No. 12-113

IN THE

Supreme Court of the United States

MERRILL LYNCH, PIERCE,
FENNER & SMITH, INC.,

Petitioner,

v.

GEORGE McREYNOLDS, *et al.*, on behalf of himself and all other similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

HENRY M. SNEATH
Counsel of Record
PRESIDENT OF DRI
55 West Monroe,
Suite 2000
Chicago, IL 60603
(312) 795-1101
hsneath@psmn.com

MARY MASSARON ROSS
HILARY A. BALLENTINE
PLUNKETT COONEY
38505 Woodward Ave.,
Suite 2000
Bloomfield Hills, MI 48304
(313) 983-4801

Attorneys for Amicus Curiae

243387

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* DRI 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

This Case Presents The Court With An Opportunity To Resolve Conflicting Circuit Decisions And Clarify That The "Issue Class" Provision Of Federal Rule Of Civil Procedure 23(C)(4) Cannot Be Used As A Means To Certify Distinct Sub-Issues Of A Class Unable To Satisfy Rule 23(b) 6

A. Federal Rule of Civil Procedure 23(c)(4) does not authorize certification of an issue class unable to satisfy Rule 23(b) .. 6

B. "Issue" classes like the one permitted by the Seventh Circuit's decision produce all of the problems attendant of abusive class actions but none of the benefits 10

C. Absent review, the federal courts will continue to apply Rule 23(c)(4) inconsistently 14

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

CASES

Aldens, Inc. v. Miller,
610 F.2d 538 (8th Cir. 1979) 15

Allison v. Citgo Petroleum Corp.,
151 F.3d 402 (5th Cir. 1998) 7, 15

Alternative Sys. Concepts, Inc. v. Synopsys Inc.,
374 F.3d 23 (1st Cir. 2004) 15

Amchem Products, Inc. v. Windsor,
521 U.S. 591 (1997) 3, 9

Califano v. Yamasaki,
442 U.S. 682 (1979) 3

Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) . . . . . *passim*

Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper,
445 U.S. 326 (1980) 13

Gates v. Rohm and Haas Co.,
655 F.3d 255 (3d Cir. 2011) 2-3, 4, 17

Hohider v. UPS, Inc.,
574 F.3d 169 (3d Cir. 2009) 9, 15

Cited Authorities

Page

In re Motor Fuel Temperature Sales Practices Litigation,
279 F.R.D. 598 (D. Kan. 2012) 15

In re Nassau County Strip Search Cases,
461 F.3d 219 (2d Cir. 2006) 4, 16, 17

Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co.,
346 F.3d 1190 (9th Cir. 2003) 15

Matter of Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995) 11

McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
672 F.3d 482 (2012) 4, 8, 14

Piper Aircraft Co v. Reyno,
454 U.S. 235 (1981) 13

Thorogood v. Sears, Roebuck and Co.,
547 F.3d 742 (7th Cir. 2008) 11

Valentino v. Carter-Wallace, Inc.,
97 F.3d 1227 (9th Cir. 1996) 4, 16, 17

Wagner v. Pennwest Farm Credit, ACA,
109 F.3d 909 (3d Cir. 1997) 15

Page

Walker v. O'Brien,
216 F.3d 626 (7th Cir. 2000) 15

Wal-Mart Stores, Inc. v. Dukes et al.,
131 S. Ct. 2541 (2011) . . . . . *passim*

STATUTES AND OTHER AUTHORITIES

Fed. R. Civ. P. 23 . . . . . *passim*

Fed. R. Civ. P. 23(a) 3, 9

Fed. R. Civ. P. 23(b) . . . . . *passim*

Fed. R. Civ. P. 23(b)(1) 3, 9

Fed. R. Civ. P. 23(b)(2) 3, 6, 7, 9

Fed. R. Civ. P. 23(b)(3) 3, 9

Fed. R. Civ. P. 23(c)(4) . . . . . *passim*

Fed. R. Civ. P. 35(b)(1) 15

Sup. Ct. R. 37.6 1

39 F.R.D. 69 (1966) 7

S. Rep. No. 109-15 (2005), reprinted in 2005
U.S.C.C.A.N. 3 12

Advisory Committee Notes, Fed. R. Civ. P. 23 8

Cited Authorities

Page

Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005) 10

Barry F. McNiel, *et al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483 (updated 8/5/96) 11

Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607 (Spring 2010) 12

Charles Alan Wright, *et al.*, *Federal Practice and Procedure*, 7AA Fed. Prac. & Proc. Civ. § 1778 (3d ed. Supp. 2012)..... 2, 9

Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmakng*, 73 Tex. L. Rev. 1 (November 1994) 14

Fred Misko, Jr. & Frank E. Goodrich, *Managing Complex Litigation: Class Actions and Mass Torts*, 48 Baylor L. Rev. 1001 (1996)..... 8-9

Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)..... 11

Page

James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903 (1996) 11

L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 La. L. Rev. 157 (Fall 2004) 11

Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709 (2003) 4, 8

Mark Anchor Albert, *Required Class*, 32-JUN L.A. Law. 38 (2009) 6

Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207 (Winter 2010) 12

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97 (2009)..... 6-7, 10

Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251 (2002)..... 10

Cited Authorities

Page

Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591 (2006) 10

Thomas E. Willging, *et al.*, *Empirical Study of Class Actions in Four Federal District Courts* 7 (1996). 12-13

INTEREST OF *AMICUS CURIAE* DRI[1]

DRI – The Voice of the Defense Bar ("DRI") is an international organization comprised of more than 22,000 attorneys defending businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys around the globe. Therefore, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense attorney, and to improve the civil justice system in America. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent. To promote these objectives, DRI participates as *amicus curiae* in cases such as this that raise issues of importance to its membership and to the judicial system.

DRI's members are regularly called upon to defend their clients in class action suits, and this practical real-world experience informs DRI's view that the issue presented here is critically important to a proper interpretation of Federal Rule of Civil Procedure 23, and its provision allowing for issue classes. Increasingly, litigants defending class action lawsuits are faced with a trial or appellate court's approval of certification of a discrete sub-issue despite the fact that the claim as a whole does not satisfy the requirements of Rule 23(b). The

1. Pursuant to Supreme Court Rule 37.6, DRI certifies that no counsel for any party authored this brief, either in whole or in part, and that no entity or person, aside from DRI, its members, and its counsel, made a monetary contribution to the brief's preparation or submission. DRI further certifies that counsel of record for both parties received timely notice of DRI's intent to file this brief. The parties have consented to the filing of this brief.

Seventh Circuit's decision in this case will have a profound effect on businesses and individuals who may be subject to these types of suits as it authorizes a trial court to certify a proposed class under Federal Rule of Civil Procedure 23(c)(4) even where causation and remedy issues require individualized proofs. This will create the potential for abuse of the class action mechanism. Left unreviewed by this Court, the Seventh Circuit's decision could lead to the routine certification of a class action in every case where a common issue – no matter how small – exists; and this is true despite individual causation and remedy issues that prevent satisfaction of Rule 23(b), and thus should prevent certification at all. DRI has a strong interest in assuring that Rule 23(c)(4) is not applied in a manner that allows courts to "sever issues until the remaining common issue predominates over the remaining individual issues[.]"*Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996). *See also* Charles Alan Wright, et al., *Federal Practice and Procedure*, 7AA Fed. Prac. & Proc. Civ. § 1778 (3d ed. Supp. 2012). Relieving plaintiffs of their burden under Rule 23(b) directly affects the fair, efficient, and consistent functioning of our civil justice system and, as such, is of vital interest to the members of DRI.

DRI also knows, as a result of the experience in defending class action litigation, of the need for clarification of the law regarding the proper interpretation of Rule 23(c)(4). DRI's members, like all of bench and bar, need guidance which is currently unavailable due to a circuit split. The Seventh Circuit's decision is but the most recent in a series of conflicting decisions issued by the appellate circuits. Compare *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n 21 (5th Cir. 1996), with *Gates v. Rohm and*

Haas Co., 655 F.3d 255, 273 (3rd Cir. 2011). This split in the law results in forum shopping, and makes it difficult for lawyers to advise their clients regarding the risk of class action litigation or the likely outcome of such efforts. The current lack of clarity in the law of the "issue" class, as exemplified by the conflicting circuit court decisions, will be left even more muddied in the wake of the Seventh Circuit's decision if this Court denies certiorari. DRI has a strong interest in assuring that a uniform rule is adopted which maintains the viability of class action suits while safeguarding the Legislative requirement that a proposed class satisfy one of the subsections of Rule 23(b) before availing itself of class treatment.

SUMMARY OF THE ARGUMENT

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2550 (2011), quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979). It is for this precise reason that the drafters enacted a rule with stringent prerequisites a proposed class must satisfy in order to avail itself of class treatment. Fed. R. Civ. P. 23. Under Federal Rule of Civil Procedure 23, no class may be certified unless it satisfies the four prerequisites of subsection (a), and fits within one of the three class action types set forth in subsection (b). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("[i]n addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification *must* show that the action is maintainable under Rule 23(b)(1), (2), or (3).") (emphasis added).

The Seventh Circuit adopted an approach that dispensed with the requirements of Rule 23(b) and permitted plaintiffs with factually distinct claims to proceed together as an "issue" class to determine disparate impact. *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith*, 672 F.3d 482 (2012). And it did so under the rubric of Rule 23(c)(4) – a provision which legal scholars have deemed to be a mere "housekeeping provision" authorizing bifurcation of the common and individual issues in a class action that has been properly certified under Rule 23(b). Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 752-63 (2003). See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996). Neither the text nor purpose of Rule 23 supports use of subsection (c)(4) as a way to circumvent compliance with subsection (b). Nor can this result be squared with this Court's recent pronouncement in *Dukes*, which declined to certify one of the largest employment class actions in history on disparate impact claims strikingly similar to those present here. *Dukes*, *supra*, at 2556-57.

Regardless of the outcome, now is the time for this Court to rule on this significant issue. The federal circuit courts of appeal that have addressed this issue have reached inconsistent results, with three different viewpoints emerging. Compare *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *In re Nassau County Strip Search Cases*, 461 F.3d 226 (2nd Cir. 2006), with *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996); and *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 273 (3rd Cir. 2011). The conflicting decisions leave both bench and bar with no clear directive on how to interpret Rule 23(c)(4) when faced with a proposed class action. In addition, the split in the circuits leads to forum

shopping. This Court should therefore grant review to resolve the disagreement among the circuits and provide guidance on whether a class action brought as an issue class under Rule 23(c)(4) can be certified even when class members cannot fit their claim into one of the types of class actions identified in Rule 23(b).

Left intact, the Seventh Circuit's precedent-setting error threatens to increase exponentially the already-extortionate settlement pressures that class defendants confront. Opportunistic plaintiffs using the Seventh Circuit's decision as a roadmap will find it easier to convert a simple lawsuit into a class action by pointing to a single common issue shared by numerous plaintiffs. This, in turn, will invite a significant upswing in the opportunistic filing of abusive class actions with their devastating consequences for businesses, their owners, employees, customers, and the judicial system.

This case provides this Court a suitable vehicle for addressing the interplay between Rule 23(b) and (c)(4) – an issue on which this Court has not yet spoken. It provides the Court with occasion to address the limits that the Federal Rules of Civil Procedure places on class actions. And it allows the Court to ensure that both district and appellate courts safeguard and enforce an interpretation limiting class treatment to situations in which a single trial will resolve issues shared by all class members.

ARGUMENT

This Case Presents The Court With An Opportunity To Resolve Conflicting Circuit Decisions And Clarify That The "Issue Class" Provision Of Federal Rule Of Civil Procedure 23(C)(4) Cannot Be Used As A Means To Certify Distinct Sub-Issues Of A Class Unable To Satisfy Rule 23(b).

A. Federal Rule of Civil Procedure 23(c)(4) does not authorize certification of an issue class unable to satisfy Rule 23(b).

In requiring a proposed class action to fit within one of three expressly enumerated "types" or "categories," the drafters sought to "strike a balance between the desirability of classwide adjudication and the interests of class members to pursue claims separately or not at all." Mark Anchor Albert, *Required Class*, 32-JUN L.A. Law. 38, 40 (2009). The second of the three class types, and the one the African-American financial advisors relied on to certify their race discrimination case, permits class treatment only when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]" Fed. R. Civ. P. 23(b)(2). The "key" to Rule 23(b)(2), as this Court has recognized, is "the indivisible nature of the injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes et al.*, 131 S.Ct. 2541, 2557 (2011), quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate*

Proof, 84 N.Y.U.L. Rev. 97, 132 (2009). Accordingly, Rule 23(b)(2) does not permit class treatment "when each class member would be entitled to an individualized award of money damages." *Dukes*, *supra*, at 2557. See also 39 F.R.D. 69, 102 (1966) (noting that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages."). Stated another way, the "underlying premise of the (b)(2) class" is that "its members suffer from a common injury properly addressed by class-wide relief." *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998). That premise "begins to break down when the class seeks to recover back pay or other forms of monetary relief to be allocated based on individual injuries." *Id.*

It is for this reason – that resolution of a claim would require individuated causation and remedy determinations – that this Court in *Dukes* reversed the Ninth Circuit's decision to certify arguably the largest employment class action in history. *Dukes*, *supra*, at 2556-57. The *Dukes* Court noted that a challenge to a national policy that delegates discretion to local supervisors over employment matters is unworkable as a class action – in fact, it is "just the opposite" of that required for a class action. *Id.* at 2554. The challenged policy in *Dukes* bears striking similarities to the policies challenged by the black financial advisors here, which afford discretion to financial advisors to "team" up with others, and to management to reallocate the accounts of departing advisors. But in a stunning departure from *Dukes*, the Seventh Circuit certified an injunction class under Rule 23(b)(2), fully mindful that "should the claim of disparate impact prevail in the class-wide proceeding, hundreds of separate trials may be necessary to determine which class members were

actually adversely affected by one or both of the practices and if so what loss each class member sustained[.]"672 F.3d at 491. The Seventh Circuit did so by invoking the "issue" class procedure of Rule 23(c)(4), allowing a class action to proceed on the question of whether the acts of discretion authorized by the challenged policies have a racially disparate impact on the minority financial advisors.

Contrary to the Seventh Circuit's decision, Rule 23(c)(4) cannot be used to manufacture Rule 23(b) class certification. Subsection (c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). The scant Advisory Committee notes on this statutory provision signal its minimal importance in the overall statutory scheme. Advisory Committee Notes, Fed. R. Civ. P. 23. Indeed, legal scholars have recognized that Rule 23(c)(4) is to be read as a "housekeeping provision" authorizing bifurcation of the common and individual issues in a class action that has been properly certified under Rule 23(b), rather than as creating an additional type of class action. Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 Emory L.J. 709, 752-63 (2003). See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996). But the Seventh Circuit used Rule 23(c)(4) to certify an "issue class" even though the need for individual relief determinations made certification under Rule 23(b) improper. *Dukes*, *supra*.

Left unreviewed by this Court, the Seventh Circuit's opinion provides opportunistic plaintiffs with a "trump card" to manufacture Rule 23(b) certification – the "issue class." Because identification of a common issue is a requirement easily met in most cases, Fred Misko, Jr.

& Frank E. Goodrich, *Managing Complex Litigation: Class Actions and Mass Torts*, 48 Baylor L. Rev. 1001, 1010-11 (1996), certification of a class action under Rule 23(c)(4) by cherry-picking one or more common questions (even though individual questions predominate for the claim as a whole) could become nearly automatic. A court could "sever issues until the remaining common issue predominates over the remaining individual issues," thus "eviscerat[ing] the predominance requirement." *Castano*, 84 F.3d at 745 n. 21. See also Charles Alan Wright, et al., *Federal Practice and Procedure*, 7AA Fed. Prac. & Proc. Civ. § 1778 (3d ed. Supp. 2012) (recognizing this possibility). This is not what the drafters intended when Rule 23(c)(4) was enacted. Nor is it consistent with this Court's prior decisions. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997) ("[i]n addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification *must* show that the action is maintainable under Rule 23(b)(1), (2), or (3).") (emphasis added).

Cases that involve varying individual proof of causation and injury generally are not workable as class actions because the individual issues overwhelm the common issues. Fed. R. Civ. P. 23(a); *Amchem*, *supra*, at 620; *Hohider v. UPS, Inc.*, 574 F.3d 169, 195-96 (3rd Cir. 2009). And that rule makes sense from a practical standpoint. The class mechanism saves the parties and the court time and resources when the issues are largely common and so one trial can resolve many claims at once while still satisfying our constitutional standards for due process. But once a class is certified despite the need for as many as a hundred or more separate trials, it becomes a litigation nightmare for the parties and the courts. The Seventh Circuit's decision invites courts to disregard

such individual issues on the theory that an issue class is preferable over individual actions. Such a decision, which clashes with the clear text of Rule 23 and this Court's philosophy in *Dukes*, is properly reviewed by this Court. Absent review, the Seventh Circuit's decision will simply exacerbate the already-existing split among the appellate circuits that have addressed the issue.

B. "Issue" classes like the one permitted by the Seventh Circuit's decision produce all of the problems attendant of abusive class actions but none of the benefits.

Even in the usual course, "the vast majority of certified class actions settle, most soon after certification." Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 Duke L.J. 1251, 1291-1291 (2002) ("[E]mpirical studies…confirm what most class action lawyers know to be true[.]"); see also *Nagareda*, *supra*, at 99 ("With vanishingly rare exception, class certification [leads to] settlement, not full-fledged testing of the plaintiffs' case by trial."); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 Notre Dame L. Rev. 591, 647 (2006) ("[A]lmost all certified class actions settle."). Indeed, a 2005 study conducted by the Federal Judicial Center found that roughly 90% of the suits under review that were filed as class actions settled after certification. Barbara J. Rothstein & Thomas E. Willging, Federal Judicial Center, *Managing Class Action Litigation: A Pocket Guide for Judges* 6 (2005). This is because class actions place defendants in the untenable position of betting the company on the outcome of a trial. Defendants, unwilling to roll the dice, are placed under

intense pressure to settle, even if an adverse judgment seems "improbable." See *Thorogood v. Sears, Roebuck and Co.*, 547 F.3d 742, 745 (7th Cir. 2008); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995). See also Barry F. McNiel, *et. al.*, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 489-90 (updated 8/5/96). Fear of negative publicity is also a motivating factor to settle even weak class claims. L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 La. L. Rev. 157, 222 (Fall 2004).

The Seventh Circuit's holding in this case, if left uncorrected by this Court, will only exacerbate these problems and proliferate more of these "blackmail settlements." *Rhone*, *supra* at 1298, citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973). In short, the Seventh Circuit's opinion that Rule 23(c)(4) provides a basis to certify an issue class that does not satisfy Rule 23(b) will allow abusive class actions to progress more easily to certification – and legally unwarranted settlement. And the enhanced promise of a pay-off would trigger the filing of many more lawsuits, including "strike suits" brought by opportunistic plaintiffs' attorneys to obtain "the defendants' cost savings from avoiding the litigation, distraction, and reputation costs of responding to the plaintiffs' complaint" rather than the true worth of the claim. James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 970 (1996).

The strain this places on the individuals and businesses that DRI's members are regularly called on to defend cannot be overstated. Even before the Seventh Circuit's decision in this case, the attendant costs of a major lawsuit could sound the death knell for new companies and those suffering under today's current economic climate. Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform the Securities Class-Action System: Exploring Arbitration as an Alternative to Litigation*, 33 Harv. J.L. & Pub. Pol'y 607, 612 (Spring 2010). But the Seventh Circuit's recent decision gives even more power in upfront settlement discussions to plaintiffs whose claims might require individualized causation and remedy determinations. "Such leverage can essentially force corporate defendants to pay ransom…" S. Rep. No. 109-15, 17 20-21 (2005), reprinted in 2005 U.S.C.C.A.N. 3, 21; Michael B. Barnett, *The Plaintiffs' Bar Cannot Enforce the Laws: Individual Reliance Issues Prevent Consumer Protection Classes in the Eighth Circuit*, 75 Mo. L. Rev. 207, 208 (Winter 2010). And the ripple effects of these exorbitant settlements will be felt throughout the economy. The costs of settlements are, at least partially, inevitably passed on to consumers in some form or another.

But there will be additional victims, too, if issue classes may be certified under Rule 23(c)(4) irregardless of Rule 23(b). The Seventh Circuit's approach will place a robust strain on the courts and judges called on to adjudicate these "issue" class claims. It is well-understood that class action litigation consumes more judicial resources than individual litigation. In fact, one study found that class actions consume almost five times more judicial time and resources than non-class civil actions. Thomas E. Willging, et. al., *Empirical Study of Class Actions in Four*

Federal District Courts, 7, 11, 23 (1996). It becomes even more problematic for the bench to carry out proceedings when adjudication of a class suit involves both class *and* individual trials. The class action mechanism should not be used in situations like the present one where proper adjudication of the claim will require individualized proofs and trial; these claims are better brought as individual suits. Reaffirming the notion that class actions should be limited to situations where a single issue or issues can be resolved through a single trial, will go a long way in preserving the district and appellate courts' limited judicial resources.

Until this Court provides guidance, DRI's members will have no way to predict whether their clients will fall victim to misuse of Rule 23. Certainly, the Seventh Circuit's relaxation of class certification requirements will encourage potential class members to forum-shop, a practice looked upon with disfavor by the Court. See *Piper Aircraft Co v. Reyno*, 454 U.S. 235, 254 (1981); *Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326 (1980). But beyond that, because of confusion and differing views among the appellate circuits, DRI's members and clients have no way of knowing what standard a particular court will apply. DRI therefore has a strong interest in assuring that this Court adopts a clear standing rule that is capable of consistent application across the country.

Rule 23(b) provides the key component of the balance of when class treatment is preferable over individual actions. The Seventh Circuit's decision disrupts this careful balance by allowing a class unable to fit within one of the types set forth in Rule 23(b) to proceed as an "issue"

class under Rule 23(c)(4), even though final resolution of the claims will require individualized proofs and trials. 672 F.3d at 491. It is imperative that this Court review the Seventh Circuit's decision and adopt a rule that preserves the careful balance.

The reach of the Seventh Circuit's decision goes well beyond disparate impact claims and other employment discrimination disputes. The flawed analysis would also affect plaintiffs' attempts to obtain class certification in many other contexts, including products liability, securities, and antitrust cases. Left unreviewed by this Court, the Seventh Circuits' boundless interpretation of Rule 23(c)(4) will invite a wave of meritless class actions. The time is ripe for this Court to step in and provide guidance on this issue.

C. Absent review, the federal courts will continue to apply Rule 23(c)(4) inconsistently.

This Court has long sought to achieve uniform pronouncements of federal law. "Both the Constitution's framers and the Supreme Court have stressed that the articulation of nationally uniform interpretations of federal law is an important objective of the federal adjudicatory process." Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmakng*, 73 Tex. L. Rev. 1, 38 (November 1994). Uniformity serves several "laudable goals," including "ensuring the predictability of legal obligations," garnering respect for judicial authority, and ensuring that "similarly situated litigants are treated equally." *Id.* at 38-39. Given the desire for uniformity among the circuits, a decision that "conflicts with the authoritative decisions of other United States Court of Appeals that have addressed

the issue" is deemed, for purposes of rehearing en banc, a decision of "exceptional importance" requiring review. See Fed. R. Civ. P. 35(b)(1). And many appellate circuits, including the Seventh Circuit, have expressly recognized the importance of ruling consistent with sister circuits on issues of federal law, viewing deviations from past decisions a last resort to be avoided. See, e.g., *Walker v. O'Brien*, 216 F.3d 626, 634 (7th Cir. 2000); *Kelton Arms Condo. Owners Ass'n v. Homestead Ins. Co.*, 346 F.3d 1190, 1192 (9th Cir. 2003); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979); *Alternative Sys. Concepts, Inc. v. Synopsys Inc.*, 374 F.3d 23, 31 (1st Cir. 2004); *Wagner v. Pennwest Farm Credit, ACA*, 109 F.3d 909, 912 (3rd Cir. 1997).

This Court's review is needed to resolve a circuit conflict and engender uniformity on the issue of whether Rule 23(c)(4) may be used to manufacture Rule 23(b) class certification. The inconsistency among the appellate circuits leaves DRI's members unable to predict accurately for their clients the outcome of class certification requests. See *In re Motor Fuel Temperature Sales Practices Litigation*, 279 F.R.D. 598, 608 (D. Kan. 2012); *Hohider v. United Parcel Service, Inc.*, 574 F.3d 169, 202 n. 25 (3rd Cir. 2009) (discussing the circuit split). Currently, DRI's members must counsel their clients on three divergent interpretations of Rule 23(c)(4). The first view, adopted by the Fifth Circuit - and DRI submits correctly so – allows courts to certify distinct classes addressed to particular issues only if the claim as a whole also merits class-wide treatment. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998); *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 n. 21 (5th Cir. 1996). In *Castano*, the Fifth Circuit explained:

> "The proper Interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial…Reading rule 23(c)(4) to allow a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended."

The Fifth Circuit's approach ensures that the class certification device is not used in a manner likely to be abused and to deprive defendants of defenses or to force defendants to settle.

The same cannot be said, however, of the Ninth Circuit's view, which allows an "issue class" to be certified even where the claim as a whole cannot proceed under Rule 23(b). In *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996), the Ninth Circuit held, in a stunning departure from the language of Rule 23(b), that "[e]ven if the common questions do not predominate over the individual questions so that class certification of the entire action is warranted, Rule 23 authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues." The Second Circuit adopted the Ninth Circuit's view in *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2nd Cir. 2006), and held that

Rule 23 "authorizes the district court in appropriate cases to isolate the common issues under Rule 23(c)(4)(A) and proceed with class treatment of these particular issues[,]" – even when common questions do not predominate over the individual questions. *Id.* at 226, citing *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

By contrast, a third and final view to date, adopted by the Third Circuit, requires the district court to apply a multi-factor balancing test to certification of Rule 23(c)(4) classes. *Gates v. Rohm and Haas Co.*, 655 F.3d 255, 273 (3rd Cir. 2011).

The outcome of a motion for class certification utilizing Rule 23(c)(4) should not turn on the happenstance of the district or circuit in which the lawsuit is filed. But unless and until this Court grants review, this is the harsh reality that defendants will face. The unpredictability created by the circuit split makes it extremely difficult for DRI's members to properly advise their clients on whether to litigate a class action or settle, and on how to place a value on the case for settlement purposes or to set reserves. A decision in this case would go a great distance in clarifying the "issue class" mechanism and the manner in which Rule 23(c)(4) may be used to certify a class under Rule 23(b). This Court should therefore take this opportunity to restore uniformity to the nation's courts and clarify the meaning and scope of Rule 23(c)(4). Failure to do so will have a harmful impact on the businesses and individuals DRI's members are regularly called upon to defend.

CONCLUSION

For the foregoing reasons, *Amicus Curiae* DRI respectfully urges the Court to grant Merrill Lynch, Pierce, Fenner & Smith, Inc.'s Petition for Writ of Certiorari.

Respectfully submitted,

HENRY M. SNEATH
Counsel of Record
PRESIDENT OF DRI
55 West Monroe,
Suite 2000
Chicago, IL 60603
(312) 795-1101
hsneath@psmn.com

MARY MASSARON ROSS
HILARY A. BALLENTINE
PLUNKETT COONEY
38505 Woodward Ave.,
Suite 2000
Bloomfield Hills, MI 48304
(313) 983-4801

Attorneys for Amicus Curiae