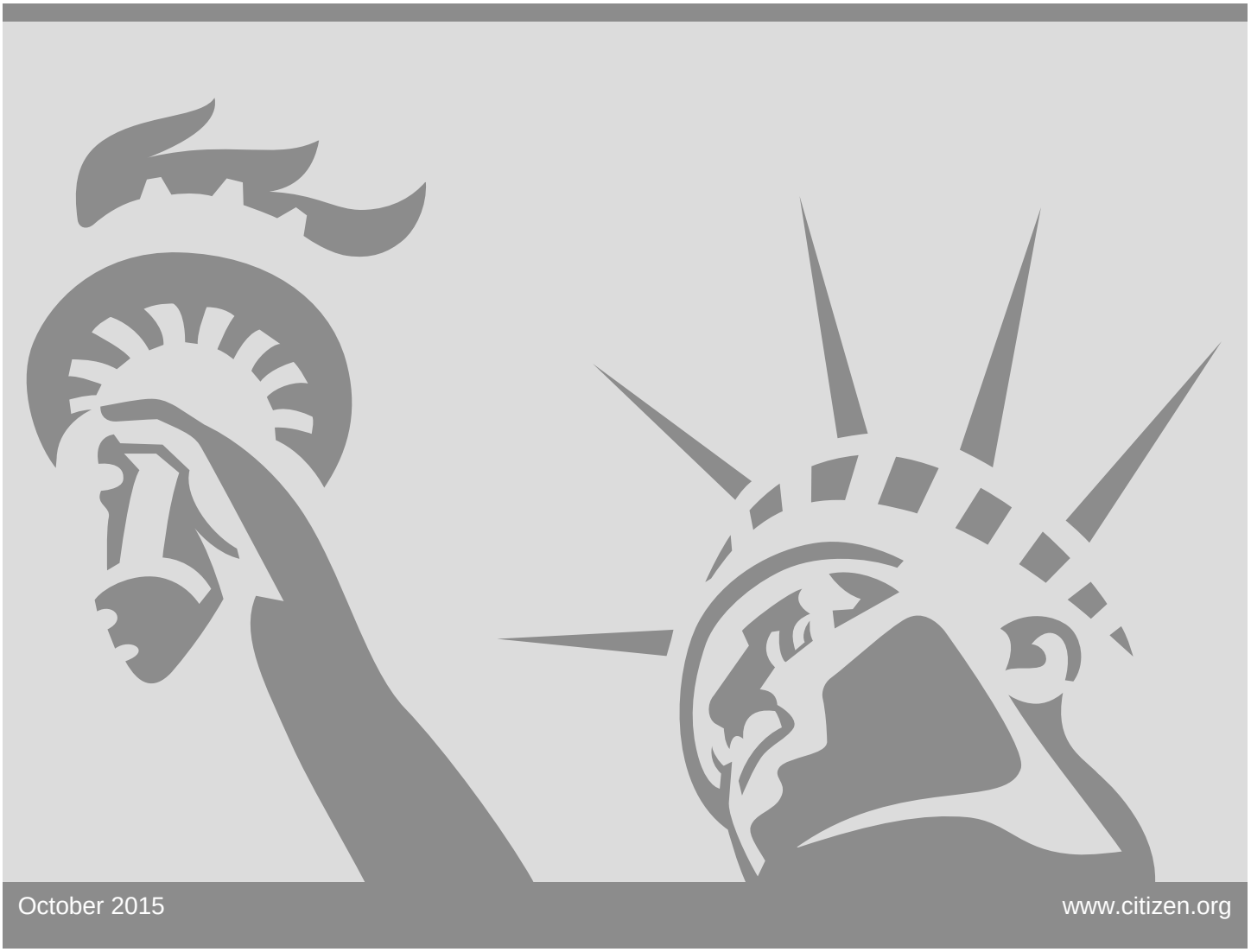

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The Fiction of the “No-Injury” Class Action

Acknowledgments

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Executive Summary

Class actions are cases in which many individuals join together to seek redress against unlawful conduct. Class action lawsuits are powerful tools for combating corporate wrongdoing because they enable victims to bring claims that individuals acting alone could not feasibly pursue. As a result, they have become lightning rods for corporate interests that seek to insulate themselves against liability when they sell defective products or engage in misrepresentations affecting large numbers of consumers.

The latest tactic used to disparage class actions is to assert that they are commonly filed on behalf of people who have not genuinely suffered any harm and have no legitimate basis for a lawsuit. Defenders of corporate wrongdoing have invented a new catch-phrase in their efforts to suppress class actions and now call for abolishing what they call the "no-injury class action."

This paper examines this latest attack on class actions and concludes that the "no-injury class action" is fictitious. The kinds of class actions to which corporate interests and their apologists seek to attach this label in fact involve a number of very real injuries suffered by consumers who buy defective products or who make purchases because of misrepresentations. These injuries include the need to repair or replace products to avoid serious injury, the economic injury of paying for a defective product that is not worth the premium price charged for it, the harm of receiving a worthless product that is not what it was held out to be, and the harm of paying extra for qualities a product is said to have, but does not in fact have.

All of these injuries are real, and they are exactly the same kinds of injuries that the law has traditionally allowed people to go to court to redress, not only in consumer cases, but also in other areas of the law.

Public policy should not be based on mythology. The fiction that the courts have opened their doors to "no-injury class actions" must not go unchallenged, lest it lead policymakers to close the courts to lawsuits that seek remedies for real harms suffered by real people.

Introduction

Class actions are cases where large numbers of people who are victims of corporate or governmental wrongdoing join together in a lawsuit to protect their rights and obtain remedies for the harms they have suffered. Class action lawsuits have helped combat race discrimination (as in *Brown v. Board of Education*, which outlawed segregation in schools), environmental destruction (as in the class actions brought on behalf of victims of the BP oil spill in the Gulf of Mexico), and sales of defective products (as in lawsuits brought for purchasers of Toyota cars prone to unintended acceleration), to name a few examples. Often, class actions are the only practical way for individuals to obtain relief against a corporate lawbreaker with huge resources available to defend against lawsuits.

In large part because of the effectiveness of class actions, the defense bar and advocates for business groups have long complained about such lawsuits. In 2005, with Congress's passage of the Class Action Fairness Act (CAFA), these forces succeeded in reducing individuals' ability to litigate class actions in state court. In reality, the goal of the new law was not only to change the jurisdictional and procedural playing field, but to make class actions harder to maintain. Nonetheless, class actions continue to be filed and, often, to succeed in ending corporate abuses and obtaining relief for class members. Accordingly, attacks on class actions continue.

Today, anti-class action voices are pushing the idea that many class actions in which consumers claim that they were duped into buying or overpaying for products involve plaintiffs who have suffered "no injury." This paper examines that claim, to test its validity as a matter of fact and of law. We conclude that the types of cases currently drawing criticism all involve real claims of injury to class members. In other words, the "no injury class action" is a myth.

We begin by considering the cases cited by anti-class action advocate John Beisner at a recent hearing before a subcommittee of the House of Representatives. The cases cited in the House testimony can be placed in two broad categories:

> (1) cases where the product is defectively designed or manufactured, in ways that can lead to particular problems that don't manifest themselves in every case (for example, premature tire wear or defective brakes that may lead to automobile accidents), and
>
> (2) cases where the product is not defective but is different from what it is represented to be (e.g., "organic," "all-natural," "Made in the USA").

Importantly, in *all* class actions alleging a defective product, the class must prove that the product is indeed defective. In the first category, although each consumer has purchased a defective product, business advocates argue that the consumer is not injured if the defect is latent and creates a risk of some further problem that a particular consumer may not experience. The cases cited by class-action critics in this category, however, all involve one or both of two specific types of injuries that support a right of action for relief. First,

consumers in many cases must fix or replace a product before a more obvious and even more harmful injury manifests itself. For example, if a car has defective brakes, the vehicle owner should not wait until an accident occurs before getting the brakes fixed. The owner and all similarly situated owners who purchased the product therefore should have standing to sue and a right to sue to redress the injury. Second, even where the product does not need not be repaired or replaced unless and until the problem caused by the defect becomes manifest, consumers have suffered economic injury by purchasing the defective product. For example, if twenty percent of expensive washing machines unexpectedly develop a smelly mold, but the remainder work fine and never smell, the consumer may not need to repair or replace the machine. Courts have rightly recognized, however, that if consumers paid for a high-end product and would not have paid the high price had they been aware of the potential defect, the consumers have suffered harm for which they should be compensated.

As for the second broad category, cases involving misrepresentations about a product's qualities also fall into two subsets presenting distinct types of injuries: (1) cases where the misrepresentation goes to the very essence of the product, and (2) cases where the misrepresentation is about some attribute apart from the primary function of the product. Cases in the first category almost inevitably involve the very real injury of having paid for a product that is not what it was represented to be. For example, all consumers who buy a pill advertised as a cure for colds are injured if the claim was bogus. The second group includes cases such as the "all natural" cases, where the consumer intended to buy tea, for example, and bought tea that tastes as expected, but the tea is not in fact "all natural." In some cases, if the seller did not charge a premium based on the misrepresentation, this class of tea purchasers may include some people who were not injured—they are happy with the tea and the misrepresentation was not important to their buying decision. As we explain, the presence of these individuals in the class does not mean no one was injured and should not bar certification, but instead should be addressed at the remedy stage.

Notably, all of the cases cited by Beisner are consumer class actions. The same kinds of injuries that are present in these kinds of cases are accepted by courts in a broad range of cases not just as a proper basis for standing (that is, the bare ability to get into court) but also as a proper basis for the award of substantial damages. Three areas of law outside of the consumer context—(1) securities law, (2) trademark law, and (3) antitrust law—further support consumers' standing and right to a remedy where they have purchased a product that, although it functions, they would not have purchased but for a misrepresentation, or where they paid more than they should have for a product that was defectively designed or manufactured.

(1) Securities cases. Federal securities statutes mandate that disclosure of various types of information be accurate and complete and make the provision of inaccurate or misleading information actionable. Thus, a suit for securities fraud resembles a consumer misrepresentation suit, which similarly alleges harm from deceptive information, and both types of suit seek to achieve similar policy goals.

(2) Trademark infringement cases. Although the federal trademark statute, the Lanham Act, does not itself provide that consumer injuries are actionable, Congress's aims in allowing competitor suits under the Act parallel goals served by consumer misrepresentation suits and reflect recognition that consumers suffer harm when they purchase products based on misrepresentations.

(3) Antitrust cases. Like consumer misrepresentation suits, antitrust cases involve claims of consumer injury as a result of purchasing at a price inflated by the defendant's challenged behavior.

In all three contexts, the notion that overpayment constitutes injury is uncontroversial.

The Fiction of the "No-Injury" Class in the Consumer Context

Injury is an important concept in the law in two major respects. First, in the federal courts, a plaintiff must claim some injury to establish "standing" to sue. Absent a plaintiff with standing, the Supreme Court has held that a federal court lacks any jurisdiction over a case. Thus, injury is a threshold requirement for obtaining access to the federal courts. Second, proof of injury is generally essential to obtain a remedy in a lawsuit. Money damages are generally awarded as redress for demonstrated injuries, and injunctions (court orders directing defendants to take or not to take some action) are generally available only to prevent an otherwise irreparable injury.

On April 29, 2015, attorney John Beisner, who played a critical role in drafting CAFA and spearheading efforts leading to its passage and is a partner at the law firm Skadden, Arps, Slate, Meagher & Flom LLP, testified on behalf of the U.S. Chamber of Commerce before the House of Representatives Committee on the Judiciary, Subcommittee on the Constitution and Civil Justice.[1] His testimony focused on the Fairness in Class Action Litigation Act of 2015 and his view that the legislation would prevent "overbroad" or "no-injury" class actions.[2] Citing thirteen cases, he argued that in recent years, federal courts have certified class actions even though "many class members have never encountered any problem with the subject product—and likely never will."[3] Citing six other cases, he argued that these supposedly "no-injury" cases illustrate a "depart[ure] from the long line of decisions rejecting no-injury class actions."[4]

The thirteen cases cited in the testimony as supposed examples of classes without injury involved consumers who alleged that they paid for a product they did not get. Mr. Beisner's underlying message was that getting less than you paid for, or getting something entirely different than what you paid for, is not an injury. The concept of injury as used in Mr. Beisner's testimony also has considerable rhetorical force. The suggestion that class-action plaintiffs are flocking to the courts to sue over things that did them no real harm is a powerful way of attacking both the lawsuits themselves and the motives of the plaintiffs who pursue them.

Mr. Beisner's testimony, however, ignores the injuries the consumers suffer when they purchase defective products and when sellers engage in fraud and deception. As discussed in detail in Parts I and II below, in each of the cases cited in support of the notion of "no injury class actions," class members suffered real injuries. Class members thus had standing to sue and, if they could prove their claims, the right to recover damages or obtain injunctive relief. These were not cases that should have been tossed aside on a theory of "no harm, no foul."

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[1] *Statement of the U.S. Chamber of Commerce*, Testimony by John Beisner, April 29, 2015, available at https://www.uschamber.com/sites/default/files/class_action_hearing_testimony.pdf ("Testimony").

[2] *Id.* at 3.

[3] *Id.* at 7.

[4] Testimony at 7.

The thirteen cases criticized by Mr. Beisner fall into the two broad categories. Cases in the first category concern defectively designed or manufactured products where the defects do not always cause problems—for example, defects that can lead, but do not always lead, to premature tire wear, accidents, mold growth, water leaks, or rotted wood. The second category of cases encompasses those where the product may or may not be defective, but in either event is different from what the manufacturer claimed it to be. Examples of these products include cold remedies that are no more than sugar water, food products touted as "all natural" that contain synthetic ingredients, and nut products falsely advertised for purported health benefits.

None of the cases cited in either category supports Mr. Beisner's notion of "no injury class actions." As we explain, his interpretation of the cases ignores the real injuries suffered by consumers when they purchase defective products or products whose qualities were misrepresented by the seller.

Mr. Beisner's testimony also cites six additional court decisions as examples of "decisions rejecting no-injury class actions." The suggestion that these decisions reflect legal standards fundamentally at odds with those applied in the cases Mr. Beisner criticizes misconstrues the facts and law of these cases. Indeed, these six cases confirm that courts already have the standards they need to dispense with cases that should not proceed on a classwide basis. Part III discusses these six decisions.

I. Defectively Designed or Manufactured Products

Many of the cases cited by Mr. Beisner in support of "no injury class actions" are consumer defective-product cases: lawsuits where consumers allege and must prove that the product they purchased was defective in either design or manufacture. A review of these cases shows that in all them, consumers suffered an injury.

The injuries in these consumer defective products cases can be categorized into two types of concrete injuries suffered by consumers. The first kind of injury involves defective products that may cause substantial damage if they are not immediately repaired or replaced. Consumers who have purchased such a product must choose between incurring the cost of fixing the defect or exposing themselves to the continued danger of using the defective product. For instance, a faulty plumbing piece must be replaced before it starts leaking and causes water damage, and a defective braking component in a vehicle must be fixed or replaced before the car loses braking power.

The second kind of injury in the cited consumer defective-product cases stems from defective products that do not need to be replaced or repaired until the defect manifests itself. Consumers who purchased a defective product that has not yet manifested the defect have already suffered injury if they paid more for the defective product than it is worth (i.e., more than it could have commanded in the market had its latent defect been known). This kind of injury shows up, for example, in cases dealing with defective washing machines that are likely to develop mold and bad odors. If a washing machine does not yet have any mold

or bad smell, there may be no need to go through with a costly replacement. Even so, purchasers of the defective washing machines are injured because they paid for an expensive washing machine that turns out to have a flaw that makes it less valuable.

A. Injury: Cost of repairing or replacing a defective product that poses a risk of substantial damage if not repaired or replaced

- *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010).

In this case, the class members bought Land Rovers that were prone to premature and uneven tire wear because of a geometry defect in the vehicle's alignment.[5] The plaintiffs sued for breach of warranty, violation of consumer protection laws, and unjust enrichment.[6] The defendant argued that individual issues would predominate because not all class members' cars had premature tire wear, and for those that did, they would have to show that the tire wear was not caused by other things, such as driving habits and weather.[7] Mr. Beisner's testimony takes issue with the Ninth Circuit's assertion that proof of the manifestation of the defect is not required for class certification.[8]

The premature tire wear may not have yet manifested itself on all of the vehicles, but all of the class members suffered the same injury: the defective geometry alignment of the Land Rovers they had purchased. To avoid premature tire wear, they would need to pay to have the alignment fixed. The defect also diminished the value of their vehicles.

- *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011).

This product liability case involved brass fittings used in household plumbing systems. The brass fittings are defective because they are inevitably susceptible to stress corrosion cracking as soon as they are installed.[9] This condition gets worse over time and eventually causes water leaks. The plaintiffs sought damages, declaratory relief, and an order enjoining the defendant from denying warranty claims for the defective parts, among other injunctive relief.[10] Mr. Beisner's testimony focuses on the defendant's argument that some members of the class had not suffered any injury because their plumbing systems had not yet started leaking.[11]

Although some of the class members had not suffered leaks from the defective brass fittings, all of them had purchased and installed defective brass fittings and would need to pay to replace them to avoid water damage. Each class member was stuck with a plumbing

[5] 617 F.3d at 1170.

[6] *Id.* at 1171.

[7] *Id.* at 1173.

[8] Testimony at 7-8.

[9] 644 F.3d at 609.

[10] Second Amended Complaint, available at http://www.plainsite.org/dockets/j3vrpq4k/minnesota-district-court/in-re--zurn-pex-plumbing-products-liability-litigation/ (Dkt. No. 148).

[11] 644 F.3d at 616.

piece that would fail and cause water leaks unless replaced. The need to incur replacement expenses was a real monetary injury suffered by all class members. All were likewise faced with a real threat of injury (denial of warranty claims) that could be redressed by prospective injunctive relief.

- *Banks v. Nissan North America, Inc.*, 301 F.R.D. 327 (N.D. Cal. 2013).

Certain Nissan vehicles had a defect in the brake components that caused loss of braking power. The plaintiffs sought damages, injunctive relief, and restitution. The defendant argued that the class was overbroad because it included car owners who had not experienced brake failure.[12] Mr. Beisner's testimony takes up this same point.[13]

All class members, however, had purchased Nissans with the defect. Class members whose vehicles had not yet lost braking power would either have to pay to get the braking problem fixed or continue to use a vehicle with a dangerous defect that could appear at any time, placing the driver, passengers and anyone else on the road at grave risk.

- *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014).

This case involved casement windows with a design defect that caused them to leak, leading to water damage. The plaintiffs sought damages and an order compelling the defendants to inspect and replace the defective windows, and to reimburse customers who had already paid to repair and replace defective windows. The court certified two subclasses: One of consumers who had already repaired and replaced windows that had rotted, and the other of consumers whose windows had not yet rotted or who had not yet replaced their rotted windows.[14]

The Seventh Circuit, in a per curiam decision joined by Judge Posner, upheld certification of the two classes.[15] In doing so, the court affirmed that class members suffered two kinds of injuries: the repair costs incurred by members who had to replace their windows, and the repair costs that other members would have to incur to avoid the substantial risk of leaks for windows that had not yet rotted.[16]

The parties reached a settlement, which the district court approved. On appeal again, the Seventh Circuit, this time with Judge Posner writing, vacated the approval, calling the settlement "inequitable—even scandalous."[17] Mr. Beisner's testimony suggests that the settlement was "scandalous" because few class members submitted claims, reflecting an absence of real injury.[18] To the contrary: The court of appeals rejected the settlement

[12] 301 F.R.D. at 335.

[13] Testimony at 9.

[14] 753 F.3d at 721; *see also Pella Corp. v. Saltzman*, 606 F.3d 391, 392-93 (7th Cir. 2010).

[15] *Pella Corp.*, 606 F.3d at 392.

[16] *Id.* at 394-95.

[17] 753 F.3d at 721.

[18] Testimony at 11-12.

because it was "stacked against the class" and favorable only to the defendant company and class counsel, rather than providing redress for the substantial injuries the court had identified the first time around as justifying both damages and prospective-relief subclasses.[19] That is, the settlement benefits provided would not be sufficient in relation to the quality of the claims asserted on behalf of the class. Thus, the testimony mistakes a bad settlement for a bad case. (Importantly, Judge Posner's opinion did not hold that the class should be decertified; instead, he remanded for appointment of new class representatives and class counsel to pursue the claims whose certification the court had previously affirmed.)

Having defective windows that require replacement is an injury, regardless of whether the wood has begun to rot.

- *In re IKO Roofing Shingle Products Liability Litigation*, 757 F.3d 599 (7th Cir. 2014).

The manufacturer of asphalt roofing shingles falsely told customers that the shingles met industry standards. When the defective shingles prematurely fell apart, the underlying roof and other housing structures were damaged. The complaint sought restitution, damages, declaratory relief, and injunctive relief, including an order requiring IKO to remove and replace class members' roofs with suitable alternative roofing material of the class members' choosing.[20] The district court denied class certification, but the Seventh Circuit reversed and remanded for application of the correct legal standard.[21] Mr. Beisner's testimony takes issue with the court of appeals' decision because some class members' roofing shingles had not manifested the defect.[22]

Whether or not the shingles have failed and caused damage to the house of each class member, the cost of replacing the shingles constitutes injury. Those who purchased the shingles must replace them to avoid the risk of substantial damage to their homes.

B. Injury: Paying too much for a product with a latent defect

- *Washing Machine Cases.*

The testimony cites three class actions involving defective washing machines: *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012); *Glazer v. Whirlpool Corp. (In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation)*, 722 F.3d 838 (6th Cir. 2013); and *Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *judgment vacated,* 133 S. Ct. 2768 (2013), *judgment reinstated,* 727 F.3d 796 (7th Cir. 2013).

[19] 753 F.3d at 724.

[20] Third Amended Complaint available at http://c2033602.cdn.cloudfiles.rackspacecloud.com/IKO_Complaint.pdf.

[21] 757 F.3d at 603.

[22] Testimony at 11.

In each of these cases, the plaintiffs alleged that they purchased washing machines with a design defect that the seller did not disclose, namely, a propensity to develop mold, mildew, bacteria, and foul odors. The defendants—and Mr. Beisner's testimony—argued that most of the class members' washing machines had not produced mold and therefore that most of the class members did not have an injury sufficient for standing.[23]

Class members, however, properly alleged injury in one of two ways: Either they purchased defective machines that developed mold, and/or they overpaid when they purchased the washing machines with an undisclosed defect. Each member of the class properly claimed an injury because each one allegedly paid a premium for a washing machine that had a hidden flaw.[24]

II. Product Misrepresentations

Other cases cited by Mr. Beisner in support of his notion of "no injury class actions" fit within the category of product misrepresentation. Again, a review of these cases shows that consumers suffered injury. The cases involving product misrepresentations also fall into two subcategories. In the first subcategory, the product was different from what it claimed to be—for example, a product sold as a cold remedy that in fact is a worthless sugar pill. In these cases, the consumer was injured because she paid for something she did not get at all. In the second subcategory, the misrepresentation may be less fundamental—the product was what the manufacturer or seller claimed at least in some sense—but the defendant misrepresented the product's quality or attributes relevant to a consumer's decision to purchase it.

A. Injury: Paying for a product that is not what it claims to be

- *Forcellati v. Hyland's, Inc.*, 2014 WL 1410264 (C.D. Cal. Apr. 9, 2014).

The plaintiffs alleged that the defendants' homeopathic children's cold and flu products were no more than sweetened and flavored water with very dilute active ingredients, and thus, that defendants' claims that the products provided fast, safe, and effective relief from cold and flu symptoms were false. The complaint sought declaratory relief, damages, and injunctive relief to prevent the defendants from continuing the misleading conduct. Mr. Beisner's testimony highlighted the defendants' argument that the commonality requirement was not met because some members of the class were satisfied with the product and, therefore, were not injured.[25]

[23] *Tait*, 289 F.R.D. at 479; *Glazer*, 722 F.3d at 849, 857; *Butler*, 702 F.3d at 362.

[24] *Glazer* subsequently proceeded to trial, and the jury returned a verdict for the defendant, Whirlpool. *See In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, Case No. 1:08-wp-65000 (N.D. Ohio Oct. 31, 2014). The verdict for Whirlpool does not call into question the propriety of pursuing the claims as a class, but instead reflects the jury's finding that the class failed to prove its claims. If the verdict is upheld on appeal, it will prove no more than that the system worked: A large group of plaintiffs claiming a cognizable common injury sued, and when they failed to prove their claim, the defendant got the benefit of a judgment against the entire class.

[25] 2014 WL 1410264, at *9; Testimony at 11.

All class members were injured because they purchased a product that falsely purported to contain certain ingredients and, as a result, was not the product that they thought they were buying. In addition, the product did not provide effective cold relief and the plaintiffs alleged that any effectiveness was because of the placebo effect.[26]

Paying anything for a worthless product falsely represented as having medicinal value is obviously an injury. The argument that being hoodwinked into paying for snake-oil is not an injury—or that consumers who remain deceived about the fact that the product is a sham are not injured—is strikingly indicative of the breadth of the attempt to apply the misleading "no-injury" label to class actions.

B. Injury: Purchasing a product based on misrepresentations about the product's attributes

Where misrepresentations do not go to the essence of a product, but to qualities that may be of greater or lesser importance to different consumers, class actions based on the misrepresentation may in some cases include some class members who were not injured. Whether the class includes uninjured members depends in part on whether the proof establishes that all members paid a premium based on the misrepresentations (which would establish injury to the entire class). Even absent a claim of a premium paid by all members, however, the possibility that some class members may not have suffered injury should not bar class certification. Whether an individual class member was injured by a misrepresentation about the product is an issue properly considered at the remedy stage.

- *Bruno v. Quten Research Institute, LLC*, 280 F.R.D. 524 (C.D. Cal. 2011).

The plaintiffs purchased a dietary supplement called Qunol. Qunol's manufacturer claimed that its active ingredient had "6X BETTER ABSORPTION" and was "6 Times More Effective" than competing brands of the supplement. The complaint alleged that these claims were untrue and sought an order requiring the defendants to disgorge unjust enrichment, destroy misleading and deceptive advertising materials and product labels, and pay restitution and statutory damages. In response, the defendant argued that the claims of better absorption did not cause any injury to the named plaintiff because the premium price for the product was due to the product's liquid form, not due to its absorption properties.[27] The defendants also challenged the standing of class members, arguing that proof of standing would require fact-intensive, individualized inquiries.[28] Mr. Beisner's testimony suggests that the court "refused to consider the class members' actual experience with the product," instead incorrectly focusing on the whether the misrepresentations were misleading.[29]

[26] *Id.* at *9.

[27] 280 F.R.D. at 530 n.2.

[28] *Id.* at 531.

[29] Testimony at 8.

Whether or not the manufacturer charged a premium because of the effectiveness claim or because of the liquid form, the plaintiffs bought something that was not what it purported to be. They paid for a product that falsely claimed to be more effective than competing brands. A settlement agreement approved by the court provided that the defendant would pay damages and prohibited the defendants from labeling the product as more effective or as providing more absorption unless those claims were supported by scientific evidence.[30]

- *Lilly v. Jamba Juice Co.*, 2014 WL 4652283 (N.D. Cal. Sept. 18, 2014).

The plaintiffs purchased smoothie kits that claimed to be "All Natural" but in fact contained unnatural ingredients. The plaintiffs sought a full refund, an order requiring the seller to give up all profits it had made on the product, and injunctive relief. Although the defendant did not contest that consumers who bought the smoothie kits based on the "All Natural" misrepresentation had stated an injury, the defendant argued that some class members may have purchased the smoothie kits for reasons other than the "All Natural" label and, therefore, were not injured.[31] Mr. Beisner's testimony notes that the plaintiffs did not allege having experienced any problems with the juice.[32]

The problem all class members experienced with the juice was that they paid a premium for a supposedly all-natural product. For that reason, they all suffered injury. Class members who purchased the product because of the misrepresentation were also injured because they did not receive the claimed benefit. The case settled and the settlement agreement include an injunction requiring the defendant to re-label the products.[33]

- *Zeisel v. Diamond Foods, Inc.*, 2011 WL 2221113 (N.D. Cal. June 7, 2011).

The class members purchased shelled walnuts with packaging claiming that the omega-3 in walnuts would promote heart health.[34] The plaintiffs alleged that the labeling was misleading because the research does not conclusively support those findings. The complaint sought damages in the amount paid to purchase the walnuts and an order enjoining Diamond from advertising its products in a misleading manner. As noted in Mr. Beisner's testimony, the defendant argued that the named plaintiff was not injured because he had said he would continue to purchase walnuts regardless of the health claims.[35] The defendant also argued that the absent class members lacked standing and could not show class-wide reliance on the health claim.[36]

Class members who purchased the product because of the misrepresentation were injured. Class members who would have purchased the walnuts regardless of the

[30] *Bruno v. Quten Research Inst., LLC*, 2013 WL 990495, at *1 (C.D. Cal. Mar. 13, 2013).

[31] 2014 WL 4652283, at *7.

[32] Testimony at 9.

[33] *Lilly v. Jamba Juice Co.*, 2015 WL 2062858, at *7 (N.D. Cal. May 4, 2015).

[34] 2011 WL 2221113, at *1.

[35] *Id.* at *4; Testimony at 9-10.

[36] 2011 WL 2221113, at *1.

misrepresentation were also injured if they paid a premium for the claimed health benefit, an issue that would properly be considered at the remedy stage. As part of a settlement approved in 2012, Diamond paid restitution and agreed to change its labels and website.[37]

- *Thurston v. Bear Naked, Inc.*, 2013 WL 5664985 (S.D. Cal. July 30, 2013).

The plaintiffs brought claims against Bear Naked for marketing as "natural" 11 food products that contained synthetic ingredients. Among other remedies, the complaint sought damages, restitution, and an order enjoining Bear Naked from advertising misleadingly. Mr. Beisner's testimony repeats the defendant's argument that the class included members who were unaffected by, or not exposed to, the "natural" misrepresentations on Bear Naked products and therefore lacked standing.[38]

All class members were injured if they paid a premium for the claimed "natural" benefit. If there was no premium for that claimed benefit, class members who purchased the product based on the "natural" claim were injured. Class members who would have purchased the product regardless of the claim were not injured—an issue properly considered at the remedy stage.

III. Courts Apply Appropriate Standards to Dispense With Cases That Should Not Proceed as Class Actions.

Although consumers claimed real injuries in every case, Mr. Beisner argues that the thirteen cited decisions demonstrate "a growing embrace of overbroad, no-injury class actions" and represent a departure from a "long line of decisions rejecting no-injury class actions."[39] He then discusses six decisions as examples of how courts used to reject the types of class actions that Mr. Beisner contends courts now improperly allow to proceed.[40] His testimony, however, similarly misconstrues these six cases. A review of the cases shows that the difference between the outcomes in those cases and the cases he criticizes does not demonstrate a change in the law or a trend toward accepting cases that do not involve real claims of injury.

In fact, the six cases cited by Mr. Beisner as examples of decisions properly rejecting class actions are generally consistent with the thirteen cases he criticizes. The differences reflect differences in the facts and circumstances, not a change in standards courts use to determine legal injury and thus certify a class. Indeed, many of the six decisions are contemporaneous with the thirteen decisions Mr. Beisner criticizes. Both sets of decisions illustrate that courts have applied, and continue to apply, appropriate standards to determine whether to grant class certification.

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[37] *Zeisel v. Diamond Foods, Inc.*, 2012 WL 4902970 (N.D. Cal. Oct. 16, 2012).

[38] 2013 WL 5664985, at *3; Testimony at 10.

[39] Testimony at 3, 7.

[40] *Id*. at 4-7.

A. Failure to State a Cause of Action

Of the six cases cited by Mr. Beisner to support his notion that courts previously rejected class certification for "no-injury" class actions, the courts dismissed the claims in three for failure to state a cause of action, before reaching the issue of class certification, because the allegedly defective products did not cause any harm to the named plaintiffs. Mr. Beisner's testimony suggests that these types of cases are generally similar to class actions where some class members own defective products that have not yet caused damage—for example, the class action in *In re Zurn Pex Plumbing Products Liability Litigation*, where some class members had brass fittings that had not yet failed. Unlike *Zurn Pex*, however, the three cases Mr. Beisner holds up as models in this regard concerned products with alleged defects that did not create any hazard; no facts indicated that the defects could lead to harm. A product that poses a merely speculative risk of harm is different from a product with a defect that has already caused harm to some class members, where the risk of harm is present and real—such as the risk of damage created by defective geometry alignment in vehicles, defective casement windows, or defective vehicle braking systems. Faced with claims that the products posed only speculative risks of speculative injuries, the courts properly dismissed the three cases.

- *Lee v. General Motors Corp.,* 950 F. Supp. 170 (S.D. Miss. 1996).

The plaintiffs alleged that the detachable fiberglass roofs on their Chevrolet Blazers were defective because they did not meet General Motors' safety specifications.[41] The plaintiffs had suffered no personal injury: There had been no accidents involving the vehicles at issue, and all of the vehicles owned by the purported class members had been driven without incident for at least five years.[42] Finding that it was mere conjecture that the fiberglass roofs could fail and cause harm, the court dismissed the case for failure to state a cause of action.

- *Yost v. General Motors Corp.*, 651 F. Supp. 656 (D.N.J. 1986).

The plaintiff alleged that the vehicle's engine would allow oil, water, and coolant to mix in the crankcase, which could cause damage that in turn could cause safety problems.[43] The court dismissed the case, based on breach of warranty and fraud claims, explaining that, under state law, "[d]amage is a necessary element of both counts," and the plaintiff "has not alleged that he has suffered any damages."[44] Whether or not the decision was correct on the facts, it is consistent in principle with cases allowing defect claims to proceed.

[41] 950 F. Supp. 170, 172.
[42] *Id.* at 172, 174.
[43] 651 F. Supp. at 657.
[44] *Id.*

- *Yu v. IBM*, 732 N.E.2d 1173 (Ill. App. Ct. 2000).

The plaintiff purchased software that allegedly was not Y2K (Year 2000) compliant.[45] The defendant had made available a free fix that could be downloaded from the internet or installed from a free CD-ROM, and, after filing the complaint, the plaintiff installed the free upgrade and verified that it worked.[46] The court dismissed the case for failure to state a cause of action because there was no allegation of actual injury and because the case was moot.[47] The complaint offered only speculation that the software might not work after December 31, 1999.[48]

B. Class Action Standards

The three remaining cases demonstrate that courts continue to apply existing Rule 23 standards to weed out cases that should not proceed on a classwide basis. These cases were dismissed based upon their particular facts and circumstances, using the same legal standards applied in the thirteen decisions Mr. Beisner attacks, not based on a finding that the plaintiffs were seeking to bring a "no-injury" class action.

- *Burton v. Chrysler Grp. LLC*, 2012 WL 7153877 (D.S.C. Dec. 21, 2012).

The plaintiffs brought a putative class action alleging that certain Dodge Ram trucks were manufactured with an exhaust system defect that caused excessive soot accumulation, leading to a variety of problems.[49] The court denied the motion for class certification because the plaintiffs "failed to specify a specific defective component and instead list various problems that can result from an alleged defect." Thus, the court held, the plaintiffs could not establish commonality.[50] The court also explained that uncertainty regarding how many trucks with the unspecified defect were experiencing problems "highlight[ed]"

[45] 732 N.E.2d at 1175.

[46] *Id.* at 1176.

[47] *Id.* 1177-78.

[48] In a footnote, Mr. Beisner cites *Weaver v. Chrysler Corp.*, 172 F.R.D. 96 (S.D.N.Y. 1997), and *Ford Motor Co. v. Rice*, 726 So. 2d 626 (Ala. 1998), as examples of "other courts [that have] followed the same approach." Testimony at 5 n.13. In *Weaver*, the plaintiff alleged that integrated child safety seats were defective because the shoulder strap would unlatch, but failed to allege that the child safety seat in his vehicle had ever malfunctioned; the court held that under relevant principles of state tort law, his claims of economic injury were not sufficient to state a claim. *Weaver*, 172 F.R.D. at 98-99. Whether that ruling was correct or not under applicable principles of substantive state law has no bearing on whether claims of economic injury can support class treatment where such claims support a cause of action under relevant law. In *Rice*, the named plaintiffs alleged that their SUVs had a design defect that gave them a propensity to roll over, but none of the plaintiffs' vehicles had rolled over and none of them could point to any adverse economic consequences from the alleged defect. *Rice*, 726 So. 2d at 627. The state court determined that substantive state law did not allow a cause of action in such circumstances—a determination that is not contrary to decisions allowing certification of classes where such allegations do state a claim under applicable law.

[49] 2012 WL 7153877, at *1.

[50] *Id.* at *4.

the lack of commonality among putative class members.[51] Whether or not the court was correct or not to find a lack of commonality on the particular facts, the case illustrates that where class members' injuries are not the result of a common circumstance, existing Rule 23 standards provide a ready means to prevent certification.

- *Kachi v. Natrol, Inc.*, 2014 WL 2925057 (S.D. Cal. June 19, 2014).

The plaintiff alleged that some of Natrol's fitness supplements falsely claimed to improve male sexual performance, immunity, and cardiovascular function by increasing the levels of Nitric Oxide in the blood, when in fact the products did not metabolize into Nitric Oxide.[52] The evidentiary record before the court indicated that although the fitness supplements were ineffective when used by healthy individuals, they were effective when used by unhealthy individuals.[53] Because the class included both healthy and unhealthy individuals, the court denied class certification on the grounds of commonality and typicality, noting that the class definition was "woefully overbroad."[54] The court also dismissed the case for lack of subject matter jurisdiction for failure to meet the amount in controversy requirement necessary to establish federal jurisdiction based on diversity.[55] The case does not, as Mr. Beisner's testimony suggests, reflect a court's rejection of certification in a case involving no injury, but rather illustrates that differences among members of a proposed class may at times prevent a broad certification. Here, a narrower class involving the group that suffered injury would have been appropriate, but was not possible because of the absence of diversity jurisdiction.

- *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982).

These three consolidated cases arose from defects in Firestone tires.[56] Most of the tires at issue in the suit "led full and uneventful lives," remaining failure-free for the number of miles for which they were guaranteed.[57] The court determined that the owners of these functioning tires—a majority of the putative class—had not suffered any injury and had failed to state a cause of action.[58] Because a majority of the putative class members did not have a claim for relief, the court denied class certification.[59] The case does not in any way call into doubt the correctness of decisions certifying classes based on injuries widely (even if not always universally) shared among class members.

[51] *Id.* at *6.
[52] 2014 WL 2925057, at *1.
[53] *Id.* at *5.
[54] *Id.* at *5 n.2.
[55] *Id*. at *6.
[56] 535 F. Supp. at 597.
[57] *Id.* at 601.
[58] *Id.* at 602.
[59] *Id.* at 603.

Beyond The Consumer Context: Similar Injuries as the Basis for Standing in Securities Law, Trademark Law, and Antitrust Law

Consumer standing to pursue the types of cases criticized by Mr. Beisner is well-supported by principles applicable to cases in other contexts, where similar types of injuries are accepted without question as a proper basis for both standing and the award of substantial damages. As discussed below, firmly established principles of securities law, trademark law, and antitrust law support a consumer's standing and right to a remedy where the consumer purchased a functional product based on a misrepresentation (or omission), or where the consumer overpaid because the product was defective. In these areas, overpayment has long been recognized as an injury sufficient to state a claim for relief.

I. Securities Litigation

Federal securities law mandates accurate and complete information in securities offerings and transactions. The law's focus on providing information to purchasers—and its recognition of an injury when faulty information renders purchasers worse off—creates strong parallels between securities litigation and consumer misrepresentation litigation, where plaintiffs similarly allege an injury stemming from inaccurate or incomplete information. As discussed below, the parallels exist both with respect to the causes of action in these two areas and with respect to the common purposes underlying both kinds of suits.

A. Background and Operation of Federal Securities Regulation

1. Securities regulation generally

Congressional regulation of securities arose in response to the 1929 stock market crash and "reports of widespread abuse in the securities industry."[60] Although many states had enacted laws regulating securities, dubbed "blue sky laws," the state laws had proved insufficiently effective to stave off "outrageous conduct by securities promoters." Over the next decade, Congress enacted a series of statutes aimed at the securities industry; in addition to periodic amendments to those Acts, Congress enacted additional major securities statutes in 1970 and 2002.[61]

[60] *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170 (1994); *see also SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186–87 (1963) ("'It requires but little appreciation . . . of what happened in this country during the 1920's and 1930's to realize how essential it is that the highest ethical standards prevail' in every facet of the securities industry." (alterations in original) (quoting *Silver v. New York Stock Exch.*, 373 U.S. 341, 366 (1963))).

[61] *See* 1 *Treatise on the Law of Securities Regulation* § 1.2 (discussing the Securities Act of 1933, the Securities Exchange Act of 1934, the Public Utility Holding Company Act of 1935 (repealed in 2005), the Trust Indenture Act of 1939, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Investor Protection Act of 1970, and the Sarbanes-Oxley Act of 2002).

Two kinds of "regulatory philosophies" characterize securities regulation generally: "merit regulation" or "disclosure."[62] The former approach—widely employed in state blue sky laws at the time Congress entered the field[63]—"seek[s] to protect investors by prohibiting transactions that authorities deem unfair or unjust."[64] Deviating from that state practice, Congress has adopted the latter approach in federal legislation.[65]

That disclosure approach manifests in a variety of forms in federal securities regulation. For example, some statutes require certain information to be made available at the time of a public offering,[66] while others mandate annual and quarterly reporting.[67] Other provisions create liability for failures to disclose fully or accurately, by, for example, permitting SEC enforcement actions,[68] or providing for private causes of action by those alleging an injury resulting from misstatements or omissions in required disclosures.[69] This last form of securities regulation—the creation of private actions for those alleging an injury stemming from the information provided to them during transactions—creates the most direct parallel between securities regulation and consumer misrepresentation suits.

2. Section 10(b) fraud suit

Section 10(b) of the Securities Exchange Act of 1934 prohibits the use of "manipulative or deceptive device[s]" "in connection with the purchase or sale of any security."[70] Broadly speaking, this section allows a plaintiff to recover when she can show that, in purchasing securities, she relied on some material misrepresentation to her detriment. For example, the plaintiffs in *Matrixx Initiatives, Inc. v. Siracusano*, were found to have stated a claim within section 10(b) by alleging that Matrixx Initiatives had made misleading statements about one of its products, Zicam, in public statements and a press release.[71] Several medical professionals had contacted Matrixx about the possibility that Zicam had caused some

[62] *A.S. Goldmen & Co. v. New Jersey Bureau of Sec.*, 163 F.3d 780, 782 n.4 (3d Cir. 1999).

[63] *See* 1 *Treatise on the Law of Securities Regulation* § 1.2.

[64] *A.S. Goldmen*, 163 F.3d at 782 n.4; *see also Treatise on the Law of Securities Regulation* § 1.2 (explaining that, under state blue sky laws, "the state securities commissioner or administrator typically was given the power to determine whether the securities were suitable for sale" by "evaluating the substantive terms of the securities to be offered").

[65] *A.S. Goldmen*, 163 F.3d at 782 n.4; *see also Capital Gains Research Bureau, Inc.*, 375 U.S. at 186 ("A fundamental purpose, common to [federal securities] statutes, was to substitute a philosophy of full disclosure for the philosophy of caveat emptor . . . ." (citing H.R. Rep. No. 73-85 (1933))); S. Rep. No. 73-47, at 1 (1933) ("The basic policy [of the Securities Act of 1933] is that of informing the investor of the facts concerning securities to be offered for sale . . . and providing protection against fraud and misrepresentation.").

[66] *See* 15 U.S.C. § 77g.

[67] *See* 15 U.S.C. § 78m.

[68] *See generally* 6 *Treatise on the Law of Securities Regulation* § 16.2

[69] *See, e.g.*, 15 U.S.C. § 77k (providing private remedy for misstatements or omissions in registrations statement); 15 U.S.C. § 78j(b) (providing implied private right of action for use of "manipulative or deceptive device[s]" in connection with purchase or sale of securities).

[70] 15 U.S.C. § 78j(b).

[71] 131 S. Ct. 1309 (2011).

users to lose their sense of smell—a condition called anosmia. With notice of this possible link, Matrixx made public statements predicting a rosy financial future and, in response to a report that the FDA was investigating complaints linking Zicam to anosmia, "issued a press release that suggested that studies had confirmed that Zicam does not cause anosmia."[72] Following reports by various third parties of the potential link, Matrixx's stock price fell significantly. The Court found that a "reasonable investor" might have acted differently had she been informed of the adverse events,[73] *see id.* at 1321, and that Matrixx's press release was "misleading" as Matrixx "had not conducted any studies relating to anosmia and the scientific evidence at th[e] time" of its press release "was insufficient" to support the press release's conclusion that Zicam did not cause anosmia, *see id.* at 1324. Other statements that have been found to be actionably misleading include statements misstating the scope of a company's patent,[74] incorrectly representing a company's progress in a given area,[75] and inaccurately characterizing a company's financial position.[76]

A plaintiff in a securities fraud suit must show many of the same elements that a plaintiff in a consumer misrepresentation must show, including, among others, (1) a material misrepresentation or omission, (2) reliance (or "transaction causation"), (3) economic loss, and (4) a causal connection between the material representation and the economic loss (or "loss causation").[77] The first three elements—misrepresentation, reliance, and economic loss—have direct parallels in consumer misrepresentation cases, where consumers similarly must allege that they spent money that they would not have (or spent more money than they would have) absent a misrepresentation.[78] The economic loss in a consumer misrepresentation suit stems from owning a product that a plaintiff values at

[72] *See id.* at 1315, 1324.

[73] In doing so, the Court rejected Matrixx's argument that reports of adverse events could not give rise to a material misrepresentation or omission "absent a sufficient number of such reports to establish a statistically significant risk that [a] product [was] in fact causing the events." *Id.* at 1318–19. The Court found this "bright-line rule" was inconsistent with the "fact-specific" materiality inquiry that focuses on how a "reasonable investor" would have acted if she had access to the information at issue. *Id.* at 1318, 1321 (internal quotation marks omitted).

[74] *See*, *e.g.*, *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 426 (5th Cir. 2001) (inaccurate statement that method of use patent covered drug itself).

[75] *See*, *e.g.*, *Spitzberg v. Houston Am. Energy Corp.*, 758 F.3d 676, 684 (5th Cir. 2014) (oil and gas company's statement suggested that it had begun production or geological testing though it had not); *cf. SEC v. Platforms Wireless Int'l Corp.*, 617 F.3d 1072, 1094 (9th Cir. 2010) (SEC enforcement action under 10(b) involving press release that indicated working prototype existed even though no such operational prototype existed and company did not have funds to built prototype).

[76] *See*, *e.g.*, *Marrari v. Med. Staffing Network Holdings, Inc.*, 395 F. Supp. 2d 1169, 1183 (S.D. Fla. 2005) (company alleged to have misrepresented and falsified earnings and periodic reports).

[77] *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341–42 (2005).

[78] *See*, *e.g.*, *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Products Liab. Litig.*, No. 3:09-CV-20001-DRH, 2012 WL 865041, at *14 (S.D. Ill. Mar. 13, 2012) ("[P]laintiff contends she paid an overcharge—more than she otherwise would have—because of the allegedly fraudulent advertising campaign."); *Craig v. Twinings N. Am., Inc.*, No. 5:14-CV-05214, 2015 WL 505867, at *3 (W.D. Ark. Feb. 5, 2015) (accepting allegation that plaintiff "would not have purchased [a] product" or "would have purchased a cheaper product[] had she known the 'true contents' of the product" as sufficient for Article III standing); *Kwikset Corp. v. Superior Court*, 246 P.3d 877, 890-91 (Cal. 2011) (finding sufficient allegations that a plaintiff "would not have bought the product but for the misrepresentation").

less than what she paid; assuming reliance, the plaintiff owns that product because of the misrepresentation.[79] In other words, there is a causal connection between the misrepresentation and the economic loss, analogous to loss causation in securities fraud.[80] Thus, the showing a securities fraud plaintiff must make is similar to the showing a plaintiff would make in a consumer misrepresentation suit, and the nature of the very real injury that both types of actions seek to redress—economic losses that result from deception in the marketplace—supports claims for relief in both.

3. Counterargument based on distinct motivations for purchase

One might argue against the analogy by pointing to the difference in motivations for purchasing securities as compared to the motivations for purchasing consumer products. Individuals purchase securities for their monetary value. Thus, when a consumer suffers a monetary loss because of misleading information, her expectations have been frustrated directly—she bought the security to make money and misleading information meant that she did not make the amount of money she predicted she would. In contrast, an individual purchases a consumer product for the thing itself. If advertising or packaging misrepresents the product, but the product is still perfectly functional, one could argue that the consumer's expectations have not been frustrated as fully—she still has a product that is functional, even if some characteristics are different than she thought at the time of purchase.

[79] *See Kwikset*, 246 P.3d at 893 n.19 ("[P]laintiffs are . . . out the money they paid and have in its place only a product they value at less than what they paid.").

[80] One could argue that the Supreme Court's pronouncements in *Dura Pharmaceuticals* with respect to loss causation rebut this analogy. In *Dura*, the Court explained that showing an inflated purchase price was insufficient to satisfy loss causation because a "higher purchase price will sometimes"—but not always—"play a role in bringing about a future loss." *Dura*, 544 U.S. at 343. Thus, one might argue that securities law does not recognize overpayment as an injury: an investor who can show only that she paid for a security overvalued because of a representation cannot recover. However, the Court's treatment of overpayment as necessary but not sufficient for establishing a claim is premised on aspects of securities inapplicable to consumer purchases. Although it is reasonable to treat an investor's valuation of a share as equal to the market price, the value a consumer places on a product may vary based on that consumer's subjective preferences, *see, e.g.*, *Kwikset*, 246 P.3d at 889 ("To some consumers, processes and places of origin matter."). Accordingly, an investor who purchases a share at an inflated price "has suffered no loss" because "the inflated purchase payment is offset by ownership of a share that *at that instant* possesses equivalent value." *Dura*, 544 U.S. at 342. Not so with consumer products: a consumer purchases a product not because she expects to make money off of it (as with a share of stock) but, instead, because she "value[s] the product as labeled more than the money . . . she parted with," *Kwikset*, 246 P.3d at 890; when the product does not have that value because such labeling is incorrect, the inflated purchase payment is offset by something less than ownership of that product. And, unlike with securities, where purchases "are normally [made] with an eye toward a later sale," *Dura*, 544 U.S. at 342, it is unreasonable to assume consumers could simply resell overvalued products, *see Kwikset*, 246 P.3d at 890 (outlining "four difficulties" with the "idea that [consumers] could as easily turn around and sell [products] to someone else for [the consumer's purchase] price"). Thus, while the *Dura* Court envisioned various resale scenarios where an overpayment might not lead to a loss, *see Dura*, 544 U.S. at 342–43, such situations are inapposite in the consumer context. Unlike in securities fraud suits, there is always a causal connection between the misrepresentation and the economic loss in consumer misrepresentation suits.

This argument, however, does immeasurable damage to the notion, necessary to a free and competitive market,[81] that "the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."[82] By respecting only those consumer choices that go to the core reason for purchasing a category of item and not those that influence the choice of a particular product, the argument would subordinate free consumer choice to paternalistic judicial determination of what a consumer is really after in making a purchase. Though the reasons for purchasing securities are not identical to those for purchasing consumer products, use of this distinction to undercut the analogy between securities regulation and misrepresentation suits would, in undermining consumer choice as a general matter, seem to prove too much.

B. Congressional Goals

Congress has identified certain goals of securities statutes that also underlie consumer misrepresentation suits: (1) protecting purchasers, (2) protecting those engaged in non-deceptive business, and (3) encouraging investment.

First, Congress has aimed to protect the uninformed public from making bad purchases. As the Senate Report to the 1933 Act explained, the aim of the Act was to "prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation."[83] "[I]ncomplete, careless, or false representations" had led to "billions of dollars . . . invested in practically worthless securities."[84] And, in demanding accurate information for investors—both through required disclosures and through liability for misrepresentations—Congress sought to protect the "average investor, who is of necessity personally uninformed" from such losses.[85] In essence, Congress's securities regulations seek to prevent purchases that would not have been made (or would not have been made at that price) absent misleading or incomplete information—the same kind of purchases that consumer protection statutes providing the basis for consumer misrepresentation suits aim to avoid.[86]

Second, securities regulations aim to protect those doing honest business in at least two ways. First, the prohibition on fraudulent or otherwise illegal practices "protect[s] honest

[81] As discussed in section II.B, *infra*, protecting consumer choice is also an aim of federal trademark legislation.

[82] *FTC v. Algoma Lumber Co*., 291 U.S. 67, 78 (1934).

[83] S. Rep. No. 73-47, at 1 (1933).

[84] *Id*. at 2.

[85] S. Rep. No. 73-792, at 2 (1934) (quoting statement of Franklin D. Roosevelt); *see also Wright v. Bankers Serv. Corp.*, 39 F. Supp. 980, 983 (S.D. Cal. 1941) ("The Securities Exchange Act was passed to protect the investing public. The lifetime savings of too many people who could ill afford to lose them were taken by dishonest promoters and salesmen in exchange for worthless securities.").

[86] *See*, *e.g*., *Kwikset*, 246 P.3d at 890 (describing the object of a state law prohibiting product labeling that falsely states products are made in the United States as "protect[ing] consumers from being misled" and explaining that "the economic harm" in such purchases is the fact that "the consumer has purchased a product that he or she paid more for than he or she otherwise might have been willing to pay if the product had been labeled accurately" (internal quotation marks omitted) (citation omitted) (emphasis omitted)).

enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion."[87] Misrepresentation suits can similarly be seen to aim to purge the competitive advantage obtained through false statements.[88] Second, those engaged in the securities business may find themselves the victim of deceptive practices.[89] "While investor protection was a constant preoccupation of the legislators [enacting the 1933 Act], the record is also replete with references to the desire to protect ethical businessmen."[90] Actions seeking recovery for consumer deception serve similar policies of protecting legitimate businesses because businesses themselves purchase consumer goods and may be victimized by the same types of misrepresentations as individual consumers.

Third, Congress has sought to energize the marketplace by "restor[ing] the confidence of the prospective investor in his ability to select sound securities."[91] Allowing investors to trust market information "encourage[s] the investment necessary for capital formation, economic growth, and job creation."[92] Investors who know they can sue for inaccurate or incomplete information will be more willing to rely on that information and, in doing so, participate in the market. Similarly, consumer purchasers who know inaccurate advertising will be actionable will be more willing to purchase in reliance on that advertising.[93]

In short, consumer actions not only seek recovery for the same kinds of injuries as do securities actions, but also serve the same fundamental policies. The critical goal of the securities laws—providing redress when marketplace deception results in economic losses to securities buyers—parallels that of consumer misrepresentation law, which similarly seeks to preserve the integrity of markets and provide remedies when misrepresentations cause losses to market participants.

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[87] S. Rep. No. 73-47, at 1 (1933); *see also* 77 Cong. Rec. 2935 (1933) (statement of Rep. Chapman) ("One of [the 1933 Act's] purposes is to protect [those doing honest business] from the illegitimate competition of financial racketeers.").

[88] *See, e.g.*, *Kwikset*, 246 P.3d at 891 ("The [California Unfair Competition Law] and false advertising law are both intended to preserve fair competition . . . ."); *id.* at 890 ("The Legislature evidently recognized some companies were using or might be tempted to use inaccurate 'Made in America' labeling . . . and that . . . competitors who honestly made their wares in the United States and marketed them as such were being or would be harmed.").

[89] *See, e.g.*, *United States v. Naftalin*, 441 U.S. 768, 770 (1979) (describing brokers who were victims of short selling scheme).

[90] *Id.* at 776 (quoting statements from Representatives Kelly and Chapman and Senators Fletcher and Norbeck in relation to the Securities Act of 1933).

[91] S. Rep. No. 73-47, at 1 (1933).

[92] S. Rep. 104-98, at 4 (1995); *see also* 77 Cong. Rec. 2935 (1933) (statement of Rep. Chapman) ("We believe the enactment of this bill into law will bring money from the hoarders' hiding places. It will be conducive to confidence on the part of investors. It will stimulate industry; it will accelerate the wheels of commerce.").

[93] *See*, *e.g.*, *Kwikset*, 246 P.3d at 891 (noting that it would be "[c]ontrary to th[e] general purpose" of state law on standing in consumer protection suits "if we were to deny standing to consumers who have been deceived by label misrepresentations in making purchases" as "we would impair the ability of consumers to rely on labels").

II. The Lanham Act

Enacted in 1946, the Lanham Act aimed "to codify and unify the common law of unfair competition and trademark protection."[94] It allows competitors to sue for trademark infringement and for false advertising. While these suits differ from misrepresentation suits in that consumers cannot sue for Lanham Act violations, Congress's motivations for creating these causes of action parallel the purposes served by consumer misrepresentation suits and underscore the legitimacy of treating the harms misrepresentations impose on consumers as actionable injuries.

A. Background and Operation of the Lanham Act

The basic principle of trademark law "is that distinctive marks—words, names, symbols, and the like—can help distinguish a particular artisan's goods from those of others."[95] Being the first to employ a "distinct mark in commerce" confers certain rights, including the right to "prevent[] others from using the mark."[96] "Trademark law has a long history, going back at least to Roman times," *id.*, but congressional regulation dates back to 1870.[97] In the decades following that 1870 statute, Congress continued to pass various trademark statutes. In 1946, Congress passed the Lanham Act "[t]o put all existing trade-mark statutes in a single piece of legislation."[98] Since 1946, the Act has been amended over thirty times,[99] but the Act remains the current comprehensive federal trademark law.[100]

The Lanham Act protects trademark in at least two ways. First, an owner of a mark can register its mark with the United States Patent and Trademark Office. Second, an owner of a mark—whether that mark is registered or not—can sue for infringement.[101] The touchstone of an infringement suit is whether use of a mark "is likely to cause confusion, or to cause mistake, or to deceive."[102]

Though "much of the Lanham Act addresses the registration, use, and infringement of trademarks and related marks," the Act "goes beyond trademark protection,"[103] including by making false advertising actionable.[104] Unlike state false advertising statutes that may

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[94] *Inwood Labs., Inc. v. Ives Labs., Inc*., 456 U.S. 844, 861 n.2 (1982) (White, J., concurring in the judgment).

[95] *B & B Hardware, Inc. v. Hargis Indus., Inc*., 135 S. Ct. 1293, 1299 (2015).

[96] *Id*.

[97] *See* 1 *McCarthy on Trademarks and Unfair Competition* § 5:3 (4th ed.) (citing An Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyrights, ch. 2, 16 Stat. 198 (1870)).

[98] S. Rep. 79-1333, at 5 (1946).

[99] *See McCarthy* §§ 5:5, 5:11.

[100] *See B & B Hardware*, 135 S. Ct. at 1299.

[101] *See* 15 U.S.C. § 1114(1)(a) (providing for suit for infringement of registered marks); *id.* § 1125(a)(1)(A) (providing for suit for infringement of unregistered marks).

[102] *Id.* § 1114(1)(a); *id.* § 1125(a)(1)(A).

[103] *Dastar Corp. v. Twentieth Century Fox Film Corp*., 539 U.S. 23, 28–29 (2003).

[104] *See* 15 U.S.C. § 1125(a)(1)(B). The *Dastar* Court identified § 43(a) of the Lanham Act, codified at 15 U.S.C. § 1125(a), as the part of the Act that "goes beyond trademark protection." *Dastar*, 539 U.S. at 29. "Section

permit suits by consumers,[105] the Lanham Act permits only one who can "allege an injury to a commercial interest in reputation or sales"—put more simply, a competitor—to sue for false advertising.[106]

B. Congressional Goals

The legislative history of the Lanham Act bears out at least three distinct purposes served by its provisions: (1) protecting consumers, (2) protecting businesses, and (3) protecting consumer choice in a competitive market. The first two goals parallel those discussed with respect to securities regulation in section I.B. As noted there, these goals are also furthered by misrepresentation suits. In describing the Lanham Act's third goal below, this section explains that this goal similarly underlies misrepresentation suits.

First, the Lanham Act aims to protect consumers from making purchases based on misinformation. The Senate Report accompanying the Lanham Act explained that the Act sought "to protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get."[107] By making confusing misuse of trademarks and other forms of false advertising actionable, the Lanham Act protects "the consumer against fraud."[108] Although the Act protects that interest by providing a federal cause of action to competitors, the policy underlying the Act is a recognition that consumers suffer injury when they purchase a product that is not what it is represented to be. Indeed, writing in Lanham Act cases, the Supreme Court has repeatedly stated that a consumer who purchases a product that is not what its seller claimed it to be suffers an injury sufficient to give the consumer standing to sue: "A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III." *Pom Wonderful LLC v. Coca Cola Co.*, 134 S. Ct. 2228, 2235 (2014) (quoting *Lexmark*, 134 S. Ct. at 1390).

Second, the Lanham Act seeks to protect business against "unfair competition either by infringement or deceit."[109] "Goodwill is often the most valuable asset that a trading establishment can have, and trade-marks are essentially symbols of business goodwill."[110] When another company uses an established mark, that use threatens to upset consumer

1125(a) . . . creates two distinct bases of liability: false association, § 1125(a)(1)(A), and false advertising, § 1125(a)(1)(B)." *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377, 1384 (2014). Thus, a trademark infringement suit for an unregistered mark—discussed in the preceding paragraph—may also be seen to "go[] beyond trademark protection."

[105] *See, e.g.*, *Hinojos v. Kohl's Corp*., 718 F.3d 1098, 1103 (9th Cir. 2013), *as amended on denial of reh'g and reh'g en banc* (July 8, 2013) (discussing California law).

[106] *Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S. Ct. 1377, 1390 (2014).

[107] S. Rep. No. 79-1333, at 3 (1946); *see also* S. Rep. No. 100-515, at 4 (1988) ("Trademark law protects the public by making consumers confident that they can identify brands they prefer and can purchase those brands without being confused or misled."); *id.* ("[A] purpose of the Trademark Law Revision Act of 1988 is . . . to improve the law's protection of the public from counterfeiting, confusion, and deception.").

[108] H.R. Rep. 76-944, at 2 (1939).

[109] S. Rep. 77-568, at 2 (1941).

[110] H.R. Rep. 76-944, at 2 (1939).

goodwill. The Lanham Act aims to prevent that use so that a company "may safely extend its use [of a mark], build [its] commercial goodwill upon it, and advertise the qualities of [its] product to which the mark attaches." S. Rep. 77-568, at 2 (1941); *see also* S. Rep. No. 79-1333, at 3 (1946) ("[W]here the owner of a trade-mark has spent energy, time, and money in presenting to the public the product, he is protected in his investment from its misappropriation by pirates and cheats.").

Third, Congress aimed to encourage consumer choice in a competitive marketplace. Trademarks "permit the goods of different makers to be distinguished from each other."[111] "[B]y enabling the buyer to distinguish" goods, trademarks "make possible a choice between competing articles."[112] Trademarks are thus "the essence of competition."[113] If courts looked only to whether a plaintiff seeking a product obtained a functional product, the incentive for producers to distinguish their goods would be reduced, undermining consumer choice. Thus, by creating liability even for "emblems that typically do not affect the compositional features of the product, but that nevertheless exert great influence over consumer decisionmaking," consumer misrepresentation suits help to guard against homogeneity in consumer goods and protect consumer choice.[114]

III. Antitrust

Antitrust law imposes liability for certain kinds of anticompetitive behavior. Unlike the areas of law considered above, antitrust law does not take aim at misleading information. The specific congressional aims motivating antitrust statutes—"deterring anticompetitive conduct and ensuring the compensation of victims of that conduct"[115]—are distinct from the purposes served by most consumer misrepresentation suits. Nonetheless, the type of injury long recognized in antitrust actions is similar to the type of injury recognized in consumer misrepresentation suits, and, perhaps as a result, defendants in antitrust cases have recently made a form of the "no injury" argument advanced against consumer class actions. If successful, that argument would undercut fundamental and long-established principles of antitrust law. The federal appellate courts' so-far unanimous rejection of the argument in the antitrust context further demonstrates the flaw in the "no-injury" argument for both antitrust and consumer class actions.

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[111] *Id*. at 3 (1939).

[112] S. Rep. No. 79-1333, at 4 (1946); *see also Smith v. Chanel, Inc*., 402 F.2d 562, 566 (9th Cir. 1968) ("Preservation of the trademark . . . makes effective competition possible in a complex, impersonal marketplace by providing a means through which the consumer can identify products which please him and reward the producer with continued patronage. Without some such method of product identification, informed consumer choice, and hence meaningful competition in quality, could not exist.").

[113] S. Rep. No. 79-1333, at 4 (1946); *see also* H.R. Rep. 76-944, at 3 (1939) ("To protect trade-marks . . . is to promote competition and is sound public policy.").

[114] Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 Harv. L. Rev. 525, 611 (2004) (noting that process representations "such as whether a good's production harmed workers, animals, or the environment," *id.* at 526, "function quite similarly to trademarks, logos, [and] brands," *id.* at 611).

[115] *California v. ARC Am. Corp*., 490 U.S. 93, 102 (1989).

A. Similarity of the Injury in an Antitrust Suit and a Consumer Misrepresentation Suit

Federal law permits suit by private plaintiffs who are "injured in [their] business or property by reason of anything forbidden in the antitrust laws."[116] The Supreme Court has interpreted this language expansively, explaining that "[a] consumer whose money has been diminished by reason of an antitrust violation has been injured 'in his . . . property' within the meaning of [the statute]."[117] Thus, "consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an injury" under antitrust laws.[118]

This injury is analogous to the injury alleged in a consumer misrepresentation suit. An antitrust plaintiff alleges that she paid more than she would have absent some collusive behavior.[119] A consumer misrepresentation plaintiff alleges that she paid more than she would have absent some misrepresentation. *See, e.g.*, *Kwikset*, 246 P.3d at 890 ("[B]ecause of the misrepresentation the consumer (allegedly) was made to part with more money than he or she otherwise would have been willing to expend . . . ."). In both cases, one could argue, first, that the plaintiff got a functional product or service for her payment and, second, that each plaintiff accepted a set price for that product. And in both cases, the plaintiff argues that she should be deemed injured because she spent a greater sum than she would have absent the defendant's challenged—either deceptive or collusive—behavior. If, as courts have long recognized, such overpayment is a legally cognizable injury in antitrust cases, it is likewise an injury in consumer cases.

B. "No Injury" Argument in Antitrust Suits

1. In the antitrust context, overpayment is a well-accepted injury

Given the similarity between the injuries in a consumer misrepresentation suit and an antitrust suit, it would seem that the latter action would be susceptible to the "no injury" argument being advanced by defendants in misrepresentation suits. For example, *In re Processed Egg Products Antitrust Litigation* involved allegations that egg producers and trade groups had conspired, in violation of the Sherman Act, "to manipulate the supply of eggs and egg products and thereby affect the domestic prices of those goods."[120] One might note that consumers who purchased eggs "paid for and received [eggs], none of which [were] tainted, spoiled, adulterated, or contaminated" and that they "consumed the products without incident or physical injury"—precisely the argument lodged against

[116] 15 U.S.C. § 15(a).

[117] *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) (alteration in original) (quoting 15 U.S.C. § 15(a)).

[118] *Id*. at 334.

[119] *See, e.g.*, *Reiter v. Sonotone Corp*., 442 U.S. 330, 335 (1979) ("[T]he complaint alleges[] petitioner and the class of persons she seeks to represent have been forced to pay illegally fixed higher prices for the hearing aids and related services they purchased from respondents' retail dealers.").

[120] 851 F. Supp. 2d 867, 876 (E.D. Pa. 2012).

consumer misrepresentation suits.[121] The defendants in *In re Processed Egg Products* did not argue, however, that class members were not injured because they paid for eggs and got eggs. And the court had little trouble identifying an injury: The plaintiffs "allegedly personally purchased eggs at artificially inflated prices—a monetary injury—which constitutes harm."[122]

In re Processed Egg Products is typical of many antitrust class actions. Courts hearing antitrust suits routinely recognize that paying more for a product—even if that product operates just as warranted—constitutes an injury.[123] Overpayment is the classic antitrust injury, and, unlike in consumer cases, defendants in antitrust cases would not think to argue that class members have not suffered injury when they pay more as a result of an antitrust violation. Thus, in *In re Automobile Parts Antitrust Litigation*, where the plaintiffs asserted claims under federal and state antitrust laws, state consumer protection laws, and state unjust enrichment laws, the defendants did not challenge standing on the ground that overpayment could not constitute an antitrust injury, even as they made that argument (unsuccessfully) on the unjust enrichment claims.[124]

2. Rejection of "no injury" argument in antitrust suits

Although overpayment is a well-established antitrust injury, defendants in two recent antitrust cases advanced a slightly modified "no-injury" argument—that, in the particular

[121] *See, e.g.*, Memorandum in Support of Defendant's Motion to Dismiss or Alternatively to Strike the Class Allegations at 8, *Craig v. Twinings N. Am., Inc*., No. 5:14-CV-05214, 2015 WL 505867, at *1 (W.D. Ark. Feb. 5, 2015) ("She paid for and received packaged tea, none of which was tainted, spoiled, adulterated, or contaminated. . . . And she consumed the products without incident or physical injury.").

[122] *In re Processed Egg Products*, 851 F. Supp. 2d at 887.

[123] *See, e.g.*, *In re Niaspan Antitrust Litig*., 42 F. Supp. 3d 735, 758 (E.D. Pa. 2014) (explaining that "[t]he alleged injury in this case is paying too much for Niaspan" and finding this allegation sufficient for Article III standing "under the [antitrust] laws of states in which [named plaintiffs] reside or in which they either purchased or made reimbursements for Niaspan"); *In re Auto. Parts Antitrust Litig*., 29 F. Supp. 3d 982, 997 (E.D. Mich. 2014) ("[Plaintiffs] have alleged that Defendants caused them economic injury because the overcharges affected the price of vehicles containing Fuel Senders as well as stand-alone Fuel Senders purchased as replacement parts. As the Complaints detail, there is a reasonable inference here that Defendants' anticompetitive conduct harmed businesses and impacted the prices that consumers paid for new vehicles." (citation omitted)); *Precision Assocs., Inc. v. Panalpina World Transp., (Holding) Ltd*., No. CV-08-42 JG VVP, 2013 WL 6481195, at *10 (E.D.N.Y. Sept. 20, 2013), *report and recommendation adopted*, No. 08-CV-00042 JG VVP, 2014 WL 298594 (E.D.N.Y. Jan. 28, 2014) (finding that "[t]he payment of . . . collusive surcharges and of supracompetitive, fixed and inflated prices are injuries in fact . . . meeting the Article III inquiry"); *In re Packaged Ice Antitrust Litig*., 779 F. Supp. 2d 642, 662-63 (E.D. Mich. 2011) ("[T]he [complaint] alleges that [the named plaintiff] . . . purchased packaged ice . . ., that as a result of the nationwide conspiracy each of the [plaintiffs] has suffered injury in that they have paid more for packaged ice than they would have paid absent the conspiracy and that they have thereby suffered an injury. These facts are sufficient . . . to sustain the [plaintiffs'] burden at the pleading stage to plausibly suggest a claim under [California's antitrust law].");[123] *id.* at 663 (finding same allegations sufficient under Michigan and New York antitrust laws).

[124] 29 F. Supp. 3d 982, 1015-29 (E.D. Mich. 2014) (finding plaintiff adequately pleaded unjust enrichment in the form of overpayment). With respect to the antitrust claims in the case, the defendants did not contest the notion that overpayment could constitute both Article III injury and antitrust injury, but unsuccessfully contested the adequacy of the plaintiffs' allegations of such injury. *See id*. at 997-1007.

circumstances at issue, the class included some people who did not overpay. As the appellate courts considering the appeal in each case recognized, the possibility that some members did not overpay should not bar class certification. But, as in some of the product misrepresentation cases, the fact that the class included people who were not injured instead poses the question how to ensure a match between remedies and class members who have injuries.

In his April testimony, Mr. Beisner discussed two antitrust cases as examples of "overbroad, no-injury class actions."[125] In reality, neither case could arguably be described in that manner unless antitrust law were upended to reject overpayment as an antitrust injury. The defense argument in both cases (unlike the argument made in some of the consumer cases Mr. Beisner described) was not that there was *no* injury in the cases, as it was undisputed in each that thousands of class members alleged that they had paid prices inflated by the alleged antitrust conspiracy. Rather, the claim was that the classes should not be certified because a *minority* of class members had, for various reasons, not suffered such injury. Yet the easy fit between antitrust principles and class litigation shows that certification of antitrust classes that *may* include some members who have not suffered damages is consistent with Rule 23 principles. The courts' rejection of the "no-injury" argument in this context—which is really an argument against majority-injury classes, not "no-injury" ones—further supports rejection of the "no-injury" argument in consumer class actions.

In re Nexium Antitrust Litigation challenged an agreement between a brand-name and a generic drug manufacturer to settle litigation over the validity of the patent on the drug Nexium.[126] Under the agreement, the brand-name manufacturer would pay the generic manufacturer more than one billion dollars, and the generic manufacturer would delay entry of generic Nexium onto the market for six years.[127] The plaintiffs alleged that the settlement agreement was an unlawful agreement not to compete, without which a generic version of the drug would have been on the market, which would have caused the price to be lower.[128]

Arguing against class certification, the defendants contended that the presence of some class members who arguably had not suffered damages (for example, they got discounts or for similar reasons did not overpay, or they would have bought the name-brand drug at full price even if a generic version had been on the market) defeated the certification requirement that common issues raised by the litigation predominate over individual issues.[129] The court of appeals rejected that theory, explaining that, if liability is established and the case proceeds to a determination of damages, the plaintiffs could at that time propose an appropriate mechanism for excluding uninjured class members.[130]

[125] Testimony at 12.
[126] 777 F.3d 9 (1st Cir. 2015).
[127] *Id*. at 15-16.
[128] *Id.* at 16.
[129] *Id*. at 18.
[130] *Id*. at 20-21.

Similarly, in *In re Urethane Antitrust Litigation*, the antitrust defendant argued that a class was improperly certified because proceeding as a class would not allow the defendant to "show in individualized proceedings that certain class members suffered no injury."[131] Again, the defendant did not argue that the class alleged *no* injury, just that not all class members would have meritorious claims for damages even if the antitrust conspiracy were proved. Like the First Circuit in *In re Nexium*, the Tenth Circuit held that the district court had not abused its discretion in finding that class-wide issues predominated over individualized issues and, therefore, granting class certification. The court noted that the key elements of the price-fixing claim were the existence of a conspiracy and its impact—both issues capable of class-wide proof. The court explained, "Under the prevailing view, price-fixing affects all market participants, creating an inference of class-wide impact even when prices are individually negotiated."[132] Because "price-fixing would have affected the entire market," the court could treat impact as a common question. "The presence of individualized damages would not change this result."[133]

In antitrust cases, the plaintiff does not allege that the product purchased was any different from what the plaintiff expected, only that the price was too high. That widely shared, concrete injury routinely justifies class certification in antitrust cases, and consumer claims involving comparable injuries should receive similar treatment. As the two recent courts of appeals agreed, the argument that a case cannot be certified because *some* class members suffered no injury is inconsistent with established law in the antitrust context as it is in other Rule 23 cases. It properly should be rejected in the consumer misrepresentation context as well.

Conclusion

The "no-injury" class action is a myth. The very examples offered by its proponents to prove its existence belie their claims. Each of those cases involves real injuries—the need to take costly measures to avoid injury to life or property, or monetary losses resulting from overpayment for products that were not what the defendant represented them to be. Similar injuries routinely support actionable claims, including class claims, in other areas of the law.

The true danger is not that "no-injury" class actions will expand from consumer cases into other areas such as antitrust. The danger is that the misleading "no-injury" characterization of consumer cases in which the great majority of class members have suffered obvious and demonstrable injuries will bleed over into other fields of law and impair the effectiveness of the class action as a means for resolving common claims based on unlawful conduct affecting large numbers of people.

[131] 768 F.3d 1245, 1254 (10th Cir. 2014).

[132] *Id*.

[133] *Id*. at 1255.