Nos. 16-1124 & 16-3019

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

IN RE: FLONASE ANTITRUST LITIGATION

SMITHKLINE BEECHAM CORPORATION
D/B/A GLAXOSMITHKLINE N/K/A GLAXOSMITHKLINE LLC,

Defendant-Appellant,

v.

STATE OF LOUISIANA,

Respondent-Appellee.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:08-cv-3301 (Hon. Anita B. Brody)

BRIEF OF *AMICUS CURIAE* AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT AND REVERSAL

Cary Silverman*
SHOOK, HARDY & BACON L.L.P.
1155 F Street N.W., Suite 200
Washington, DC 20004
(202) 783-8400
csilverman@shb.com
**Counsel of record*

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
(202) 682-1168
Of Counsel

November 1, 2016

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule 26.1, the American Tort Reform Association (ATRA) hereby certifies that it has no parent corporation, issues no stock, and no publicly held company has an ownership interest in ATRA.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. STATES ARE INCLUDED AS CLASS MEMBERS IN A WIDE RANGE OF LITIGATION AND KNOW HOW TO EXERCISE THEIR RIGHTS TO OBJECT OR OPT OUT 4

II. THE ELEVENTH AMENDMENT DOES NOT APPLY WHEN THE STATE ACTS AS A PLAINTIFF, IS NOT SUBJECT TO MONETARY LIABILITY, AND THE REQUEST IS FOR PROSPECTIVE INJUNCTIVE RELIEF 10

III. A WAIT-SEE-AND-REMAIN-SILENT APPROACH UNDERMINES THE ABILITY OF PARTIES TO REACH GLOBAL SETTLEMENTS AND ENCOURAGES STATES TO FILE COPYCAT LAWSUITS SEEKING A PREMIUM OVER THE CLASS AWARD 12

CONCLUSION 16

CERTIFICATE OF COMPLIANCE 17

CERTIFICATE OF SERVICE 18

TABLE OF AUTHORITIES

Page

Cases

Christy v. Pennsylvania Tpk. Comm'n, 54 F.3d 1140 (3d Cir. 1995)................10, 11

Ehrheart v. Verizon Wireless, 609 F.3d 590 (3d Cir.2010).....................................13

Ex Parte Young, 209 U.S. 123 (1908) 11

Hans v. Louisiana, 134 U.S. 1 (1890) 10

Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 (1994) 10-11

In re: Amgen Inc. v. Conn. Ret. Plans & Trust Funds,
133 S. Ct. 1184 (2013)..6

In re Amgen Inc. Sec. Litig.,
No. 07-cv-2536, ECF No. 587 (C.D. Cal. Aug. 9, 2016)................................7

In re Flonase Antitrust Litig., No. 08-cv-3301,
2015 WL 9273274 (E.D. Pa. Dec. 21, 2015) 4-5

In re Lupron Mktg. & Sales Practices Litig.,
228 F.R.D. 75 (D. Mass. 2005) 5

In re Neurontin Mktg., Sales Practices & Prods. Liab. Litig.,
No. 04-cv-10981, ECF No. 4302 (D. Mass. Nov. 7, 2014)......................... 5-6

In re Real Estate Title & Settlement Servs. Antitrust Litig.,
No. MDL 633, 1986 WL 6531 (E.D. Pa. June 10, 1986) *aff'd*, 815
F.2d 695 (3d Cir. 1987), and *aff'd sub nom. Appeal of State of Ariz*.,
815 F.2d 696 (3d Cir. 1987) 9

Koslow v. Commonwealth of Pennsylvania, 302 F.3d 161 (3d Cir. 2002)..............12

Mitchell v. Comm'n on Adult Entm't Establishments of State of Del.,
12 F.3d 406 (3d Cir. 1993) 12

Nichols v. SmithKline Beecham Corp.,
No. CIV.A.00-6222, 2005 WL 950616 (E.D. Pa. Apr. 22, 2005) 6

Philadelphia Elec. Co. v. Anaconda Am. Brass Co.,
43 F.R.D. 452 (E.D. Pa. 1968) 6

Rochester v. White, 503 F.2d 263 (3d Cir. 1974) 11

Southern States Police Benevolent Ass'n v. First Choice Armor & Equip.,
241 F.R.D. 85 (D. Mass. 2007) 5

Sullivan v. DB Investments, Inc., 667 F.3d 273 (3d Cir. 2011) 13, 14

Constitutional Provisions and Statutes

U.S. Const. amend XI. 10

Other Authorities

Alaska Dep’t of Law, Press Release, *Department Announces $19 Million Settlement in Securities Fraud Claims Against Qwest Communications*, Nov. 21, 2007, *at* https://perma.cc/JD9W-NJSM 7

Kyle Barnett, *La. AG Hires Nine Private Law Firms, 17 Attorneys for Federal Antitrust Pharmaceutical Lawsuit*, LegalNewsline, May 22, 2015, at http://legalnewsline.com/stories/510550772-la-ag-hires-nine-private-law-firms-17-attorneys-for-federal-antitrust-pharmaceutical-lawsuit 15

Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403 (2003)................................4

Josh Gerstein, *Time Warner Cases Finds a Surprise*, N.Y. Sun, Dec. 7, 2006, at 1, *at* https://perma.cc/33EN-BU2S 7

Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times, *at* http://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html 15

Or. Dep’t of Justice. Press Release, *Oregon Files Securities Lawsuit Against Countrywide for Misleading Filings that Caused $14 Million in Losses to State*, Jan. 26, 2011, *at* https://perma.cc/P6CH-XSAJ 8

E. Scott Reckard, *Judge OKs Countrywide Settlement but Big Investors Opt Out*, L.A. Times, Feb. 26, 2011, *at* https://perma.cc/C9N6-UV2J 8

Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges (Fed. Jud. Ctr. 3d ed. 2010), *at* https://perma.cc/MX9V-SY7B..9

Amir Rozen *et al.*, *Opt-Out Cases in Securities Class Action Settlements*, Cornerstone Research, at 5 (2013), *at* https://perma.cc/GP6K-MGKM.......13

Willliam B. Rubenstein, Newberg on Class Actions § 18:23 (5th ed. 2016)............3

Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation. Where Should Tort Law Draw the Line?*, 80 Brook. L. Rev. 599 (2015)...14

Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. Penn. L. Rev. 1971 (2008).............................. 8-9

Jonathan Stempel, *Pfizer to Pay $325 Million in Neurontin Settlement*, Reuters, June 2, 2014, *at* https://perma.cc/966X-8X32 6

Jonathan Stempel, *Lawsuits Mount for BofA's Countrywide*, Reuters, Jan. 27, 2011, *at* https://perma.cc/7LRX-EN8T 8

Ashley L. Taylor, Jr. et al., *Post CAFA: Objections by State Attorneys General to Class Action Settlements*, ABA State & Local News, vol. 36, no. 4 (2013), *at* https://perma.cc/39VF-384A 8

IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues. ATRA is concerned that if the district court's decision is upheld, ATRA members who believe they have settled antitrust, consumer, securities, and other class actions after years of expensive litigation will find themselves subject to copycat lawsuits brought by state governments.

STATEMENT OF THE ISSUE ADDRESSED BY *AMICUS CURIAE*

Whether a state can invoke sovereign immunity to avoid being bound by a class settlement and, instead, bring a new lawsuit making identical claims when the State was expressly included in the class, received notice of the action and settlement, and did not opt out.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c), no party's counsel authored this brief in whole or in part. No party, nor any party's counsel, nor any person other than ATRA, its members, or its counsel contributed money intended to fund preparing or funding this brief.

SUMMARY OF ARGUMENT

Class actions brought by private attorneys often include state governments as members of the putative class. State governments are consumers of goods and services, just like ordinary members of the public. Governments act similarly to private insurers in purchasing or reimbursing the costs of prescription drugs. State government entities manage pension funds for their employees, acting in a similar capacity to private shareholders. When a class action alleges that consumers were misled to purchase a product due to an unfair trade practice, that investors suffered losses due to a securities violation, or, as here, overpaid in purchasing a product due to anti-competitive practices, states are in the same position as private actors. When states are included within the class definition, receive notice, and do not opt-out, they should be bound by the agreed result.

Here, state governments that purchased Flonase were expressly included in a conditionally-approved settlement class. The settlement resolved, after years of litigation, allegations that a pharmaceutical company improperly delayed the introduction of a generic version of the drug. Louisiana received notice of the proposed $35 million settlement and did not opt out or otherwise object. Instead, it took a wait-see-and-remain-silent approach. More than a year after final approval of the settlement, the State, through retained outside law firms, filed its own lawsuit asserting the very same allegations raised and settled in the federal lawsuit.

When the Defendant requested that the district court overseeing the settlement enjoin Louisiana from proceeding, the court found that sovereign immunity did not allow it to enforce the settlement against the State. That result is not supported by the Eleventh Amendment. Sovereign immunity protects the state purse, precluding individuals from suing it, without consent, for monetary damages. It does not apply to the state acting as a *plaintiff*, nor does it preclude a court's ability to enjoin a state from prospectively acting in a manner that is contrary to a court-approved settlement. Certainly evidence that the state financially benefited from the settlement, which the district court refused to consider, should end the matter.

Scholars recognize that the district court's decision suggests that states "can evade the binding effect of federal class actions" and raises the question of whether states can be included in class actions at all. Willliam B. Rubenstein, Newberg on Class Actions § 18:23 (5th ed. 2016). This is a troubling conclusion, one that if not addressed by this Court will irreparably damage the ability of parties to enter into comprehensive class settlements that fully resolve disputes. It also subjects businesses that believe litigation is behind them to the potential for multiple copycat lawsuits by state attorneys general and other entities. These lawsuits, which may be brought through retained contingency-fee counsel, will seek a premium over what the State could have received through the class settlement and

require defendants to pay a second time to settle claims they believed were already resolved.

For these reasons, this Court should reverse the district court's decision and find that the Eleventh Amendment does not impact the binding nature of court-approved class settlements on states.

ARGUMENT

I. STATES ARE INCLUDED AS CLASS MEMBERS IN A WIDE RANGE OF LITIGATION AND KNOW HOW TO EXERCISE THEIR RIGHTS TO OBJECT OR OPT OUT

When states purchase goods and services, receive adequate notice of a class action related to such purchases, and do not opt out, they should be bound by the settlement or judgment just as any other class member. The State of Louisiana contends, and the district court agreed, that sovereign immunity accorded to the State under the Eleventh Amendment prevents it from being bound in such circumstances. Unless the district court's ruling is reversed, the ability of parties to settle disputes in a comprehensive and final manner will be jeopardized.

It is common for states or state entities to be included in the definition of a class. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 449 (2003). The district court acknowledged that class settlements have included state governments and agencies, but nevertheless found the ability of class settlements and judgments to

bind them "an open question of law." *In re Flonase Antitrust Litig.*, No. 08-cv-3301, 2015 WL 9273274, at *5 (E.D. Pa. Dec. 21, 2015).

States purchase goods and services, like anyone else. When a dispute arises with the quality, marketing, or pricing of a product, states may be included as members of a class action. For example, as purchasers of equipment or other products for state agencies, states may be included as class members in litigation following a product failure. *See, e.g., Southern States Police Benevolent Ass'n v. First Choice Armor & Equip.*, 241 F.R.D. 85, 93 (D. Mass. 2007) (certifying class action including state and local law enforcement entities that purchased allegedly defective body armor).

States, as third-party payors for prescription drugs, are included in class actions alleging that products are overpriced as a result of racketeering or violations of consumer protection law. *See, e.g., In re Lupron Mktg. & Sales Practices Litig.*, 228 F.R.D. 75, 77 n.3 (D. Mass. 2005) (defining settlement class to include "the United States government . . . and all other government entities' claims"). States are also included in class actions alleging that they bought or reimbursed patients for prescription drugs that were improperly marketed for off-label uses. *See, e.g., In re Neurontin Mktg., Sales Practices & Prods. Liab. Litig.*, No. 04-cv-10981, ECF No. 4302, at 2-3 (D. Mass. Nov. 7, 2014) (certifying nationwide class of third-party payors, including government entities that

purchased epilepsy drug or generic equivalents for their employees or others covered by a government employee health plan); *see also* Jonathan Stempel, *Pfizer to Pay $325 Million in Neurontin Settlement*, Reuters, June 2, 2014, *at* https://perma.cc/966X-8X32 (discussing litigation and settlement).

As administrators of retirement and pension funds, states and state entities suffer losses when misrepresentations inflate the value of shares, and they obtain recovery through class actions alleging securities fraud. *See, e.g., In re: Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013) (affirming certification of class action brought by Connecticut Retirement Plans and Trust Funds on behalf of all persons and entities that purchased Amgen stock).

State government entities, as here, are also included as class members in antitrust class actions that allege uncompetitive behavior resulted in overpricing of products. *See, e.g*., *Nichols v. SmithKline Beecham Corp*., No. CIV.A.00-6222, 2005 WL 950616, at *7 (E.D. Pa. Apr. 22, 2005) (approving settlement class including "a governmental entity . . . to the extent it makes prescription drug purchases as part of a health benefit plan for its employees"); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 456-57 (E.D. Pa. 1968) (certifying class including "[a]ll state and municipal governments, governmental authorities and sub-divisions in the United States" that purchased certain pipe and tubing from defendants).

States that participate in class actions stand to receive substantial recovery as a result of a settlement. For example, state pension funds will receive a share of a $95 million securities class action settlement with Amgen. *See, e.g.*, *In re Amgen Inc. Sec. Litig.*, No. 07-cv-2536, ECF No. 587 (C.D. Cal. Aug. 9, 2016) (Order Granting Preliminary Approval of Class Action Settlement, Approving Form and Manner of Notice, and Setting Date for Hearing on Final Approval of Settlement).

States can and do opt-out of class actions when they find that the state is likely to receive a more substantial recovery through separate litigation. For example, Alaska opted out of a $2.5 billion settlement with AOL Time Warner, in an action in which shareholders alleged that the company overstated its revenues. *See* Josh Gerstein, *Time Warner Cases Finds a Surprise*, N.Y. Sun, Dec. 7, 2006, at 1, *at* https://perma.cc/33EN-BU2S. Alaska would have received about $1 million through the class settlement, but instead recovered $50 million through its own lawsuit. *See id.* Alaska also opted out of a $400 million class settlement with Qwest under which the state would have received $427,000. Instead, it recovered $19 million for its funds' losses. *See* Alaska Dep't of Law, Press Release, *Department Announces $19 Million Settlement in Securities Fraud Claims Against Qwest Communications*, Nov. 21, 2007, *at* https://perma.cc/JD9W-NJSM.

Similarly, Oregon was among major institutional investors that opted out of a $624 million class settlement with mortgage lender Countrywide Financial. *See* E. Scott Reckard, *Judge OKs Countrywide Settlement but Big Investors Opt Out*, L.A. Times, Feb. 26, 2011, *at* https://perma.cc/C9N6-UV2J. Under the class settlement, Oregon would have received $500,000 to cover $14 million in investment losses by the state's pension and workers' compensation funds. *See id.* Instead, the State Treasurer and Attorney General decided to opt-out and the state filed its own securities lawsuit because it believed it could do far better in separate settlement talks. *See id.*; *see also* Or. Dep't of Justice, Press Release, *Oregon Files Securities Lawsuit Against Countrywide for Misleading Filings that Caused $14 Million in Losses to State*, Jan. 26, 2011, *at* https://perma.cc/P6CH-XSAJ. Michigan similarly opted out of the Countrywide settlement and brought its own claim. *See* Jonathan Stempel, *Lawsuits Mount for BofA's Countrywide*, Reuters, Jan. 27, 2011, *at* https://perma.cc/7LRX-EN8T.

States that have concerns with a class action also have other options available to them, such as intervening in the litigation, objecting to a settlement, or filing an *amicus* brief.[2] District courts in the Third Circuit have long overseen

---

[2] *See* Ashley L. Taylor, Jr. et al., *Post CAFA: Objections by State Attorneys General to Class Action Settlements*, ABA State & Local News, vol. 36, no. 4 (2013), *at* https://perma.cc/39VF-384A (providing examples of groups of state attorneys general filing amicus briefs or otherwise raising objections to settlement of consumer class actions); Catherine M. Sharkey, *CAFA Settlement Notice*

litigation in which states have objected to class action settlement terms or opted out. *See, e.g., In re Real Estate Title & Settlement Servs. Antitrust Litig*., No. MDL 633, 1986 WL 6531, at *6 (E.D. Pa. June 10, 1986) (noting, in approving settlement of antitrust class action, that attorneys general of Montana, New Jersey, Ohio, Pennsylvania, and Wisconsin, as purchasers of title insurance at issue, opposed proposed settlement, and that Arizona moved to be excluded from proposed class), *aff'd*, 815 F.2d 695 (3d Cir. 1987), and *aff'd sub nom. Appeal of State of Ariz*., 815 F.2d 696 (3d Cir. 1987).

In sum, the class settlement before this Court, in including state governments and their agencies, is no different than many other types of class settlements. When included in a class settlement, governments know their options and can take action that is in the best interest of the state. What they cannot do is sit on their rights during the litigation and as the court approves the settlement, then bring a separate, identical lawsuit.

Provision: Optimal Regulatory Policy?, 156 U. Penn. L. Rev. 1971, 1982-88 (2008) (same); *see also* Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges 37 (Fed. Jud. Ctr. 3d ed. 2010), *at* https://perma.cc/MX9V-SY7B (recognizing that government actors may participate as an intervenor or friend of the court and suggesting that courts consider inviting them to participate as such, particularly in addressing attorney fee issues).

II. THE ELEVENTH AMENDMENT DOES NOT APPLY WHEN THE STATE ACTS AS A PLAINTIFF, IS NOT SUBJECT TO MONETARY LIABILITY, AND THE REQUEST IS FOR PROSPECTIVE INJUNCTIVE RELIEF

Sovereign immunity does not affect situations in which a state serves in the capacity of *plaintiff* (or class member) and where the state is entitled to monetary recovery stemming from its participation in the marketplace.

The Eleventh Amendment provides "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI. The Eleventh Amendment protects states, as sovereigns, from being sued by "an individual without its consent." *See Hans v. Louisiana*, 134 U.S. 1, 12-13 (1890) (applying sovereign immunity to preclude Louisiana citizen from suing his state for interest payments on bonds). The party asserting Eleventh Amendment immunity bears the burden of proving its applicability. *Christy v. Pennsylvania Tpk. Comm'n*, 54 F.3d 1140, 1144 (3d Cir. 1995).

The Eleventh Amendment shields states from suit, not their ability to be bound to a court-approved settlement in which it was certified as a member of the plaintiff class after notice and an opportunity to object or opt-out. As this Court has recognized, the Eleventh Amendment is focused on protecting the "State's purse" from individual lawsuits seeking damages. *See Christy*, 54 F.3d at 1145

(quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) and recognizing the "most important" factor in determining whether an entity qualifies for Eleventh Amendment protection is whether a judgment against that entity would be paid out of the state treasury).

GlaxoSmithKline's request for an injunction to enforce a settlement agreement, which would preclude the state attorney general from proceeding with an identical lawsuit in state court, does not transform it from a defendant in an antitrust case to a plaintiff. Nor does the GlaxoSmithKline's request transform the State of Louisiana from a member of the plaintiff class that is eligible to collect damages to a defendant exposed to liability.

This Court has also recognized that *Ex Parte Young*, 209 U.S. 123 (1908), preserves the ability of federal courts to prospectively require a state official to bring his or her conduct into conformity with federal law. *See Rochester v. White*, 503 F.2d 263, 267 (3d Cir. 1974). While the Eleventh Amendment bars monetary relief against a State, the ability of a litigant to obtain prospective relief, enjoining a state attorney general from violating his or her rights, is well established. *See id.* at 267-68.

Even if GSK's request for an injunction against Louisiana is viewed as triggering sovereign immunity, the State's decision not to opt-out of the class settlement, and its receipt of settlement funds (which the district court refused to

consider, *see* Appellant's Br. at 20-21), should waive its Eleventh Amendment immunity. *See Koslow v. Commonwealth of Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002) (finding that a state's election to participate in a federal financial program and its receipt of federal funds operates as a waiver of sovereign immunity). The State cannot, after years of litigation, notice, and a court-approved settlement, now assert that it is not bound by the agreement due to the Eleventh Amendment. *See Mitchell v. Comm'n on Adult Entm't Establishments of State of Del.*, 12 F.3d 406, 409 (3d Cir. 1993) (finding state commission that had voluntarily entered settlement was not "free at any time thereafter to disavow the judgment on eleventh amendment grounds" and pursue alternative relief).

III. A WAIT-SEE-AND-REMAIN-SILENT APPROACH UNDERMINES THE ABILITY OF PARTIES TO REACH GLOBAL SETTLEMENTS AND ENCOURAGES STATES TO FILE COPYCAT LAWSUITS SEEKING A PREMIUM OVER THE CLASS AWARD

States that do not view their inclusion in a class action as in their best interests have options, as noted, have the ability to intervene in the litigation, opt-out, or object to settlement terms. What they cannot do, and what is detrimental to the ability of parties to reach a comprehensive and final resolution of disputes, is wait, see, remain silent, and then bring their own lawsuit.

Whether a state intends to opt-out of a class action may have significant implications for a settlement. Defendants may offer significantly less money to settle a class action if they expect a state, like any other major class member, to

opt-out. *See* Amir Rozen *et al.*, *Opt-Out Cases in Securities Class Action Settlements*, Cornerstone Research, at 5 (2013), *at* https://perma.cc/GP6K-MGKM. Defendants will also have less incentive to settle cases, and may decide to go to trial, since they may still face copycat class actions brought by states and state entities. *See id.*

This Court has recognized the value of settlements, particularly in class action and other complex litigation. Class settlements "promote the amicable resolution of disputes and lighten the increasing load of litigation faced by the federal courts." *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (en banc) (citing *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 594 (3d Cir.2010)). It has understood that "achieving global peace is a valid, and valuable, incentive to class action settlements." *Id*. As this Court observed in approving a broad settlement of an antitrust class action brought on behalf of direct and indirect purchasers of diamonds:

> A responsible and fair settlement serves the interests of both plaintiffs and defendants and furthers the aims of the class action device. Plaintiffs receive redress of their claimed injuries without the burden of litigating individually. Defendants receive finality. Having released their claims for consideration, class members are precluded from continuing to press their claims. Collateral attack of settlements and parallel proceedings in multiple fora are common realities in modern class actions—features that can imperil the feasibility of settlements if defendants lack an effective way to protect bargained-for rights. If the indirect-purchaser claims at issue here were excluded, nothing would bar the plaintiffs from bringing them as separate class actions or as

> aggregate individual actions, leaving defendants exposed to countless suits in state court despite the settlement.

Id. at 339 (internal citations and quotations omitted).

Sullivan was controversial in valuing the ability of a defendant to obtain "global peace" above the propriety of including individuals with no viable claim in the settlement. *See id*. at 340 (Jordan, J., joined by Smith, J., dissenting); *see generally* Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation. Where Should Tort Law Draw the Line?*, 80 Brook. L. Rev. 599 (2015) (expressing concern with the growing number of no-injury class action lawsuits). However, this Court properly understood in *Sullivan* that the ability to settle a class action falls apart when defendants cannot achieve finality, cannot enforce a settlement, and would continue to face lawsuits. *See* 667 F.3d at 339.

If states are not bound by class action settlements, despite receiving notice and not opting out, then defendants will face duplicative lawsuits filed by state governments and entities around the country. That is precisely what occurred here. Instead of objecting to a settlement, or opting out, states will sit on their rights, file their own lawsuits, and seek a premium over the amount they would have received through class settlements. This premium will not only seek an amount of compensation that exceeds the earlier class settlement, but an amount that covers the attorneys' fees of outside counsel that are often retained by some states to

pursue such actions.[3] *See, e.g.*, Eric Lipton, *Lawyers Create Big Paydays by Coaxing Attorneys General to Sue*, N.Y. Times, *at* http://www.nytimes.com/2014/12/19/us/politics/lawyers-create-big-paydays-by-coaxing-attorneys-general-to-sue-.html (documenting how "[p]rivate lawyers . . . scour the news media and public records looking for potential cases in which a state or its consumers have been harmed, approach attorneys general" and the lawyers, who are often campaign contributors to the attorney general, typically take 20% of the state's recovery); Kyle Barnett, *La. AG Hires Nine Private Law Firms, 17 Attorneys for Federal Antitrust Pharmaceutical Lawsuit*, LegalNewsline, May 22, 2015, *at* http://legalnewsline.com/stories/510550772-la-ag-hires-nine-private-law-firms-17-attorneys-for-federal-antitrust-pharmaceutical-lawsuit (examining Louisiana's history of hiring outside counsel and the use of multiple law firms to bring an action against AstraZeneca).

As a result, defendants will face uncertain liability exposure, duplicative lawsuits, and unwarranted litigation costs.

[3] ATRA has long expressed concern with the practice of states bringing enforcement actions through retained contingency-fee counsel. When a state or state entity is included as a member of a class action, however, it is acting purely in its capacity as a market participant, not as a sovereign.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

/s/ Cary Silverman

Cary Silverman
SHOOK, HARDY & BACON L.L.P.
1155 F Street NW, Suite 200
Washington, D.C. 20004
(202) 783-8400
csilverman@shb.com

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW, Suite 400
Washington, DC 20036
(202) 682-1168

Of Counsel

Dated: November 1, 2016

CERTIFICATE OF COMPLIANCE

I hereby certify the Brief of *Amicus Curiae* American Tort Reform Association complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,510 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using MS Word in 14-point Times New Roman.

The hard copy and the electronic copy of this brief are identical. The electronic copy has been virus-scanned using antivirus software, McAfee, version 8.8.0, and no virus was detected.

/s/ Cary Silverman
Cary Silverman

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

/s/ Cary Silverman
Cary Silverman

Dated: November 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amicus Curiae* American Tort Reform Association with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the Court's CM/ECF system on November 1, 2016. Ten paper copies of the brief were deposited in U.S. Mail addressed to the Court. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CF/ECF system.

/s/ Cary Silverman
Cary Silverman

Dated: November 1, 2016