sup> *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 901-02 (Mass. 2009).



permitted medical monitoring when the plaintiff establishes, through competent expert testimony, that:

(1) The defendant's negligence (2) caused (3) the plaintiff to become exposed to a hazardous substance that produced, at least, subcellular changes that substantially increased the risk of serious disease, illness, or injury (4) for which an effective medical test for reliable early detection exists, (5) and early detection, combined with prompt and effective treatment, will significantly decrease the risk of death or the severity of the disease, illness or injury, and (6) such diagnostic medical examinations are reasonably (and periodically) necessary, conformably with the standard of care, and (7) the present value of the reasonable cost of such tests and care, as of the date of the filing of the complaint.<sup>126</sup>

Rather than money damages, the plaintiffs sought to compel cigarette makers to provide them with a court-supervised program of medical surveillance using a specific technology, low-dose computed tomography chest scans, for early detection of lung cancer.<sup>127</sup>

The court's requirement that the plaintiff show "proof of impact" and physiological changes<sup>128</sup> provides at least a marginal limiting factor in medical monitoring cases and distinguishes *Donovan* from decisions that allowed claims to proceed without any evidence of physical injuries on the basis of exposure to hazardous substances. The court broadly found that when there is such a marker, "[n]o particular level or quantification of increase in risk of harm is necessary, so long as it is substantial."<sup>129</sup>

The Massachusetts high court gave few justifications for its sweeping holding. *Donovan* did not cite the many decisions rejecting medical monitoring, let alone grapple with their reasoning. The court downplayed its significant departure from tort law in allowing recovery for medical monitoring for the increased risk of serious disease, comparing it to allowing recovery for the costs of medical testing after an accident that produces physical trauma but no visible injuries.<sup>130</sup> As the U.S. Supreme Court explained in *Buckley*, however, physical trauma cases represent "special recovery" situations that are "beside the point" in typical medical monitoring cases that do not involve the "presence of a traumatic physical impact."<sup>131</sup> In physical trauma cases, plaintiffs *have* suffered a cognizable injury: they have been physically struck, and the only question

<sup>126</sup> *Id.* at 902.

<sup>127</sup> *See id.* at 897-98.

<sup>128</sup> *Id.* at 900 (internal quotation marks omitted).

<sup>129</sup> *Id.* at 901.

<sup>130</sup> *Donovan*, 914 N.E.2d at 900-01.

<sup>131</sup> *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 440 (1997).

is how badly they were hurt. Medical testing confirms the extent of the injury that the plaintiffs actually suffered at the time of the accident.<sup>132</sup>

The court's analysis suggests that it will consider the viability of medical monitoring claims on an individual, fact-specific basis. *Donovan* involved an instance in which individuals alleged "a present injury in the form of objectively observable and identifiable damage to the tissues and structures of their lungs resulting in a substantially increased risk of cancer."<sup>133</sup> The court's ruling may have limited applicability beyond the context of tobacco litigation.<sup>134</sup>

The U.S. Court of Appeals for the First Circuit, in what may be the first appellate decision addressing a medical monitoring claim under Massachusetts law post-*Donovan*, found that former Raytheon plant workers who claimed exposure to beryllium dust and fumes, and their family members, who claimed exposure to particles the workers brought home on their clothing, failed to state a medical monitoring claim.<sup>135</sup> The court granted summary judgment to the company because the plaintiffs presented no evidence that they had developed beryllium sensitization, a condition that may show an increased risk for organ problems.<sup>136</sup> The court also found that *Donovan* unambiguously required a showing of symptoms or subclinical changes to support a medical monitoring claim and described the plaintiffs' attempt to read the case differently as through "rose-colored glasses."<sup>137</sup>

The Maryland Court of Appeals is the most recent high court to permit a claim for medical monitoring; however, it provided significant safeguards intended to prevent wholly speculative lawsuits.<sup>138</sup> In a case involving an underground gasoline leak, the court found that residents whose wells did not test above government action levels for MTBE could not show an "objective, reasonable fear of developing cancer" or maintain a claim for medical monitoring.<sup>139</sup> It rejected the

<sup>132</sup> See, e.g., *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 819-20 (D.C. Cir. 1984).

<sup>133</sup> *Donovan*, 914 N.E.2d at 898.

<sup>134</sup> The court explicitly noted that it would "leave for another day consideration of cases that involve exposure to levels of chemicals or radiation *known* to cause cancer, for which immediate medical monitoring may be necessary although no symptoms or subclinical changes have occurred." *Id.* at 901.

<sup>135</sup> See *Genereux v. Raytheon*, 754 F.3d 51, 56 (1st Cir. 2014).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> See *Exxon Mobil Corp. v. Ford*, 71 A.3d 105 (Md. 2013); *Exxon Mobil Corp. v. Albright*, 71 A.3d 30 (Md. 2013).

<sup>139</sup> *Albright*, 71 A.3d at 67, 85.

plaintiffs' lawyers' contention that "any exposure" to the chemical was sufficient to bring a lawsuit.<sup>140</sup> Each individual, through expert testimony, would need to show "a particularized, significantly-increased risk of developing a disease in comparison to the general public" to recover proven medical costs.<sup>141</sup> The court also found that instead of giving plaintiffs cash awards that could be spent on items other than healthcare expenses, the appropriate relief is to establish a fund, administered by a trustee, to reimburse valid medical monitoring expenses.<sup>142</sup> Finally, the court upheld the general rule that individuals cannot recover damages merely for fear of developing a disease in the future unless that fear is reasonable and he or she, as a result of that fear, developed a physical injury capable of objective determination.<sup>143</sup> Finding that the trial courts had not applied these requirements, the Maryland Court of Appeals reversed a \$1.5 billion compensatory and punitive damages award and a \$147 million award in the companion cases.

In December 2013, the New York Court of Appeals, the state's highest court, rejected an equitable medical monitoring claim brought by longtime heavy smokers who have not been diagnosed with a smoking-related disease.<sup>144</sup> The court found that medical monitoring is only available after an individual shows a physical injury. The court explained that "[t]he requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system."<sup>145</sup> This physical injury requirement is important, the court found, because "it defines the class of persons who actually possess a cause of action, provides a basis for the factfinder to determine whether a litigant actually possesses a claim, and protects court dockets from being clogged with frivolous and unfounded claims."<sup>146</sup>

The court recognized that although it "undoubtedly has the authority to recognize a new tort cause of action, . . . [this] authority must be exercised responsibly."<sup>147</sup> The court summarized some of the policy problems that could occur from creating a new, full-blown tort cause of action. For instance, the court acknowledged that countless plaintiffs could come forward to recover monitoring costs, "effectively flooding the courts while

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<sup>140</sup> See *id.* at 44, 67 n.60, 85.

<sup>141</sup> *Id.* at 84.

<sup>142</sup> See *id.* at 80-81.

<sup>143</sup> *Id.* at 67; *Ford*, 71 A.3d at 127-30.

<sup>144</sup> See generally *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013).

<sup>145</sup> *Id.* at 14.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 17.

concomitantly depleting the tortfeasor's resources for those who have actually sustained damage."<sup>148</sup> "Moreover," the court added, "it is speculative at best, whether asymptomatic plaintiffs will ever contract a disease; allowing them to recover medical monitoring costs without first establishing physical injury would lead to the inequitable diversion of money away from those who have actually sustained an injury as a result of the exposure."<sup>149</sup> The court also noted that, from a practical standpoint, "it cannot be overlooked that there is no framework concerning how such a medical monitoring program would be implemented and administered."<sup>150</sup> The court concluded, "The legislature is plainly in the better position to study the impact and consequences of creating such a cause of action, including the costs of implementation and the burden on the courts in adjudicating such claims."<sup>151</sup>

The pendulum continues to swing. In a New Year's Eve 2014 decision, the Nevada Supreme Court, revisited its earlier decision in *Badillo* in which it was among the first to follow *Buckley*.<sup>152</sup> The court ruled that while Nevada does not recognize a stand-alone claim for medical monitoring, a plaintiff may seek medical monitoring as a form of relief to an ordinary negligence suit even when he or she does not have a present physical injury.<sup>153</sup> So long as a plaintiff can plead and prove negligence, he or she can recover medical monitoring damages.<sup>154</sup> The court expressly declined, at the time, to provide criteria for a plaintiff to qualify for such relief.<sup>155</sup> Rather, it is sufficient, the court said, for the plaintiff to show that he or she is "reasonably required to undergo medical monitoring beyond what would have been recommended had the plaintiff not been exposed to the negligent act of the defendant."<sup>156</sup>

### E. Proper Treatment of Medical Monitoring Claims

As these cases show, it is critical for courts to exercise prudence when considering lawsuits seeking compensation for medical monitoring. Courts may take the unsound, minority

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<sup>148</sup> *Id.* at 18.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (citing Victor E. Schwartz et al., *Medical Monitoring: The Right Way and the Wrong Way*, 70 MO. L. REV. 349, 382-85 (2005) [hereinafter *Medical Monitoring*]).

<sup>152</sup> *Sadler v. PacifiCare of Nev.*, 340 P.3d 1264, 1267 (Nev. 2014).

<sup>153</sup> *Id.* at 1270.

<sup>154</sup> *Id.* at 1271.

<sup>155</sup> *Id.* at 1271-72.

<sup>156</sup> *Id.* at 1272.

approach, illustrated by Missouri and West Virginia, which permits large class actions seeking cash damages now based on a speculative future harm. Or they can take the Maryland approach, which permits medical monitoring in a narrow range of cases, requires individual proof of harm, and reimburses actual medical expenses from a fund. Even courts that might permit judicially-supervised medical monitoring have rejected such claims when they involve remote risks.<sup>157</sup> The most defensible approach is to follow the steps of the U.S. Supreme Court, the New York Court of Appeals, and most other state courts in upholding traditional principles of law by rejecting medical monitoring claims by individuals with no present injury.

If courts recognize a broad cause of action for medical monitoring, the prospect of endless liability is easy to envision. Untold numbers of plaintiffs could seek recovery for their exposure to allegedly defective pharmaceutical products, environmental toxins, or workplace chemicals. Lawsuits may be rooted in fear and unsupported by most scientific studies, but rely on outlier, preliminary, or arguably inapplicable studies. Each scare could trigger a wave of speculative lawsuits. Cell phone manufacturers may face suits from users who believe that they need monitoring to detect the possible risk of cancer from minute amounts of radiation.<sup>158</sup> People who regularly use plastic containers in microwaves or drink from water bottles containing BPA may sue manufacturers to detect whether there are harmful effects.<sup>159</sup> Millions of people who use nonstick cooking pans might have sued for medical monitoring costs.<sup>160</sup> Diet soda manufacturers risk lawsuits complaining that sugar substitutes carry cancer risks and demanding medical monitoring to ensure early detection.<sup>161</sup> Women who use baby powder may demand

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<sup>157</sup> See, e.g., *Sheridan v. NGK Metals Corp.*, 614 F. Supp. 2d 536, 537 (E.D. Pa. 2008); *In re Meridia Prods. Liab. Litig.*, 328 F. Supp. 2d 791, 826 (N.D. Ohio 2004), *aff'd sub nom. Meridia Prods. Liab. Litig. v. Abbott Labs.*, 447 F.3d 861 (6th Cir. 2006); *Pohl v. NGK Metals Corp.*, No. 0733, 2006 Phila. Ct. Com. Pl. LEXIS 472, at \*45-49 (Pa. C.P. Nov. 29, 2006); see also *Rowe v. E.I. DuPont de Nemours & Co.*, Civil Nos. 06-1810 (RMB), 06-3080, 2008 WL 5412912, at \*12 (D.N.J. Dec. 23, 2008) (denying class certification).

<sup>158</sup> See, e.g., Geoffrey Kabat, *Do Cell Phones Cause Brain Cancer? The Diehards Cling Desperately to Opinion*, FORBES (Mar. 5, 2013, 8:00 AM), <http://www.forbes.com/sites/geoffreykabat/2013/03/05/do-cell-phones-cause-brain-cancer-the-diehards-cling-desperately-to-opinion/>.

<sup>159</sup> See, e.g., Amanda Mascarelli, *BPA is Still Everywhere, and Mounting Evidence Suggests Harmful Effects*, WASH. POST (Dec. 9, 2013), [http://www.washingtonpost.com/national/health-science/bpa-is-still-everywhere-and-mounting-evidence-suggests-harmful-effects/2013/12/06/2ff4a462-5b5d-11e3-a49b-90a0e156254b\\_story.html](http://www.washingtonpost.com/national/health-science/bpa-is-still-everywhere-and-mounting-evidence-suggests-harmful-effects/2013/12/06/2ff4a462-5b5d-11e3-a49b-90a0e156254b_story.html).

<sup>160</sup> See, e.g., Robert L. Wolke, *Don't Toss That Teflon Pan-Yet*, WASH. POST (Feb. 1, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/31/AR2006013100279.html>.

<sup>161</sup> See, e.g., Assoc. Press, *Diet Coke Under Pressure to Reverse Slump, Exec Says*, LAS VEGAS SUN (Oct. 15, 2013), <http://www.lasvegassun.com/news/2013/oct/15/>

medical monitoring for an increased risk of ovarian cancer.<sup>162</sup> If the potential plaintiffs are innumerable, then so too are the number of companies that might suddenly face massive, unforeseen liability for long-term screening.

In addition, those who believe they were exposed to toxic substances do not necessarily benefit from such litigation. Some plaintiffs would likely suffer anxiety as a result of "[f]alse positives [that] can devastate patients and their families."<sup>163</sup> One study found that "the probability of overdiagnosis is remarkably high" in screening and early detection programs (i.e., "some of the cases diagnosed by an early detection program would have never developed the disease").<sup>164</sup> Furthermore, medical screening itself may pose health risks that may be greater than the risks for which monitoring is sought.<sup>165</sup> As the New York Court of Appeals recognized, imposing liability before a person develops a condition may deplete resources available for individuals should they develop a medical condition in the future.<sup>166</sup>

The imposition of medical monitoring liability is unpredictable because our understanding of when exposure to a particular substance may trigger disease is continually evolving.<sup>167</sup> As some of the examples above illustrate, prospective plaintiffs' claims may exist one moment and disappear the next as emerging science redefines if and when individuals are at risk of disease, and whether there is any health benefit to early

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diet-coke-under-pressure-reverse-slump-exec-says/. Animal studies in the 1970s led to widespread concern that saccharin could cause cancer, but subsequent studies showed no clear evidence of an association between saccharin and cancer in humans. A federal law required elimination of the warning label requirement in 2000. See *Artificial Sweeteners and Cancer*, NAT'L CANCER INST., <http://www.cancer.gov/cancertopics/factsheet/Risk/artificial-sweeteners> (last visited May 1, 2015).

<sup>162</sup> See Sindhu Sundar, *J&J Seeks To Boot Suit Claiming Baby Powder Causes Cancer*, LAW360 (Aug. 12, 2014), <http://www.law360.com/articles/566440/print?section=classification> (discussing class actions seeking economic losses in *Mihalich v. Johnson & Johnson*, No. 3:14-cv-00600 (S.D. Ill.) (complaint filed May 23, 2014) and *Estrada v. Johnson & Johnson*, No. 2:14-cv-01051 (E.D. Cal.) (complaint filed Apr. 18, 2014)).

<sup>163</sup> *Medical Monitoring*, *supra* note 151, at 356-57; Serena Gordon, *More Cancer Tests Mean More False-Positive Results*, ABC NEWS (May 11, 2010), <http://abcnews.go.com/Health/Healthday/story?id=7562464>.

<sup>164</sup> Ori Davidov & Marvin Zelen, *Overdiagnosis in Early Detection Programs*, 5 BIostatistics 603, 603 (2004).

<sup>165</sup> See, e.g., Natasha Singer, *In Push for Cancer Screening, Limited Benefits*, N.Y. TIMES (July 17, 2009), [http://www.nytimes.com/2009/07/17/health/17screening.html?\\_r=0&pagewanted=print](http://www.nytimes.com/2009/07/17/health/17screening.html?_r=0&pagewanted=print) ("[E]xcept for a few types of cancer, routine screening has not been proven to reduce the death toll from cancer for people without specific symptoms or risk factors—like a breast lump or a family history of cancer—and could even lead to harm, many experts on health say."); Shirley S. Wang, *CT Scans Linked to Cancer*, WALL ST. J. (Dec. 15, 2009), [www.wsj.com/articles/SB126082398582691047](http://www.wsj.com/articles/SB126082398582691047).

<sup>166</sup> See *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11, 18 (N.Y. 2013).

<sup>167</sup> See Jamie A. Grodsky, *Genomics and Toxic Torts: Dismantling the Risk-Injury Divide*, 59 STAN. L. REV. 1671, 1709-11 (2007).

detection. Companies would never be able to predict how many plaintiffs had potential claims or for which plaintiffs screening would be medically advisable.

In addition, the policy rationales supporting medical monitoring have lost much of their force. Now that insurers must provide insurance regardless of any preexisting condition, and all people are required to have insurance coverage or face a penalty, the notion that individuals may lack access to basic screening for cancer or other illnesses is even more questionable.

In sum, medical monitoring claims, while having a surface appeal, are empty suit litigation. The scales of justice overwhelmingly weigh against creating a cause of action for totally asymptomatic plaintiffs. If courts recognize a medical monitoring cause of action, then the elements of a medical monitoring cause of action should be narrowly tailored with precise criteria that mitigate open-ended and unpredictable liability. The further problem with such a tailored approach is that most courts are not equipped to “monitor” medical monitoring claims far into the future.

### III. UNMANIFESTED PRODUCT DEFECTS

Anyone who watches television or listens to the radio is familiar with this common voiceover, often in regard to a drug or medical device: “If you have used [product] and suffered an injury, such as [medical condition], you may be entitled to compensation.” In recent years, plaintiffs’ lawyers have flipped this pitch on its head. With growing frequency, attorneys are filing class actions (no advertisement to identify clients is necessary) on behalf of everyone who purchased an allegedly defective product who was *not* harmed. These claims are a paradigm of empty suit litigation.

Plaintiffs and defendants are not likely to see eye-to-eye on whether class members in such claims experienced harm. The claims sound much like product liability suits but are often brought under other theories of liability. Rather than claim a product caused physical harm, the lawsuits often seek to recover for alleged pecuniary losses stemming from a latent, unmanifested defect. These nebulous claims for “economic loss” typically rely on expert testimony to present a theory of classwide damages. Some claims seek compensation for the difference between the value of the product free from defects and the resale value of the product after it is tarnished by allegations of a defect. Alternatively, these claims may essentially allege that consumers overpaid for the product and seek the difference between the purchase price and the hypothetical lower market value of the product resulting

from an allegedly undisclosed risk that was not experienced by the plaintiffs.

As Professor Sheila Scheuerman observes, in recent years, plaintiffs have shifted their theories of recovery in these types of suits from tort and contract claims, which have shown little success, to violations of state consumer protection acts.<sup>168</sup> As this section will show, some courts have demonstrated a willingness to entertain lawsuits that claim a product's value has diminished because of concerns that the product might fail in the future, while most others have rejected such claims.

The result is that any person who suffered a physical injury allegedly as a result of a defect brings a personal injury claim, which is often consolidated in a mass tort docket, while everyone else who uneventfully purchased and used the product becomes a member of a consumer class action for economic loss. Overall, courts "have been singularly unreceptive to these 'no-injury' claims."<sup>169</sup> While most courts have dismissed claims or denied class certification, some unmanifested defect claims have resulted in multi-million and billion dollar settlements. This section examines recent examples in two of the most common products subject to these no-injury claims, prescription drugs and automobiles, though similar types of cases arise in other contexts.<sup>170</sup> It also considers recent consumer class action litigation that reached the U.S. Supreme Court related to alleged defects in washing machines and the impact of the Court's ruling in *Comcast v. Behrend* on class certification of such theories.

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<sup>168</sup> See Sheila B. Scheuerman, *Against Liability for Private Risk-Exposure*, 35 HARV. J.L. & PUB. POL'Y 681, 691 (2012).

<sup>169</sup> DAVID G. OWEN, PRODUCTS LIABILITY LAW 273 & n.84 (2005).

<sup>170</sup> See, e.g., *Walewski v. Zenimax Media, Inc.*, 502 F. App'x 857, 861 (11th Cir. 2012) (affirming district court's denial of class certification where plaintiff sought damages on behalf of all persons or entities that purchased a fantasy video game because the class included users who never experienced the alleged defect, which occurred only after 200 or more hours of play, and therefore never sustained a loss); *Sanchez v. Wal Mart Stores, Inc.*, No. Civ. 2:06-CV-2573-JAM-KJM, 2009 WL 1514435, at \*2-3 (E.D. Cal. May 28, 2009) (denying class certification where class representative made use of an umbrella stroller for eighteen months without incident yet sought partial refund of the \$20 retail price representing the product's alleged diminution in value after it was found to have a pinch point that posed a risk of harm because there was "no proof of the existence of injury on a classwide basis"); *Wilson v. Style Crest Prods., Inc.*, 627 S.E.2d 733, 736 (S.C. 2006) (recognizing, in dismissing warranty and fraudulent concealment claims brought by purchasers of anchor tie down systems for manufactured homes claimed to have a risk of failure in high winds, that "the no-injury approach to product litigation has been rejected in most decisions").



A. *Lawsuits on Behalf of Patients Who Used a Drug and May Have Benefited From It*

Mass tort litigation against pharmaceutical manufacturers typically alleges that an FDA-approved prescription drug failed to adequately warn of particular risks and that a defect in the information that accompanies the drug or its labeling caused a patient to use the drug and suffer an adverse effect. At any particular point in time, thousands of these types of pharmaceutical product liability claims are pending in state and federal courts, awaiting trial or settlement.<sup>171</sup> Some plaintiffs' lawyers, however, bring a different variety of lawsuit against drug makers. Rather than allege that a defect in the drug caused harm, these claims generally allege that a drug is simply not as safe or effective as patients (or their doctors) were led to believe, or that the patient would not have purchased the drug, or spent less for it, had she fully appreciated the risks, even when the medicine worked for that individual. The remedy sought is often a refund of the purchase price or the estimated difference in value of the drug as marketed and the drug sold with its alleged flaws.

Is this empty suit litigation? In answering this question, one observes that several judges have dismissed these types of claims by finding that the plaintiffs lack Article III standing or fail to state a claim. For example, in a frequently cited Fifth Circuit case, *Rivera v. Wyeth-Ayerst Laboratories*, the court found that an individual who purchased and used Duract, a painkiller that was found to have a risk of causing liver damage, did not show injury-in-fact when she, and those she sought to represent, had experienced no physical injuries.<sup>172</sup> The court essentially characterized the claim as, "you sold it, I bought it, there was a defect in the product's design or warnings, *other* patients were injured, pay me."<sup>173</sup> The Fifth Circuit found that the plaintiffs never explained how the class members experienced economic injury but spent "most of their brief listing helpful suggestions on

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<sup>171</sup> Over 20,000 pharmaceutical product liability claims are currently in federal multi-district litigation. See U.S. J.P.M.L., MDL STATISTICS REPORT—DISTRIBUTION OF PENDING MDL DOCKETS BY DISTRICT (2014) [hereinafter MDL STATISTICS REPORT], available at [http://www.jpml.uscourts.gov/sites/jpml/files/Pending\\_MDL\\_Dockets\\_By\\_District-July-15-2014.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-July-15-2014.pdf).

<sup>172</sup> *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 321 (5th Cir. 2002).

<sup>173</sup> See *id.* at 319 ("Rivera's claim to injury runs something like this: Wyeth sold Duract; Rivera purchased and used Duract; Wyeth did not list enough warnings on Duract, and/or Duract was defective; other patients were injured by Duract; Rivera would like her money back. The plaintiffs do *not* claim Duract caused them physical or emotional injury, was ineffective as a pain killer, or has any future health consequences to users. Instead, they assert that their loss of cash is an 'economic injury.'").

how a court could calculate damages."<sup>174</sup> In finding the class members lacked standing, the Fifth Circuit found that the alleged injuries were not experienced by the class, but were suffered by non-class member patients.<sup>175</sup>

A federal district court came to a similar conclusion in *Williams v. Purdue Pharma Co.*, which involved a class action brought on behalf of patients who purchased OxyContin, a medication for relief of chronic pain.<sup>176</sup> The plaintiffs alleged that the manufacturer over-promoted the drug as providing "smooth and sustained" pain relief for twelve hours" with little chance of addiction, which allowed the manufacturer to artificially inflate its prices.<sup>177</sup> The plaintiffs specifically excluded from the class "all patients who failed to receive 12-hour relief from OxyContin and/or who had problems with its alleged addictive qualities."<sup>178</sup> The court was faced squarely with the question of "whether patients who were prescribed a drug for pain, and who personally suffered no ill effects or lack of efficacy, can sue for money damages" under the District of Columbia's consumer protection law.<sup>179</sup> After reaffirming that only consumers actually harmed can recover through tort law, the court considered the "more difficult question" of whether the District's consumer protection statute allowed such a claim.<sup>180</sup> Relying on *Rivera*, the court found that the plaintiffs did not allege that they "were in any way deceived—or even saw—any of that advertising" and failed to allege that they sustained any injury-in-fact.<sup>181</sup> The court dismissed the claim, reasoning that the plaintiffs had received the benefit of the bargain—a drug that had relieved their pain—and had no basis to recover the purchase cost.<sup>182</sup>

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 320. After the manufacturer of the drug withdrew it from the market, the FDA counseled those who used it that, upon discontinuing use of the drug, they should not be concerned about developing liver problems as a result of the drug in the future and no action is necessary. U.S. Food & Drug Admin., *Questions and Answers for Withdrawal of Duract*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Aug. 23, 2013), <http://www.fda.gov/Drugs/ResourcesForYou/Consumers/QuestionsAnswers/ucm073043.htm>.

<sup>176</sup> *Williams v. Purdue Pharm. Co.*, 297 F. Supp. 2d 171, 172-73 (D.D.C. 2003).

<sup>177</sup> *See id.*

<sup>178</sup> *Id.* at 173.

<sup>179</sup> *Id.* at 172.

<sup>180</sup> *Id.* at 176-77.

<sup>181</sup> *Id.* at 177 (finding *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315 (5th Cir. 2002), "both instructive and persuasive").

<sup>182</sup> *See id.* at 176. Another example is *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 68-69 (S.D.N.Y. 2002), where the court, in denying class certification to unharmed users of an anti-diabetic and anti-inflammatory drug under the New Jersey Consumer Fraud Act, found that it was not a "defensible position" to presume that Rezulin was worthless when it was undisputed that the drug was "enormously beneficial to many patients" who "presumably got their money's worth and suffered no economic injury." *Id. But cf. In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 75 (W. Va. 2003) (reversing

More recently, courts addressed the viability of product defect claims without injury following Merck's withdrawal of Vioxx from the market after a clinical trial revealed that it could increase the risk of heart attack and stroke. Merck faced numerous individual claims and class actions in federal and state court filed on behalf of the estimated 20 million patients who took the drug between 1999 and 2004.<sup>183</sup> In dismissing a Vioxx claim of a District of Columbia resident for lack of Article III standing in 2012, the court overseeing federal multidistrict litigation found that "[t]here is no obvious, quantifiable pecuniary loss that Plaintiff incurred from purchasing a drug that worked for him and did not cause him any harm."<sup>184</sup> The New Jersey Supreme Court dismissed a Vioxx-related class action, finding that a plaintiff who has not experienced "a personal physical injury" cannot bring what is essentially a product liability claim through asserting a medical monitoring or consumer protection claim.<sup>185</sup>

Courts reached similar results in Avandia litigation where individuals not injured by the diabetes drug alleged that their physicians might not have been adequately warned of all of the risks associated with the drug and, had they been, might have prescribed an alternative medication,<sup>186</sup> or that the company over-promoted the drug's safety and effectiveness.<sup>187</sup> Courts have also flatly rejected assertions that any person who purchased a drug for an off-label use necessarily overpaid because the purchase price was predicated on the drug having scientifically-

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trial court denial of class certification of consumer protection claim, finding that "[i]f the consumer proves that he or she has purchased an item that is different from or inferior to that for which he bargained, the 'ascertainable loss' requirement [of the West Virginia statute] is satisfied").

<sup>183</sup> See *In re Vioxx Prods. Liab. Litig.*, 874 F. Supp. 2d 599, 601 (E.D. La. 2012).

<sup>184</sup> *Id.* at 606; see also *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364, 365, 386 (D.N.J. 2004) (granting summary judgment for defendant where individuals with arthritis who took, and received pain relief from, Celebrex or Vioxx sought to recover some or all of the purchase price by alleging that the defendants failed to publicize the results of two clinical studies that revealed possible risks associated with the use of the drugs).

<sup>185</sup> *Sinclair v. Merck & Co.*, 948 A.2d 587, 595 (N.J. 2008).

<sup>186</sup> See, e.g., *Dumpson v. SmithKline Beecham Corp.*, Civil Action No. 10-2476, 2013 U.S. Dist. LEXIS 96776, at \*7 (E.D. Pa. July 10, 2013) (finding plaintiff failed to state claim under California consumer protection statute or for unjust enrichment where "Plaintiff has not alleged any harm to him: he does not allege that his health was impaired by the use of Avandia, nor does he identify what he would have paid for some other drug had he not taken Avandia, or anything beyond that his physician 'might have considered prescribing' some 'alternative medication'").

<sup>187</sup> See, e.g., *Schrank v. SmithKline Beecham Corp.*, Civil Action No. 07-4965, 2013 U.S. Dist. LEXIS 96768, at \*6 (E.D. Pa. July 10, 2013) (dismissing claims under New York's consumer protection statute and for medical monitoring where plaintiff failed to allege she purchased Avandia as a result of misrepresentations in advertisements or that she paid more for Avandia than an alternative treatment).

demonstrated efficacy for its labeled indications only.<sup>188</sup> Where courts have certified pharmaceutical no-injury claims, however, defendants have settled for multi-million dollar sums.<sup>189</sup>

*B. Lawsuits On Behalf of People Who Have Driven a Car Without Incident*

Anyone who owns a motor vehicle is likely to be well-served in what occurs when manufacturers, vehicle owners, drivers, or others identify a product defect. It is not uncommon for mechanical or electronic issues to arise with such complex products. When a defect poses a safety hazard, manufacturers work with the Department of Transportation's National Highway Traffic Safety Administration (NHTSA) to notify all registered owners of the affected vehicle of the safety-related defect and correct the equipment at issue free of charge through a repair, replacement, or refund.<sup>190</sup> This process is intended to provide a reliable and efficient means of identifying potential defects, verifying that they pose true safety concerns, and addressing them at no cost to the driver. According to NHTSA, since the law's enactment in 1966, "more than 390 million cars, trucks, buses, recreational vehicles, motorcycles, and mopeds, as well as 46 million tires, 66 million pieces of motor vehicle

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<sup>188</sup> See, e.g., *Judy v. Pfizer, Inc.*, No. 042-01946-02, 2010 WL 3001745, at \*13 (Mo. Cir. Ct. July 27, 2010) (denying class certification where plaintiffs failed to present evidence that the price of the drug was "in any way predicated on the level of scientific efficacy for which it was proven to have for on-label uses" and therefore the proposed class "would include more than a small number of uninjured individuals").

<sup>189</sup> See *Plubell v. Merck & Co.*, 289 S.W.3d 707, 716 (Mo. Ct. App. 2009) (affirming certification of a class of Missouri residents who were prescribed Vioxx, but experienced no injury, under the Missouri Merchandizing Practices Act, finding that the plaintiffs could allege an objective ascertainable loss by claiming that Vioxx was worth less than the product as represented because the company had not fully disclosed risks associated with the drug); Carolina Bolado, *Merck Puts Up \$39M to Settle Vioxx Class Action*, LAW360 (Nov. 1, 2012, 10:12 PM), <http://www.law360.com/articles/391401/merck-puts-up-39m-to-settle-vioxx-class-action> (reporting \$39 million settlement of Missouri case); Ciaran McEvoy, *Merck To Pay \$23M to Settle Vioxx Economic-Loss Claims*, LAW360 (July 18, 2013, 2:41 PM), <http://www.law360.com/articles/458233/merck-to-pay-23m-to-settle-vioxx-economic-loss-claims> (reporting \$23 million settlement of consumer class action seeking economic losses on behalf of those who used Vioxx without incident outside of Missouri).

<sup>190</sup> See 49 U.S.C. §§ 30118(c), 30120(a), 30163 (2012). NHTSA has authority to issue vehicle safety standards and require manufacturers to recall vehicles that have safety-related defects or do not meet Federal safety standards. *Id.* § 30118(a). A "defect" includes any defect in performance, construction, a component, or material of a motor vehicle or motor vehicle equipment." *Id.* § 30102(a)(2). NHTSA receives reports of safety concerns through a toll free telephone number, website, and mail. See *Motor Vehicle Defects and Safety Recalls: What Every Vehicle Owner Should Know*, NHTSA, <http://www-odi.nhtsa.dot.gov/recalls/recallprocess.cfm> (last visited May 1, 2015). Recalls are often voluntarily initiated by manufacturers after they identify a safety issue, but are sometimes required after NHTSA completes an investigation. See *id.*

equipment, and 42 million child safety seats have been recalled to correct safety defects.”<sup>191</sup>

Now imagine that these affected drivers, or even a fraction of them, decided that, because an issue arose with their vehicle, it was worthwhile to file a lawsuit claiming that they experienced a loss because they paid for a “problem free” car or because the resale value of their car had fallen. Courts have traditionally dismissed claims brought under fraud, product liability, and other theories where the allegedly defective product had not malfunctioned,<sup>192</sup> and most continue to reject them.<sup>193</sup>

These courts recognize that allegations that “[d]iminished value premised upon a mere possibility of future product failure is too speculative and uncertain to support a fraud claim.”<sup>194</sup> They have found that plaintiffs who seek to recover the “future hypothetical diminution in value” of their vehicle, after the manufacturer has addressed the mechanical issue at no charge, has shown no ascertainable loss.<sup>195</sup> Courts have also found that a plaintiff who alleges that he would have paid less for a car had he known of a mechanical issue prior to a recall cannot complain that he did not receive the benefit of the bargain when he testifies in a deposition, after the manufacturer repaired the car, that he is “happy” and it “is working fine.”<sup>196</sup> It is particularly

<sup>191</sup> *Motor Vehicle Defects and Safety Recalls: What Every Vehicle Owner Should Know*, *supra* note 190, at 1.

<sup>192</sup> See *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 627-28 (8th Cir. 1999) (collecting cases); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 629 (Ala. 1998) (“[C]ourts have generally concluded that claims based on allegations of inherent product ‘defects’ that have not caused any tangible injury are not viable . . .”); *Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 240-41 (Wis. 2004) (citing ten cases decided between 1986 and 2002 as a “representative sample”).

<sup>193</sup> See *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1017 (7th Cir. 2002) (rejecting a warranty claim brought by individuals who alleged their vehicles were sold with tires that were prone to deterioration, but who had not experienced a tire failure, finding that “[i]f tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation. As a result, most states would not entertain the sort of theory that the plaintiffs press”).

<sup>194</sup> *Tietsworth*, 677 N.W.2d at 240-41 (affirming trial court’s dismissal of class action by motorcycle owners after manufacturer notified owners that certain engines had failed and offered an extended warranty and repair kit); see also *Wallis v. Ford Motor Co.*, 208 S.W.3d 153, 154 (Ark. 2005) (finding that allegation that sport utility vehicles had a propensity to roll over and that these “inherent design problems” diminished the value of class member’s SUV’s was not sufficient to sustain a common law fraud claim).

<sup>195</sup> *Thiedemann v. Mercedes-Benz USA, Inc.*, 872 A.2d 783, 795 (N.J. 2005) (dismissing class action under New Jersey Consumer Fraud Act alleging economic losses stemming from faulty fuel valve where manufacturer had provided loan cars and replaced part at no cost and plaintiffs had not attempted to sell their car).

<sup>196</sup> *In re Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig.*, 915 F. Supp. 2d 1151, 1154, 1159 (C.D. Cal. 2013) [hereinafter *In re Toyota Motor Corp.*] (dismissing nationwide class action brought on behalf of all 2010 Toyota

improper, as the New Jersey Supreme Court recognized, to subject an automaker to treble damages, attorney's fees, court costs, as provided by the consumer protection statute of that state and many others, for "a defect . . . in and of itself" in a product as complex as a car.<sup>197</sup>

As the New Jersey Supreme Court recognized, in these types of lawsuits, essentially what plaintiffs claim "is that they are entitled to [an automobile] without any flaws or glitches, without any reasonably-remediable problems, and without any of the ordinary tribulations of automobile ownership or lease: in other words, a perfect car unaffected by the laws of physics and common sense."<sup>198</sup> Other courts have called such claims "seriously misguided" and instructed that "[m]erely stating a creative theory does not establish the actual injury that is required to prevail on . . . product liability claims."<sup>199</sup>

In some instances, courts have found that plaintiffs bringing such claims meet the minimum requirements for standing by virtue of purchasing the product at issue or that the plaintiffs have stated a viable claim, but find that the proposed class fails to satisfy standards for certification.<sup>200</sup> For example, in a nationwide class action in which GM had voluntarily recalled and replaced airbags in vehicles that had inadvertently triggered before the suit, the U.S. Court of Appeals for the Fifth Circuit found that the trial court erred in certifying the class because of significant variations and conflicts among applicable warranty law among the states.<sup>201</sup> The class, in that case, excluded any owner who sustained a physical injury as a result of an unexpected airbag deployment and named as class representatives individuals

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Prius and Lexus HS 250h hybrid vehicles after the company conducted a voluntary recall to address an issue with its anti-lock braking system).

<sup>197</sup> *Thiedemann*, 872 A.2d at 794.

<sup>198</sup> *Id.* at 789.

<sup>199</sup> *In re Toyota Motor Corp.*, 915 F. Supp. 2d at 1158.

<sup>200</sup> *See, e.g., Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 598 (9th Cir. 2012); *Cole v. Gen. Motors, Corp.*, 484 F.3d 717, 719 (5th Cir. 2007). Courts have divided in other contexts on the issue of whether class certification is proper where the class representative has standing, but the class includes members with no plausible claim to damages. Several federal appellate courts have upheld certification of classes that include members with no injury. *See, e.g., In re Nexium Antitrust Litig.*, 2015 WL 265548, at \*11 (1st Cir. Jan. 21, 2015); *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1254 (10th Cir. 2014); *Kohen v. Pac. Investment Mgmt. Co.*, 571 F.3d (7th Cir. 2009). Other circuit courts have found that a class may not be certified when not all members were injured in fact. *See, e.g., In re Rail Freight Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013); *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006); *see also In re Deepwater Horizon*, 739 F.3d 790, 801-03 (5th Cir. 2014) (surveying courts taking the *Kohen* test versus the *Denney* test in finding that class members met either test).

<sup>201</sup> *See Cole*, 484 F.3d at 725-26.

who all had close relationships to the attorneys that filed suit.<sup>202</sup> After filing their lawsuit, the plaintiffs turned down an offer from GM to expedite their repairs, but eventually had their vehicles fixed.<sup>203</sup> The Fifth Circuit recognized that “many jurisdictions do not permit the recovery of economic loss in vehicle defect cases where the vehicle has performed satisfactorily and never manifested the alleged defect,” regardless of whether the claim is brought in contract or tort law.<sup>204</sup> While the court found that some jurisdictions might permit such claims, since most jurisdictions likely would not do so, the class representative failed to show common issues of law predominate.<sup>205</sup>

Similarly, the Ninth Circuit decertified a nationwide class action against Honda due to significant variations in state consumer protection laws. The action raised key issues of whether a plaintiff must show that a defendant intentionally or knowingly omitted information and demonstrate reliance on an alleged misrepresentation, as well as differences in the relief available under state law, such as statutory damages and treble damages.<sup>206</sup> Even if the class were limited to California residents, the court found, common issues of fact did not predominate because “it almost certainly includes members who were not exposed to, and therefore could not have relied on, Honda’s allegedly misleading advertising material.”<sup>207</sup> In reaching its decision, the Ninth Circuit recognized that state courts and legislatures have an interest in determining how broadly to apply consumer protection laws to regulate conduct and impose liability.<sup>208</sup> The court observed that “[m]ore expansive consumer protection measures may mean more or greater commercial liability, which in turn may result in higher prices for

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<sup>202</sup> *Id.* at 719 (identifying the class representatives as the mother of plaintiffs’ counsel, a paralegal for plaintiffs’ counsel, and the paralegal’s cousin).

<sup>203</sup> *See id.* at 719-20.

<sup>204</sup> *Id.* at 729 (citing *Briehl v. Gen. Motor Corp.*, 172 F.3d 623, 627-28 (8th Cir. 1999) (collecting cases that dismissed claims brought under any theory for allegedly defective anti-lock braking systems where plaintiffs’ brakes never malfunctioned or failed)) (also citing other cases dismissing claims seeking economic loss for an unmanifested alleged defect, including *In re Air Bag Prods. Liab. Litig.* 7 F. Supp. 2d 792, 805 (E.D. La. 1998) (air bags); *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99-100 (S.D.N.Y. 1997) (integrated child safety seats); *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986) (engine leakage); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 603 (S.D.N.Y. 1982) (tires); *Am. Suzuki Motor Corp. v. Super. Ct. of L.A. Cnty.*, 44 Cal. Rptr. 2d 526, 531 (Cal. Ct. App. 1995) (rollover risk)).

<sup>205</sup> *Cole*, 484 F.3d at 730.

<sup>206</sup> *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 591 (9th Cir. 2012).

<sup>207</sup> *Id.* at 596.

<sup>208</sup> *See id.* at 591-93.

consumers or a decrease in product availability.”<sup>209</sup> Since the states feel the effects of imposing liability, the Ninth Circuit found, their legislatures and courts are “entitled to set the proper balance and boundaries between maintaining consumer protection, on the one hand, and encouraging an attractive business climate, on the other hand.”<sup>210</sup>

Not all courts have put the brakes on claims of this kind. A few recent successes by plaintiffs’ lawyers in obtaining class certification or settlement is likely to fuel continued litigation. For example, in *Lloyd v. General Motors Corp.*,<sup>211</sup> the Maryland Court of Appeals took what one law professor characterized as “an unfortunate, unwarranted, and unnecessary extension of tort law” by holding that unmanifested product defects are actionable.<sup>212</sup> The court reinstated a class action initially brought by Maryland owners against GM, Ford, and Chrysler (later adding Saturn), which sought the costs of strengthening seats in vehicles manufactured throughout the 1990s.<sup>213</sup> The class, which expressly excluded anyone who experienced a personal injury in a crash, alleged that the seatbacks had a tendency to collapse rearward in rear-impact collisions.<sup>214</sup>

Professor Rebecca Korzec of the University of Baltimore School of Law criticized the opinion as ignoring the fundamental difference between tort and contract law.<sup>215</sup> Since the plaintiffs had not suffered physical harm, she noted, their only injury was that they did not receive the car seats for which they paid.<sup>216</sup> Seeking the lost “benefit of the bargain,” she explains, is the province of contract law and claims that a product fails to meet a buyer’s expectations are typically barred

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<sup>209</sup> *Id.* at 592 (citing *White v. Ford Motor Co.*, 312 F.3d 998, 1017-18 (9th Cir 2002) and Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 109 (2006)).

<sup>210</sup> *Id.* While many courts have dismissed claims alleging unmanifested defects under state consumer protection acts, they have reached similar results when considering breach of warranty, common law fraud, negligent misrepresentation, and other claims. *See, e.g., Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99 (S.D.N.Y. 1997) (“It is well established that purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own.”); *Yost v. Gen. Motors Corp.*, 651 F. Supp. 656, 657-58 (D.N.J. 1986) (“Damage is a necessary element of both counts—breach of warranty and common law fraud.”); *Am. Suzuki Motor Corp. v. Super. Ct. of L.A. Cnty.*, 44 Cal. Rptr. 2d 526, 531 (Cal. Ct. App. 1995) (finding the vast majority of vehicles at issue performed as they were intended and, thus, were “fit for their ordinary purpose”).

<sup>211</sup> *Lloyd v. Gen. Motors Corp.*, 916 A.2d 257 (Md. 2007).

<sup>212</sup> Rebecca Korzec, *Lloyd v. General Motors Corporation: An Unfortunate Detour in Maryland Products Liability Law*, 38 U. BALT. L.F. 127, 128 (2008).

<sup>213</sup> *Lloyd*, 916 A.2d at 262.

<sup>214</sup> *See id.* at 263.

<sup>215</sup> Korzec, *supra* note 212, at 127, 136.

<sup>216</sup> *See id.* at 129-30.



in tort suits by the economic loss doctrine.<sup>217</sup> “Providing tort compensation only after injury occurs ensures that the extent of injury and the identity of the injured parties is more than speculative.”<sup>218</sup> Alleging a tort claim, Professor Korzec observes, provides a plaintiff with the ability to threaten a defendant with punitive damages, a remedy not available in contract claims.<sup>219</sup> Although punitive damages are rarely awarded, such liability exposure may inflate the settlement value of a class action. The court’s ruling also essentially transformed a basic warranty claim into a consumer protection claim,<sup>220</sup> effectively eliminating a requirement that private plaintiffs under Maryland’s Consumer Protection Act show actual “injury or loss sustained” as a result of the prohibited practice and authorizing them to seek recovery of attorneys’ fees.<sup>221</sup>

The culmination of these types of claims is the Toyota “sudden unintended acceleration” lawsuits. After widespread media coverage on the topic in 2010, Toyota was hit with a surge of claims alleging that the electronics system in certain vehicles can result in “sudden unintended acceleration.” While about 400 people alleged they experienced personal injuries, wrongful death, or property damage as a result of a defect in the cars,<sup>222</sup> class action lawsuits sought recovery for economic losses on behalf of an estimated 22 million owners.<sup>223</sup> The class actions claimed that, while those owners of Toyota vehicles were not physically harmed, the risk of product failure led to a decrease in the resale value of their cars, causing them a financial loss.

Studies by the National Highway Traffic Safety Administration (NHTSA) and National Aeronautics and Space Administration (NASA) found no evidence of a defect in the throttle, braking, software, or electronics.<sup>224</sup> Rather, “[a]fter

<sup>217</sup> See *id.* at 130-37.

<sup>218</sup> *Id.* at 149.

<sup>219</sup> See *id.* at 138.

<sup>220</sup> See *Lloyd v. Gen. Motors Corp.*, 916 A.2d 257, 281 (Md. 2007).

<sup>221</sup> MD. CODE ANN., COM. LAW § 13-408(a) (2014).

<sup>222</sup> See MDL STATISTICS REPORT, *supra* note 171 (reporting total of 423 actions transferred to *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, MDL No. 2151 (C.D. Cal.)).

<sup>223</sup> See Order Granting Motion for Final Approval of Proposed Class Action Settlement, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 8:10ML 02151 JVS (FMOx) (C.D. Cal. July 24, 2013) [hereinafter *Final Sudden Acceleration Settlement Order*].

<sup>224</sup> See U.S. DEPT OF TRANSP., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., TECHNICAL ASSESSMENT OF TOYOTA ELECTRIC THROTTLE CONTROL (ETC) SYSTEMS (2011), [hereinafter *NHTSA ASSESSMENT*], available at [http://www.nhtsa.gov/staticfiles/nvs/pdf/NHTSA-UA\\_report.pdf](http://www.nhtsa.gov/staticfiles/nvs/pdf/NHTSA-UA_report.pdf); see also Editorial, *Toyota’s Acceleration Problem Could be Customer-Based*, WASH. POST (Sept. 6, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/05/AR2010090502878.html>.

conducting the most exacting study of a motor vehicle electronic control system ever performed by a government agency," NASA found, and NHTSA agreed, that accidents were likely either the result of a pedal becoming entrapped under a floor mat or the driver pushing the wrong pedal.<sup>225</sup>

U.S. District Judge James Selna, presiding over the multi-district docket encompassing all sudden unintended acceleration claims pending in federal courts, found that the plaintiffs had satisfied the minimum threshold for standing, regardless of whether they experienced the alleged defect, but cautioned that "[w]hether they can recover for that injury under a particular theory of liability is a separate question."<sup>226</sup> He later declined to dismiss the plaintiffs' claims, based on application of California case law, while recognizing that "a number of states . . . would preclude or would highly likely preclude some or all of the claims asserted by Plaintiffs whose products have manifested no defect."<sup>227</sup>

Nevertheless, in December 2012, Toyota announced a settlement of the economic loss claims to put litigation behind it,<sup>228</sup> which the court approved in July 2013.<sup>229</sup> The \$1.1 billion settlement creates a fund to pay anyone who owned, purchased, or leased any of about forty Toyota, Lexus, or Scion models made between 1998 and 2010.<sup>230</sup> The court also approved payment of

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<sup>225</sup> NHTSA ASSESSMENT, *supra* note 224, at vii; *see also* TRANSP. RESEARCH BD., THE SAFETY PROMISE AND CHALLENGE OF AUTOMOTIVE ELECTRONICS: INSIGHTS FROM UNINTENDED ACCELERATION, SPECIAL REP. NO. 308 165 (2012), available at [http://www.nap.edu/catalog.php?record\\_id=13342](http://www.nap.edu/catalog.php?record_id=13342) (agreeing with NHTSA's decision to close its investigation after its initial study, followed by NASA's study, found that electronic throttle control systems were not a plausible cause of reports of sudden unintended acceleration and recommending that NHTSA expand its expertise in automotive electronics to more effectively investigate and handle public concern in this area in the future). Toyota won three of its first four product liability trials. *See* Jaclyn Trop, *Toyota Seeks a Settlement for Sudden Acceleration Cases*, N.Y. TIMES (Dec. 13, 2013), <http://www.nytimes.com/2013/12/14/business/toyota-seeks-settlement-for-lawsuits.html> (reporting that Toyota received defense verdicts after trials in New York in 2011, Philadelphia in June 2013, and Los Angeles in October 2013, before settling an Oklahoma City case after a \$3 million verdict in October 2013).

<sup>226</sup> *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prod. Liab. Litig.*, 754 F. Supp. 2d 1145, 1161 (C.D. Cal. 2010).

<sup>227</sup> *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prod. Liab. Litig.*, 785 F. Supp. 2d 925, 932 (C.D. Cal. 2011) (citing Alabama, North Dakota, Ohio, Pennsylvania, and Wisconsin case law, as examples of jurisdictions likely to dismiss such claims and denying a motion to certify application of California law to nationwide class action).

<sup>228</sup> *See* Press Release, Toyota Announces Settlement of Economic Loss Litigation That Provides Value to Customers (Dec. 26, 2012), available at <http://pressroom.toyota.com/releases/toyota+settlement+litigation+value+customers+dec26.htm>.

<sup>229</sup> *See* Final Sudden Acceleration Settlement Order, *supra* note 223.

<sup>230</sup> *See id.* Objectors charged that it was improper to use \$30 million of the settlement to promote driver education when the settlement alleged a design defect. Ultimately, these objections led to a shift of \$1.5 million to auto safety groups. *See*

\$200 million in the plaintiffs' attorneys' fees and \$27 million in expenses separate from the settlement fund to be divided among the 31 plaintiffs' firms that worked on the litigation as they deem appropriate.<sup>231</sup>

The settlement is reportedly the largest of its type in automobile history.<sup>232</sup> At the time the settlement received final approval, however, just over two percent of those who were mailed a notice of the settlement filed a claim.<sup>233</sup> Under the settlement's terms, even those who do not file a claim will receive a check in the mail good for ninety days and, if they fail to cash the check, they will receive a reminder notice and another check.<sup>234</sup> A controversial *cy pres* provision will distribute unclaimed funds to five law schools to establish fellowships to research low participation rates in class action settlements.<sup>235</sup>

The Toyota settlement is a potential game changer in no-injury litigation and its impact is likely to be felt beyond the automobile industry. It sends a message to plaintiffs' lawyers that it is more profitable to be among the first to file a consumer class action for speculative economic losses on behalf of anyone who purchased a product rather than compete to represent a limited number of people whose physical injury may have been caused by a defect.<sup>236</sup> Taking the consumer class action route

Juan Carlos Rodriguez, *\$1.1B Toyota Suit Moves Ahead With Objector Settlement*, LAW360 (Jan. 9, 2014, 5:44 PM), <http://www.law360.com/articles/499948/1-1b-toyota-suit-moves-ahead-with-objector-settlement>.

<sup>231</sup> Order Regarding Motion for Attorneys' Fees, Reimbursement of Expenses, and Compensation to Named Plaintiffs, at 2-3, 20, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, and Prods. Liab. Litig.*, No. 8:10-ML-02151 JVS (FMOx) (C.D. Cal. June 17, 2013). Unsurprisingly, the settlement resulted in additional litigation over the amount and allocation of attorneys' fees among the plaintiffs' lawyers. See Megan Stride, *Attys' Fee War Accelerates Between Firms in \$1B Toyota Deal*, LAW360 (Aug. 6, 2013, 7:23 PM), <http://www.law360.com/articles/463051/attys-fee-war-accelerates-between-firms-in-1b-toyota-deal>.

<sup>232</sup> See W.J. Hennigan, *Toyota Settlement in Sudden-Acceleration Case Will Top \$1 Billion*, L.A. TIMES (Dec. 26, 2012), <http://articles.latimes.com/2012/dec/26/business/la-fi-toyota-to-pay-at-least-12-billion-to-settle-suddenacceleration-lawsuit-20121226>; Bill Vlastic, *Toyota Agrees to Settle Lawsuit Tied to Accelerations*, N.Y. TIMES (Dec. 26, 2012), <http://www.nytimes.com/2012/12/27/business/toyota-settles-lawsuit-over-accelerator-recalls-impact.html>.

<sup>233</sup> See Amanda Bronstad, *\$1.6 Billion Toyota Settlement Wins Final Approval*, NAT'L L.J. (July 22, 2013) (reporting that only 500,000 owners of 22.5 million who were sent a notice filed a claim).

<sup>234</sup> *\$1.6B Toyota 'Runaway Vehicle' Settlement Expected to be Approved Today*, L.A. DAILY NEWS (July 18, 2013), <http://www.dailynews.com/general-news/20130719/16b-toyota-runaway-vehicle-settlement-expected-to-be-approved-today>.

<sup>235</sup> See Amanda Bronstad, *Objections Mount to \$1.6 Billion Toyota Settlement*, NAT'L L.J. (May 14, 2013) (discussing objections to *cy pres* proposal).

<sup>236</sup> In addition to claims seeking lost value or refunds from manufacturers on the basis of latent defects, auto dealerships and rental companies have also faced no-injury claims. See *Felix v. Ganley Chevrolet, Inc.*, No. 98985, 2013 WL 4238945, at \*19 n.8 (Ohio Ct. App. Aug. 15, 2013) (Rocco, J., dissenting) (affirming certification of a class of all purchasers of automobiles from a group of dealerships that included an

also allows for extrapolation of damages to thousands or millions of people and may provide a basis for recovery of statutory damages, treble damages, and attorneys' fees and costs under some state consumer protection laws. Indeed, within three months of the Toyota verdict, thirteen plaintiffs' law firms brought a similar sudden unintended acceleration lawsuit against Ford.<sup>237</sup> In addition, the same attorneys involved in the Toyota litigation are now claiming a loss in resale value of millions of General Motors's vehicles following recalls addressing potentially faulty ignition switches.<sup>238</sup>

### C. Comcast v. Behrend, Washing Machines, and the Future of No-Injury Class Actions Certification

The U.S. Supreme Court's ruling in *Comcast v. Behrend*,<sup>239</sup> combined with *Wal-Mart Stores, Inc. v. Dukes*,<sup>240</sup> provides new ammunition for defense counsel when responding to attempts to certify no-injury class actions. In *Comcast*, the Court signaled a problem with class actions that lacked a nexus between the theory of liability and an assessment of common damages.<sup>241</sup> In *Wal-Mart*, the Court warned that shortcuts to establishing classwide liability and damages through engaging in "Trial by

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invalid arbitration clause in purchase contracts, regardless of whether a dispute arose that placed the arbitration clause at issue, and summarily awarding \$200 in "discretionary damages" to each class member); *but cf.* *Hershenow v. Enterprise Rent-A-Car Co. of Boston*, 840 N.E.2d 526, 535 (Mass. 2006) (finding class failed to state a claim under Massachusetts consumer protection law when they alleged they that a rental agreement contained an unlawful "collision damage waiver" provision purporting to waive the rental company's claims against a renter for potential vehicle damage when the class members returned the vehicles undamaged; plaintiffs had not suffered any injury because they never had to make a claim under the provision and, therefore, were not "worse off during the rental period than [they] would have been had the CDW complied in full" with Massachusetts law).

<sup>237</sup> See Class Action Complaint at 4-5, *Belville v. Ford Motor Co.*, Civil Action No. 3:13-cv-6529, 2013 WL 1281238 (S.D. W. Va. Mar. 28, 2013); see also Christopher Jensen, *Suit Claims Ford Failed to Protect Vehicles From Unintended Acceleration*, N.Y. TIMES (Mar. 29, 2013), <http://wheels.blogs.nytimes.com/2013/03/29/suit-claims-ford-failed-to-protect-vehicles-from-unintended-acceleration/>. The district court's dismissal of claims brought on behalf of individuals who had used their vehicles without incident for many years in that case may at least slightly dampen enthusiasm for no-injury claims stemming from the Toyota settlement. See *Belville v. Ford Motor Co.*, 13 F. Supp. 3d 528, 533 (S.D. W. Va. 2014); see also *id.* at 542 (noting that the court "has not found any comparable cases that have allowed such claims to survive"). The court also dismissed the plaintiffs' fraud-based claims because they failed to state with particularity the alleged misrepresentation, quoted only broad statements about safety that were "mere puffery," and did not assert that they actually saw or relied on misstatements in making their purchases. See *id.* at 543-46.

<sup>238</sup> See Linda Sandler et al., *Plaintiffs' Lawyers Compete to Lead Ignition Switch Battle*, BLOOMBERG BNA PROD. SAFETY & LIAB. REP. (Aug. 11, 2014).

<sup>239</sup> *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

<sup>240</sup> *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

<sup>241</sup> *Comcast Corp.*, 133 S. Ct. at 1430.

Formula” impermissibly abridge a defendant’s right to due process.<sup>242</sup> These requirements present a challenge to certifying class actions where only the class representative can show an injury or where damages are based on an alleged diminution in value of a product that will vary in individual cases.

In *Comcast*, cable television subscribers in the Philadelphia area alleged that they paid higher prices as a result of the cable provider’s strategy of swapping their cable systems with competitors to “cluster” their operations in the region.<sup>243</sup> The plaintiffs sought class certification under Rule 23(b)(3), which requires “that the questions of law or fact common to the class members predominate over any questions affecting only individual members.”<sup>244</sup> While the plaintiffs proposed four theories of anti-competitive behavior that impacted subscribers, the district court only accepted one as capable of being proven class-wide when it certified the class. Yet, the plaintiffs offered testimony by an expert who used a model to calculate damages based on all four theories of antitrust impact, instead of just the one theory accepted by the court. The Third Circuit affirmed the district court’s reliance on the plaintiffs’ damages model, finding that at the class certification stage, plaintiffs did not have to “tie each theory of [harm] to an exact calculation of damages.”<sup>245</sup>

The Supreme Court’s five-member majority reversed the Third Circuit’s affirmation of class certification, emphasizing that the theory of harm accepted by the district court must match the basis for calculating damages across the entire class.<sup>246</sup> As the Court explained, “at the class certification stage (as at trial), any model supporting a plaintiff’s damages case must be consistent with its liability case.”<sup>247</sup> Otherwise, “[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class.”<sup>248</sup> The Court also clarified that the “rigorous analysis” required by Rule 23 may require consideration of merits issues that overlap with class certification prerequisites.<sup>249</sup> The

<sup>242</sup> *Wal-Mart*, 131 S. Ct. at 2561.

<sup>243</sup> *Comcast*, 133 S. Ct. at 1430.

<sup>244</sup> FED. R. CIV. P. 23(b)(3).

<sup>245</sup> *Comcast Corp.*, 133 S. Ct. at 1431 (quoting *Behrend v. Comcast Corp.*, 655 F.3d 182, 206 (3d Cir. 2011)).

<sup>246</sup> *Id.* at 1435 (“There is no question that the model failed to measure damages resulting from the particular antitrust injury on which [Comcast’s] liability in this action is premised.”).

<sup>247</sup> *Id.* at 1433.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

D.C. Circuit has summarized the holding of *Comcast* as: "No damages model, no predominance, no class certification."<sup>250</sup>

*Comcast* built on the Supreme Court's earlier ruling in *Wal-Mart*, where the Court unanimously reversed certification of a nationwide class action alleging the retailer's employment practices had a disparate impact on women. There, the plaintiffs proposed determining liability and backpay owed from a sample of class members, then multiplying the number of valid claims by the average backpay to determine recovery for the entire class.<sup>251</sup> This "novel project," the Court found, would impermissibly use class certification to modify a substantive right because it would preclude Wal-Mart from litigating defenses to individual claims.<sup>252</sup> Some of these individuals may not have experienced an injury as a result of illegal practices, but could have been denied an employment opportunity for lawful reasons.<sup>253</sup> Yet, through "Trial by Formula," these uninjured class members would receive backpay.<sup>254</sup>

Claims brought against washing machine manufacturers, alleging front-load machines have a design flaw making them prone to mold growth,<sup>255</sup> provided the first test as to how courts would apply these decisions to class actions that include members who experienced no injury from an alleged product defect. In an Ohio class action, the plaintiffs asserted claims against the Whirlpool Corporation for tortious breach of warranty, negligent design, and negligent failure to warn over the alleged growth of mold in front-loading washing machines.<sup>256</sup> Plaintiffs asserted similar breach-of-warranty claims against Sears, Roebuck & Co. over mold growth in its washers in an Illinois case.<sup>257</sup> Both manufacturers argued that the classes were overbroad because most washing machine owners did not have a mold issue and were pleased with their purchases.<sup>258</sup>

The district courts certified the Whirlpool and Sears classes and the appellate courts affirmed while *Comcast* was pending before the Supreme Court. The Sixth Circuit ruled

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<sup>250</sup> *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252-53 (D.C. Cir. 2013).

<sup>251</sup> *See Wal-Mart*, 131 S. Ct. at 2561.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *See id.*

<sup>255</sup> *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359, 362 (7th Cir. 2012), *reinstated*, 727 F.3d 796, 802 (7th Cir. 2013); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 678 F.3d 409, 414 (6th Cir. 2012), *cert. granted, judgment vacated sub nom, aff'd*, 722 F.3d 838 (6th Cir. 2013).

<sup>256</sup> *Whirlpool*, 678 F.3d at 412.

<sup>257</sup> *Butler*, 702 F.3d at 361.

<sup>258</sup> *Butler*, 702 F.3d at 362; *Whirlpool*, 678 F.3d at 420.

that certification is appropriate “if class members complain of a pattern or practice that is generally applicable to the class as a whole[,]” which the court found was implicated by the plaintiffs’ claims of common design flaws in the machines.<sup>259</sup> “Even if some class members have not been injured by the challenged practice,” the court found, “a class may nevertheless be appropriate.”<sup>260</sup> The Seventh Circuit agreed. It found that the basic question raised by the mold claim was common to the entire class, and that the class action mechanism “is the more efficient procedure” for resolving whether the machines are defective.<sup>261</sup>

The Supreme Court granted *certiorari* and vacated and remanded the washing machine decisions for reconsideration in light of *Comcast*. In doing so, the Court appeared to send a message that it expected lower courts to more closely evaluate whether damages claimed in a putative class action fit the alleged harm.<sup>262</sup> On remand, however, the Sixth and Seventh Circuits reaffirmed their earlier rulings. The appellate courts focused on language in *Comcast* that requires a showing of predominance at the class certification stage<sup>263</sup> and applied that holding only to liability instead of liability and damage considerations. Judge Posner, writing for the Seventh Circuit, wondered, “[W]hy did the Supreme Court remand the case to us for reconsideration in light of that [*Comcast*] decision?”<sup>264</sup> The Seventh Circuit answered its own question by declaring that *Comcast* emphasized that predominance must be satisfied by proof at the class certification stage, but found that “[i]f the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification.”<sup>265</sup>

The Sixth Circuit distinguished *Comcast* from the *Whirlpool* case by noting that the issues of liability and damages had been bifurcated in the latter. Like the Seventh Circuit in *Butler*, the Sixth Circuit found that that the plaintiffs met their

<sup>259</sup> *Whirlpool*, 678 F.3d. at 420.

<sup>260</sup> *Id.*

<sup>261</sup> *Butler*, 702 F.3d at 362.

<sup>262</sup> John H. Beisner et al., *From Cable TV to Washing Machines: The Supreme Court Cracks Down on Class Actions*, BLOOMBERG LAW-BNA (May 8, 2014), <http://www.bna.com/from-cable-tv-to-washing-machines-the-supreme-court-cracks-down-on-class-actions/>.

<sup>263</sup> *See In re Whirlpool Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860 (6th Cir. 2013); *Butler*, 727 F.3d at 800.

<sup>264</sup> *Butler*, 727 F.3d at 800.

<sup>265</sup> *Id.* at 800-01.

obligation to show predominance by showing that liability issues are susceptible to proof on a class-wide basis.<sup>266</sup> The Sixth Circuit began with the premise that the plaintiffs need only raise "one common question to certify a class," and found that the validity of the class members' claim centered on whether design defects in the machines caused mold growth and "whether Whirlpool adequately warned" its customers when it began receiving complaints.<sup>267</sup> The court found that "the trial of common questions will evoke common answers likely to drive resolution of this lawsuit"<sup>268</sup> and found that the district court did not abuse its discretion in certifying a liability class.

Both courts dismissed the manufacturers' arguments that the class lacked predominance because most of the members suffered no injury,<sup>269</sup> with the Seventh Circuit adding that the lack of injury was "an argument not for refusing to certify the class but for certifying it and then entering a judgment that would largely exonerate Sears—a course it should welcome, as all class members who did not opt out of the class action would be bound by the judgment."<sup>270</sup>

The Supreme Court denied review of recertification of the *Whirlpool* and *Butler* cases.<sup>271</sup> Rather than settle, however, Whirlpool fought on, resulting in a rare class action trial in a federal district court in Cleveland, Ohio. After just two hours of deliberation, the jury returned a defense verdict.<sup>272</sup> The jury found the plaintiffs had not shown that Whirlpool negligently designed its machines or breached its warranty.<sup>273</sup>

The impact of *Comcast* and *Wal-Mart* on no-injury class actions remains uncertain. *Comcast* has the potential to discourage no-injury consumer class actions by requiring a close fit between the damages sought and the harm alleged. *Wal-Mart* should aid in preventing certification of classes based on

<sup>266</sup> *Whirlpool*, 722 F.3d at 860.

<sup>267</sup> *Id.* at 853.

<sup>268</sup> *Id.* at 857-58 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)); see also *Butler*, 727 F.3d at 801.

<sup>269</sup> *Whirlpool*, 722 F.3d at 857 (citing *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1173 (9th Cir. 2010) (affirming class certification in a case alleging that an alignment defect caused premature tire wear, even though a majority of class members' vehicles did not manifest the tire wear)).

<sup>270</sup> *Butler*, 727 F.3d at 799.

<sup>271</sup> *Sears, Roebuck and Co. v. Butler*, 134 S. Ct. 1277 (2014); *Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014).

<sup>272</sup> See James F. McCarty, *Federal Jury Rejects Class-Action Lawsuit Brought Against Whirlpool Front-loading Washing Machines*, CLEVELAND PLAIN DEALER (Oct. 31, 2014), [http://www.cleveland.com/court-justice/index.ssf/2014/10/federal\\_jury\\_rejects\\_class-act.html](http://www.cleveland.com/court-justice/index.ssf/2014/10/federal_jury_rejects_class-act.html).

<sup>273</sup> See *Allison v. Whirlpool Corp.*, No. 1:08-WP-65001 (N.D. Ohio) (Verdict Form, Oct. 30, 2014).



statistical models that attribute injuries to individuals who have not experienced a loss. As of yet, however, the potential of these cases has not been fully realized.

Courts have certified classes while acknowledging that individualized issues in calculating damages may arise later.<sup>274</sup> Courts have also certified classes with respect to “particular issues,” such as liability, even when Rule 23 safeguards do not warrant class treatment in regard to the damages alleged.<sup>275</sup> Some courts have allowed plaintiffs to establish classwide damages through expert testimony showing that a product’s “true market price” was less than the retail price due to a failure to disclose a safety hazard or found that the availability of statutory damages under a state’s consumer protection law avoids the need for individualized inquiries or expert testimony.<sup>276</sup> Despite the Supreme Court’s admonition in *Wal-Mart* against “Trial by Formula,” some courts have permitted certification of classes based on sampling where there is substantial variation between class members and some have experienced no injury.<sup>277</sup>

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<sup>274</sup> See, e.g., *Thurston v. Bear Naked, Inc.*, No. 3:11-CV-02890-H (BGS), 2013 WL 5664985, at \*10 (S.D. Cal. July 30, 2013); *Munoz v. PHH Corp.*, No. 1:08-cv-0759-AWI-BAM, 2013 WL 2146925, at \*24, 26 (E.D. Cal. May 15, 2013) (recommendation by a Magistrate Judge to certify the class).

<sup>275</sup> For example, in a pre-*Comcast* decision, the Seventh Circuit found it appropriate to certify one “common issue” of “whether windows suffer from a single, inherent design defect leading to wood rot,” while the issue of damages could be dealt with in individual follow-on proceedings. *Pella Corp. v. Saltzman*, 606 F.3d 391, 393 (7th Cir. 2010). Following *Comcast*, in *In re IKO Roofing Shingle Prod. Liab.*, 757 F.3d 599 (7th Cir. 2014), the Seventh Circuit declined to overrule *Pella*. It reversed a trial court’s decision finding a class of purchasers of roofing shingles that were allegedly deceptively marketed could not be certified because their varied experiences with the tiles precluded common damages. See *id.* at 602. Instead, the Seventh Circuit suggested that the plaintiffs seek uniform damages on behalf of the entire class based on the difference in the value of the tile as represented and a tile that did not mean certain industry standards. *Id.* at 600.

<sup>276</sup> See, e.g., *Guido v. L’Oreal, USA, Inc.*, Nos. CV 11-1067 CAS (JCx), CV 11-5465 CAS (JCx), 2013 WL 3353857, at \*9, \*15 (C.D. Cal. July 1, 2013) (inviting plaintiffs to renew motion for certification upon obtaining expert testimony showing the difference in value between a \$5.99 hairstyling product with and without a flammability warning on the label, and certifying New York class because the availability of statutory damages of \$50 per violation under the state’s consumer protection law provided a measure of classwide damages that made an individualized inquiry unnecessary).

<sup>277</sup> See, e.g., *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1257 (10th Cir. 2014) (affirming certification of antitrust claim based on expert testimony extrapolating aggregate damages from a sample of class members who had varying degrees of injury, and in many cases no injury at all); *Bouaphakeo v. Tyson Foods, Inc.*, 765 F.3d 791, 797-800 (8th Cir. 2014) (affirming class certification of wage-and-hour lawsuit based on statistical evidence of the time a fictional “average” employee would spend on donning and doffing-related activities, despite significant differences in job responsibilities and required safety equipment, and evidence that many class members had no damages). *But see* *Espenscheid v. DirectSat USA, LLC*, 705 F.3d 770, 774 (7th Cir. 2013) (rejecting, in wage-and-hour suit, proposal to extrapolate from the experience of 42 “representative” employees to 2,341 class members who worked varying hours because it would confer a windfall on some members while undercompensating others).

These decisions offer plaintiffs several potential routes to class certification post-*Comcast* and *Wal-Mart*. To avoid *Comcast* complications, plaintiffs' lawyers are likely to work with economists to develop more sophisticated damages models early in the litigation, more frequently seek certification of liability-only classes, or file class actions under laws providing for statutory damages.<sup>278</sup>

Other courts are relying on *Comcast* and *Wal-Mart* to deny certification of such claims.<sup>279</sup> For example, a California district court decertified a class composed of all persons who had purchased Pom Wonderful juice during a five-year period and claimed the manufacturer had made deceptive representations about the health benefits of its products.<sup>280</sup> The plaintiffs alleged two alternative theories of damages: they either sought a full refund on the cost of products on the basis that they would not have purchased the products if the company had accurately advertised them or claimed they were entitled to the premium price they paid for the Pom products above ordinary juice

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<sup>278</sup> Approximately one third of state consumer protection acts provide for statutory damages. See Schwartz & Silverman, *supra* note 2, at 22 n.13 (compiling statutes). All but about five of these states allow for recovery of statutory damages through a class action as well as an individual claim. See *id.* at 29. Several federal laws also provide for statutory damages in lieu of actual damages. See, e.g., Fair and Accurate Transaction Act, 15 U.S.C. § 1681n(a) (2014); Fair Credit Reporting Act, 17 U.S.C. § 1681n (2012); Telephone Consumer Protection Act, 47 U.S.C. §§ 227(b)(3), 277(c)(5) (2012). Even prior to *Comcast*, plaintiffs' law firms have expanded their use of these statutes to bring class actions. See, e.g., James G. Snell & Carlos P. Mino, *TCPA*, BLOOMBERG BNA (Feb. 14, 2013), <http://www.bna.com/telephone-consumer-protection-act-cases-are-on-the-rise/> (reporting a 54% increase in TCPA class actions between August 2011 and August 2012).

<sup>279</sup> See, e.g., *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084-87 (7th Cir. 2014) (Posner, J.) (finding that the district court was not required to determine whether each of 150 class members suffered an injury from alleged groundwater determination, but reversing class certification because the district court "treated predominance as a pleading requirement" and failed to examine "the realism of the plaintiffs' injury and damages model" where the defendants argued that the plaintiffs' homes may have lost value due to declining real estate values and the benzene may not have entered their water supply); *Cabbat v. Philip Morris USA, Inc.*, Civil No. 10-00162 DKW/BMK, 2014 WL 32172, at \*9-12 (D. Haw. Jan. 6, 2014) (finding certification of a class of smokers who purchased light cigarettes for reasons other than health benefits, which include individuals who suffered no injury, was not apt for classwide resolution and failed to present a methodology for determining the lost benefit of the bargain as required by *Comcast*); *Gooden v. SunTrust Mortgage, Inc.*, No. 2:11-cv-2595-JAM-DAD, 2013 WL 6499250, at \*6 (E.D. Cal. Dec. 11, 2013) (denying certification of a class alleging mortgage holder had required owner to obtain insurance in excess of the property's replacement cost because the court would need to assess the replacement value of each home to determine whether a class member suffered an actual injury); *Martin v. Ford Motor Co.*, 292 F.R.D. 252, 274-76 (E.D. Pa. 2013) (finding that where 83.2% of the vehicles at issue had not malfunctioned, expert testimony on the impact of a recall on the resale value was not sufficient for class certification purposes because the resale value of a vehicle is based on multitude of individual factors); see also *infra* Part IV.

<sup>280</sup> *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, No. ML-02199 DDP (RZx), 2014 WL 1225184, at \*1 (C.D. Cal. Mar. 25, 2014).

products resulting from the alleged nutritional value misrepresentations.<sup>281</sup> Although the court declined to adopt an “expansive reading of *Comcast*” that requires a damages model to distinguish between injured and uninjured persons,<sup>282</sup> it found the two approaches failed to provide a classwide measure of damages. The “full refund” approach did not account for the value consumers received in consuming the product.<sup>283</sup> Such an award would not constitute restitution, but would provide consumers with an “unexpected boon” and profit from a windfall.<sup>284</sup> The “price premium” model simply assumed that the price difference between Pom and other juice products is attributable to Pom’s alleged health representations, rather than a myriad of other potential consumer motivations in purchasing a more expensive product.<sup>285</sup> The classwide damages were not sufficiently tied to Pom’s alleged misrepresentations, the court found.<sup>286</sup>

The outcome of the Whirlpool bellwether trial suggests that even when courts certify no-injury class actions, jurors may not be persuaded by such cases. It remains to be seen whether the defense verdict will increase the willingness of businesses to take high-risk class actions to trial, rather than settle.

*D. Is Regulatory Action More Effective for Addressing the Potential for Future Harm Than Litigation?*

In light of all of these relevant decisions, let us return to our basic question: are class action claims based on potential harms caused by products empty suit litigation? A fundamental flaw in class actions seeking recovery for unmanifested defects is the assumption that private litigation is an effective means of protecting the public from hazardous products before an injury occurs. Some court rulings that have permitted these claims, such as the Maryland Court of Appeals’ decision in *Lloyd*,<sup>287</sup> overlook or discount a key part of the safety net: the role of government agencies in preventing future harm through issuing safety standards and recalling dangerous products. These agencies were created, in part, due to recognition that private litigation does not provide an efficient or effective means of

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<sup>281</sup> See *id.* at \*1, \*5.

<sup>282</sup> *Id.* at \*2.

<sup>283</sup> *Id.* at \*3.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at \*4-5.

<sup>286</sup> *Id.* at \*5.

<sup>287</sup> See discussion *supra* notes 211-21 and accompanying text.

proactively addressing consumer safety.<sup>288</sup> Several federal agencies are empowered to order recalls (and push companies to conduct recalls on a voluntary basis) that require manufacturers to provide repairs or replacements at no cost or refunds to consumers where evidence indicates noncompliance with a safety standard or a possible safety hazard. These agencies include the Consumer Product Safety Commission (CPSC), NHTSA, and the FDA.

Regulatory action has significant advantages for consumers over no-injury class actions. While government agencies are often chastised for moving like molasses, such criticism often reflects the length of the rulemaking or adjudicatory process rather than recalls,<sup>289</sup> which are carried out relatively quickly and often with the cooperation of manufacturers. For example, the Consumer Product Safety Act requires companies to report a defect "immediately" upon identifying a potential hazard,<sup>290</sup> which the CPSC interprets as within 24 hours of reaching such a determination and with no more than ten business days of investigation.<sup>291</sup> Its award-winning "Fast Track" program often leads companies to present a Corrective Action Plan to the agency for addressing the safety concern within twenty business days of filing an incident report.<sup>292</sup> Similarly, federal law requires automakers to notify NHTSA within five business days of determining that a safety-related defect exists or that the vehicle is not in compliance with federal motor vehicle safety standards and to promptly conduct a recall.<sup>293</sup> Manufacturers often voluntarily issue recalls, rather than engage in protracted administrative proceedings or litigation.<sup>294</sup> This avoids the need

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<sup>288</sup> See NAT'L COMM'N ON PROD. SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS 1-3 (1970) (concluding that the common law tort claims were unreliable in restraining product hazards because it was most concerned with providing post-injury remedies).

<sup>289</sup> It is important to recognize that the relatively slow process for promulgating binding rules that regulate products or conduct reflects a need, required by law, for the agency to hear, carefully consider, and respond to public comment, and for the agency to ensure that regulations are supported by statutory authority, well-reasoned, and backed by sound science. See, e.g., 5 U.S.C. § 553 (2012). This process, while sometimes time-consuming, can have significant benefits for public safety.

<sup>290</sup> See 15 U.S.C. § 2064(b) (2012).

<sup>291</sup> U.S. CONSUMER PROD. SAFETY COMM'N, RECALL HANDBOOK 8 (2012) [hereinafter CPSC RECALL HANDBOOK], available at <http://www.cpsc.gov/PageFiles/106141/8002.pdf> (last visited May 1, 2015).

<sup>292</sup> See Conditions Under Which the Staff Will Refrain From Making Preliminary Hazard Determinations, 62 Fed. Reg. 39,827 (July 24, 1997); CPSC RECALL HANDBOOK, *supra* note 291, at 15-16.

<sup>293</sup> 49 C.F.R. §§ 573.6(b), 577.2 (2011); see also 49 U.S.C. § 30118(c) (2012).

<sup>294</sup> For example, the CPSC worked with regulated companies to implement over 1,000 voluntary recalls between January 2010 and November 2013, while issuing

for consumers (or regulators) to prove an actual defect exists, even as the company addresses product safety concerns. When a manufacturer fails to promptly report a safety issue, agencies are authorized to impose substantial civil fines,<sup>295</sup> which can rise into the millions of dollars.<sup>296</sup> Knowing failure to report a safety concern can result in criminal fines in the billions<sup>297</sup> and potential jail time for corporate executives.<sup>298</sup>

Class action litigation typically proceeds at a far slower pace than addressing safety concerns through recalls. Take, for example, the Toyota sudden unintended acceleration litigation. Since 2009, Toyota has recalled eleven million vehicles and addressed concerns that accelerator pedals could become entrapped by floor mats and that pedal assemblies were susceptible to sticking.<sup>299</sup> Such repairs are made at no cost to the owners.<sup>300</sup> While NHTSA fined Toyota in 2012 for not earlier reporting concerns with two Lexus models,<sup>301</sup> in the vast majority of cases the cars of

no mandatory recalls. Voluntary Remedial Actions and Guidelines for Voluntary Recall, 78 Fed. Reg. 69,793, 69,794 (Nov. 21, 2013) (to be codified at 16 C.F.R. pt 1115).

<sup>295</sup> See, e.g., 15 U.S.C. § 2069(a) (2012) (authorizing civil penalties of up to \$100,000 per violation and up to \$15 million for a related series of violations, for failure to timely report a known hazard in a consumer product); 49 U.S.C. § 30165 (2012) (authorizing civil penalties on automakers of up to \$5,000 per violation and up to \$35 million for a related series of violations).

<sup>296</sup> See, e.g., Press Release, Consumer Prod. Safety Comm'n, Ross Stores Agrees to \$3.9 Million Civil Penalty, Internal Compliance Improvements for Failure to Report Drawstrings in Children's Upper Outerwear (June 21, 2013), available at <http://www.cpsc.gov/en/Newsroom/News-Releases/2013/Ross-Stores-Agrees-to-39-Million-Civil-Penalty-Internal-Compliance-Improvements-for-Failure-to-Report-Drawstrings-in-Childrens-Upper-Outerwear-/>; Press Release, U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., Toyota Motor Corp. Will Pay Record \$17.35 Million in Civil Penalties for Alleged Violations of Federal Law (Dec. 18, 2012) [hereinafter NHTSA Press Release], available at [http://www.nhtsa.gov/About+NHTSA/Press+Releases/2012/Toyota+Motor+Corp.+Will+Pay+Record+\\$17.35+Million+in+Civil+Penalties+for+Alleged+Violations+of+Federal+Law](http://www.nhtsa.gov/About+NHTSA/Press+Releases/2012/Toyota+Motor+Corp.+Will+Pay+Record+$17.35+Million+in+Civil+Penalties+for+Alleged+Violations+of+Federal+Law) (reporting imposition of \$17.35 million civil penalty on Toyota, pursuant to settlement agreement, for its failure to report and recall two Lexus models along with earlier recalled models, and noting that Toyota agreed to pay \$48.8 million as a result of three separate investigations into the automaker's handling of pedal entrapment, sticky pedal and steering relay rod recalls in 2010).

<sup>297</sup> See, e.g., Danielle Douglas & Michael A. Fletcher, *Toyota Reaches \$1.2 Billion Settlement to End Probe of Accelerator Problems*, WASH. POST, Mar. 19, 2014, [http://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572\\_story.html](http://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572_story.html) (reporting that "the settlement, which amounts to more than a third of Toyota's 2013 profit, is being called the largest criminal penalty imposed on a car company in U.S. history").

<sup>298</sup> See Aruna Viswanatha et al., *Toyota's \$1.2 Billion Settlement May Be Model for U.S. Probe Into GM*, REUTERS (Mar. 19, 2014, 4:45 PM), <http://www.reuters.com/article/2014/03/19/us-toyota-settlement-idUSBREA2IOVB20140319> (quoting former Public Citizen president Joan Claybrook).

<sup>299</sup> See Jaclyn Trop, *Toyota Seeks a Settlement for Sudden Acceleration Cases*, N.Y. TIMES (Dec. 13, 2013), [http://www.nytimes.com/2013/12/14/business/toyota-seeks-settlement-for-lawsuits.html?\\_r=0](http://www.nytimes.com/2013/12/14/business/toyota-seeks-settlement-for-lawsuits.html?_r=0).

<sup>300</sup> See 49 C.F.R. 573.6(c)(8) (2008).

<sup>301</sup> See NHTSA Press Release, *supra* note 296.

affected owners were modified to address any issues prior to the class action settlement. By way of contrast, the court gave final approval to Toyota's settlement of economic loss claims in July 2013,<sup>302</sup> and objections to the settlement were not resolved until January 2014, clearing the way for the plaintiffs' law firm to begin to distribute payments to class members.<sup>303</sup> The low response rate to the settlement may suggest that Toyota owners already had their concerns fully addressed through these recalls. By the time of the settlement, most Toyota owners may not have viewed themselves as having an unaddressed injury.

The typical class action, like the Toyota case, takes two or three years to settle, a period that is likely to run significantly longer in complex cases or when litigants appeal the trial court's ruling on class certification.<sup>304</sup> For example, the Maryland lawsuit challenging seatback design continued for twelve years. As detailed earlier, the Lloyd lawsuit was filed by plaintiffs in 1999, dismissed by the trial court as barred by the economic loss doctrine in 2000, affirmed by an intermediate appellate court in 2002, and reversed and reinstated by Maryland's highest court in 2007.<sup>305</sup> But that was not the end of the story. Following reinstatement of their claims, the plaintiffs amended their complaint (for the fourth time) to add five new named plaintiffs and "significantly expanded the class of vehicles" covered by the lawsuit.<sup>306</sup> The original plaintiffs, the Lloyds, no longer owned their 1995 Saturn and had purchased a 1997 Dodge Minivan, another vehicle covered by the lawsuit.<sup>307</sup> These changes triggered federal court jurisdiction under the Class Action Fairness Act, allowing the defendants to remove the case from state court.<sup>308</sup> Meanwhile, three of the four defendants, GM, Saturn, and Chrysler, filed for bankruptcy protection in 2009.<sup>309</sup>

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<sup>302</sup> Final Order Approving Class Action Settlement at 1, *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, Case No. 8:10ML 02151 JVS (FMOx) (C.D. Cal. July 24, 2013).

<sup>303</sup> Juan Carlos Rodriguez, *\$1.1B Toyota Suit Moves Ahead with Objector Settlement*, LAW360 (Jan. 9, 2014, 5:44 PM), <http://www.law360.com/articles/499948/1-1b-toyota-suit-moves-ahead-with-objector-settlement>.

<sup>304</sup> See TED FRANK, MANHATTAN INST. CTR. FOR LEGAL POLICY, CLASS ACTIONS, ARBITRATION, AND CONSUMER RIGHTS: WHY *CONCEPCION* IS A PRO-CONSUMER DECISION 5 (2013), available at [http://www.manhattan-institute.org/pdf/lpr\\_16.pdf](http://www.manhattan-institute.org/pdf/lpr_16.pdf) (citing OFFICE OF COURT RESEARCH, ADMIN. OFFICE OF THE COURTS, FINDINGS OF THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION 2000-2006: FIRST INTERIM REPORT 15-16 (Mar. 2009), available at <http://www.courts.ca.gov/documents/class-action-lit-study.pdf>).

<sup>305</sup> *Lloyd v. Gen. Motors Corp.*, 575 F. Supp. 2d 714, 715-17 (D. Md. 2008).

<sup>306</sup> See *id.* at 717.

<sup>307</sup> See *id.*

<sup>308</sup> *Lloyd v. Gen. Motors Corp.*, 560 F. Supp. 2d 420, 425 (D. Md. 2008).

<sup>309</sup> *Lloyd v. Gen. Motors Corp.*, 266 F.R.D. 98, 102 (D. Md. 2010).

There are three scenarios that can play out when government regulations establish a recall process for addressing a potential defect and consumer class actions seek recovery for an unmanifested defect. Each suggests that litigation is not as effective as the recall process for promptly addressing a safety issue. This, in turn, indicates that such claims might be deemed empty suit litigation.

In the first scenario, a federal agency has not required a recall or taken other action related to the safety concern. For example, a California district court denied certification of a claim alleging that a motorcycle released excessive heat, posing a risk of distracting the driver, and seeking to recover the amount owners allegedly overpaid for their motorcycles.<sup>310</sup> The court found that if there is a safety issue with the motorcycles, the plaintiffs “can petition NHTSA to investigate, and if [the agency] finds [a] defect related to . . . safety, it [can require the manufacturers] to fix the defect.”<sup>311</sup> This administrative remedy for uninjured class members, the court found, was superior to class action litigation for fairly and efficiently resolving the concern.<sup>312</sup>

When an agency has not taken regulatory action after years of litigation over a safety concern, there is a question as to whether the concern is backed by science and whether any damages awarded will actually further safety purposes. This scenario is exemplified by the Maryland seatback case, in which NHTSA had not ordered a recall even after a decade of litigation and the manufacturers argued that the cars fully complied with federal safety standards. In denying class certification, the federal district court took these arguments into account, finding that, should the plaintiffs prevail, a lay jury would essentially rewrite the seat rigidity standards set by government safety experts.<sup>313</sup> “If the suit resulted in the award of a few thousand dollars to each class member, it is unlikely that the class member would use the award to repair the problem,” the court found.<sup>314</sup> “It is much more likely that the class member would simply pocket the award” than replace the seats in their

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<sup>310</sup> See *Johnson v. Harley-Davidson Motor Co. Group, LLC*, 285 F.R.D. 573, 584-85 (E.D. Cal. 2012).

<sup>311</sup> *Id.* at 584.

<sup>312</sup> *Id.* (citing *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1142 (Fla. Dist. Ct. App. 2008)).

<sup>313</sup> See *Lloyd v. Gen. Motors Corp.*, 275 F.R.D. 224, 227 (D. Md. 2011) (“Plaintiffs would have asked a lay jury, unaided by the agency’s expertise, special knowledge, and ability to test, to overrule NHTSA by declaring defective any seatback below the 20,000 inch-pound threshold.”); *Lloyd*, 266 F.R.D. at 106-07 (finding that “the practical effect of a class victory would be to re-write FMVSS 207” as “a jury would supplant NHTSA on the issue of seatback rigidity”).

<sup>314</sup> *Lloyd*, 275 F.R.D. at 233.

vehicles.<sup>315</sup> "Such a result would leave in place the very risk of injury that the exception was intended to eliminate."<sup>316</sup>

In the second scenario, a manufacturer undertakes and completes a recall after a plaintiff files a class action. Under such circumstances, it is questionable what purpose continued litigation serves. For this reason, many courts have found that a class action is rendered moot when the manufacturer has already addressed the concern through a recall.<sup>317</sup> Similarly, courts have found that the class cannot be certified because it is not the most efficient means of addressing the claim.<sup>318</sup>

In the third scenario, plaintiffs' lawyers opportunistically file economic loss class actions *after* a company reports a problem and undertakes a recall, as occurred when GM addressed inadvertent deployment of side airbags<sup>319</sup> or Toyota updated the software impacting the anti-lock braking system on certain Prius and Lexus models.<sup>320</sup> In those instances, the manufacturers had fixed all the affected vehicles, including those of the class representatives, before settlement of the class action litigation. Indeed, the district court in the fuel gauge case observed that the manufacturer had honored every warranty claim made and fully fixed their vehicles with minimal inconvenience.<sup>321</sup> "Is not that the way consumer society is supposed to work?" the judge asked.<sup>322</sup> Allowing the plaintiffs' lawsuit to proceed, the trial court found, would "interrupt and distort" an "efficiently operating consumer-

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *See, e.g.,* Winzler v. Toyota Motor Sales U.S.A., Inc., 681 F.3d 1208, 1209, 1211 (10th Cir. 2012); Cheng v. BMW of N. Am., LLC, No. CV 12-09262 GAF (SHx), 2013 WL 3940815, at \*3-4 (C.D. Cal. July 26, 2013); *In re* Aqua Dots Prods. Liab. Litig., 270 F.R.D. 377, 384 (N.D. Ill. 2010), *aff'd on other grounds*, 654 F.3d 748 (7th Cir. 2011); *In re* ConAgra Peanut Butter Prods. Liab. Litig., 251 F.R.D. 689, 699, 701 (N.D. Ga. 2008); *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D. 614, 622 (W.D. Wash. 2003).

<sup>318</sup> *See, e.g.,* Martin v. Ford Motor Co., 292 F.R.D. 252, 284 (E.D. Pa. 2013) (finding class action was not an efficient means of addressing a product defect where the manufacturer, two months after the filing of the claim, initiated a voluntary recall, inspected over 300,000 vehicles, and provided a replacement or reinforcement of the part at issue to about one third of the class members).

<sup>319</sup> Cole v. Gen. Motors Corp., 484 F.3d 717, 718-19 (5th Cir. 2007) (discussed *supra* notes 200-05 and accompanying text).

<sup>320</sup> Toyota Motor Corp. Hybrid Brake Mktg., Sales Practices & Prods. Liab. Litig., 915 F. Supp. 2d 1151, 1154 (C.D. Cal. 2013) (discussed *supra* notes 196-99 and accompanying text). Plaintiffs have similarly filed class actions after a company offers to correct a problem through a warranty program, as occurred after Mercedes-Benz fixed faulty fuel sensors. Thiedemann v. Mercedes-Benz USA, L.L.C., 872 A.2d 783, 786 (N.J. 2005) (discussed *supra* notes 195-99 and accompanying text).

<sup>321</sup> Thiedemann, 872 A.2d. at 789 (quoting trial court ruling).

<sup>322</sup> *Id.*



complaint and remediation system.”<sup>323</sup> It essentially recognized that claims of this type are often empty suit litigation.

#### IV. DECEPTIVE PRODUCT ADVERTISING OR LABELING CLAIMS WHERE FEW, IF ANY, PEOPLE WERE MISLED

Plaintiffs not only assert creative claims seeking expert-developed economic losses resulting from the impact of a product hazard on the value of a product, they also bring more traditional deceptive advertising claims where few, if any, of the class members were misled. This is another type of empty suit litigation. Such claims occur with respect to a variety of products, but the trend is exemplified by a recent surge of class action lawsuits against food makers.<sup>324</sup> The principles of liability and defenses established in this food litigation could spur, or discourage, similar consumer class actions with respect to other products.

Most of the current food litigation falls in one of three categories: (1) claims alleging that a product was advertised as “all natural,” but arguably contains ingredients that are either genetically modified or arguably synthetic, and are brought on behalf of all consumers, many of whom may have purchased the product for other reasons, such as brand loyalty, price, or flavor;<sup>325</sup> (2) claims that seek recovery for allegedly deceptive advertising or labeling regarding health benefits where no reasonable person was misled or experienced a loss;<sup>326</sup> and

<sup>323</sup> *Id.*

<sup>324</sup> See INST. FOR LEGAL REFORM, THE NEW LAWSUIT ECOSYSTEM: TRENDS, TARGETS AND PLAYERS 89 (2013) [hereinafter THE NEW LAWSUIT ECOSYSTEM], available at [http://www.instituteforlegalreform.com/uploads/sites/1/web-The\\_New-Lawsuit-Ecosystem-Report-Oct2013\\_2.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/web-The_New-Lawsuit-Ecosystem-Report-Oct2013_2.pdf) (indicating “nearly 150 food class actions filed [between 2011 and 2013], with more than half filed in California courts”); Vanessa Blum, *Welcome to Food Court*, RECORDER (Mar. 1, 2013, 1:26 PM), <http://www.linerlaw.com/NewsMedia/./portalresource/lookup/wosid/cp-base-4-3324/media.name=/130301.ACA%20Recorder%20article.pdf> (finding that between March 2012 and March 2013 a network of plaintiffs’ lawyers filed 28 food labeling class actions in the U.S. District Court for the Northern District of California); Jessica Dye, *Food Companies Confront Spike in Consumer Fraud Lawsuits*, THOMSON REUTERS: SUSTAINABILITY (June 13, 2013), <http://sustainability.thomsonreuters.com/2013/06/14/food-companies-confront-spike-in-consumer-fraud-lawsuits/> (citing data compiled by food litigation attorneys at Perkins Coie that found the number of consumer fraud class actions brought in federal court against food and beverage companies increased from roughly 19 cases in 2008 to more than 102 in 2012).

<sup>325</sup> See, e.g., *Astiana v. Ben & Jerry’s Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097, at \*6 (N.D. Cal. Jan. 7, 2014) (in which defendant presented evidence that consumers lacked a common understanding of “all natural” and that “numerous other factors were more likely to motivate their purchase[]” of ice cream than such labeling).

<sup>326</sup> See, e.g., *Dennis v. Kellogg Co.*, No. 09-CV-1786-L (WMC), 2013 WL 6055326, at \*1 (S.D. Cal. Nov. 14, 2013) (claim accusing Kellogg of falsely advertising that Mini-Wheats improved kids’ attentiveness and memory to a degree not supported by competent clinical

(3) claims asserting technical violations of food labeling regulations that likely played no part in consumer purchase decisions.<sup>327</sup> Much of the food litigation involves lawsuits filed on behalf of many people who did not see or hear the alleged misrepresentation or did not purchase a product because of it. The claims frequently assert similar theories of damages discussed with respect to unmanifested product defect cases.

The greatest area of litigation with respect to food claims are those alleging that a manufacturer misleadingly advertised a product as "All Natural." Consumers may have significantly different understandings of what qualifies as "all natural," which may vary by product. The FDA has struggled with this issue. The agency abandoned an attempt to regulate "natural" claims in the late 1980s and into the 1990s, citing resource constraints and other priorities.<sup>328</sup> The FDA's current policy is that the term "natural" with respect to food means "nothing artificial or synthetic (including all color additives regardless of source) has been included in, or has been added to, a food that would not normally be expected to be in the food."<sup>329</sup>

This informal definition leaves a large gray area. One of the most common private litigation claims, for example, is that a manufacturer mislabeled a product as natural when it may

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evidence); *In re Ferrero Litig.*, 278 F.R.D. 552, 561 (S.D. Cal. 2011) (alleging misleading advertising related to the healthfulness of Nutella chocolate spread).

<sup>327</sup> See, e.g., Notice of Motion and Motion to Dismiss Amended Complaint; Memorandum of Points and Authorities in Support Thereof at 1, *Ivie v. Kraft Foods, Inc.*, No. CV 12-02554-RMW (PSG), 2013 WL 8302346, at \*1 (N.D. Cal. Nov. 7, 2012) (in which defendants asserted, in motion to dismiss, that plaintiff's lawyers had "canvassed reams of arcane federal rules and regulations" in an attempt to identify statutes the companies have technically violated, and then disingenuously asserted that their client was misled into buying the products based on those purported violations); *In re Cheerios Mktg. and Sales Practices Litig.*, Civil Action No. 09-cv-2413, 2012 WL 3952069, at \*2 (D.N.J. Sept. 10, 2012) (recognizing that plaintiffs filed class action as a result of a warning letter from FDA to General Mills, informing the manufacturer that, by advertising Cheerios as lowering cholesterol and preventing disease, it would need to obtain approval for its product as a drug).

<sup>328</sup> See Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. 2302 (Jan. 6, 1993); Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms, 56 Fed. Reg. 60,421, 60,466-67 (Nov. 27, 1991); Food Labeling, 54 Fed. Reg. 32,610 (Aug. 8, 1989); see also Termination of Proposed Trade Regulation; Rule of Food Advertising 48 Fed. Reg. 23,270, 23,271 (May 24, 1983) (in which the Federal Trade Commission abandoned attempt to define "natural" foods).

<sup>329</sup> Food Labeling: Nutrient Content Claims, General Principles, Petitions, Definition of Terms; Definitions of Nutrient Content Claims for the Fat, Fatty Acid, and Cholesterol Content of Food, 58 Fed. Reg. at 2407; see also U.S. DEP'T OF AGRIC., FOOD STANDARDS AND LABELING POLICY BOOK (2005), [http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling\\_Policy\\_Book\\_082005.pdf](http://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf) (permitting natural claims for meat and poultry if the product contains (1) no artificial flavor, color, chemical preservative, or other artificial or synthetic ingredient; (2) is minimally processed; and (3) the label includes a brief statement explaining the meaning of the term natural).

contain genetically modified ingredients, such as corn or soy. This theory provides for almost unlimited litigation, as the Grocery Manufacturers Association estimates that seventy to eighty percent of foods on store shelves contain genetically-modified ingredients.<sup>330</sup> Other common “all natural” claims allege that products contain artificial or synthetic ingredients or use of processing methods that render the foods unnatural. For example, there is a spurt of litigation claiming that products, such as orange juice,<sup>331</sup> do not qualify as natural or pure as a result of their processing.<sup>332</sup> Products that contain high fructose corn syrup also face significant litigation.<sup>333</sup>

The food litigation is driven by plaintiffs’ lawyers, advocacy groups with a regulatory agenda, or both. A relatively small group of law firms have filed most of the cases.<sup>334</sup> The claims are concentrated in California, which is viewed as an ideal state for such suits because of its expansive consumer protection laws and relaxed standing requirements.<sup>335</sup> In addition, filing in California allows for large single-state classes,<sup>336</sup> which helps avoid certification complications, since one in eight Americans is a Californian. Scanning through the litigation reveals some names over and over, indicating that some law firms recycle the same

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<sup>330</sup> See *Position on GMOs*, GROCERY MANUFACTURERS ASS’N, <http://factsaboutgmos.org/disclosure-statement> (last visited May 3, 2015) (noting that food grown using such technology require fewer pesticides and less water, reducing the price of food and the need for chemicals).

<sup>331</sup> See, e.g., *Lynch v. Tropicana Prods., Inc.*, No. 2:11-cv-07382 (DMC)(JAD), 2013 WL 2645050, at \*10–11 (D.N.J. June 12, 2013) (finding FDA rules did not preempt state consumer protection, unjust enrichment, and breach of express warranty claims); *Veal v. Citrus World, Inc.*, No. 2:12-cv-801-IPJ, 2013 WL 120761, at \*4, \*8 (N.D. Ala. Jan. 8, 2013) (finding plaintiff lacked standing to pursue claim where he did not assert that he personally consumed Florida’s Natural orange juice or that he suffered any ill health effects from consumption of the same, but rather alleges only that he purchased it, repeatedly); *Complaint, Phelps v. Coca-Cola Co.*, No. BC547592 (Cal. Super. Ct. June 3, 2014), available at <http://www.perkinscoie.com/images/content/3/3/v2/33153/06-13-2014-phelps-v-coca-cola-complaint.pdf> (asserting claim that “Simply Orange” products are not “pure” and “fresh”).

<sup>332</sup> See *Parker v. J.M. Smucker Co.*, Case No. C 13-0690 SC, 2013 WL 4516156, at \*4 (N.D. Cal. Aug. 23, 2013) (denying motion to dismiss claim alleging labeling of Crisco cooking oils as “all natural” misled consumers due to the chemical processing the oils had undergone).

<sup>333</sup> See, e.g., *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 342 (3d Cir. 2009) (reversing district court dismissal of claim on field and conflict preemption grounds when letter from FDA official advised Snapple that products containing high fructose corn syrup qualified as natural).

<sup>334</sup> See THE NEW LAWSUIT ECOSYSTEM, *supra* note 324, at 96-98 (compiling law firms and representative litigation).

<sup>335</sup> See, e.g., *Kwikset Corp. v. Super. Ct.*, 246 P.3d 877, 901 (Cal. 2011) (holding that merely purchasing a product is sufficient to establish injury in fact for purposes of standing under the state’s Unfair Competition Law).

<sup>336</sup> See Perry Cooper, *False Advertising Suits Over Food Labels Have Peaked, Plaintiffs’ Attorney Panelist Says*, BLOOMBERG L. BUREAU OF NAT’L AFFAIRS CLASS ACTION LITIG. REP. (Apr. 25, 2014).

individuals to serve as representative plaintiffs in class actions brought against different manufacturers for different types of food products.<sup>337</sup> Although the Food, Drug, and Cosmetic Act (FDCA) does not authorize a private right of action, these suits have essentially deputized a cadre of lawyers and groups as the "food police." As some of the settlement terms and claims rates confirm, actual consumer losses do not appear to be a motivating factor.

Judicial treatment of these lawsuits is "inconsistent" at best. As this section will show, courts have dismissed many of these claims, particularly when they involve products the plaintiff did not purchase, representations or labeling that a class representative did not read or hear before making a purchase, representations that would not have deceived any reasonable consumer, labeling that conformed to directly applicable and specific federal regulations, or matters that are actively under consideration by a federal agency. These claims also face the same challenges with respect to class certification as other no-injury claims, such as presenting a viable theory of classwide damages. While courts dismiss some claims, they have allowed others to proceed, often with significantly trimmed claims or class definition.

The overall impression from the quickly developing case law is that judges recognize that many of these lawsuits are empty suit claims in search of an injury. The courts are chipping away at them with the tools available through the constitution, statutes, common law, and procedural law.

#### A. *Standing: Is the Plaintiff Suing for Products He or She Did Not Purchase?*

The first hurdle to bringing a lawsuit is a low one—to show that there is an actual case or controversy, including an injury-in-fact, which satisfies Article III standing. To meet

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<sup>337</sup> See THE NEW LAWSUIT ECOSYSTEM, *supra* note 324, at 91 (citing cases including Skye Astiana and Kimberly S. Sethavanish). Other examples include Robert E. Figy and Mary Swearingen, who are named plaintiffs in at least ten class actions against various food makers filed in the Northern District of California in 2013. See, e.g., Figy v. Lifeway Foods, Inc., No. 13-cv-04828 (N.D. Cal. May 5, 2014); Figy v. Frito-Lay N. Am., Inc., No. 13-3988 (N.D. Cal. Aug. 12, 2014); Figy v. Amy's Kitchen, Inc., No. C 13-03816 (N.D. Cal. Apr. 9, 2014); Swearingen v. Attune Foods, Inc., Case No. C 13-04541 (N.D. Cal. Oct. 1, 2013); Swearingen v. Late July Snacks LLC, No. C-13-4324 (N.D. Cal. Sept. 18, 2013); Swearingen v. Santa Cruz Natural, Inc., No. C 13-04291 (N.D. Cal. Sept. 16, 2013); Swearingen v. ConAgra Foods, Inc., No. 3:13-cv-05322 (N.D. Cal. Nov. 15, 2013); Swearingen v. Amazon Preservation Partners, Inc., Case No. 13-cv-04402 (N.D. Cal. Sept. 23, 2013); Swearingen v. Healthy Beverage, LLC, No. C-13-04385 (N.D. Cal. Sept. 20, 2013); Swearingen v. Pac. Foods of Or., Inc., Case No. 13-cv-04157 (N.D. Cal. Sept. 9, 2013).

standing requirements, a plaintiff must demonstrate (1) an injury-in-fact that is actual or imminent and “concrete and particularized . . . not conjectural or hypothetical[.]” (2) that is “fairly traceable to the [defendant’s] challenged [conduct,]” and (3) is likely to be redressed by a “favorable judicial decision.”<sup>338</sup> Plaintiffs, including those who seek to represent others in a class action, must allege that they have been personally injured. It is not sufficient to allege that “injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.”<sup>339</sup> It is common in food class actions for plaintiffs to purchase one product, but seek to represent a class that purchased a much broader range of products made by the same company that had similar qualities or labels.

Courts are fractured as to whether the named plaintiff must have actually purchased each product that he or she claims was deceptively marketed to establish the requisite injury-in-fact.<sup>340</sup> Some courts have found plaintiffs lack standing to bring claims related to products they did not purchase.<sup>341</sup> Other courts have allowed more expansive standing, permitting named plaintiffs to sue for products that they never bought if the products and their labeling are “substantially similar” to products the plaintiff purchased.<sup>342</sup>

Overall, standing challenges, at best, result in trimming the number of products at issue in a class action. Plaintiffs’ lawyers

<sup>338</sup> *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

<sup>339</sup> *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

<sup>340</sup> *See Miller v. Ghirardelli Chocolate Co.*, 912 F. Supp. 2d 861, 869 (N.D. Cal. 2012) (recognizing split and analyzing cases).

<sup>341</sup> *See, e.g., Garrison v. Whole Foods Market, Inc.*, Case No. 13-cv-05222-VC, 2014 WL 2451290, at \*4–5 (N.D. Cal. June 2, 2014) (finding named plaintiffs had standing to bring claims involving products not purchased so long as those products did not implicate a “significantly different set of concerns” than those bought by the named plaintiffs); *Smedt v. Hain Celestial Group, Inc.*, Case No. 5:12-CV-03029-EJD, 2014 WL 2466881, at \*7 (N.D. Cal. May 30, 2014) (dismissing with prejudice all claims involving unpurchased products because complaint did not allege facts showing that the unpurchased products were “substantially similar” to the purchased products); *Ivie v. Kraft Foods, Inc.*, No. C-12-02554-RMW, 2013 WL 685372, at \*5 (N.D. Cal. Feb. 25, 2013); *Granfield v. NVIDIA Corp.*, No. C 11-05403 JW, 2012 WL 2847575, at \*6 (N.D. Cal. July 11, 2012); *Larsen v. Trader Joe’s Co.*, No. C 11-05188 SI, 2012 WL 5458396, at \*5 (N.D. Cal. June 14, 2012); *Carrea v. Dreyer’s Grand Ice Cream, Inc.*, No. C 10-01044 JSW, 2011 WL 159380, at \*3 (N.D. Cal. Jan. 10, 2011).

<sup>342</sup> *Brazil v. Dole Food Co.*, Case No. 12-CV-01831-LHK, 2013 WL 5312418, at \*6 (N.D. Cal. Sept. 23, 2013); *Anderson v. Jamba Juice Co.*, 888 F. Supp. 2d 1000, 1005-06 (N.D. Cal. 2012); *Brown v. Hain Celestial Grp., Inc.*, 913 F. Supp. 2d 881, 890 (N.D. Cal. 2012); *Astiana v. Dreyer’s Grand Ice Cream, Inc.*, Nos. C-11-2910 EMC, C-11-3164 EMC, 2012 WL 2990766, at \*11 (N.D. Cal. July 20, 2012); *Bruno v. Quten Research Inst., LLC*, 280 F.R.D. 524, 530-31 (C.D. Cal. 2011).

may also be able to cure an adverse ruling by adding class representatives who have purchased each variety of the product.<sup>343</sup>

*B. Failure to State a Claim: Could the Alleged Misrepresentation Have Plausibly Deceived Consumers?*

Courts, at the motion to dismiss stage, occasionally toss misrepresentation claims that do not pass the "straight face" test. These are claims where the court finds, as a matter of law, that no reasonable consumer would be misled by the allegedly deceptive representation or that allegations that the plaintiff was misled are implausible. These include lawsuits alleging that consumers purchased "Sugar in the Raw" with the belief that the product is completely unprocessed and unrefined<sup>344</sup> or that soy milk comes from a cow.<sup>345</sup> Courts have also dismissed claims asserting that consumers believed that Strawberry and Raspberry Newton cookies advertised as "made with real fruit" were made with solid fruit, rather than puree,<sup>346</sup> and that "Cinnamon Blueberry" cereal contained strawberries due to picture of cereal with fresh strawberries on box.<sup>347</sup> Then, there are the classics. More than one lawsuit has claimed, without success, that consumers believed Froot Loops contained real fruit,<sup>348</sup> or that "Cap'n Crunch's Crunch Berries" had "some nutritional value derived from fruit."<sup>349</sup>

Courts have also dismissed cases where the ingredients listed or other representations on the packaging should have resolved any ambiguity for consumers regarding terms used by

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<sup>343</sup> Standing issues also arise when a named plaintiff has experienced an injury in fact, but files suit on behalf of a broad class that may include uninjured plaintiffs. *See supra* note 200. Courts can address such situations not only through Article III standing, but by the lack of adequacy, typicality, or commonality under class certification standards.

<sup>344</sup> *Rooney v. Cumberland Packing Corp.*, No. 12-CV-0033-H (DHB), 2012 WL 1512106, at \*4 (S.D. Cal. Apr. 16, 2012).

<sup>345</sup> *Ang v. Whitewave Foods Co.*, Case No. 13-cv-1953, 2013 WL 6492353, at \*4 (N.D. Cal. Dec. 10, 2013); *Gitson v. Trader Joe's Co.*, Case No. 13-cv-01333-WHO, 2013 WL 5513711, at \*6-7 (N.D. Cal. Oct. 4, 2013).

<sup>346</sup> *Manchouck v. Mondeléz Int'l*, No. C 13-02148 WHA, 2013 WL 5400285, at \*3 (N.D. Cal. Sept. 26, 2013).

<sup>347</sup> *Shaker v. Nature's Path Foods, Inc.*, No. EDCV 13-1138-GW(OPx), 2013 WL 6729802, at \*4-5 (C.D. Cal. Dec. 16, 2013); *see also id.* at \*3 (finding that no reasonable consumer would believe that the manufacturer's use of the word "Optimum" in product name would lead consumers to believe that the cereal is good for "growth, reproduction or other vital processes").

<sup>348</sup> *Videtto v. Kellogg USA*, No. 2:08-cv-01324-MCE-DAD, 2009 WL 1439086, at \*2 (E.D. Cal. May 20, 2009); *McKinnis v. Kellogg USA*, No. CV 07-2611 ABC (RCx), 2007 WL 4766060, at \*4 (C.D. Cal., Sept. 19, 2007).

<sup>349</sup> *Werbel v. Pepsico, Inc.*, No. C 09-04456 SBA, 2010 WL 2673860, at \*3 (N.D. Cal. July 2, 2010); *see also Sugawara v. Pepsico, Inc.*, No. 2:08-cv-01335-MCE-JFM, 2009 WL 1439115, at \*3-4 (E.D. Cal. May 21, 2009).

manufacturers.<sup>350</sup> In one such case, involving a claim that pasta labeled as “All Natural” contained synthetic ingredients, a court found in granting a motion to dismiss that consumers certainly must have understood that the product was not “springing fully-formed from Ravioli trees and Tortellini bushes.”<sup>351</sup> Similarly, a court found it “utterly implausible” that reasonable consumers would take an “undisputedly true statement” about fat content in pretzels to “draw conclusions about other totally unrelated nutritional characteristics like sodium content or conclude the [p]roducts ‘made only positive contributions to a diet.’”<sup>352</sup> Clearly, it should come as no surprise to consumers that pretzels have salt!

Courts have also dismissed claims where the named plaintiff fails to allege in the complaint that he read the label at issue before purchasing the product.<sup>353</sup> Without such an allegation, the plaintiff cannot establish that the defendant’s alleged conduct caused a loss. Some courts have considered such an assertion required to fulfill standing, rather than show causation.<sup>354</sup>

In addition, courts have occasionally dismissed claims when the complaint fails to show the named plaintiffs suffered damage as a result of the alleged violation or deception because they received what they paid for, i.e. the “benefit of the bargain.”<sup>355</sup> They

<sup>350</sup> See, e.g., *Kelly v. Cape Cod Potato Chip Co.*, No. 14-00119-CV-W-DW, 2015 WL 363147, at \*6, (W.D. Mo. Jan. 27, 2015) (“Plaintiff’s assertion that she was deceived by Defendants’ [all natural] labeling is contradicted by the full disclosure of the challenged ingredients by Defendants.”); *Hairston v. South Beach Beverage Co.*, No. CV 12-1429-JFW (DTBx), 2012 WL 1893818, at \*4-5 (C.D. Cal. May 18, 2012) (holding that Lifewater-maker’s use of “all natural” would not mislead a reasonable consumer because it was not used “in a vacuum” but followed by statements regarding inclusion of vitamins and “to the extent there is any ambiguity, it is clarified by the detailed information contained in the ingredient list, which explains the exact contents of Lifewater”); see also *Chin v. Gen. Mills, Inc.*, Civil No. 12-2150 (MJD/TNL), 2013 WL 2420455, at \*9 (D. Minn. June 3, 2013); but see *Wilson v. Frito-Lay N. Am., Inc.*, No. 12-1586 SC, 2013 WL 1320468, at \*12 (N.D. Cal. Apr. 1, 2013) (ingredient list cannot contradict “natural” label).

<sup>351</sup> *Pelayo v. Nestle USA, Inc.*, 989 F. Supp. 2d 973, 978 (C.D. Cal. 2013).

<sup>352</sup> *Figy v. Frito-Lay N. Am., Inc.*, Case No. 13-3988 SC, 2014 WL 3953755, at \*10 (N.D. Cal. Aug. 12, 2014).

<sup>353</sup> See, e.g., *Maple v. Costco Wholesale Corp.*, No. CV-12-5166-RMP, 2013 WL 5885389, at \*5 (E.D. Wash. Nov. 1, 2013) (dismissing second amended complaint, finding plaintiff could not establish causation where he had not sufficiently claimed that he actually read the allegedly deceptive claims that the drink contained “natural caffeine” or that it was a “natural tonic”).

<sup>354</sup> See, e.g., *Figy v. Amy’s Kitchen, Inc.*, No. CV 13-03816 SI, 2013 WL 6169503, at \*4 (N.D. Cal. Nov. 25, 2013) (finding no standing where plaintiff failed to allege that he actually read the ingredients before purchasing the products); *Johns v. Bayer Corp.*, No. 09CV1935 DMS (JMA), 2010 WL 476688, at \*5 (S.D. Cal. Feb. 9, 2010) (Plaintiff “cannot expand the scope of h[er] claims to include a product [s]he did not purchase or advertisements relating to a product that [s]he did not rely upon”).

<sup>355</sup> See, e.g., *In re Cheerios Mktg. & Sales Practices Litig.*, Civil Action No. 09-cv-2413, 2012 WL 3952069, at \*2 (D.N.J. Sept. 10, 2012) (plaintiffs failed to adequately allege they were entitled to a refund of the full purchase price, had not received the benefit of the bargain, or were entitled to disgorgement of profits due to representation that Cheerios reduced cholesterol in violation of FDA regulations); *Mason v. Coca-Cola*

have also dismissed claims under Federal Rule of Civil Procedure 9(b), which requires pleading causes of action sounding fraud with particularity, when it is uncertain from the complaint what about the product the plaintiff found misleading.<sup>356</sup>

In many instances, however, courts that find plaintiffs fail to state a claim allow them, in some cases multiple times, to amend their complaints to correct an identified deficiency.<sup>357</sup>

*C. Preemption and Regulatory Compliance: Can a Label Consistent With Government Standards Have Deceived Consumers?*

Preemption and regulatory compliance, often invoked as defenses in food litigation,<sup>358</sup> are relevant to no-injury litigation because these principles arise in situations in which the federal agency charged with protecting the public has permitted, or explicitly authorized, a product's labeling. Where regulations provide that a product can or must be advertised in a particular way, lawsuits that say consumers were misled by such representations may strain credibility.

As noted earlier, most courts have found "all natural" claims are not preempted because the FDA has not defined the term.<sup>359</sup> Courts have also found that claims alleging that a product's labeling violates a federal regulation or alleges a theory that is consistent with federal requirements are not preempted.<sup>360</sup> Where a product's label complies with specific

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Co., 774 F. Supp. 2d 699, 705 (D.N.J. 2011) (plaintiffs failed to adequately plead facts showing how they experienced an out-of-pocket loss when they purchased Diet Coke Plus, which contained added vitamins and minerals as advertised, under the belief it had greater nutritional value).

<sup>356</sup> See, e.g., *Mason*, 774 F. Supp. 2d at 703.

<sup>357</sup> See, e.g., *Kane v. Chobani, Inc.*, 973 F. Supp. 2d 1120, 1125 (N.D. Cal. 2014) (dismissing claim only after plaintiffs failed to state a claim after amending complaint four times).

<sup>358</sup> See Federal Food, Drug, & Cosmetic Act, 21 U.S.C. § 343-1(a) (2012) (preempting states from regulating certain elements of food labeling).

<sup>359</sup> See, e.g., *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 341-42 (3d Cir. 2009) (finding claim asserting iced tea is mislabeled as "all natural" when it contains high fructose corn syrup was not preempted); *Astiana v. Ben & Jerry's Homemade, Inc.*, Nos. C 10-4387 PJH, C 10-4937 PJH, 2011 WL 2111796, at \*10 (N.D. Cal. May 26, 2011) (finding no preemption of "all natural" claims made with respect to ice cream).

<sup>360</sup> See, e.g., *Lilly v. Conagra Foods, Inc.*, 743 F.3d 662, 665-66 (9th Cir. 2014) (reversing dismissal on preemption grounds where claim regarding labeling of sunflower seed products was consistent with federal regulations requiring disclosure of entire sodium content); *Smajlaj v. Campbell Soup Co.*, 782 F. Supp. 2d 84, 93 (D.N.J. 2011) (finding claim asserting the mislabeling of low sodium soup was not preempted because it mirrors federal requirements); *Ackerman v. Coca-Cola Co.*, No. CV-09-0395 (JG)(RML), 2010 WL 2925955, at \*13 (E.D.N.Y. July 21, 2010) (finding claim asserting statements regarding the healthfulness of vitamin water to be misleading was not preempted because labeling requirements were identical to federal law).



federal regulations, however, courts have found claims alleging that the label is deceptive preempted by federal law.<sup>361</sup> Recent examples include claims challenging as deceptive small variations in transfat content,<sup>362</sup> calculation of alcohol content,<sup>363</sup> and calculation of calories<sup>364</sup> that the FDA views as acceptable. Courts have also found that state claims challenging FDA regulations governing what can be labeled “milk”<sup>365</sup> and the use of fruit names to characterize beverage flavors<sup>366</sup> are preempted.

Recently, the U.S. Supreme Court ruled that a business may pursue a Lanham Act claim against a competitor challenging a food or beverage label that complies with FDCA regulations.<sup>367</sup> In that case, Pom Wonderful, a maker and seller of pomegranate juice products, alleged that Coca-Cola’s name, label, marketing, and advertising of its Minute Maid pomegranate-blueberry juice blend was false and misleading. Pom claimed that Coca-Cola deceptively marketed the product because the labeling prominently displayed the words “pomegranate blueberry” when the juice blend was actually 99.4% apple and grape juices, and only 0.3% pomegranate juice and 0.2% blueberry juice.<sup>368</sup> Pom sued under Section 43 of the Lanham Act, which permits a competitor to sue another for unfair competition arising from false or misleading product descriptions.<sup>369</sup> The Ninth Circuit affirmed the district court’s dismissal of the claim, finding that allowing such a lawsuit, despite extensive FDA regulation of juice labeling, “would risk undercutting the FDA’s expert judgments and authority.”<sup>370</sup>

Reversing the Ninth Circuit, the Supreme Court unanimously held that such claims are not precluded.<sup>371</sup> In reaching its decision, the Court emphasized, “this is not a pre-

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<sup>361</sup> See, e.g., *Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 427 (7th Cir. 2011) (finding that claim based on representations on the packaging of chewy bars concerning dietary fiber are preempted).

<sup>362</sup> See *Young v. Johnson & Johnson*, 525 F. App’x 179, 183 (3d Cir. 2013); *Carrea v. Dreyer’s Grand Ice Cream, Inc.*, 475 F. App’x 113, 115 (9th Cir. 2012).

<sup>363</sup> See Memorandum Opinion & Order at 4, *In re Anheuser-Busch Beer Labeling Mktg. & Sales Practices Litig.*, Case No. 1:13 MD 02448 (N.D. Ohio June 2, 2014), available at [http://www.ohnd.uscourts.gov/assets/Clerks\\_Office\\_and\\_Court\\_Records/MDL/2448/MOO-25.pdf](http://www.ohnd.uscourts.gov/assets/Clerks_Office_and_Court_Records/MDL/2448/MOO-25.pdf).

<sup>364</sup> See *Burke v. Weight Watchers Int’l, Inc.*, 983 F. Supp. 2d 478, 483 (D.N.J. 2013).

<sup>365</sup> See *Ang v. Whitewave Foods Co.*, Case No. 13-cv-1953, 2013 WL 6492353, at \*4 (N.D. Cal. Dec. 10, 2013).

<sup>366</sup> See *Hairston v. South Beach Beverage Co.*, No. CV 12-1429-JFW (DTBx), 2012 WL 1893818, at \*3 (C.D. Cal. May 18, 2012).

<sup>367</sup> *Pom Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2233 (2014).

<sup>368</sup> *Id.* at 2235.

<sup>369</sup> See 15 U.S.C. § 1125 (2012).

<sup>370</sup> *Pom Wonderful LLC v. Coca-Cola Co.*, 679 F.3d 1170, 1177 (9th Cir. 2012), *rev’d*, 134 S. Ct. 2228 (2014).

<sup>371</sup> *Pom Wonderful*, 134 S. Ct. at 2233.

emption case."<sup>372</sup> Rather than involving a question of whether a federal law preempts state law claims, the case turned on whether regulations promulgated pursuant to a federal law, the FDCA, precludes private claims alleging deceptive practices under another federal statute, the Lanham Act.<sup>373</sup> The Court recognized that although the Nutritional Labeling and Education Act preempts certain *state* laws regarding food and beverage labeling, Congress did not preclude suits arising under other *federal* laws.<sup>374</sup> The Court concluded that there was no "irreconcilable conflict" between the two federal laws, finding that "[a]lthough both statutes touch on food and beverage labeling, the Lanham Act protects commercial interests against unfair competition, while the FDCA protects public health and safety."<sup>375</sup> The Court took care to note that the variation permitted by claims under the Lanham Act with respect to fair competition is "quite different from the disuniformity that would arise from the multitude of state laws, state regulations, state administrative agency rulings, and state-court decisions that are partially forbidden by the FDCA's pre-emption provision."<sup>376</sup>

Some lawyers view the high court's rejection of a broad regulatory compliance defense in *Pom Wonderful* as supportive of private consumer class actions against food makers.<sup>377</sup> Plaintiffs' lawyers are likely to frequently cite *Pom Wonderful* when opposing motions to dismiss on preemption or regulatory compliance grounds. Other observers anticipate that, although the decision may inspire more Lanham Act lawsuits between competitors, *Pom Wonderful's* narrow holding is unlikely to have a major impact on the surge of food class action litigation.<sup>378</sup>

<sup>372</sup> *Id.* at 2236.

<sup>373</sup> *Id.* at 2237.

<sup>374</sup> *Id.* at 2238.

<sup>375</sup> *Id.* at 2237-38.

<sup>376</sup> *Id.* at 2239-40.

<sup>377</sup> See Emily Kokoll, *Attys React to High Court's Pom v. Coke Lanham Act Ruling*, LAW360 (June 12, 2014, 6:37 PM), <http://www.law360.com/articles/547491/attys-react-to-high-court-s-pom-v-coke-lanham-act-ruling> (quoting reaction of several attorneys to ruling). Cf. Adam M. Reich et al., *POM Wonderful LLC v. Coca Cola Company: Have the Tides Turned in the Legal Food Fight?*, PAUL HASTINGS (June 1, 2014), <http://www.paulhastings.com/publications-items/details/?id=3a7fe169-2334-6428-811c-ff00004cbded> (commenting that *POM Wonderful* "may increase consumer litigation as class proponents seek to pile on the litigation efforts of the corporate competitors" or could shift the litigation from consumers versus manufacturer to competitor versus competitor).

<sup>378</sup> See Glenn G. Lammi, *Quick Take: Some Possible Impacts of SCOTUS's POM Wonderful Decision on State-Law Food Labeling Class Actions*, FORBES (June 13, 2014, 9:47 AM), <http://www.forbes.com/sites/wlf/2014/06/13/quick-take-some-possible-impacts-of-scotuss-pom-wonderful-decision-on-state-law-food-labeling-class-actions/> (noting that language in the opinion suggests that it will not impact arguments that the FDCA preempts state-law class actions challenging food labels).

*D. Primary Jurisdiction: Can a Court Find an Aspect of a Label Deceptive When a Government Agency is Better Equipped to Make Such a Determination?*

The primary jurisdiction doctrine provides courts with another means to dismiss claims where the labeling deficiency asserted is often technical, unsettled, or policy-based, and does not involve a representation that is likely to have injured consumers.<sup>379</sup> Some courts have applied the doctrine to stay or dismiss food labeling and advertising claims, finding that the FDA is best suited to determine if labeling terms are acceptable or misleading.<sup>380</sup>

The primary jurisdiction doctrine permits courts to defer to agencies to decide issues that are either within that agency's specialized sphere of knowledge or where there is a need for a uniform answer from a single agency rather than a multitude of answers from various courts.<sup>381</sup> A court can apply the doctrine to stay proceedings or dismiss a complaint as it awaits guidance from the agency through a formal regulation or informal guidance.<sup>382</sup> Courts have applied the primary jurisdiction doctrine to stay or dismiss claims when an agency is actively considering the issue raised in the litigation. For example, courts have applied the doctrine to preclude deceptive marketing claims challenging a manufacturer's computation of the serving size for mints<sup>383</sup> or whether yogurt qualifies as "Greek."<sup>384</sup>

The impact of the doctrine is illustrated by litigation regarding use of the term "evaporated cane juice," a term that plaintiffs have asserted in at least fifty class actions hides sugar content from consumers.<sup>385</sup> After the FDA reopened the

<sup>379</sup> Unlike federal preemption, the primary jurisdiction doctrine does not require a conflict between a state law claim and a particular regulation or evidence that Congress sought to displace state regulation. *See id.*

<sup>380</sup> *See generally* Cary Silverman, *I'll See You in the Agency! 'Primary Jurisdiction' Gains Ground As a Defense for Regulated Industries*, 31 L.J.N PROD. LIAB. LAW & STRATEGY, May 2013, at 1, 3-4, 6.

<sup>381</sup> *See* United States v. W. Pac. R.R. Co., 352 U.S. 59, 64 (1956).

<sup>382</sup> *See id.* at 63-64; Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th Cir. 2008).

<sup>383</sup> *See* Ivie v. Kraft Foods Global, Inc., No. C-12-02554-RMW, 2013 WL 685372, at \*7 (N.D. Cal. Feb. 25, 2013).

<sup>384</sup> *See* Taradejna v. Gen. Mills Inc., 909 F. Supp. 2d 1128, 1134-35 (D. Minn. 2012).

<sup>385</sup> *See* Glenn G. Lammi, *FDA Action Should Take the Juice Out of Some Food Labeling Class Actions*, FORBES (Mar. 4, 2014), <http://www.forbes.com/sites/wlf/2014/03/04/fda-action-should-take-the-juice-out-of-some-food-labeling-class-actions/>. They do so on the basis of an FDA guidance document entitled "Draft Guidance for Industry: Ingredients Declared as Evaporated Cane Juice," drafted in 2009 but never finalized, that informed the industry that "dried cane syrup," not evaporated cane juice, is the common name under federal rules for "the solid or dried form of sugar cane syrup."

comment period on a long pending rulemaking on March 4, 2014,<sup>386</sup> several courts stayed such claims<sup>387</sup> or dismissed them without prejudice.<sup>388</sup> These courts recognized that "[d]eferring to the FDA for resolution of these issues will enhance decision-making and efficiency by allowing the court to take advantage of administrative expertise."<sup>389</sup>

By way of contrast, the primary jurisdiction doctrine is not likely to stem the tide of "all natural" claims. In 2013, two federal judges entered six-month stays and another judge administratively terminated claims alleging that manufacturers could not label products as natural when they contain genetically modified ingredients.<sup>390</sup> The FDA declined invitations from the judges to address the issue.<sup>391</sup> In a January 2014 letter, an agency official explained that developing such a definition would require a public notice and comment process and require input from other federal agencies such as the U.S. Department

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Draft Guidance for Industry: Ingredients Declared as Evaporated Cane Juice, 74 Fed. Reg. 51,610 (Oct. 7, 2009).

<sup>386</sup> Draft Guidance for Industry on Ingredients Declared as Evaporated Cane Juice; Reopening of Comment Period; Request for Comments, Data and Information, 79 Fed. Reg. 12,507 (Mar. 5, 2014). Through its official notice, the FDA acknowledged that it had not reached any final decision on the usual name for evaporated cane juice but noted that "[a]fter reviewing the comments received, [it] intend[s] to revise draft guidance, if appropriate, and issue it in final form." *id.* at 12,508.

<sup>387</sup> See, e.g., *Figy v. Amy's Kitchen, Inc.*, No. C 13-03816-SI, 2014 WL 3362178 (N.D. Cal. July 7, 2014); *Gitson v. Clover Stornetta Farms*, No. C-13-01517(EDL), 2014 WL 2638203, at \*8-9 (N.D. Cal. June 9, 2014); *Swearingen v. Attune Foods, Inc.*, Case No. C13-4541 SBA, 2014 WL 2094016 (N.D. Cal. May 15, 2014), *vacated*, 2015 WL 370167 (N.D. Cal. Jan. 28, 2015); *Figy v. Lifeway Foods, Inc.*, Case No. 13-cv-04828-TEH, 2014 WL 1779251, at \*5 (N.D. Cal. May 5, 2014); *Swearingen v. Santa Cruz Natural Inc.*, No. C 13-04291 SI, 2014 WL 1339775, at \*3 (N.D. Cal. Apr. 2, 2014), *judgment set aside*, 2014 WL 2967585 (N.D. Cal. July 1, 2014); *Reese v. Odwalla, Inc.*, 30 F. Supp. 3d 935, 937 (N.D. Cal. 2014).

<sup>388</sup> See, e.g., *Saubers v. Kashi Co.*, Case No. 13CV899 JLS (BLM), 2014 WL 3908595 (S.D. Cal. Aug. 11, 2014).

<sup>389</sup> *Figy v. Amy's Kitchen, Inc.*, No. C-13-03816-SI, 2014 WL 1379915, at \*3 (N.D. Cal. Apr. 9, 2014), *judgment set aside on other grounds*, 2014 WL 3362178 (N.D. Cal. July 7, 2014). Some courts, however, have denied motions to dismiss or stay similar claims on primary jurisdiction grounds. See, e.g., *Pratt v. Whole Foods Mkt. Cal., Inc.*, Case No. 5:12-CV-05652-EJD, 2014 WL 1324288, at \*7 (N.D. Cal. Mar. 31, 2014); *Leonhart v. Nature's Path Foods, Inc.*, Case No. 5:13-CV-0492-EJD, 2014 WL 1338161, at \*6-7 (N.D. Cal. Mar. 31, 2014).

<sup>390</sup> See, e.g., *In re Gen. Mills, Inc. Kix Cereal Litig.*, Civ. Action No. 12-249(KM), 2013 WL 5943972, at \*1 (D.N.J. Nov. 1, 2013) (administratively terminating case); *Barnes v. Campbell Soup Co.*, No. C 12-05185 JSW, 2013 WL 5530017, at \*8-9 (N.D. Cal. July 25, 2013) (staying litigation for six-months); *Cox v. Gruma Corp.*, Case No. 12-CV-6502 YGR, 2013 WL 3828800, at \*2 (N.D. Cal. July 11, 2013) (staying litigation for six-months); see also *Astiana v. Hain Celestial Grp., Inc.*, 905 F. Supp. 2d 1013, 1016-17 (N.D. Cal. 2012) (declining to make an independent determination on whether manufacturer's use of "natural" on cosmetic labels was false or misleading in absence of FDA rules, regulations, or informal policy guidance on the issue).

<sup>391</sup> Letter from Leslie Kux, Assistant Comm'r for Policy, U.S. Food & Drug Admin., to Hon. Yvonne Gonzalez Rogers, Hon. Jeffrey S. White, and Hon. Kevin McNulty (Jan. 6, 2014).

of Agriculture.<sup>392</sup> The official also noted that if federal agencies were to define the term “natural,” they would need to examine:

relevant science; consumer preferences, perceptions, and beliefs; the vast array of modern food production technologies in addition to genetic engineering (e.g., use of different types of fertilizer, growth promotion drugs, animal husbandry methods); the myriad food processing methods (e.g., nanotechnology, thermal technologies, pasteurization, irradiation); and any strictures flowing from the First Amendment.<sup>393</sup>

The official concluded that, due to limited resources and higher priorities, the FDA could not undertake such an effort.<sup>394</sup>

The gap left by the FDA’s unwillingness to define what products qualify as natural virtually eliminates the ability to successfully assert “primary jurisdiction” as a defense in such litigation. With primary jurisdiction lost, and courts unlikely to find preemption, plaintiffs’ lawyers will continue to bring class actions on behalf of all consumers who purchased “natural” products, including those who were not misled, bought the product for reasons unrelated to such labeling, and consumed the food and drinks for which they paid without incident. Judges and jurors in individual cases will be left to decide an issue that the FDA found too complex to address.

*E. Class Certification: Is there a Common Injury or Damages?*

As with other no-injury claims, denying class certification is another means by which courts have effectively disposed of many lawsuits against food makers brought on behalf of many people who were not misled when purchasing a product.

Demonstrating that common questions of law or fact predominate, as required by Rule 23(b)(3), is a particular challenge where consumers may have purchased a product for a myriad of reasons other than its labeling or a representation in a particular advertisement. This is one basis upon which courts have rejected certification of “all natural” classes.<sup>395</sup> As the FDA’s

<sup>392</sup> *See id.*

<sup>393</sup> *Id.* at 2.

<sup>394</sup> *Id.* The FDA issued an informal policy statement in 1992 taking the position that genetically modified foods do not “differ from other foods in any meaningful or uniform way, or that, as a class, foods developed by the new techniques present any different or greater safety concern than foods developed by traditional plant breeding.” Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984, 22,991 (May 29, 1992).

<sup>395</sup> *See, e.g.,* Jones v. ConAgra Foods, Inc., No. C 12-01633 CRB, 2014 WL 2702726, at \*16-18 (N.D. Cal. June 13, 2014); Caldera v. J.M. Smucker Co., No. CV 12-4936-

decision not to define the phrase shows, the determination is complex and is as much a matter of science, technology, and public policy as a matter of law. Given that the agency charged with regulating food labeling cannot offer a reasoned definition of natural, attorneys may be hard pressed to show that consumers had a common understanding of the term. As a federal district court in New York found in denying class certification of a claim that pre-mixed "SkinnyGirl Margarita" was not "all natural" because it contained the preservative sodium benzoate and a tequila byproduct, the typicality requirement "prevent[s] a false prophet from bearing the standard for an entire class of claims."<sup>396</sup>

Certification motions have also failed when the proposed class includes consumers nationwide or in multiple states. Defense lawyers argue, and most courts have agreed, that significant differences in the various states' consumer fraud and warranty laws preclude nationwide class certification.<sup>397</sup> Courts have permitted attorneys to avoid this complication by certifying single-state cases, often under California law.<sup>398</sup> In addition, several courts have denied certification on the ground that a proposed class is not ascertainable because of the inability to identify members who purchased a food product due to allegedly misleading labeling.<sup>399</sup>

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GHK (VBKx), 2014 WL 1477400, at \*4 (C.D. Cal. Apr. 15, 2014); *Rapcinsky v. Skinnygirl Cocktails, L.L.C.*, No. 11 Civ. 6546(JPO), 2013 WL 93636 (S.D.N.Y. Jan. 9, 2013).

<sup>396</sup> *Rapcinsky*, 2013 WL 93636, at \*5.

<sup>397</sup> See *Thurston v. Bear Naked, Inc.*, No. 3:11-CV-02890-H (BGS), 2013 WL 5664985, at \*12 (S.D. Cal. July 30, 2013) (denying nationwide class certification due to material differences between state consumer protection laws); *Red v. Kraft Foods, Inc.*, No. CV 10-1028-GW(ARGx), 2011 WL 4599833, at \*6 (C.D. Cal. Sept. 29, 2011) (denying class certification in part because Plaintiffs attempted to apply California law to the claims of out-of-state class members).

<sup>398</sup> See, e.g., *Werdebaugh v. Blue Diamond Growers*, Case No. 12-CV-2724-LHK, 2014 WL 2191901, at \*20-21 (N.D. Cal. May 23, 2014) (certifying a class of California consumers, but not nationwide, in a claim alleging false labeling of almond milk products as containing evaporated cane juice and being "all natural"); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 509-10 (S.D. Cal. 2013) (certifying a class of California consumers in claim alleging false labeling of "all natural" products); *In re Ferrero Litig.*, 278 F.R.D. 552, 561 (S.D. Cal. 2011) (certifying a class of California consumers in a claim alleging misleading advertising related to the healthfulness of Nutella spread).

<sup>399</sup> See, e.g., *In re Pom Wonderful LLC Mktg. & Sales Practices Litig.*, No. ML 10-02199 DPP (RZx), 2014 WL 1225184, at \*6 (C.D. Cal. Mar. 25, 2014) (denying certification in part because there was no way to reliably determine who purchased Defendant's beverages or when they did so); *Sethavanish v. ZonePerfect Nutrition Co.*, Case No. 12-2907-SC, 2014 WL 580696, at \*6 (N.D. Cal. Feb. 13, 2014) (finding plaintiffs presented no administratively feasible method for weeding out inaccurate or fraudulent claims); see also *Karhu v. Vital Pharm., Inc.*, No. 13-60768-CIV, 2014 WL 815253 (S.D. Fla. Mar. 3, 2014) (noting that the plaintiff "failed to propose a realistic method of identifying" those who purchased a dietary supplement).

Certification of food class actions where an actual injury is dubious also faces challenges due to the need to show classwide damages that stem from the defendants' actions that created the liability.<sup>400</sup> Similar to economic loss claims involving automobiles, pharmaceuticals, and other products, plaintiffs have presented damages models such as a (1) full-refund model, (2) price-premium model, and (3) regression model.<sup>401</sup> Courts have found that a full refund is an inappropriate measure of damages since at least some class members, if not all, received some benefit from consuming the food.<sup>402</sup> The price-premium model, which relies on expert testimony to show the "true value" of an accurately labeled product would be lower than the purchase price, often fails in food and other class actions because of the difficulty of linking a price difference to the allegedly misleading label, as opposed to other reasons why comparable products may have different prices.<sup>403</sup> Some courts have accepted regression models, which estimate a manufacturer's gains from an alleged misrepresentation by examining sales of a product before and after inclusion of the disputed term and attempt to control for other variables that could otherwise explain changes in the products sales.<sup>404</sup> A plaintiff's abject failure to explain how consumers suffered a loss has led courts to decertify classes and grant summary judgment.<sup>405</sup>

Despite these and other challenges, some courts have certified food class actions in which many consumers likely did not

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<sup>400</sup> See, e.g., *Astiana v. Ben & Jerry's Homemade, Inc.*, No. C 10-4387 PJH, 2014 WL 60097, at \*12-13 (N.D. Cal. Jan. 7, 2014) (rejecting class certification in a case challenging "all natural" ice-cream labels based in part on insufficient proof of damages).

<sup>401</sup> See *Brazil v. Dole Packaged Foods, LLC*, No 12-CV-01831, 2014 WL 2466559, at \*15 (N.D. Cal. May 30, 2014).

<sup>402</sup> See, e.g., *Caldera v. J.M. Smucker Co.*, No. CV 12-4936-GHK (VBKx), 2014 WL 1477400, at \*4 (C.D. Cal. Apr. 15, 2014); *In re POM Wonderful LLC Mktg. & Sales Practices Litig.*, No. ML 10-02199 DDP (RZx), 2014 WL 1225184, at \*3 (C.D. Cal. Mar. 25, 2014).

<sup>403</sup> See, e.g., *Dole Packaged Foods*, 2014 WL 2466559, at \*16 (finding that a price difference can be explained by factors other than the alleged label misrepresentations); *Lanovaz v. Twinings N. Am., Inc.*, No. C-12-2646-RMW, 2014 WL 1652338, at \*6 (N.D. Cal. Apr. 24, 2014) (denying certification because plaintiff did not factor in reasons other than the promised antioxidant health benefits in the difference between the price of teas); *Caldera*, 2014 WL 1477400, at \*4 (finding that "the true value of the products to consumers likely varies depending on the individual consumer's motivation for purchasing the products at issue"); see also *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 59 (Ill. 2005) (Karmeier, J., joined by Fitzgerald, J., concurring) (finding class action alleging consumers were misled by marketing of cigarettes as "light" failed because plaintiffs sustained no actual damages when there was no price difference between light and other cigarettes).

<sup>404</sup> See *Dole Packaged Foods*, 2014 WL 2466559, at \*17.

<sup>405</sup> See *Ries v. Arizona Beverages USA LLC*, No. 10-01139 RS, 2013 WL 1287416, at \*8 (N.D. Cal. Mar. 28, 2013) (granting summary judgment and decertifying case where plaintiffs had not produced a "scintilla of evidence" after discovery from which a fact finder could properly measure restitution in a claim alleging that iced tea containing high fructose corn syrup and citric acid did not qualify as natural).

experience an injury from the contested labeling.<sup>406</sup> For example, the Southern District of California certified a class of California consumers that claimed that Ferrero misleadingly promoted its Nutella spread as part of a healthy and nutritious breakfast,<sup>407</sup> even though consumers were purchasing a hazelnut *chocolate* spread, a food universally known as a sweet dessert item.

#### F. Will Recent Settlements Feed the Litigation?

When cases survive motions to dismiss, companies have chosen to settle them rather than proceed to trial. Unlike the Whirlpool class action, it does not appear that any of the food labeling claims have resulted in a judgment. Several such cases have recently resulted in multi-million dollar settlements.<sup>408</sup> These settlements are all but certain to spur continued litigation.

The claims underlying the settlements raise questions as to whether consumers were actually harmed by the allegedly deceptive conduct. For example, as a result of an advertisement of the chocolate hazelnut spread Nutella as part of a healthy breakfast, consumers were eligible to receive \$4 for each jar

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<sup>406</sup> See, e.g., *Dole Packaged Foods*, 2014 WL 2466559, at \*20 (certifying a class alleging misleading advertising on various fruit products displaying the term "all-natural"); *Werdebaugh v. Blue Diamond Growers*, Case No. 12-CV-2724-LHK, 2014 WL 2191901, at \*20–21 (N.D. Cal. May 23, 2014) (certifying California class in claim alleging false labeling of almond milk products as containing evaporated cane juice and being "all natural"); *Astiana v. Kashi Co.*, 291 F.R.D. 493, 509-10 (S.D. Cal. 2013) (certifying a class of California consumers in claim alleging false labeling of "all natural" food products).

<sup>407</sup> *In re Ferrero Litig.*, 278 F.R.D. 552, 556 (S.D. Cal. 2011). The U.S. District Court for the District of New Jersey later certified a similar nationwide class for settlement purposes. Order Granting Preliminary Approval of Settlement, Preliminarily Certifying Settlement Class & Approving Class Notice at 2-3, *In re Nutella Mktg. & Sales Practices Litig.*, No. 11-1086(FLW)(DEA) (D.N.J. Feb. 3, 2012).

<sup>408</sup> See, e.g., Order Granting Preliminary Approval of Class Action Settlement, *Larsen v. Trader Joe's Co.*, No. 3:11-cv-05188-WHO (N.D. Cal. Feb. 6, 2014) (\$3.4 million settlement in lawsuit accusing Trader Joe's of falsely advertising products such as cookies, cinnamon rolls, buttermilk biscuits and apple juice as "all natural"); *Dennis v. Kellogg Co.* No. 09-CV-1786-L (WMC), 2013 WL 6055326 (S.D. Cal. Nov. 14, 2013) (\$4 million settlement in lawsuit claiming misleading advertising about the health benefits of cereal for children); Order Re Motion for Preliminary Approval of Class Action Settlement, *Pappas v. Naked Juice Co.*, No. LA CV11-08276 JAK (PLAx) (C.D. Cal., Aug. 7, 2013) (\$9 million settlement in lawsuit claiming that Naked Juice Co. mislabeled juice products as "all natural"); Order Granting Motion for Final Approval of Settlement, *Johnson v. Gen. Mills*, No. SACV 10-00061-CJC(ANx), (C.D. Cal. June 17, 2013) (\$8.5 million settlement in lawsuit accusing General Mills of making misleading digestive health claims about its yogurts); Settlement Agreement at ¶ H, *Kelley v. PopChips Inc.*, Case No. 1316-CV11037 (Mo. Cir. Ct., Nov. 14, 2013), available at <https://popchipssettlement.com/Portals/0/Documents/Exhibit%20A%20-%20Settlement%20Agreement%20%28File%20Stamped%29%20%2800033638%29.pdf> (\$2.4 million settlement in lawsuit accusing Popchips of misleading consumers by using the term "all natural" on its label).



purchased, but no more than \$20.<sup>409</sup> They could do so regardless of whether they saw the ad or purchased the product because of it, or even if they were fully aware of the calories and fat fully disclosed on the product's label. Likewise, consumers who purchased Frosted Mini-Wheats were eligible to receive \$5 for each box of cereal purchased, up to \$15, based on the \$4 million settlement of a class action lawsuit accusing Kellogg of falsely advertising that Mini-Wheats improved kids' attentiveness, memory, and other cognitive functions to a degree not supported by competent clinical evidence.<sup>410</sup> Consumers were eligible to file a claim regardless of their awareness of the allegedly misleading statement or whether increasing a kids' attentiveness by 20% rather than 11% was a factor in purchasing the cereal.<sup>411</sup> Red Bull recently agreed to establish a \$13 million fund to settle a class action alleging the slogan "Red Bull gives you wings" misled consumers to believe the products provided significant benefits over a cup of coffee or caffeine pill.<sup>412</sup> Anyone who purchased the energy drinks in the last twelve years is eligible to receive \$10 cash or two free Red Bull products valued at \$15—no proof of purchase (or actual deception) required.<sup>413</sup>

While consumers who fill out the necessary paperwork in such settlements eventually receive a small payment, plaintiffs' attorneys often collect millions in fees.<sup>414</sup> For example, Kellogg

<sup>409</sup> See Class Action Settlement Agreement ¶ 48, *In re Ferrero Litig.*, Case No. 11-CV-205 H (CAB) (S.D. Cal. Jan. 19, 2012); Class Action Settlement Agreement ¶ 48, *In re Nutella Mktg. & Sales Practices Litig.*, Civil Action No. 3:11-cv-01086-FLW-DEA (D.N.J. Jan. 10, 2012).

<sup>410</sup> See *Dennis v. Kellogg Co.*, Case No. 09-CV-1786-L (WMC), 2013 WL 6055326, at \*1 (S.D. Cal. Nov. 14, 2013).

<sup>411</sup> See Maria Godoy, *No, Frosted Mini-Wheats Won't Make Your Kids Smarter*, NPR (May 30, 2013, 4:20 PM), [www.npr.org/blogs/thesalt/2013/05/30/187330235/no-frosted-mini-wheats-don-t-make-your-kids-smarter](http://www.npr.org/blogs/thesalt/2013/05/30/187330235/no-frosted-mini-wheats-don-t-make-your-kids-smarter).

<sup>412</sup> Class Action Complaint at 2, *Careathers v. Red Bull N. Am. Inc.*, Case No. 1:13-cv-00369-KPF (S.D.N.Y. Jan. 16, 2013).

<sup>413</sup> See generally Plaintiffs' Memorandum of Law in Support of the Joint Motion for Preliminary Approval of Class Action Settlement, *Careathers v. Red Bull N. Am. Inc.*, Nos. 1:13-CV-0369 (KPF), 1:13-cv-08008 (KPF), (S.D.N.Y. July 31, 2014) [hereinafter *Red Bull Settlement*].

<sup>414</sup> See Order Granting Motion for Attorney Fees, Costs, and Awarding Class Representative Incentive Awards, *In re Quaker Oats Labeling Litig.*, Case No. 5:10-CV-00502-RS (N.D. Cal. July 29, 2014) (approving settlement agreement including \$760,000 in attorney's fees while consumers, other than class representatives who received \$750 incentive awards, received no monetary recovery); Stipulation of Settlement at 6, 11, *Astiana v. Kashi Co.*, Case No. 11 CV 1967 H (BGS) (S.D. Cal., May 2, 2014) [hereinafter *Kashi Settlement*] (noting that up to \$1.25 million of the \$5 million settlement funds went to the plaintiffs' attorneys fees); Order re Motion for Preliminary Approval of Class Action Settlement, *Pappas v. Naked Juice Co.*, Case No. LA CV11-08276 JAK (PLAx) (C.D. Cal. Aug. 7, 2013) (approving up to \$3.12 million of \$9 million settlement for attorneys' fees and costs); *Dennis v. Kellogg Co.*, No. 09-CV-1786-L (WMC), 2013 WL 6055326 (S.D. Cal. Nov. 14, 2013), at \*1 (allocating \$1 million of the \$4 million settlement

Company agreed to settle claims that its Kashi line's use of "All Natural" on certain products was false and misleading for \$5 million.<sup>415</sup> Under the terms of the settlement, class members with receipts may seek reimbursement of \$.50 for each product purchased, up to a maximum of \$25. The settlement also provides that plaintiffs' counsel may seek \$1.25 million in attorneys' fees.<sup>416</sup> Plaintiffs' lawyers in the Red Bull suit stand to receive \$4.75 million, which the company has agreed to pay on top of the settlement fund.<sup>417</sup>

Judges are showing increased willingness to reject proposed settlements that do not provide a significant benefit to consumers harmed by the allegedly deceptive conduct or that primarily benefit the lawyers involved.<sup>418</sup> For example, the U.S. Court of Appeals for the Ninth Circuit rejected the first settlement proposed in the Frosted Mini-Wheats case. The court initially found that the proposed \$10.5 million settlement would provide the plaintiffs' lawyers with approximately \$2 million in fees and costs, the equivalent of \$2,100 per hour, while the settlement offered class members, at most, \$15 from a \$2.75 million fund.<sup>419</sup> The court withdrew that opinion, removing most criticism of the attorneys' fees. Instead, the reissued opinion focused on the inadequacy of the settlement due to its *cy pres* award, which would distribute about half of the settlement value, \$5.5 million in goods, to food charities, a cause that had

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to attorney's fees and expenses, with another \$900,000 allocated for claims notice and administration costs).

<sup>415</sup> *Kashi* Settlement, *supra* note 414, at 6.

<sup>416</sup> *See id.*

<sup>417</sup> *Red Bull* Settlement, *supra* note 413, at 10.

<sup>418</sup> *See, e.g.,* Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014) ("Class counsel shed crocodile tears over Rexall's misrepresentations, describing them as 'demonstrably false' . . . Yet only one-fourth of one percent of these fraud victims will receive even modest compensation, and for a limited period the labels will be changed, in trivial respects unlikely to influence or inform consumers. And for conferring these meager benefits class counsel should receive almost \$2 million?"); Eubank v. Pella Corp., 753 F.3d 718, 721 (7th Cir. 2014) (finding proposed settlement of class action was "inequitable—even scandalous" in providing greater benefit to plaintiffs' attorneys than consumers); Order re: Plaintiff's Motion for Attorneys' Fees and Costs, Henderson v. J.M. Smucker Co., No. CV 10-4524-GHK (VBKx) (C.D. Cal. Feb. 28, 2014) (rejecting request for \$3.3 million in attorneys' fees claim as "grossly excessive" in light of what she actually achieved and awarding approximately \$92,000 in attorneys' fees and costs); Andrew Scurria, *Ben & Jerry's Sinks Class Cert. In: 'All Natural' Label Suit*, LAW360 (Jan. 7, 2014, 7:51 PM), <http://www.law360.com/articles/499365/ben-jerry-s-sinks-class-cert-in-all-natural-label-suit> (reporting that the court in *Astiana v. Ben & Jerry's Homemade*, No. 10-cv-4387 (N.D. Cal.) rejected a \$7.5 million settlement because of the proposed settlement amount, \$36,080 was claimed as recovery by the class and \$7.4 million were allocated as a *cy pres* remedy which, as unclaimed funds, would revert to a foundation for improving hygiene and nutrition run by Ben & Jerry's corporate parent Unilever PLC, and that the court subsequently denied class certification).

<sup>419</sup> *See* Dennis v. Kellogg Co., 687 F.3d 1149, *withdrawn and superseded*, 697 F.3d 858 (9th Cir. 2012).

no connection to the harmed consumers.<sup>420</sup> On remand, the district court increased the consumer fund to \$4 million, reduced the attorneys' fees to \$1 million, set aside \$900,000 for claims notice and administration costs, and allocated any unclaimed funds to consumer advocacy groups.<sup>421</sup>

Another example is the Seventh Circuit's rejection of a settlement stemming from Radio Shack's inclusion of a portion of the expiration date of credit cards on receipts, giving rise to statutory damages under federal law.<sup>422</sup> While lawyers representing the class would receive \$1 million in fees, class members would receive \$10 coupons valid for use in the store for a six-month period.<sup>423</sup> Judge Posner found the agreed-upon attorneys' fees "grossly disproportionate" to the "meager value" provided to consumers.<sup>424</sup>

Extremely low claims rates also indicate that there is little benefit to plaintiffs in these consumer class actions.<sup>425</sup> According to a 2013 analysis by a settlement administrator, Kurtzman Carson Consultants, the claims rates for settlements handled by her firm in which class members received notice through the media ranged from ".002% [to] 9.378%, with a median rate of .023%."<sup>426</sup> Products in the analysis included toothpaste, heating pads, gift cards, snack food, and sunglasses.<sup>427</sup> Another recent study, conducted by a defense firm, found that of six cases for which settlement distribution data was publicly available, half delivered less than 2% of their funds to class members.<sup>428</sup> The analysis found that plaintiffs used the cy pres doctrine to inflate the purported size of the benefit to the class in order to justify attorneys' fees that often exceeded the amount distributed directly to the class.<sup>429</sup> Such low claim rates may

<sup>420</sup> *Dennis*, 697 F.3d at 869.

<sup>421</sup> *Dennis v. Kellogg Co.*, No. 09-CV-1786-L (WMc), 2013 WL 6055326, at \*1 (S.D. Cal. Nov. 14, 2013).

<sup>422</sup> *See Redman v. RadioShack Corp.*, 768 F.3d 622, 627, 640 (7th Cir. 2014) (rejecting settlement of claim under the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C. § 1681c(g), which authorizes statutory damages of between \$100 and \$1,000 without the need to show actual harm).

<sup>423</sup> *See id.* at 638-39.

<sup>424</sup> *Id.* at 632.

<sup>425</sup> *See* Alison Frankel, *A Smoking Gun in Debate Over Consumer Class Actions?*, REUTERS (May 9, 2014), <http://blogs.reuters.com/alison-frankel/2014/05/09/a-smoking-gun-in-debate-over-consumer-class-actions/> (last visited May 3, 2015).

<sup>426</sup> *See* Decl. of Deborah McComb re Settlement Claims at 2, Poertner v. Gillette Co., Case No. 6:12-CV-00803-GAP-DAB (M.D. Fla. Apr. 22, 2014) (declaration of Senior Consultant at Kurtzman Carson Consultants LLC).

<sup>427</sup> *Id.*

<sup>428</sup> *See Do Class Actions Benefit Class Members?: An Empirical Analysis of Class Actions*, MAYER BROWN LLP (2013), available at <http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf>.

<sup>429</sup> *Id.* at 10-11.

suggest that consumers did not believe they were injured. The attorneys who bring such claims are empty suits, purporting to represent clients who were not harmed.

## CONCLUSION

Overall, courts are maintaining objective criteria for pure emotional harm claims based on subjective anxiety and fears, though gradually expanding the opportunity for recovery. Courts are largely rejecting claims based on speculative future injuries that may never develop or that rely on purely expert-driven theories of economic losses. Most claims seeking payments for medical testing costs by those who have no physical injury are either rejected, as exemplified by the New York Court of Appeals decision in *Coronia*, or subject to safeguards intended to require an objective indication of injury and that any money awarded is actually used for scientifically-warranted medical testing. Courts appear to uniformly dismiss claims alleging that patients are due full or partial refunds for prescription drugs they took that benefited them. Courts either find that such lawsuits are product liability claims without injury masquerading as consumer protection suits or that the plaintiffs have no claim because they received the benefit of the bargain. Most judges recognize that drivers are not entitled to a "problem free" car and view the recall process as the most efficient and effective means to address mechanical issues when they arise. Courts appear to be chipping away at the surge of class action litigation brought on behalf of many people who happily ate or drank their purchases and only later discovered they were members of a class action lawsuit. *Comcast v. Behrend* provides courts with a new tool to address no-injury lawsuits through denying class certification of consumer class actions that rely on damage calculations that do not fit the actual harm.

Nevertheless, nearly every day the media reports another sensational claim along these lines. As long as companies occasionally settle such lawsuits at multi-million and multi-billion dollar levels, plaintiffs' lawyers will continue to file them. It is far easier to assert an economic loss class action on behalf of everyone who purchased a product who was not injured, than take part in the heavily competitive market that has developed for recruiting people who may have been actually harmed by it.<sup>430</sup>

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<sup>430</sup> See Paul M. Barrett, *Need Victims for Your Mass Lawsuit? Call Jesse Levine*, BLOOMBERG BUSINESSWEEK (Dec. 12, 2013), <http://www.bloomberg.com/bw/articles/2013-12-12/mass-tort-lawsuit-lead-generator-jesse-levine-has-victims-for-sale> (examining the mass tort lead generation business).

As the food litigation shows, it takes little effort to recycle the same individuals as representative plaintiffs and allegations to another product. The FDA's reluctance to provide clarity in labeling obligations leaves the door wide open to misrepresentation claims. And while *Comcast* appears to be gaining a foothold, plaintiffs' lawyers may adapt by relying on issue-classes or laws that authorize statutory damages,<sup>431</sup> eliminating the need to show a classwide theory of damages.

Ironically, these types of lawsuits may do more to harm consumers than help them. Unnecessary medical monitoring lawsuits may lead to anxiety and, for those who obtain testing, false positives. The media scare stemming from a slew of lawsuits that exaggerate the risk of injury from a safety concern with a car may do more to harm the brand and shareholder value than the problem itself.<sup>432</sup> This leads to a chicken-and-the-egg question. Did the potential defect lower the resale value of the car or did the lawsuit making such allegations do so? Excessive drug litigation has its own side effects. Learning of such lawsuits may lead patients to not take a drug that their physician believes would provide them with significant benefits and pose little risk.<sup>433</sup> At worst, it could spur a patient to immediately stop using a drug without consulting a doctor, which itself could cause harm.<sup>434</sup> The food lawsuits not only attempt to turnout the pockets of mega-corporations, but also

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<sup>431</sup> See generally Sheila B. Scheurman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 113-14 (2009) (observing that plaintiffs are increasingly combining claims for statutory damages with class actions in litigation under the Fair and Accurate Credit Transactions Act, Telephone Consumer Protection Act, Cable Communications Policy Act, Fair Credit Reporting Act, and state consumer protection acts).

<sup>432</sup> See Ed Wallace, *The Real Scandal Behind the Toyota Recall*, BLOOMBERG BUSINESSWEEK (Feb. 11, 2010), [http://www.bloomberg.com/bw/lifestyle/content/feb2010/bw20100211\\_986136.htm](http://www.bloomberg.com/bw/lifestyle/content/feb2010/bw20100211_986136.htm) (examining several prior auto defect allegations that were overblown in the media and destroyed the value of the cars at issue).

<sup>433</sup> See generally Daniel M. Schaffzin, *Warning: Lawyer Advertising May Be Hazardous to Your Health! A Call to Fairly Balance Commercial Solicitation of Clients in Pharmaceutical Litigation*, 8 CHARLESTON L. REV. 319 (2014). For example, psychiatrists have reported that patients with schizophrenia and bipolar disorder have requested a medication change, or stop taking the medication, because the drug was targeted in lawyer ads. See *New Survey Shows Product Liability Litigation May Jeopardize Treatment Outcomes for People with Severe Mental Illnesses*, ELI LILLY & CO. (June 13, 2007), <https://investor.lilly.com/releasedetail.cfm?releaseid=248836> (discussing results of survey conducted jointly by Eli Lilly and the National Council for Community Behavioral Healthcare).

<sup>434</sup> See, e.g., Evan Levine, M.D., *Your Medication Can Kill You; Call Your Lawyer!*, LEFTIST REV. (May 19, 2012), <http://www.leftistreview.com/2012/05/19/your-medication-can-kill-you-call-your-lawyer/evanlevine/> (in which the author, a cardiologist in New York, discusses a patient who, after watching a television advertisement portraying the blood thinner, Pradaxa, as problematic and dangerous, stopped using the drug, placing himself at risk of a stroke, because he was concerned that the drug could "cause him to hemorrhage to death").

harm family-owned, socially-responsible businesses.<sup>435</sup> While few consumers actually apply for the limited payment that the occasional settlement provides, they all share the cost of litigation in the grocery store's checkout counter, at the dealership, and in their health and auto insurance rates, through less consumer choice, and damage to the economy.<sup>436</sup> In addition, settlement of empty suit litigation is likely to provide a windfall to the many class members who did not experience an injury while substantially undervaluing the claims of the few individuals who actually experienced an economic loss.

There is no single solution to "empty suit" litigation. What is clear is that the societal costs of these lawsuits outweigh their benefits. Courts, regulatory agencies, and legislatures share responsibility in putting an end to such litigation.

Courts should dismiss claims at the earliest opportunity where the alleged injury is a creation of plaintiffs' lawyers. Judges should abandon their reluctance to use the tools available to them to address claims that go well beyond reasonableness. Through Federal Rule of Civil Procedure 11, state equivalents of that rule, and other applicable statutes, they have the discretion to impose sanctions, including attorneys' fees and costs, on plaintiffs' lawyers whose suits do not pass the "straight face" test and who are "frequent filers," cutting-and-pasting the same claims against different companies and products often reusing the same individuals as class representatives in the hope that one will stick and draw a settlement. Where the parties settle such claims, courts should keep a watchful eye to ensure that class members, not just class counsel and charities selected by the parties, receive a tangible benefit from the litigation.

Courts should also recognize what while line drawing in the area of emotional harm recovery may seem arbitrary and occasionally lead to results that seem unfair, such objective constraints are essential to placing bounds on an otherwise limitless tort. Courts should also understand that tort law is ill suited to address product safety concerns before an injury occurs. That is why Congress established regulatory agencies such as the CPSC, NHTSA, and FDA. It understood that tort law "comes in too late." An agency oversight, regulation, and intervention can

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<sup>435</sup> See, e.g., Laurent Belsie, *Nutella Settles Lawsuit. You Can Get \$20.*, CHRISTIAN SCI. MONITOR (Apr. 27, 2012), <http://www.csmonitor.com/Business/new-economy/2012/0427/Nutella-settles-lawsuit.-You-can-get-20> (discussing lawsuit against Ferrero).

<sup>436</sup> See JOANNA M. SHEPHERD-BAILEY, AMERICAN TORT REFORM FOUNDATION, CONSUMER PROTECTION ACTS OR CONSUMER LITIGATION ACTS?: A HISTORICAL AND EMPIRICAL EXAMINATION OF STATE CPAs 21 (2013), available at <http://www.consumerlawsunhinged.org/consumer-protection-acts-or-consumer-litigation-acts/>.

protect the public before a person is injured from a product hazard. While the recall process is not flawless and relies on self-reporting, in most cases, the system is more efficient and effective than litigation. Those agencies should have the resources and tools they need to police reporting and recall obligations. With respect to advertising and labeling, government agencies can eliminate empty suit litigation by setting clear rules that support preemption of common law claims. An FDA regulation governing the use of “natural” in food and cosmetic advertising, for example, could put an end to about one hundred class actions. The alternative to such national standards is the status quo of inconsistent outcomes and settlements in seemingly never-ending, case-by-case litigation.

State legislatures also have a role. When necessary to address abuse, they can set standards for when medical monitoring is permissible, tighten consumer protection statutes to make clear that individuals must have an actual injury before bringing a claim, and preclude the combination of the class action mechanism and statutory damages, two tools intended to incentivize small claims that, when joined, expose companies to extraordinary liability regardless of whether anyone was actually injured.

Our courts and the civil justice system should be preserved for real and meritorious claims, not empty suit litigation.