NO. 17-1818

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IAN POLLARD, on behalf of himself and all others similarly situated,
Plaintiff-Appellee,

vs.

REMINGTON ARMS COMPANY, LLC, SPORTING GOODS PROPERTIES, INC. and E.I. DU PONT NEMOURS AND COMPANY,
Defendants-Appellees,

vs.

LEWIS M. FROST AND RICHARD DENNEY,
Objectors-Appellants.

APPEAL FROM U.S. DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI - KANSAS CITY
CASE NO. 4:13-CV-00086-ODS
HONORABLE ORTRIE D. SMITH

BRIEF OF *AMICI CURIAE* COMMONWEALTH OF MASSACHUSETTS, DISTRICT OF COLUMBIA, AND THE STATES OF CALIFORNIA, HAWAII, ILLINOIS, MAINE, MARYLAND, NEW MEXICO, NEW YORK, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT AND WASHINGTON IN SUPPORT OF OBJECTORS-APPELLANTS AND REVERSAL

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INTEREST OF *AMICI*

Amici Attorneys General, who are their respective states' chief law enforcement officers, file this brief pursuant to Fed. R. App. P. 29(a). The undersigned have a responsibility to protect consumer class members under the Class Action Fairness Act ("CAFA"), which specifically establishes a role for Attorneys General in the approval process for class action settlements. *See* 28 U.S.C. § 1715. *See also* S. REP. 109–14, 2005 U.S.C.C.A.N. 3, 6 ("notice of class action settlements [must] be sent to appropriate state and federal officials … so that they may voice concerns if … the class action settlement is not in the best interest of their citizens"). This important responsibility is heightened in this matter because there are as many as 7.5 million potentially defective Remington rifles at issue, subject to accidental firing without a trigger pull.[1] This alarming reality—long known and ignored by Remington—directly implicates the responsibility of *amici* to protect class members and the public by insisting on a fair settlement, consistent with consumer and public safety.

INTRODUCTION

It is undisputed that there are up to 7.5 million Remington rifles in circulation that may fire without a trigger pull at any time, putting their owners and

[1] Based on Remington's estimates, the undersigned are Attorneys General in states where more than two million potentially defective rifles are present.

the public at risk of death, other personal injury, and property damage. Under the settlement, fewer than 25,000 (0.3%) of those guns will be fixed. Even that is a chimerical benefit, because without a settlement many of the guns for which retrofit claims have been made would nevertheless have been fixed under Remington's preexisting, ongoing voluntary recall program.

The defect at issue in this settlement presents a serious and continuing public safety problem. Remington's own customer complaint files contain thousands of reports from consumers that its rifles fired without a trigger pull *in just the last four years*. *See* Brief of *Amici* in Support of Objections to Class Settlement, ECF No. 196 at 7. In addition, as of the date of settlement, 2,666 settlement claimants asserted that their rifles had previously fired without a trigger pull. Of these misfirings, 788 caused personal injuries or property damage. Order and Opinion, ECF No. 221 at 6.

The human costs of the product defect at issue in this case, such as accidental deaths of children, are well documented. *See, e.g.*, Gunfight: Remington Under Fire: http://www.cnbc.com/remington-under-fire/; The Remington 700: http://www.cbsnews.com/videos/the-remington-700/. Remington's longstanding awareness of the defect is also clear not just based on its customers' complaints and media reports, but also based on published internal corporate documents assembled from the discovery record in numerous personal

injury cases. *See* Remington Rifle Trigger Defect Documents: http://www.remingtondocuments.com/. Since at least the mid-1970's, Remington's own engineers have identified problems with Remington's trigger mechanisms and have recommended alternative designs. ECF No. 196 at 5–7. *See generally O'Neal v. Remington Arms Co., LLC*, 817 F.3d 1055 (8th Cir. 2015) (describing evidence of the defect).

SUMMARY OF ARGUMENT

The District Court made multiple errors in its settlement approval order. First, the court erred as a matter of law by failing to evaluate the settlement under the fairness and class-certification criteria prescribed by the Supreme Court's decision in *Amchem* and other binding precedent. The court did not, among other things, conduct the required evaluation of differences in the value of class member claims based on widely disparate state laws. After dismissing virtually every claim of the class Missouri representatives other than consumer protection act claims under Missouri law, ECF No. 40, the court failed to evaluate at any stage of the proceedings whether class members from other states might retain more valuable claims based on factual differences or more protective state law.

Those with stronger claims for economic damages almost certainly could have negotiated a better settlement. Here, the class representatives with the weakest (largely dismissed) claims based on unfavorable state law negotiated a

national settlement that would release the stronger claims of other class members. This both precludes certification of the settlement class and bars settlement approval on fairness grounds.

Second, the court erred by approving inadequate relief for class members in exchange for a broad release of state and federal claims. More than 99.5% of the class will ultimately receive nothing in exchange for their release of legal claims regardless of the strength of those claims; more than 15% of the class is rendered worse off by the settlement; and others are eligible to receive only vouchers that are insignificant or illusory, and that will not address the ongoing danger that the guns at issue will misfire. If this appeal is denied and the settlement goes forward, the entire class is likely to receive settlement benefits that will cost Remington less, likely far less, than $4 million, even though class counsel fees of $12.5 million have been approved. Further, all class members run the risk that the settlement's blanket release will eviscerate or impede their personal injury or property damage claims if their rifles misfire in the future.

Third, the court should not have approved the settlement because class members received inadequate notice of their rights or no notice at all. Among other things, this means that class members were not properly warned of the risks of their defective firearms. They were thus not sufficiently encouraged to take advantage of the only significant settlement benefit—to have their defective guns

retrofitted for their own safety and for that of their children, their hunting companions, and the general public.

ARGUMENT

I. THE DISTRICT COURT DID NOT PROPERLY ANALYZE THE SETTLEMENT FOR CLASS CERTIFICATION OR FAIRNESS

A fundamental flaw in the District Court's analysis of the settlement is its plainly erroneous conclusion of law that "[t]he parties have agreed to settle this matter, and in doing so, they have removed the differences among state laws by agreement." ECF No. 221 at 28. That statement is inconsistent with the Supreme Court's requirement, even in the context of settlement, that courts evaluate factual and state law differences to determine if the claims at issue are sufficiently equivalent in legal strength and economic value to permit certification of a national settlement class. Significant disparities in the potential value of class member claims both preclude certification of a settlement class under Rule 23 and militate against a finding of fairness when the case is to be resolved, as here, with a uniform benefit. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 604 (1997) (affirming the Third Circuit's decertification of a settlement class because "[c]lass members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims.") *See also General Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157-58, n.13 (1982) (concluding that the adequacy requirement in Rule 23(a)(4) requires that "class representatives must … possess

the same interest and suffer the same injury" as the class they represent). The purpose of requiring evaluation of adequacy of representation in the settlement context is to prevent class representatives with flawed or non-existent claims from unfairly negotiating away the stronger legal or factual claims of others for their own benefit or to preserve class counsel's opportunity to claim fees. *See Amchem*, 521 U.S. at 626 (concluding that adequacy of representation requirement in the class action rule provides "structural assurance" necessary to fairness of settlement).

Here, the court erred by failing to analyze whether removing "state law differences by agreement" is fair and consistent with Rule 23's safeguards. As a result, it overlooked that this matter came up for settlement approval for a national class even though no claim under any state law other than Missouri was ever pled. The parties never made any presentation to establish that the laws of the 50 states are the same on the important products liability issues that affect class members. Nor did the parties conduct the legally mandated evaluation of applicable choice-of-law principles necessary to determine that Missouri law fairly applies to all class member claims. As this Court held in *In re St. Jude Medical, Inc., Silzone Heart Valve Prod. Liab. Action*, 425 F. 3d 1116, 1120 (8th Cir. 2005):

> The district court's class certification was in error because the district court did not conduct a thorough conflicts-of-law analysis with respect to each plaintiff class member before applying Minnesota law. The Supreme Court has

> held an individualized choice-of-law analysis must be applied to each plaintiff's claim in a class action. *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 822-23 (1985)…. Therefore, we must first decide whether any conflicts actually exist. *See id.*, at 816.

The same analysis was mandated here, because both predominance of common claims and adequacy of representation are required to determine fairness and the certifiability of a settlement class. *See Amchem*, 521 U.S. at 621.[2] Most importantly, the class representatives cannot be adequate when their claims differ from those of other class members on significant factual or legal grounds. *Id.*

A. The Important Differences in Class Members' Claims Make Certification of the Proposed Class Improper and Unfair.

The class members' claims in this matter are entirely grounded in the respective consumer protection, contract, and tort laws of each jurisdiction in the United States. Despite this, the class representatives ultimately pled only consumer protection claims under the Missouri Merchandising Practices Act as well as generic claims for "fraudulent concealment" and "unjust enrichment." *See* First Amend. Class Action Compl., ECF NO. 90. By contrast, the settlement

[2] *Amchem* involved certification of a settlement class. The Supreme Court concluded that the settlement could not go forward based on factual differences and state law variations applicable to class member claims, even though "superiority" of a class action for adjudication at trial was not at issue. Therefore, this court should reject Appellees' contention (offered below) that *St. Jude's* concern about state law differences in class member claims is not relevant to settlement because no trial is contemplated.

release will discharge all claims "whether sounding in tort, contract, breach of warranty, … or any other claims whatsoever under federal law or the law of any state." ECF No. 138 at ¶ 94. In short, all claims (other than certain personal injury and property damage claims) are released under federal law as well as the laws of all 50 states and the District of Columbia, *even though the only substantive claim pled was a single consumer protection claim under Missouri law.*

Problematically, the class representatives themselves disparaged the strength of their single remaining claim to justify their settlement. *See* "Decisions Addressing the Missouri Merchandising Practices Act Present Hurdles to Overall Success, Class Certification and Damages," Joint Supp. Br. Pursuant to the Court's Order of Dec. 8, 2015, ECF NO. 127 at. 23–7. The District Court, without analyzing whether those alleged "hurdles" apply to class members in other states, apparently adopted the class representatives' pessimistic view and described their likelihood of success as "minimal." ECF No. 221 at 29. The court reached this conclusion without evaluating any state's law other than Missouri's, without determining whether class members with manifestly defective rifles suffer economic loss under relevant state laws, and without examining a shred of the overwhelming evidence that in many states class members' claims are enhanced

because Remington has been aware of the tendency of the rifles at issue to fire without a trigger pull for more than 50 years.[3]

1. The Parties Have Failed to Show That the Law Applicable to Claims of Citizens of Different States Is Sufficiently Uniform to Be Resolved with Identical Benefits.

The District Court conducted neither the necessary evaluation of state laws nor a conflict-of-law analysis, because the parties did not even attempt to carry their burden of establishing the appropriate choice of law. *See St. Jude*, 425 F.3d at 1120. *See, e.g.*, *Adams v. Kansas City Life Ins. Co*., 192 F.R.D. 274, 278 (W.D. Mo. 2000) (describing the process necessary to "credibly demonstrate" that state law variances in a multistate class do not preclude certification). It is the parties' burden—and not the court's or the objectors'—to make the necessary credible demonstration. *Id*. *See also Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 370 (4th Cir. 2004) ("The plaintiffs have the burden of showing that common questions of law predominate, and they cannot meet this burden when the various laws have not been identified and compared."); *Ramthun v. Bryan Career College Inc*., 93 F. Supp.3d. 1011, 1020 (W.D. Ark. 2015) (rejecting class action settlement because

[3] This matter proceeded directly from an order dismissing the bulk of the Plaintiffs' claims to proceedings on various versions of a class settlement. *See* ECF Nos. 40 61. Because of the resulting absence of a factual record in the District Court, some of the *amici* filed a brief in that court that described and appended substantial factual materials about the long history of this rifle defect. *See* ECF 196 at 5–9.

"[p]laintiffs have not presented an adequate choice-of-law analysis on all of the … causes of action"). Ultimately, the court was required to consider whether class representatives have agreed to ignore the stronger state law claims of some class members in order to get a better settlement for themselves. *Amchem*, 521 U.S. at 625–26. For this purpose, review of Missouri law alone is insufficient.[4]

In approving the settlement without any analysis of other state law, the District Court ignored binding precedent and instead cited a single out-of-circuit decision, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 304 (3rd Cir. 2011). ECF No. 221 at 28. *Sullivan* is an outlier: it is inconsistent with *Amchem* and *St. Jude* as well as the law of other jurisdictions. *See Mirfasihi v. Fleet Mortgage Corp*., 450 F.3d 745, 749–50 (7th Cir. 2006) (if a claim in a national settlement is grounded in state law, its value must be analyzed under the law of all states whose law may apply). *See generally Marshall v. Nat'l Football League*, 787 F.3d 502, 519 (8th Cir. 2015) ("[I]n evaluating the strength of the plaintiffs' case and the potential

[4] Given that the harms at issue occurred in many states, Missouri conflict-of-law principles would likely result in application of the *lex loci delicti* rule, applying the laws of the states where the rifles were sold. *See Dorman v. Emerson, Elec. Co.*, 23 F.3d 1354, 1359 (8th Cir. 1994) ("Missouri law establishes that where it is difficult to see clearly that a particular state has the most significant relationship to an issue, the trial court should apply the *lex loci delicti* rule…[and] apply the substantive law of the place where the injury occurred."). Among other things, Remington is not based in Missouri and most of the class members neither reside in nor purchased their rifles there. ECF No. 90 at ¶¶ 8, 12–26.

value, the district court must take into account the interests of the entire class—not merely the named plaintiffs."). It is also inconsistent with the Third Circuit's own decision in *In re General Motors Corp. Pick Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995). *Sullivan*'s peculiar holding was largely grounded in federal antitrust law, and the only state-law claims at issue were virtually identical indirect-purchaser claims—not the complex matrix of state tort, consumer protection and product safety claims at issue in the *General Motors* case and here. Here, as discussed below, claims that the District Court believed were weak or non-existent in Missouri are strong and have considerable value to class members in other states.

2. The State Law Differences at Issue in This Case Are Meaningful and Complicated, Raising Problems for Fairness and Class Certification that the District Court Ignored.

Although *amici* decline to take up the parties' burden (and the District Court's obligation) to analyze jurisdiction-by-jurisdiction differences to evaluate the proposed class, even cursory review illustrates the complex factual and legal differences here.

Other class members appear to have far better claims than the largely dismissed claims put forward by the class representatives. These intra-class factual and legal differences were never considered by the District Court.

As the court and class representatives noted below, they believed Missouri law poses hurdles for the class representatives' surviving consumer protection claim and may require manifestation of the defect to establish a basis for damages. *See supra*, at 8. By contrast, in Massachusetts, for example, it is clear that selling a gun that fails "fundamental requirements of safety and performance" violates the Commonwealth's consumer protection law:

> If, during ordinary use in keeping with directions, the product performs in a deviantly unsafe or unexpected way, the product's sale has occurred in circumstances which make the sale deceptive or unfair. This is especially so where harmful or unexpected risks or dangers inherent in the product, or latent performance inadequacies, cannot be detected by the average user or cannot be avoided by adequate disclosures or warnings.

Am. Shooting Sports Council, Inc. v. Att'y Gen., 429 Mass. 871, 877 (1999); *see also Leardi v. Brown*, 394 Mass. 151, 159-60 (1985) (explaining circumstances in which statutory damages can be awarded for indeterminate but real economic injuries).

Similarly, the law regarding the applicability of the economic loss doctrine varies across states. For example, class members residing in Maryland may successfully bring an action for their economic losses based upon the history of injury or death associated with the affected rifles whether or not a defect has been manifest. *See Lloyd v. Gen. Motors Corp.*, 397 Md. 108, 131 (2007) (recognizing an uninjured class of plaintiffs' ability to sue for economic losses under a products

liability theory of recovery and the state's consumer protection act, where there were 38 reported injuries and three deaths associated with the product, but no injuries to class members). Many other states also have complete or limited exceptions to the economic loss doctrine that are potentially applicable here. *See, e.g.*, *Russell v. Deere & Co.*, 61 P.3d 955, 958 (Or. App. 2003) (economic loss claims allowed where product defect poses an unreasonable danger to persons or other property); *Stanton v. Bayliner Marine Corp.*, 866 P.2d 15, 19–20 (Wash. 1993) (same); *Home Depot U.S.A., Inc. v. Wabash Nat. Corp.*, 724 S.E.2d 53, 59–60 (Ga. App. 2012) (economic loss claim allowed where "sudden and calamitous event" shows defect poses an unreasonable risk of injury).

With respect to the duty to warn, several states have adopted variations based on the Third Restatement, Torts: Product Liability § 10, creating potential economic liabilities for a post-sale failure to warn.[5] Other states apply differing obligations on sellers depending on the product.[6] The court dismissed such claims

[5] *E.g.*, *Sta-Rite Indus., Inc. v. Levey*, 909 So. 2d 901, 905 (Fla. Dist. Ct. App. 2004); *Lovick v. Wil–Rich*, 588 N.W.2d 688, 695–96 (Iowa 1999); *Liriano v. Hobart Corp.*, 700 N.E.2d 303, 307 (N.Y. 1998); *Robinson v. Brandtjen & Kluge, Inc.*, 500 F.3d 691, 697 (8th Cir. 2007) (South Dakota law).

[6] *See, e.g.*, *Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 409 (N.D. 1994) (imposing post-sale duty to warn where the product defect posed a grave risk of serious injury); *Walton v. Avco Corp.*, 530 Pa. 568, 578 (1992) (imposing post-sale duty to warn where the defective product is sold in a limited or specialized market); *Sigler v. Am. Honda Mtr. Co.*, 532 F.3d 469, 485 (6th Cir. 2008) (whether

here, based only on Missouri law. *See* ECF No. 40 at 3-4. There are also significant differences in state laws with respect to fraudulent concealment that may mean some class members retain such claims and others do not. *See In re Ford Motor Co. Vehicle Paint Litigation*, 182 F.R.D. 214, 222–23 (E.D. La. 1998) (describing relevant state laws).

Finally, despite the parties' attempt to create subclasses based on rifle models, there is reason for concern about the adequacy of the class representatives here. The District Court relied on the economic loss doctrine under Missouri law to dismiss significant products liability claims because the class representatives were not owners of guns for which the defect had manifested. *See* ECF No. 40 at 4. Those individuals are thus not representative of the many thousands of rifle owners whose guns *have* manifested the defect by misfiring, including especially those who own guns that have already caused personal injury or property damage. *See supra*, at 2. Under *Amchem*, they cannot properly represent those owners who have claims that survive under the economic loss doctrine, even in states like Missouri, based on a manifest defect.[7] *See supra*, at 13.

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a product is defective due to a lack of adequate warnings under Tennessee law depends on whether consumers could reasonably form expectations about the product's performance).

[7] To the extent any of the class representatives own guns that have misfired, it is telling that they did not bring available tort claims by way of an amended complaint.

B. For Many Class Members, the Settlement's Benefits Are Illusory, Inadequate or Non-Existent.

The settlement's three principal alleged consumer benefits—a retrofit for some subclasses, vouchers for others, and a generic gun safety video—do not withstand meaningful fairness scrutiny.

1. The Owners of 1.2 Million Remington Rifles Actually Are Made Worse Off by the Settlement.

Under the settlement, Remington offers the 1.2 million members of settlement subclass B(1)—"all current owners of Remington Model 700 and Model Seven rifles containing an X-Mark Pro trigger mechanism manufactured from May 1, 2006 to April 9, 2014"—a retrofit to fix the defect in their trigger in exchange for a release. ECF No. 138 at ¶ 36. But this remedy is already available. These class members may participate in an ongoing voluntary recall that replaces the triggers for these same firearms. *See* ECF No. 221 at 30, n.27. Under this existing recall, consumers do not release any claims against Remington. [8]

[8] All members of subclass A(3) and certain members of subclass A(2) also are already entitled to obtain a trigger repair from Remington without a release. *See* Remington Model 600 & 660 (Jan. 11, 2017), https://www.remington.com/support/safety-center/safety-modification-program/remington-model-600-660; Model 710 Product Safety Warning and Recall Notice (Jan. 11, 2017), https://www.remington.com/support/safety-center/model-710-product-safety-warning-and-recall-notice.

To require a release in exchange for relief that is already available to class members makes them worse off. *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) (a settlement that provides relief "that already is on offer," which "duplicates a remedy that most buyers already have received, and that remains available to all members of the putative class," does "not adequately protect[] the class members' interests."). Indeed, class actions following preexisting recalls typically do not get certified under Rule 23 because they fail to meet the superiority requirement of Rule 23(b)(3). *Waller v. Hewlett-Packard, Inc.*, 295 F.R.D. 472, 488 (S.D. Cal. 2013) (collecting and explaining relevant caselaw).

2. The Vouchers Being Offered to Members of Class A(3) and A(4) Are Essentially Worthless.

Other class members who do make claims have no option for a retrofit or repair and will receive only a voucher in the amount of $10 or $12.50 for purchase of additional Remington products. *See* ECF No. 138 at ¶ 53; ECF No. 221 at 30, n.26. Almost every Remington product, including rifles, ammunition, hats and T-shirts, costs more. Such settlements, requiring a payment by the class member to obtain a settlement benefit, are heavily disfavored. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 632–33 (7th Cir. 2014) (discussing the problems associated with settlements in which benefits are paid in coupons); *cf. Galloway v. Kansas*

City Landsmen, LLC, 833 F.3d 969, 973–75 (8th Cir. 2016) (noting sometimes "minimal" value of coupons to consumers in evaluating attorney's fees award). In ascertaining the fairness of such a settlement, the Court is to "consider, among other things, the real monetary value and likely utilization rate of the coupons provided by the settlement." S. REP. 109–14, at 31, 2005 U.S.C.C.A.N. 3, 31. *See also True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1082 (C.D. Cal. 2010) (rejecting coupon settlement in a products liability case under the CAFA standard).

Here, small-dollar vouchers are effectively no consideration for the release in this settlement, and they should not have been approved. First, the amounts are paltry in comparison to the significant costs of Remington products. Such a voucher has value only if it is used, and the company will undoubtedly profit when consumers add substantial value to the awarded amount to pay for Remington products, such as new rifles, that typically cost hundreds or thousands of dollars. Second, claimants who receive vouchers retain the considerable personal and financial risks associated with ongoing possession of defective rifles.

3. The Safety DVD Offered to All Claimants is of No Value.

The settlement's proponents assert that a generic gun safety video is consideration for the release. *See* Second Joint Suggestion in Support of Final Settlement Approval, ECF No. 180 at 11–12. That video provides no specific information relevant to managing or preventing a known trigger defect, and it is

duplicative of information widely disseminated elsewhere. *See id.* at 12, n.12 (describing contents of the video). The National Rifle Association, for example, freely publicizes gun safety rules on the internet that are effectively the same as those that Remington offers as a settlement "benefit."[9] Nothing in the settlement video explains the conditions that might cause the Remington trigger defect to manifest itself or how to avoid them.

C. The Miniscule Number of Claims Demonstrates the Settlement's Unfairness.

The settlement's supposed relief is inadequate not only in form, but also in reach. As of the date of the fairness hearing, only 22,000 claims had been filed. ECF No. 221 at 21. Although the claims process remains open, there is no ongoing effort to provide notice to class members, making it unlikely that a significant number of new claims will materialize. Ultimately, more than 99.5% of the rifles at issue are unlikely to be repaired through the settlement, and their owners will receive nothing at all in exchange for their release.

From another perspective, using the valuation methodologies adopted by the District Court, the maximum economic value to class members is likely to be under $2 million (assuming that all 22,000 claims are eligible for retrofit at a

[9] *See* NRAExplore: Discover the Possibilities, NRA Gun Safety Rules (Jan. 11, 2017), https://gunsafetyrules.nra.org.

maximum estimated value to the class member of $89.50). ECF No. 221 at 30, n.24. Even with an extraordinarily optimistic projection that claims will double before the claims period ends, the cash value of the settlement to class member remains under $4 million.[10] This pales in comparison to the $12.5 million in attorney's fees awarded to class counsel. ECF No. 221 at 37–39.[11]

D. The District Court Failed to Fully Consider the Impact of the Settlement's Release on Future Personal Injury Claims.

Although the settlement's release purports to exempt personal injury and property damage claims, it broadly covers many of the claims that sound in tort or contract that may serve as grounds for those actions. For example, failure to warn is a common basis for a products liability action for personal injuries. *See, e.g.*, *In re Levaquin Prods. Liab. Litig.*, 700 F.3d 1161 (8th Cir. 2012). Similarly, breach of the warranty of merchantability is often the basis for a personal injury action, despite sounding in contract. *See, e.g.*, *West v. Alberto Culver Co.*, 486 F.2d 459, 461 (10th Cir. 1973) (applying Colorado law). Yet the language of the settlement

[10] This number almost certainly exceeds the real value of the settlement because, among other reasons, an unspecified number of class members made claims for vouchers alone, with a maximum value per voucher of $12.50 in credit toward Remington products.

[11] The large fee award was justified by the Court, in large part based on a calculation that assumed that all class members would claim and receive the settlement benefits that they qualify for. ECF No. 221 at 37–39. The low settlement claims rate makes the fallacy of the Court's assumption clear.

release could be used by Remington to oppose future personal injury claims based on those causes of action brought by class members, whether they receive a settlement benefit or not. *See* ECF NO. 138 at ¶ 94 (discharging all claims "whether sounding in tort, contract, breach of warranty, … or any other claims whatsoever under federal law or the law of any state"). Even if that defense fails, a class member's failure to file a claim or to have the gun retrofitted could be the basis for an attempted assumption of risk or contributory negligence defense.

Remington has failed to disavow the intention to use the settlement to gain these advantages in personal injury cases. And the *Garza* shotgun settlement, cited by Plaintiffs to justify the release in this settlement, ECF No. 201 at 5–6, diminishes rather than advances the parties' position on fairness. In *Garza*, the negotiated release *specifically excluded* economic loss claims to the extent that they serve as the basis for a personal injury action. *See Garza v. Sporting Goods Properties, Inc.*, Civ. A. SA-93-CA-108, 1996 WL 56247, at *36 (W.D. Tex. Feb. 6, 1996) (excluding personal injury, wrongful death, and derivative claims "allegedly arising out of barrel bursts involving Shotguns … regardless of whether such claims are based on negligence, warranty, strict products liability, or any other cause of action or theory of recovery"). These explicit limits are not present here, and Remington may take advantage of that ambiguity.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY FINDING THAT NOTICE TO THE CLASS SATISFIED THE REQUIREMENTS OF RULE 23

The District Court also failed to properly execute its obligation to "direct notice in a reasonable manner to all class members who would be bound by the [settlement]." Fed. R. Civ. P. 23(e). "Absentee class members will generally have [] no knowledge of the suit until they receive the initial class notice. This will be their primary, if not exclusive, source of information for deciding how to exercise their rights under Rule 23." *In re Nissan Motor Corporation Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1977).

Notice (1) must be sent directly to class members, to the greatest extent practicable, and (2) must explain the case and settlement in plain language designed to alert recipients of the nature of the action and how the settlement will affect their rights. Fed. R. Civ. P. 23(c)(2)(B) and (e). The notice offered in this settlement does neither. *Amici* and the objectors made clear that other means of identifying class members were readily available; yet the District Court approved a notice plan that resulted in direct notice to less than 15% of the class and an abysmal 0.29% claims rate, ECF No. 221 at 13, 21, a rate that is strikingly low compared to other similar settlements.

For the class members who did receive notice, its contents failed to clearly convey the true nature of this action and settlement: to retrofit faulty guns and

prevent accidental deaths or injuries. *See* ECF No. 201 at 2; ECF No. 180 at 11. A settlement should not be approved unless all identifiable class members have been sent the clear, concise, and direct notice to which they are entitled as a matter of due process. *See Amchem*, 521 U.S. at 617.

A. Direct Notice Was Not Provided to All of the Class Members Who Could Reasonably Be Identified.

"The United States Supreme Court has declared that [Rule 23] expresses an 'unambiguous requirement' that 'individual notice must be provided to those class members who are identifiable through reasonable efforts.'" *Nissan*, 552 F.2d at 1097 (citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175–76 (1974)). Actual, direct "notice and an opportunity to be heard [are] fundamental requisites of the constitutional guarantee of procedural due process." *Eisen*, 417 U.S. at 173 (finding abuse of discretion in failure to require direct notice to 2.25 million members of a six-million-member class, where name and address information could be obtained only through a timely and expensive process).

As *amici* and others pointed out to the District Court, the parties reasonably could have provided direct notice to a much greater portion of the class. *See* ECF No. 196 at 18; Aff. of Todd B. Hilsee, Ex. 2 to Frost Obj., ECF No. 150. The parties also could have provided funding to state agencies, which could have sent additional mailings to class members identified in firearm transaction records

maintained by many states. *See* ECF No. 196 at 18, n.15 (examples of states that maintain firearms sales registries). These reasonable efforts would have significantly increased direct notice to the class at minimal cost.

Instead of taking practical steps to provide the best notice reasonably available, the parties only sent about 93,000 mailings and 1 million emails to class members, choosing predominantly to rely on publication and a social media campaign. These limited efforts provided direct notice to less than 15% of the class, leaving to chance whether the majority of the class would ever learn of this opt-out settlement, which includes the release of their legal rights and a time-limited opportunity to correct a dangerous, latent defect in their rifles. *See* ECF No. 221 at 7, 13. As a result of such limited efforts, only 0.29% of potential class members have filed claims and Remington will incur only minimal cost for retrofits. ECF No. 221 at 21.

While low claims rates may reasonably result in some circumstances, all the evidence presented to the District Court makes clear that here an effective notice would have yielded a significantly higher claims rate. The response rate in a similar settlement with a better notice topped 20%. *See* ECF No. 201 at 5 (plaintiffs report a 25% claims rate in *Garza* shotgun barrel defect settlement). Even the prior voluntary Remington rifle recall had better notice and apparently generated a higher claims rate. Settlement Hearing Transcript at 6:12–14

(approximately 351,000 gun owners previously sought a retrofit through the prior recall, or about 22% of the estimated 1.55 million gun owners whose guns fit the recall criteria).

These similar matters produced response rates approximately *100 times greater* than those garnered by the settlement notice here. Yet when the parties were questioned about the methods used to identify recipients of the voluntary recall notice, they could not answer. Settlement Hearing Transcript at 6:12–20.

"[N]otice by publication is not enough with respect to a person whose name or address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings.... The source or sources providing the greatest number of names and addresses must be used." *Nissan*, 552 F.2d at 1097-99. Because additional class members were easily identifiable, the District Court abused its discretion in finding that the parties' notice efforts were reasonable under the circumstances.

B. The Parties' Notice Failed to Apprise Class Members of the Nature of the Case in "Plain, Easily Understood Language."

The language of the settlement notice likely also prevented those who received it from grasping the significant risk posed by their firearms' defective triggers in order to encourage claims for retrofit. The content of a settlement notice must "clearly and concisely state in plain, easily understood language" the

nature of the class action and settlement. *See* Rule 23(c)(2)(B)(i). "[That] information must be structured in a manner that enables class members rationally to decide [how to respond]. [It] must be sufficiently detailed to permit class members to determine the potential costs and benefits involved[.]" *See Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999). Here, because of the consequences of a future misfire, any adequate description of the nature of the case must clearly state the potential consequences of continuing to use a firearm that can accidentally fire without a trigger pull.[12] It makes little sense to have a settlement where the only significant benefit is a repair, if the settlement notice does not adequately explain why the repair is needed.

Here, neither the notice nor the settlement website meaningfully describes, in plain language, the risks associated with continued use of the rifles at issue. *See* ECF No 138, Ex. B, C & F. Instead, to the extent that the danger is referenced at all, it is couched in technical language offset by a prominent *denial*:

> The class action lawsuit claims that trigger mechanisms with a component part known as a trigger connector are defectively designed and can result in accidental discharges without the trigger being pulled.… Defendants deny Plaintiffs' allegations and claim that the design of the

[12] Although guns are exempt from the recall regime of the federal Consumer Product Safety Commission ("CPSC"), the CPSC's recall notice practices are clearly based on its substantial experience in encouraging consumer compliance with product safety recalls. Those practices therefore provide some guidance on how to provide effective notice of a recall. As discussed in the *amici*'s brief below, the notice here meets none of the CPSC's standards. ECF No. 196 at 13–19.

> firearms is not defective and that the value and utility of these firearms have not been diminished.

See ECF No 138 Ex. B, at 1–2. By contrast, in the earlier *voluntary* recall, Remington told gun owners:

> WARNING: STOP USING YOUR RIFLE. Any unintended discharge has the potential for causing injury or death. Immediately stop using your rifle until Remington can inspect it to determine if the XMP trigger has excess bonding agent used in the assembly process, which could cause an unintentional discharge and, if so, replace the trigger mechanism. If you own a rifle subject to this recall, Remington will provide shipping, inspection, replacement of the trigger mechanism if necessary, and return at no cost to you. DO NOT attempt to diagnose or repair your rifle yourself…. For the safety of you and those around you, Remington strongly encourages you to STOP USING YOUR RIFLE immediately and contact Remington for inspection and repair.

See https://xmprecall.remington.com/ (Remington product safety warning and recall notice referenced in *amici* Reply Brief, ECF 208 at 8, n.6).[13]

Recipients of Remington's recall warning overwhelmingly responded to the clear language of the recall, leading to almost a 100 times better response rate there than to the settlement notice. That large response evidences that class members are deeply concerned about this issue. Had they received a similarly clear settlement

[13] Another gun manufacturer, Ruger, recently recalled its Mark IV pistols because of the risk that they may fire without a trigger pull in certain circumstances: https://ruger.com/dataProcess/markIVRecall/. In its notice of recall, it stated: "Until your Mark IV™ pistol has been retrofitted or you verify that it is not subject to the recall, we strongly recommend that you not use your pistol."

notice in this case, regarding a defect that likewise can lead to injury or death, far more than .29% of the class are likely to have filed claims or opted out.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's order and opinion, and reject the proposed settlement for failure to meet the class certification, fairness, and notice requirements of Rule 23.

July 6, 2017

Respectfully submitted,

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CERTIFICATES OF COMPLIANCE AND SERVICE

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29(a)(5) and 32(a)(7)(B)

I hereby certify the following:

1. This brief complies with the length limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), because it contains 6,491 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman style, 14-point font.

3. This brief has been scanned for viruses and is, to my knowledge, virus free.

_/s/ Gary Klein_____
July 6, 2017 Gary Klein

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2017, I electronically submitted the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

_/s/ Gary Klein_____
July 6, 2017 Gary Klein