No. 17-1818

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IAN POLLARD, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, REMINGTON ARMS COMPANY, LLC, SPORTING GOODS PROPERTIES, INC., AND E.I. DUPONT NEMOURS AND COMPANY,

Appellees,

v.

LEWIS M. FROST AND RICHARD L. DENNEY,

***Appellants*.**

On Appeal from the
United States District Court for the Western District of Missouri
No. 4:13-CV-00086-ODS (Hon. Ortrie D. Smith, Presiding)

BRIEF OF STATES OF ALABAMA, ARKANSAS, LOUISIANA, MICHIGAN, MISSOURI, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WEST VIRGINIA, WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

The undersigned Attorneys General are their respective States' chief law enforcement officers. They regularly comment on proposed class action settlements as authorized under the Class Action Fairness Act of 2005 ("CAFA"). *See* 28 U.S.C. §§ 1332, 1453 and 1711-15. The amici States agree with the amicus brief of Massachusetts and its companion states that CAFA "specifically establishes a role for Attorneys General in the approval process for class action settlements." *See* Br. *Amicus Curiae* of Mass. et. al. at 1 (citing 28 U.S.C. § 1715). But the amici States disagree with Massachusetts about whether the District Court properly approved the underlying settlement in this case. Far from "protect[ing] consumer class members," Mass. Br. 1, Massachusetts' arguments wrongly discount the benefits of the settlement to public safety and the class. The District Court rightly rejected the attempt by Massachusetts and its companion States to inject issues about firearms regulation that are unrelated to claims the settlement would resolve. Sound principles of class-action administration and proper respect for the District Court's discretion call for this Court to affirm.

ARGUMENT

As a preliminary matter, the Court should recognize that no State strictly followed the procedures established by Congress to object to the class action settlement at issue in this case. In enacting the Class Action Fairness Act, Congress wanted state regulators to be "in a position to react if the settlement appears unfair to some or all class members or inconsistent with applicable regulatory policies." S. Rep. No. 109-14, at 32, reprinted in 2005 U.S.C.C.A.N. at 32. For that reason, CAFA requires defendants, no later than 10 days after the parties propose a settlement, to serve a voluminous notice "upon the appropriate State official of each State in which a class member resides." 28 U.S.C. § 1715(b). CAFA precludes courts from ruling on the settlement until at least 90 days after State officials get the notice, *id.* §1715(d), a period of time Congress chose to be "consistent with the period normally needed to provide notice to class members and allow parties to opt-out, intervene, or otherwise respond." John Beisner & Jessica Davidson Miller, *Litigating in the New Class Action World: A Guide to CAFA's Legislative History*, 6 CLASS ACTION LITIG. REP. 403, 414 (2005). In this case, the defendants sent their notice to affected AGs on December 5, 2014. *See* ECF 180 at 22, 31; ECF 180-1, at 74-75. The Court established a timeframe extending almost two years beyond that date—until November 18, 2016—for comments or objections. *See* ECF 140. Yet during that

period neither Massachusetts nor any other State offered their views on the settlement.

In short, Massachusetts could have filed an objection to the settlement under CAFA, but it did not. By the time Massachusetts filed its amicus brief below, the time to object had already passed and the settlement was already well on its way to being approved. This delay is the reason that Massachusetts and its companion States are amici instead of objectors in this Court.

In any event, the District Court clearly acted within its discretion when it found that Massachusetts had not offered any good reason to prevent the settlement from being approved. As explained below, the deal the parties struck is a reasonable and fair way of redressing the only harm for which the plaintiffs were seeking a remedy—economic damages. The criticisms Massachusetts and its companion States have lodged are not grounded in any concern about boosting the plaintiffs' economic recovery, but are instead an unwarranted effort to use this litigation to achieve other policy goals about firearms regulation in general. The District Court was right to reject these arguments and approve the settlement.

A. Massachusetts cannot show that the settlement is unfair.

Although Massachusetts' disagreement with the settlement invokes public safety concerns, those concerns are misdirected. In particular, Massachusetts is wrong when it says that "the true nature of this action and settlement" is to "prevent

accidental deaths or injuries." Mass. Br. 21-22. This lawsuit is a dispute between private parties about economic losses that the plaintiffs allegedly incurred when they bought an allegedly defective product from the defendant. The mere fact that the product at issue is a gun does not transform this case into a lawsuit about firearm safety. The claims here belong to the class members, not the States, and those claims are about economic damages. Because the settlement adequately addresses that alleged economic loss, Massachusetts' public safety concerns should not become an obstacle to the entry of final judgment.

It is important to keep in mind that the settlement does not affect claims for personal injury or property damage at all. It is exclusively about claims for economic loss—loss the plaintiffs say flowed from a defect that, according to the plaintiffs, makes these Remington rifles fire too quickly or easily. The defendants do not believe that these rifle triggers are defective at all, and many members of the class likely feel the same way. But in the interests of ending this litigation, the defendants agreed to settle all claims of the class members who believe that the alleged defect reduced their rifle's value. For class members who purchased rifles that Remington still manufactures, the defendants will retrofit the triggers, free of charge, and in so doing eliminate the alleged economic loss. For class members who own rifles that Remington stopped manufacturing several decades ago and therefore cannot feasibly

retrofit with a new trigger, the defendants will provide vouchers for Remington products, which will never expire, in the amount of $12.50 or $10.

It is difficult to see how Massachusetts or any other State can have bona fide concerns about this deal so long as it is limited to economic damages. The retrofitted trigger will eliminate any conceivable economic loss suffered by members of the first settlement class, and the members of the second class will get far more in the way of compensation for their alleged economic losses than they could ever expect to accomplish in a lawsuit. Remington stopped making the latter class members' rifles several decades ago, and the District Court aptly concluded that the statute of limitations would bar "the vast majority" of those claims. ECF 221 at 29. As this Court has emphasized, "[t]he most important consideration" in determining whether a settlement is "fair, reasonable, and adequate" is "the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement." *Petrovic v. Amoco Oil Co.,* 200 F.3d 1140, 1150-51 (8th Cir. 1999) (internal quotation marks omitted). When the settlement provides class members "significantly more" than they likely would have achieved at trial, as is the case here, a district court cannot be said to have "abused its discretion in approving the settlement." *Id.*

If the parties proposed to settle personal injury claims arising from misfired rifles, then we might agree with Massachusetts that the settlement raises serious issues about public safety and appropriate compensation. But Massachusetts is

simply wrong when it claims that the settlement could extinguish "personal injury and property damage claims" that class members might eventually wish to assert against the defendants. Mass. Br. 19. Before it was willing to approve this settlement, the District Court expressly "raised concerns about a potential reading of the release to include" such claims. ECF 221 at 27. The Court noted that the parties eliminated that potential problem altogether by "removing certain paragraphs from the settlement agreement as well as removing a box on the claims form that class members were required to check." *Id.* The settlement agreement expressly states that "[r]eleased claims do not include claims for personal injury and personal property damage." ECF 138 at 28, ¶ 94. *See also* ECF 180-1 at 12, ¶ 26 (Fourth Amended Settlement Agreement). For its part, the District Court buttressed that unambiguous statement with an express finding that "personal injury or property damage are not released in the settlement agreement." ECF 221 at 27. In light of these two express statements—one in the settlement agreement and the other in the order approving it—Massachusetts cannot seriously argue that a court will later find personal injury or property damage claims to have been extinguished by the judgment below.

Massachusetts' public safety concerns also make little sense when one considers alternatives to the settlement. Massachusetts does not point to any additional measures, beyond retrofitting, that Remington or anyone else could take to address the problem of allegedly defective triggers. But, if the settlement is

scuttled or delayed, this retrofitting will presumably not happen, and tens of thousands of rifles would remain "defective," in Massachusetts' view, for an indefinite amount of time. Mass Br. 8. Any move that holds up this process also would delay distribution of a gun-safety video, which the defendants have agreed to provide as an additional benefit to class members. Although Massachusetts asserts that a video concerning firearm safety has "[n]o [v]alue" as compensation for the plaintiff class, Mass. Br. 17, the video obviously has value as a public safety measure. In light of Massachusetts' expressed concerns about firearms safety, it makes no sense for Massachusetts and its companion States to object to the video's distribution.

Ultimately, States have better ways to protect the public from accidental shootings than by objecting to this settlement. Because firearms are lethal even if they work as intended, Massachusetts' real public safety concern appears to be about firearms in general, not the alleged defect at issue in this settlement. Mass. Br. 1, 2; *see also* ECF No. 196 at 9 (Mass. District Court brief). If States like Massachusetts want to regulate firearms or the gun industry more generally, their avenue for doing so is through actions to enforce their own public-safety laws. There are important limits on the AGs' ability to bring those suits, for AGs cannot usurp the legislative role by "supersed[ing] a product-regulatory structure already in place" by virtue of congressional or state legislative enactments. Donald G. Gifford, *Impersonating the*

Legislature: State Attorneys General and Parens Patriae Product Litigation, 49 B.C. L. REV. 913, 919 (2008). But in no event can AGs effectuate regulatory reform, in the firearms industry or any other context, by impeding private tort settlements that adequately compensate the plaintiffs for the only harms they are seeking to redress. The District Court did not abuse its discretion in concluding that the settlement fairly resolves the only claims at issue—claims for economic damages—and leaves issues about firearms regulation, personal injury, and property damage for another day.

B. The District Court did not abuse its discretion by approving the class notice and class certification.

Massachusetts' arguments about class notice and class certification are even further afield. Because Massachusetts filed its trial-court amicus brief after the deadline the District Court had set for objections, it did not make any of its arguments about class notice or class certification in time for the District Court to address those issues. In fact, Massachusetts did not make some of those arguments to the District Court at all, and the parties to this appeal are not pressing many of the arguments Massachusetts is trying to offer, as a nonparty *amicus*, for this Court's consideration. In any event, Massachusetts does not establish that the District Court abused its discretion in the class notice or class certification.

1. Massachusetts offers no persuasive criticism of the class notice.

Massachusetts' objections to the class notice came at a particularly late hour. The parties already had planned and implemented two rounds of notice. After the District Court found the response rate after the first round of notice too low, the parties went back to the drawing board and developed a more comprehensive plan, which the District Court approved in August 2016. The result was a notice effort that, by any metric, was far-reaching and exhaustive:

- "More than one million individuals received emails from Remington";
- "nearly 100,000 individuals received a notice via United States mail";
- "more than thirty-six million magazines published the notice"; "
- "more than 225 websites displayed the press release";
- "nearly one million internet banners were displayed";
- "posters were sent to approximately 11,000 stores to be displayed"
- "nearly thirty thousand radio spots reached fifty-five million individuals"; and
- "the targeted social media campaign on Facebook reached four million individuals and resulted in 375,000 individuals clicking on the advertisements.

ECF 221 at 12-13. It was against this backdrop that Massachusetts and its companion States announced their view, some four months after the District Court approved the

supplemental notice plan and two months after objections were due, that the District Court and the parties had failed to provide the class members enough notice of this settlement. *See* ECF 196 at 9-13.

The District Court's rejection of that argument cannot be deemed to be an abuse of discretion now, particularly in light of the reality that Massachusetts' arguments on appeal are in many respects different from the ones it offered below. Massachusetts' district-court brief did not do what it has done in its brief here concerning notice; it did not simply make passing reference, in a footnote, to the practices of the federal Consumer Safety Protection Commission. Mass. Br. 25 n.12. Instead, Massachusetts' entire argument below was that the District Court should impose, on the class notice, the same "requirements" the CSPC rule creates for mandatory recall notices. ECF 196 at 9-13. The problem with that argument was that, as the District Court explained, Congress has expressly "exempted" firearms manufacturers and sellers "from regulations promulgated by the CPSC." ECF 221 at 24 n.23 (citing 5 U.S.C. § 2052(a)(5)(E)). Massachusetts concedes this point, and it cannot accuse the District Court of abusing its discretion when it declined to second-guess Congress and import the CPSC regulations into Rule 23 on its own. And having failed to rely on anything except the CSPC regulations below, Massachusetts cannot now fault the District Court for not adopting the different theories it is raising

here. *See United States v. Charles*, 531 F.3d 637, 640 (8th Cir. 2008) ("[W]e generally do not consider arguments not raised below.").

Massachusetts' current criticism of the content of the notice also is different from what it offered the District Court. To be sure, Massachusetts did take the remarkable position in the District Court, which it now repeats on appeal, that the court should have required the defendants to stop denying that the rifles were defective—a position that, the District Court rightly concluded, is incompatible with the denial of liability on which defendants generally insist before they are willing to settle a case of this sort.[1] *See* ECF 221 at 24. But Massachusetts did *not* buttress that argument, as it does now, by pointing to language from what it contends to have been "an earlier voluntary recall" by Remington. *See* Mass. Br. 26 (citing a recall website and claiming that it referenced the recall in a footnote from its reply brief in the District Court, ECF 208 at 8, n.6, that does not mention the recall). Particularly

[1] A denial of liability is so commonplace that it is included in the relevant forms for giving notice of a class action settlement. *See* 3 West's Fed. Forms, District Courts-Civil § 18:88 (5th ed.)("[a]lthough Defendant *[name of defendant]* has denied liability, a conditional settlement agreement has been reached"); *id.* § 18:92 (5th ed.) ("the Defendants, while denying liability, offered $*[dollar amount of settlement sum]* in settlement of all claims"); Manual for Complex and Multidistrict Litigation, 49 F.R.D. 217, 239 (1970) ("defendants, while denying liability proposed a final settlement"). *See also* 7 Am. Jur. Pl. & Pr. Forms Compromise and Settlement § 28 ("5. *[Name of defendant company]* denies liability."); 3 West's Fed. Forms, District Courts-Civil § 18:82 (5th ed.) ("Defendants, while denying liability, have proposed a settlement of the class action claims in this case.") (model order appointing mediator).

without that argument in front of it, the District Court acted within its discretion in finding that the language used here, specifying that the plaintiffs were claiming that the alleged defect "can result in accidental discharges without the trigger being pulled," was clear enough to put reasonable readers on notice of what was at stake. ECF 138-2 at 3-4.

Massachusetts' critique of the rate at which class members responded to the notice ignores numerous practical realities about this case. The claims rate Massachusetts references, 0.29%, assumes that "all 7,500,000 firearms" at issue "are still in circulation." ECF 221 at 21. As the District Court noted, that assumption is "highly improbable" in light of the amount of time that has passed since Remington manufactured some of these rifles. *Id.* The actual claims rate is likely larger, and it will continue to grow as the claims period continues. And the District Court undertook yeoman's efforts to increase this rate, cancelling the first scheduled final settlement approval hearing due to low claim numbers and not approving a notice plan until after the parties subjected their supplemental notice plan to six weeks of third-party testing. *See* ECF 221 at 4-5, 12 n.14. As a result of the parties' efforts, the "claims rate increased significantly." *Id.* at 21.

The unique context of this case also provides critical perspective on why the claims rate is what it is. It cannot be forgotten that this case involves a class of consumers, firearms owners, who by and large know their product unusually well,

and might well have concluded based on that knowledge that they did not need the retrofit. The District Court had vivid evidence before it on this front: one of the mediators in the case informed the District Court that he himself "owned one of the firearms at issue, and because he is satisfied with his firearm and never experienced any issues with the firearm, he will not submit a claim or send the rifle to Remington." ECF 220 at 10-11. After two rounds of notice that reached millions of people, the District Court reasonably concluded that it had struck the right balance between informing as many people of the settlement as possible and respecting the apparent decision by many not to submit a claim.

One final point about notice: Massachusetts cannot seriously suggest that the District Court could have boosted the claims rate by "provid[ing] funding to state agencies" to send "additional mailings to class members identified in firearm transaction records maintained by many states." Mass. Br. 22. By "many," Massachusetts apparently meant three plus the District of Columbia—the only examples of registries to which it pointed the District Court. *See* ECF 196 at 18 n.15. The overwhelming majority of States have no registry, especially of transactions in long-guns as opposed to handguns. *See* Law Center to Prevent Gun Violence, *States That Require Sellers to Report Firearm Sales to Law Enforcement.*[2] So at best,

[2] at http://smartgunlaws.org/gun-laws/policy-areas/gun-sales/maintaining-records-of-gun-sales/#state (last visited August 24, 2017).

Massachusetts is proposing an additional avenue of notice that would have reached a miniscule number of people—particularly since Massachusetts conceded below that its own registry memorializes only "recent" transactions and is not even "publicly available." ECF 196 at 18 n.15. The District Court did not abuse its discretion when it declined to go down that route.

2. Massachusetts makes no persuasive argument against class certification.

Massachusetts' arguments concerning class certification face similar difficulties. None of the objectors appearing in this Court contested the District Court's certification decision below, and no one has filed an appeal challenging that aspect of the judgment below. The State's decision to make those arguments exclusively as an *amicus*, both here and in the District Court, makes their assessment on the merits especially problematic. Ordinarily this Court will "consider only issues argued in the briefs filed by the parties and not those argued in the briefs filed by interested nonparties." *Cont. Ins. v. Ne. Pharm. & Chem. Co.,* 842 F.2d 977, 984 (8th Cir. 1988). This Court can bend that rule when the "substantial public interests are involved," *see id.*, but this case is a poor candidate to fall within that rare exception. The settlement is, for reasons discussed above, reasonable on its face, and this Court reverses a district court's certification decision "only for abuse of that discretion." *Prof'l Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 645 (8th Cir. 2012).

The facial reasonableness of this settlement, and its limitation to claims for economic loss, dispel Massachusetts' class-certification criticisms in any event. Far from being a "fundamental flaw," Mass. Br. 5, the District Court's statement that the settlement "removed" the material "differences among" applicable state laws was sound. ECF No. 221 at 28. Any material differences were eliminated not simply because of the mere fact of settlement itself, but because of *the nature of the recovery the settlement provided class members*. When a defendant challenges class certification on the ground that differences in the applicable laws will make individualized issues predominate, the defendant must show that "1) a true conflict exists, 2) each state has an interest in applying its own law, and 3) if each state has such an interest, which state's interest would be more impaired should its law not be applied." *In re Activision Sec. Litig.*, 621 F. Supp. 415, 430 (N.D. Cal. 1985); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 136 ("[T]he party who claims that the foreign law is different from the local law of the forum has the burden of establishing the content of the foreign law."). And although Massachusetts asserts that the applicable state laws vary in certain ways, it points to no difference that is *material* for the purposes of this settlement. The settlement provides any willing participant either a retrofit remedy that fully offsets the economic loss, or a voucher that, for the older weapons, exceeds the economic loss that would be recoverable in

court. Massachusetts has not shown, or even argued, that certain class members would be entitled to more under the differing laws of their home States.

* * *

In many cases, state regulators play an important role under CAFA by pointing federal courts to fundamental flaws in proposed class-action settlements—flaws that, if not corrected, will prejudice the citizens of those States. The *amici* States here regularly object to proposed settlements on those grounds. But the settlement here does not have any fundamental flaws. In a class action that is limited to claims for economic loss, class counsel and the defendants crafted a pragmatic solution that provides a full remedy to any class member who wants it. The District Court was well within its discretion when it approved this settlement.

CONCLUSION

This Court should affirm the District Court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief is in compliance with the type-volume limitations of the Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 3767 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure, as counted using the word-count function in Microsoft Word.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief employs a proportionally spaced typeface from the 2007 version of Microsoft Word in 14 point Times New Roman.

A scan of this brief revealed it to be virus-free.

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On August 28, 2017, I electronically filed this document with the Clerk of this Court by using the CM/ECF system. All participants in the case are registered CM/ECF users, and the CM/ECF system will effectuate service on them. I will serve paper copies when directed by the Clerk.

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