IN THE NEW MEXICO COURT OF APPEALS

ARTHUR ARGUEDAS, et al.,

Plaintiffs-Appellants,

v. **Ct. App. No. 35,699**

GARRETT SEAWRIGHT, et al.,

Defendants-Appellees.

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE ALBUQUERQUE HISPANO CHAMBER OF COMMERCE, AND THE NEW MEXICO ASSOCIATION OF COMMERCE AND INDUSTRY

On Appeal From
The First Judicial District Court,
County of Santa Fe
Hon. Sarah M. Singleton
No. D-0101-CV-2013-01293

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STATEMENT REGARDING SUBMISSION OF AMICUS BRIEF

Pursuant to Rule 12-320(A) NMRA, *amici curiae* Chamber of Commerce of the United States of America ("the Chamber"), Albuquerque Hispano Chamber of Commerce, and Association of Commerce & Industry hereby submit this amicus curiae brief pursuant to their contemporaneously filed motion for leave to file an amicus brief.[1] Pursuant to Rule 12-320(D)(1) NMRA, counsel for all parties of record received timely notice of *amici*'s intent to file this amicus brief.

/s/ *Ashley C. Parrish*

Counsel for *Amici*

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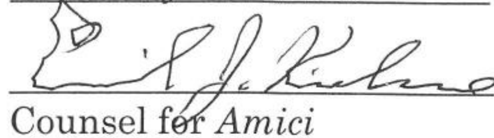
[1] Pursuant to Rule 12-320(C) NMRA, *amici* state that no counsel for any party to this appeal authored any portion of this brief, nor has any party's counsel or any party to the appeal made any monetary contribution intended to fund the preparation or submission of this brief.

STATEMENT OF COMPLIANCE

Pursuant to Rules 12-318(G) and 12-320(D)(3) NMRA, *amici curiae* hereby certify that this brief complies with the limitations of Rule 12-318(F) NMRA. This brief has been prepared using a proportionally spaced type style or typeface (Century Schoolbook, 14 point font), and contains 6,038 words (inclusive of footnotes). This word count was obtained using Microsoft Word 2016.

/s/ *Ashley C. Parrish*



Counsel for *Amici*

INTEREST OF *AMICI*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million businesses and organizations of every size, in every industry sector and from every region of the country. The Chamber regularly advocates for the interests of its members in federal and state courts throughout the country in cases of vital concern to the nation's business community.

The Albuquerque Hispano Chamber of Commerce represents and advocates for its 1,300 members that include small and large businesses, of which approximately 90 percent reside within the city of Albuquerque. The Albuquerque Hispano Chamber of Commerce was organized to promote economic development, to enhance economic development opportunities, and to provide business and workforce education with an emphasis on small and Hispanic-owned businesses.

The Association of Commerce & Industry was founded in 1959 to marshal the advocates, resources, and policies that enable businesses to thrive and families to prosper in New Mexico. As the statewide

chamber of commerce and business advocate, with hundreds of members statewide, ACI gives its members an unmatched opportunity to access and engage the state government in the decisions that affect the private sector.

Plaintiffs' argument, if successful, would permit class actions to be certified despite no showing that any member of the class suffered any actual injury as a result of a violation of the New Mexico Unfair Practices Act, NMSA 1978, § 57-12-10 *et seq.* This is of grave concern to the business community. As this case illustrates, alleged technical violations of consumer protection statutes can often be alleged on behalf of large numbers of people who in fact suffered no injury. If such lawsuits are permitted — without the need to demonstrate any injury beyond the alleged statutory violation itself — businesses will be predictably tied up in costly litigation over harmless alleged lapses, diverting their resources from more productive uses and chilling investment in New Mexico.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this case, plaintiffs plead a class action under the New Mexico Unfair Practices Act, seeking $100 in statutory damages for every individual insured by State Farm in New Mexico who carried less than the liability coverage limits in uninsured motorist insurance between May 2004 and June 2011. Plaintiffs brought this claim despite it being undisputed that (1) the action the defendant insurance agents took — selling uninsured motorist ("UM") insurance that was less than the liability coverage limits — was not illegal at the time; (2) once the Supreme Court clarified the relevant law in 2010, if the UM coverage offer did not comply with legal requirements, then that policy would be reformed by operation of law to provide equal-limits UM coverage at no additional cost; and (3) none of the plaintiffs, or any member of the proposed class, suffered any actual injury as a result of these alleged violations. The Court should reject Plaintiffs' effort to create millions of dollars of liability based on alleged statutory violations that harmed no one.

These types of "no-injury" class action lawsuits are foreclosed by the plain language of NMSA 1978, § 57-12-10(E), which limits the

damages available to unnamed consumer protection class action plaintiffs to "such actual damages as were suffered by each member of the class." The statutory language is buttressed by the constitutional due process considerations that are the foundation of the adequate representation requirement for class actions: a class representative who has suffered no injury will inevitably be disengaged from the litigation, and cannot adequately represent the interests of unnamed class plaintiffs. Limiting the damages available to unnamed class plaintiffs does not leave plaintiffs — even single plaintiffs or those who are unable to show any actual damages — without a remedy; the statute allows additional broad injunctive and other relief that can adequately deter violations. The availability of other forms of relief is among the reasons that state courts have nearly unanimously prohibited no-injury class actions.

Besides the dispositive plain-text and constitutional arguments, there are strong policy reasons to reject no-injury class actions. These cases put businesses at risk of liability far out of proportion to the actual harm caused by their conduct. The cost of defending these cases is prohibitive — especially to small businesses that cannot sustain

years of discovery and motion practice — and thus defendants tend to settle even favorable cases. The cost of "shakedown" settlements and litigation defense is felt in reduced consumer access to goods and services and reduced investment in productive economic activity. Moreover, these costs are not balanced by substantial payouts to class members: payments to plaintiffs' lawyers — the only group that truly benefits from no-injury class actions — far exceeds the minimal amounts received by class members. This dynamic has caused many states to move toward prohibiting no-injury class actions in recent years. This Court should enforce the UPA as written and require unnamed class action plaintiffs to show actual damages to recover.

ARGUMENT

I. The Court Should Prohibit No-Injury Class Actions Under New Mexico's Consumer Protection Law.

Like similar statutes in many other states, New Mexico's Unfair Practices Act permits unnamed class plaintiffs to receive only actual, not nominal damages. Besides being the plainly stated intent of the Legislature, this limitation is consistent with due process requirements, since only a class representative with an actual injury will be incentivized to monitor and participate in class litigation in which the

claims of absent, unknown class members will be adjudicated. The protections afforded by the statute are robust enough to deter even *de minimis* violations, since other forms of relief — including injunctions, fees, and relief under other statutes — remain available to plaintiffs.

A. New Mexico's Consumer Protection Law Requires Actual Injury for Class Claims and Adequately Deters Violations.

The plain language of NMSA 1978, § 57-12-10 limits consumer protection class action members to the receipt of actual damages, and does not permit them to receive statutory damages (defined in Subsection B as the greater of actual damages or $100, increased to $300 for willful violations). Subsection E of NMSA 1978, § 57-12-10 states:

> In any class action filed under this section, the court may award damages to the named plaintiffs as provided in Subsection B of this section and may award members of the class such actual damages as were suffered by each member of the class as a result of the unlawful method, act or practice.

This language is clear: "named plaintiffs" may receive the greater of actual damages *or* statutory damages as defined in Subsection B, but unnamed class members may only receive actual damages. *See State v. Jade G.*, 2007-NMSC-010, ¶ 28, 141 N.M. 284 ("[W]hen the Legislature

includes a particular word in one portion of a statute and omits it from another portion of that statute, such omission is presumed to be intentional."). By "actual damages," the statute means what it says: the actual damages sustained by a plaintiff as a result of breach of a duty; the phrase is "synonymous with compensatory damages." *Behrmann v. Phototron Corp.*, 1990-NMSC-073, ¶ 24, 110 N.M. 323.

As the clearly expressed intent of the Legislature, this limitation on the damages available to unnamed class plaintiffs is binding. *See Estate of Brice v. Toyota Motor Corp.*, 2016-NMSC-018, ¶ 5, 373 P.3d 977 (the "guiding principle" in construing statutes is to "determine and effectuate the Legislature's intent when it enacted the statute," looking "first to the plain language of the statute, giving the words their ordinary meaning"). Indeed, this Court recognized the statute's plainly stated requirement more than a decade ago in *Brooks v. Norwest Corp.*, when it recognized that NMSA 1978, § 57-12-10 "limit[s] the award for unnamed plaintiffs in a class action to actual damages, while allowing named plaintiffs to collect statutory and treble damages." 2004-NMCA-134, ¶ 37, 103 P.3d 39.

Limiting unnamed class members to actual, not statutory damages, works to adequately punish harmful behavior without deterring beneficial economic activity — even in cases of single or small violations with minimal actual damages that are subject to the $100 cap. As noted above, the statutory cap for nominal damages is trebled in cases of willful violations of the law. NMSA 1978, § 57-12-10(E). Moreover, the class action device itself removes the difficulty of litigating small claims, as individual damages snowball quickly into significant liability when bundled together on behalf of a class. Injunctive relief and attorneys' fees are also available even without proof of actual damages. *Id.* §§ 57-12-10(A), (C). And the State can seek civil penalties against repeat or serious offenders. *Id.* § 57-12-11. All of this potential relief is in addition to remedies available under other applicable statutes. *Id.* § 57-12-10(D).

Far from leaving aggrieved consumers without a remedy for consumer protection violations, this expansive set of legal tools provides broad relief for plaintiffs. At the same time, as the Ohio Supreme Court stated recently in construing a similar consumer protection statute, limiting unnamed class members to actual damages guards against

over-deterrence that diminishes beneficial economic activity by "protect[ing] defendants from being held liable for 'huge damage awards'" far out of proportion to the actual harm sustained by consumers. *Felix v. Ganley Chevrolet, Inc.*, 49 N.E.3d 1224, 1231 (Ohio 2015) (noting availability of broad injunctive and other remedial relief in holding that unnamed class plaintiffs may only recover for actual damages) (citation omitted).

B. Construing the State's Consumer Protection Laws to Allow No-Injury Class Actions Raises Serious Due Process Concerns.

In New Mexico, even when the federal Article III requirements of injury in fact, causation, and redressability are not jurisdictional, they remain prudential considerations that guide the standing inquiry, *see Deutsche Bank Nat'l Trust v. Johnston*, 2016-NMSC-013, ¶ 13, 369 P.3d 1046, and the requirement of an injury in fact in particular is "deeply ingrained in New Mexico jurisprudence," *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶ 20, 144 N.M. 471. No-injury suits by individuals are thus already at the outer bounds of what is permissible under New Mexico law. No-injury class actions, by contrast, are well beyond those bounds and raise serious due process concerns, since there

is little incentive for unnamed class members to monitor and participate in litigation seeking relief for statutory violations when they have sustained no actual damages. Due process requires that the class representative "fairly insures the protection of the interests of absent parties who are to be bound by" the outcome of the litigation. *See Hansberry v. Lee*, 311 U.S. 32, 42 (1940). This in turn requires adequate representation by the class representative, notice to class members, and that class members being given the opportunity to be heard and participate in the class proceedings. *See Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 811–12 (1985). The adequate representation requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

In a no-injury class action, however, the class representatives — to say nothing of class members — have little incentive to monitor the litigation and ensure that members' rights and interests are adequately represented. Actual damages create the "fighting interest" that makes a class representative or member pay attention to what is being done in his name. Time is a scarce resource; few named plaintiffs are likely to

spend time and effort to monitor the complex proceedings of class litigation when they have sustained no actual injury as a result of the defendant's acts. The practical effect of this entirely reasonable disengagement by class representatives is that "class counsel effectively appoint themselves as agents for the class, wielding a power to transact in class members' rights." Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 150–51 (2003). Consumers have little incentive to hold their class representatives and class counsel accountable, since they "have individually too little at stake to spend time monitoring the lawyer—and their only coordination is through him." *Mars Steel Corp. v. Cont'l Illinois Nat. Bank & Trust Co. of Chicago*, 834 F.2d 677, 681 (7th Cir. 1987) (Posner, J.). As described below, the result is entirely predictable: class settlements that create massive fee windfalls for plaintiffs' lawyers and generate little relief for plaintiffs — usually, not even the minimal statutory damages they could have expected to receive if they had pursued statutory damages on their own. *See infra* at 25-30.

Further, class actions settlements have *res judicata* effect on class members, whose claims will be extinguished regardless of whether, due

to later factual developments, their claims ripen and they sustain actual damages after settlement is concluded. Class members can thus have "their future claims devalued and decided before they even accrue," Jeremy Gaston, *Standing on Its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 TEX. L. REV. 215, 237 (1998), long before it is "obvious that the settling of future plaintiffs' claims — essentially without their knowledge — is desirable, necessary, or worthwhile," *id.* at 238.

C. States With Similar Consumer Protection Statutes Overwhelmingly Prohibit No-Injury Class Actions.

Allowing statutory damages in consumer class actions absent any showing of injury would depart from the overwhelming authority in other states with similar statutes. A growing number of states have interpreted their consumer protection statutes to preclude statutory damages in class actions or to require plaintiffs to plead and prove an actual injury. These statutes all contain similar language to New Mexico's consumer protection statute, and were adopted to address similar problems.

In *Felix v. Ganley Chevrolet, Inc.*, for instance, the Ohio Supreme Court held that "treble statutory damages are not awarded in class

actions" under Ohio's consumer protection statute, and instead required that plaintiffs bringing such suits "must allege and prove that actual damages were proximately caused by the defendant's conduct." 49 N.E.3d 1224, at ¶¶29–31. In that case, as here, the Ohio statute distinguished between damages available in an individual suit and damages available in a class action. In individual suits, "[t]he consumer may . . . recover, *but not in a class action*, three times the amount of his actual damages or two hundred dollars, whichever is greater." Ohio Rev. Code Ann. § 1345.09(B) (2012) (emphasis added). Class action suits, by contrast, allow only for a plaintiff to "recover damages or other appropriate relief." *Id.* The court noted that "[t]his damage limitation is consistent with a policy determination that while treble or statutory damages, punitive damages, and attorney fees are available in actions under consumer-protection statutes to encourage consumers with smaller amounts of damages to bring their claims, treble statutory damages are not awarded in class actions because class-action lawsuits deter violations of the law by permitting the aggregation of claims." *Felix*, 49 N.E. 3d 1224, at ¶30 (internal citations omitted).

Ohio is not alone. In *Wallis v. Ford Motor Co.*, the Arkansas Supreme Court interpreted similar language to conclude that plaintiffs in a class action must have incurred "actual damage or injury." 208 S.W.3d 153, 161 (Ark. 2005) (quoting Ark. Code Ann. § 4–88–113(f)) ("[A] private cause of action is limited to instances where a person has suffered 'actual damage or injury as a result of an offense or violation as defined in this chapter.'"). The Washington Supreme Court reached the same conclusion. Washington's consumer protection statute, like New Mexico's, provides that those bringing suit can recover only the "actual damages" sustained, *see* Wash. Rev. Code Ann. § 19.86.090, and the Washington Supreme Court interpreted that statute to prohibit no-injury class actions. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 719 P.2d 531, 539 (Wash. 1986). *See also Tietsworth v. Harley-Davidson, Inc.*, 677 N.W.2d 233, 245 (Wis. 2004) (citing Wis. Stat. § 100.18(11)(b)(2)) (plaintiff under consumer protection statute must have sustained a "pecuniary loss"); *Yu v. Int'l Bus. Machs. Corp.*, 732 N.E.2d 1173, 1177 (Ill. App. Ct. 2000) ("[N]othing in plaintiff's complaint alleges actual injury or damages. . . . As plaintiff's claims of consumer fraud, deceptive trade practices and

negligence require actual injury or damage, we hold that plaintiff's claims constitute conjecture and speculation.").

Many states have gone farther, and have rejected no-injury class actions arising in fraud and products liability contexts as well. *See, e.g.*, *Ziegelmann v. DaimlerChrysler Corp.*, 649 N.W.2d 556, 565 (N.D. 2002) ("We conclude, like the vast majority of courts that have considered similar no-injury product liability lawsuits, that Ziegelmann's claim of injury is simply too speculative to constitute a legally cognizable tort injury."); *Pfizer, Inc. v. Farsian*, 382 So.2d 405, 407 (Ala. 1996) ("Under Alabama law, Farsian's fear that his valve could fail in the future is not, without more, a legal injury sufficient to support his claim."); *Wilson v. Style Crest Prods., Inc.*, 627 S.E.2d 733, 737 (S.C. 2006) ("We hold the Homeowners need to show that the product delivered was not, in fact, what was promised and they have not shown that.").

The trend in other states is clear: consumer protection class action claims should be limited to recovering actual damages.

II. There Is An Eminently Rational Basis for the Legislature to Have Prohibited No-Injury Class Actions.

Allowing consumer protection plaintiffs who have suffered no actual harm to maintain a cause of action is not only contrary to the

statute's plain language and established law, but would be bad for businesses—especially small businesses. Permitting no-injury class actions inevitably leads to "shakedown" suits seeking massive damages over technical statutory violations that cause little or no harm. Small businesses can rarely afford the exorbitant costs of defending a suit or run the risk of being hit with a substantial damage award. So small businesses almost always settle and pass the resulting settlement costs to consumers, who face increased costs and reduced consumer choice as a result. Meanwhile, the actual class members rarely receive more than a pittance. The only winners in these suits are plaintiffs' lawyers, who consistently walk away with windfall fee awards. Like many courts before it, this Court should require unnamed class plaintiffs to show actual injury to recover damages.

A. No-Injury Class Actions Lead to the Proliferation of Often Meritless Suits That Hurt Businesses.

No-injury class actions present real risks for small businesses: the comparative ease of filing suit without having to prove or even plead actual damages leads to the proliferation of lawsuits, often for highly technical violations of statutes that have harmed no one, and these businesses cannot afford to foot the substantial costs of litigating a case.

The State of California's experience is especially instructive. California's Unfair Competition Law, prior to being amended in 2004, initially did not require class-action plaintiffs to show that they had suffered actual harm. *See* Sharon J. Arkin, *The Unfair Competition Law After Proposition 64: Changing the Consumer Protection Landscape*, 32 W. St. U. L. Rev. 155, 167–68 (2005). The statute's broad scope, coupled with its lack of an actual injury requirement, resulted in a torrent of litigation. From 1991 until the end of 2004, there were 352 reported appellate decisions involving the law, more than a tenfold increase in the average number of such cases from prior years. *Id.* at 155. The plaintiffs' bar took advantage of the statute in a series of "blackmail" or "shakedown" suits, a practice that California Attorney General Bill Lockyer called "extortionate." Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 Colum. Bus. L. Rev. 1, 21 (2010). Plaintiffs' lawyers sued software companies for putting software in boxes that were "too big," sued nail salons for "deceptively" using the same bottle of nail polish on multiple customers, and sued grocery stores for putting both the actual and suggested retail prices on consumer goods. *Id.* In one

notorious set of related cases, plaintiffs' lawyers collected $1,000 to $5,000 apiece from hundreds of small businesses operated by immigrants—who often spoke little English and were unfamiliar with the law—that had been cited for regulatory violations. Arkin, *supra*, at 167. The business owners were given a choice: pay the plaintiffs' firm a few thousand dollars, or risk their livelihoods in suits over technical violations of obscure statutes that had injured no one. California voters eventually decided that enough was enough and voted to amend the statute to require plaintiffs to prove actual damages. Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 5 (2005).

B. The Enormous Costs of Defending a No-Injury Class Action Raises the Stakes of Class Certification and Causes Defendants—Especially Small Businesses—to Settle Even Favorable Cases.

Enormous damages are only one part of the equation: the legal costs of defending such suits can also be astronomical. Class action litigation costs in the United States totaled $2.17 billion in 2016, an increase of $70 million from the previous year. *See The 2017 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation*, at 3–4 (2017) ("*Class Action*

Survey"), *available at* http://classactionsurvey.com/pdf/2017-class-action -survey.pdf. These cases can drag on for years even before a class is certified. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions* 1, 5 (Dec. 2013) ("Approximately 14% of all class action cases remained pending four years after they were filed, without resolution or even a determination of whether the case could go forward on a class-wide basis."). Given the length of many of these cases, it is no surprise that the cost to defend a single large class action can run as much as $100 million. *See* Adeola Adele, Dukes v. Wal-Mart: *Implications for Employment Practices Liability Insurance* 1 (July 2011). Of firms embroiled in "bet-the-company" class action litigation, 75 percent spent $5 million or more each year on outside counsel. *Class Action Survey*, *supra*, at 17. However, just 28 percent of companies reported that their insurance covers even a portion of their defense costs. *Id.* at 18.

Even when these suits are not litigated on the merits, they still hurt businesses. Given the potentially enormous damages at stake, a defendant business will often settle instead of rolling the dice on litigation, even if it stands a good chance of prevailing on summary

judgment or at trial. Courts have long recognized the power of class action lawsuits to induce settlement. *See, e.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 419 n. 3 (2010) (Ginsburg, J., dissenting) (quoting Advisory Committee's Notes on Fed. R. Civ. P. 23) ("[A] class action can result in 'potentially ruinous liability.'")); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (Posner, J.) ("[C]ertification of a class action, even one lacking merit, forces defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability. . . . [Defendants] may not wish to roll these dice."). Consumer protection statutes that allow for damages without injury compound this phenomenon by letting plaintiffs bring the coercive power of massive, aggregated damages to bear even when the plaintiffs have not been injured. Such a statutory scheme "systematically distort[s] private incentives," resulting in lawsuits that

"bear little relation" to harm they purport to deter. Butler & Johnston, *supra*, at 19.

The result is cases like *Blanco v. CEC Entertainment Concepts, L.P.*, where a plaintiff sued Chuck E. Cheese's restaurants for alleged violations of the Fair and Accurate Credit Transactions Act of 2003. No. CV 07-0559 GPS (JWJx), 2008 WL 239658, at *1 (C.D. Cal. Jan. 10, 2008). The court noted that, if plaintiff's proposed class were certified, damages would range between $198 million and $1.98 billion, despite the fact that the plaintiff "admit[ted] that she incurred no actual harm and has not alleged actual harm to the class." *Id.* at *2. The potential damages would have far exceeded defendant's annual net income (of less than $70 million) and bankrupted the company. *Id. See also Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209, 1210 (11th Cir. 2005), *cert. denied*, 547 U.S. 1051 (2006) (no-injury class action under the Driver's Privacy Protection Act, where potential statutory damages reached $1.4 billion).

A defendant in such a lawsuit faces enormous pressure to settle. Often, it will elect to settle for more than the expected value of the suit, rather than risk the company on a devastating loss. *See, e.g.*, Richard

A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1882 (2006) ("[A] defendant would be willing to pay more than the expected value of the litigation in order to settle the class action and thereby rid itself of the greater variance of outcomes associated with it."), H.R. Rep. No. 106-320, at 8 (1999) ("Too frequently, corporate decisionmakers are confronted with the implacable arithmetic of the class action: even a meritless case with only a 5% chance of success at trial must be settled if the complaint claims hundreds of millions of dollars in damages."). In practice, "virtually every mass tort class action that has been successfully certified has settled out of court rather than been litigated to judgment," even where "there appears to be no substantive basis for defendant liability." George L. Priest, *What We Know, And Don't Know About Modern Class Actions: A Review of the Eisenburg-Miller Study*, Manhattan Institute Civil Justice Report 9, at 4 (Feb. 2005); *see also Class Action Survey*, *supra*, at 25 (just 2.1 percent of class action suits go to trial). Defendants have even been forced to settle cases when state policies encouraged the Defendants' conduct. *See* S. Rep. No. 109-14, at 21 (2005) ("[I]nsurance companies are often

forced to settle lawsuits even though the challenged actions were fully in accordance with state law—or encouraged by state policies.").

The near-certainty of settlement means that, in practice, cases rarely progress beyond the class certification stage. To put it bluntly, class certification is often "the whole case." FTC Workshop, *Protecting Consumer Interests in Class Actions* (Sept. 13–14, 2004), in *Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate,"* 18 GEO. J. LEGAL ETHICS 1197, 1213 (2005). Despite this practical reality, however, classes are readily certified, "often based upon satisfaction of relatively undemanding procedural requirements." Butler & Johnston, *supra*, at 25. This is especially true in certain state courts. *See* S. Rep. No. 109-14, at 22. And appellate courts have been reluctant to grant petitions seeking interlocutory review of class certification. *See* U.S. Chamber Inst. for Legal Reform, *A Roadmap for Reform: Lessons from Eight Years of the Class Action Fairness Act* 14 (October 2013) (fewer than one-fourth of the petitions seeking interlocutory review of lower court certification rulings were granted). Defendants in state consumer protection law class actions thus find themselves in the unenviable position of being forced to settle often

meritless suits, over nonexistent injuries, with little prospect of legal recourse, or else bet the company.

While these abusive lawsuits take a toll on businesses of all sizes, they hit small businesses particularly hard. In 2008, businesses with fewer than 500 employees faced a total tort liability of $105.4 billion. U.S. Chamber Institute for Legal Reform, *Tort Liability Costs for Small Business* 9 (July 2010) ("*Tort Liability*"). Of this figure, $35.6 billion—or 33.7 percent of all total monetary liability—was paid out-of-pocket by businesses instead of being covered by insurance. *Id.* Even among small businesses, the burden is borne disproportionately by the very smallest companies. Businesses with an annual tort liability of less than $1 million paid out 57 percent of all commercial tort liability costs, though they brought in just 8 percent of total revenues. *Id.* at 10. Despite being exposed to a disproportionate share of liability vis-à-vis revenues, however, small businesses often lack the insurance coverage to mitigate the loss or the resources to put up a legal fight.

"Shakedown" settlements thus often come right out of the bottom line, and small businesses are especially likely to settle, even "when they believe they have a good chance of winning at trial because they

cannot risk the potential loss of their business and everything they own." Butler & Johnston, *supra*, at 25. On average, the cost of settling a legal dispute consumes 10 percent of a small business owner's annual salary. *See* NFIB, *National Small Business Survey* vol. 5, issue 2 (2005). These costs, in turn, are often passed on to consumers or employees in the form of more expensive products and services, cut employee benefits, and lost jobs. *See, e.g.*, *Tort Liability*, *supra*, at 6 (finding that 11 percent of surveyed small business owners and managers were forced to lay off employees because of litigation concerns). Likewise, 73 percent of surveyed business owners and managers responded that business suffered as a result of litigation. *Id.*

C. No-Injury Class Actions Perpetuate Economic Conditions and a Business Climate That Hurts Consumers.

The great irony of no-injury class action suits under the state consumer protection laws that allow for them is that, in the long run, such suits actually *hurt* consumers. In one poll, 61 percent of responding business owners and managers said that their products and services became more expensive because of litigation concerns, and 45 percent said that litigation concerns rendered a product or service

unavailable. *Tort Liability*, *supra*, at 6. The causal relationship here is self-evident: businesses must either bring in more revenue or cut costs to make up for additional expenses imposed by defending lawsuits. On the market level, the uncertainty caused by the unnerving prospect of massive liability makes all goods and services that much more expensive, "imposing what is essentially an excise tax on each and every consumer sale." Butler & Johnston, *supra*, at 45. Class action tort costs, whether liability or defense costs, thus curb the consumption of otherwise beneficial products, and price some consumers out of the market entirely. *See id.* Like all excise taxes, these costs are also often regressive and borne disproportionately by lower income consumers. *See id.* (citing J. Fred Giertz, *Excise Taxes*, THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 111–13 (Joseph J. Cordes, Robert D. Ebel, & Jane G. Gravelle eds., 1999)). Because the damages sought in these suits are often wildly disproportionate to the injury being redressed, the costs of these suits, once passed to consumers, outweigh their social benefit. *See id.* ("[T]he cost imposition and welfare loss from this regressive tax . . . is likely to be highly disproportionate to whatever benefits CPA liability may generate."); *see also* Joanna Shepherd, *An*

Empirical Study of No-Injury Class Actions, at 5 (2016), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2726905 ("Most consumers will receive little benefit in exchange for the higher prices, reduced innovation, and lower product quality."). In short, consumers often pay far more for their "protection" than it is actually worth.

No-injury class action suits would thus hurt consumers in the aggregate even if every dollar of damages found its way back into consumers' pockets. But they don't. In practice, consumers see very little of the headline-grabbing damage figures; the minimal settlement payouts to the class generally amount to what Judge Posner has called "a mess of potage." *Mars Steel*, 834 F.2d at 681. For instance, in *Parker v. Time Warner Entm't Co., L.P.*, a class action arising out of alleged violations of the Cable Communications Policy Act, plaintiffs' attorneys walked away with nearly $3.5 million in fees and compensated expenses, just shy of 31 percent of the total value of the settlement. 631 F. Supp. 2d 242, 279 (E.D.N.Y. 2009). The class plaintiffs, by contrast, each received their choice of (1) "one free month of any Time Warner Cable service that is available on a monthly basis and to which the customer does not currently subscribe," (2) two free on-demand movies,

or (3) a check for $5. *Id.* at 249. For alleged violations of a statute that provides $1000 in damages per claimant, *see* 47 U.S.C. § 551(f)(2)(A), plaintiffs thus received 0.5 percent of what they would have received if they successfully brought suit on their own. Likewise, in *Gutierrez v. Autowest*, a case under the California Consumer Legal Remedies Act, the class received a *total* of $82,848 in damages and the class representatives received another $70,278, but their lawyers walked away with a whopping $1,494,988 in fees—about ten times the payouts to the class and class representatives combined—plus another $63,265 in expenses. Verdict and Settlement Summary, *Gutierrez v. Autowest*, No. CGC05317755, 2009 WL 2736967 (Cal. Super. Feb. 25, 2009).

These figures are not atypical. According to one recent study of 432 no-injury class action settlements between 2005 and 2015, attorneys' fees consumed an average of 37.9 percent of the settlement awards. Shepherd, *supra*, at 2. By contrast, plaintiff classes "typically receive less than 9 percent of the total" award. *Id.* Other studies have come to similar findings. *See, e.g.*, Rand Institute for Civil Justice, *Insurance Class Actions in the United States* 55 (2007) (finding that, for the cases for which a claim rate could be computed, the median was just

15 percent);[2] Mayer Brown, *Do Class Actions Benefit Class Members* 10 (2013) (finding that, for the cases for which a claim rate could be computed, the median claim rate was less than 12 percent).[3] Payouts to lawyers are among the factors that cause class actions to "propagate, spreading amoeba-like across federal and state courts" as "'copycat' class actions crop up elsewhere." Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125, 2146 (2000) (quoting Linda S. Mullenix, *Dueling Class Actions*, NAT'L L.J., Apr. 26, 1999, at B18).

The more prevalent the no-injury class action lawsuit becomes, the more harm is done to the public. The plaintiffs' attorney representing disengaged class members is "potentially an unreliable agent of his principals," *Mars Steel*, 834 F.2d at 681, more apt to seek a large fee award than the best interests of individual consumers or the public at large. Private plaintiffs with no responsibility to seek the

[2] Available at http://www.rand.org/content/dam/rand/pubs/monographs/2007/RAND_MG58721.pdf.

[3] Available at https://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf.

public interest are able to harass businesses with frivolous lawsuits seeking statutory damages that far exceed the harm sustained, over-enforcing a statutory scheme that is better left to public enforcement agencies and plaintiffs with actual injuries.

Given this dynamic, it is thus unsurprising that some jurisdictions, like California, upon realizing the "divergence in incentives in filing suit between private and public law enforcers," Butler & Johnston, *supra*, at 26, have amended their consumer protection statutes to prohibit no-injury class actions, as New Mexico's statute already does. New Mexico has no legitimate interest in inviting inevitable amoeba-like growth in no-injury class actions that reduce consumer choice, increase the cost of goods and services, and generate huge fees for plaintiffs' lawyers while providing minimal relief to an indifferent class of uninjured consumers. This Court should enforce the UPA as written in order to limit the social and financial damage done by no-injury class actions.

CONCLUSION

The decision of the First Judicial District Court dismissing the complaint should be affirmed.

DATED: August 4, 2017

Respectfully submitted,

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