No. 16-3334

In the United States Court of Appeals
for the Seventh Circuit

CHARLENE EIKE, SHIRLEY FISHER, JORDAN PITLER, and ALAN RAYMOND, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

v.

ALLERGAN, INC.; ALLERGAN USA, INC.; ALLERGAN SALES, LLC; ALCON LABORATORIES, INC.; ALCON RESEARCH, LTD.; FALCON PHARMACEUTICALS, LTD.; BAUSCH AND LOMB, INC.; PFIZER, INC.; MERCK & CO., INC.; and MERCK, SHARP & DOHME, CORP.,
Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Illinois, East St. Louis Division
Case No. 3:12-cv-01141-SMY-DGW
Hon. Staci M. Yandle

APPELLEES' PETITION FOR REHEARING *EN BANC*

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-3334

Short Caption: Eike v. Allergan, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Charlene Eike, Shirley Fisher, Jordan Pitler, and Alan Raymond, and all others similarly situated

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i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Leah M. Nicholls Date: March 17, 2017

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Brian Wolfman

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Attorney's Signature: s/ Thomas P. Rosenfeld Date: March 17, 2017

Attorney's Printed Name: Thomas P. Rosenfeld

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STATEMENT RESPECTING REHEARING *EN BANC*

Rehearing en banc is warranted because the panel decision conflicts with:

(1) the Supreme Court's holding in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), that Article III jurisdiction must be decided prior to and independently of whether a plaintiff states a cause of action on the merits;

(2) this Court's affirmation in *Remijas v. Neiman Marcus Group,* LLC, 794 F.3d 688, 694-95 (7th Cir. 2015), that, in the context of claims involving consumer products, "financial injury in the form of an overcharge can support Article III standing"; and

(3) this Court's repeated holdings—consistent with the holdings of other Circuits—that dismissals for lack of jurisdiction, including for lack of standing, must be dismissed without prejudice, *see, e.g.*, *Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652 (7th Cir. 2011); *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 758 (7th Cir. 2006).

INTRODUCTION

The panel's decision on this Rule 23(f) appeal, holding that the Plaintiffs lack standing to bring their claims, is remarkably short on legal analysis. Perhaps for that reason, the decision runs headlong into several basic principles established by this Court and the Supreme Court, namely, the requirement that a standing analysis precede and be independent from an analysis on the merits; that

consumers alleging that they spent too much on a product as a result of the defendant's illegal actions have generally pled an Article III injury-in-fact; and that a dismissal for lack of standing is without prejudice. If left to stand, the panel decision could lead district courts in this Circuit to abandon these previously uncontested propositions or, at the least, could muddy the waters.

BACKGROUND

A. Plaintiffs' Claims

Plaintiffs brought this class action on behalf of glaucoma patients in Illinois and Missouri who purchased Defendants' prescription eye drops to treat their disease. Because Defendants' eye droppers are designed to emit drops far larger than the human eye can absorb, much of each drop is necessarily wasted. The peer-reviewed scientific literature, Plaintiffs' expert, and Defendants' own pre-litigation studies unanimously recommend a drop size of 5 to 15 or 16 microliters (μL) for all patients and all medications, whereas Defendants' drops range in size from 21.9 to 60 μL. Dist. Ct. Dkt. No. 176-6 ¶ 47. Those scientific studies conclude that smaller drops are just as effective as larger drops at treating glaucoma, are safer because they reduce side effects, and would be cheaper for patients because patients could purchase fewer bottles of medication for the same course of treatment. *See* Dist. Ct. Dkt. No. 44, at A-1, ¶¶ 6, 47-63; Dist. Ct. Dkt. No. 176-2, ¶¶ 25-34, 43-44. For example, a patient using Allergan's Alphagan P 0.15% is forced to purchase almost three times as much medication as she needs for her daily treatment because of its

large drop size—an excess that costs her more than $1,000 each year. Dist. Ct. Dkt. No. 176-6, Ex. E-1; Dist. Ct. Dkt. No. 44 ¶ 75.[1]

Further, there does not appear to be any scientific or regulatory reason preventing Defendants from using droppers that emit smaller drops. Droppers emitting smaller drops have already been designed, produced, and successfully tested on patients—including by some of the Defendants themselves. *See* Appellees' Br. 7-8. And, though the question has not yet been decided by the district court, Plaintiffs maintain that FDA pre-approval is not required for Defendants to redesign the dropper to reduce the medications' drop size. *See* Appellees' Br. 8-10.

Plaintiffs allege that Defendants' packaging of their medication in droppers that emit too-large drops is a prohibited unfair business practice under the Illinois Consumer Fraud Act, 815 ILCS 505/1 *et seq.*, and Missouri Merchandising Practices Act, Mo. Rev. Stat. § 407.010 *et seq.*, and seek damages equivalent to the value of the necessarily wasted medication. *See generally* Dist. Ct. Dkt. No. 44. The Illinois and Missouri laws adopt the standard for unfair business practices articulated by the Federal Trade Commission's Unfairness Policy Statement: A "practice is 'unfair' . . . if it 'caused or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by

[1] The scientific mechanisms and evidence are described in more detail in the Appellees' Brief at 3-7, which have been drawn from Plaintiffs' expert's testimony and allegations in Plaintiffs' complaint that have been endorsed by Plaintiffs' expert.

countervailing benefits to consumers or to competition.'" *Id.* ¶¶ 122, 123; *see id.* ¶¶ 124-132 (alleging how Defendants' practice meets each of the prongs).

B. Procedural Background

In response to Plaintiffs' class-action complaint, Defendants moved to dismiss under Rule 12(b)(6), arguing, among other things, that Plaintiffs failed to sufficiently plead their unfairness claim and that the state-law claims are preempted by federal law. *See* Dist. Ct. Dkt. No. 147. The district court denied the motion, explaining that Plaintiffs had sufficiently pled all the elements of an unfair-practices claim, *id.* at 5-6, sufficiently pled proximate cause, *id.* at 6-7, and sufficiently pled actual injury, *id.* at 7-8.

As to Defendants' federal preemption defense, the district court found that Defendants had failed to meet their demanding burden of demonstrating preemption at the motion-to-dismiss stage and that there was an open question of fact as to whether FDA pre-approval is required for Defendants to redesign their droppers—if pre-approval is required, Plaintiffs' state-law claims are preempted. *Id.* at 10-12. The district court explained that a factual record was needed before the issue could be determined, and discovery on that issue had not begun. *Id.* at 12. Defendants sought reconsideration of that ruling, or, in the alternative, certification for interlocutory review. The district court rejected Defendants' arguments. Dist. Ct. Dkt. No. 199.

The parties then conducted discovery limited to class certification, following which Plaintiffs moved for class certification. Dist. Ct. Dkt. No. 176. The district

court denied Defendants' *Daubert* motions as to both Plaintiffs' experts and granted class certification. A.018 *et seq.* Defendants then sought immediate interlocutory review in this Court under Federal Rule of Civil Procedure 23(f). In their Rule 23(f) petition, Defendants argued, for the first time, that Plaintiffs lacked standing to bring their state-law claims and also sought review of the class-certification decision. This Court granted review.

C. The Panel Decision

After argument, a panel of this Court issued a five-page decision holding that Plaintiffs lack standing to bring their state-law claims in federal court, not reaching the class-certification issue. Op. 5. The opinion (incorrectly) describes Plaintiffs' claims as "dissatisfaction with a product made by multiple firms, or its price," and does not, at any point, discuss the legal basis for Plaintiffs' claims—that Defendants only sell necessary prescription medication in droppers that emit too-large drops, which, in turn, is an unfair business practice as articulated by the Federal Trade Commission and thus prohibited by Missouri and Illinois law. *Id.* at 3. In fact, neither "unfairness" nor "unfair" appear anywhere in the opinion.

Despite failing to acknowledge the basis for Plaintiffs' claims, failing to acknowledge the district court's two decisions rejecting Defendants' argument that Plaintiffs failed to state a claim, and lacking appellate jurisdiction over the question, the panel determined that Plaintiffs had no cause of action. Citing no legal authority whatsoever, the panel appears to have reasoned that the Plaintiffs lack a cause of action because their claims are akin to those of a purebred cat

owner, disappointed in the breeder's recommendation of expensive food and drinking fountains. *Id.* at 3-4. Because, according to the panel (again, without citing authority), the cat owner has "no cause of action" for following that recommendation, neither do Plaintiffs here. *Id.* at 4.

The decision goes on to suggest that Plaintiffs instead should have taken their claims to the FDA, but in the very same paragraph, acknowledges that the FDA cannot give Plaintiffs the relief they seek in this lawsuit. *Id.* at 4-5.[2]

The final substantive paragraph of the opinion begins by reasserting that "supposing it were demonstrable that a smaller eye drop would be more effective and cheaper than the ones manufactured by the defendants, the class members would have no cause of action" and mischaracterizing Plaintiffs claims as arguing only that the Defendants "could do better by" them. *Id.* at 5. Then, for the first time in the opinion, the panel decision mentions standing—an issue that actually was before it on this appeal. *Id.* The opinion quickly concludes that because Plaintiffs have "failed to allege 'an invasion of a legally protected interest,'" they have failed to allege an injury and lack standing. *Id.* At no point did the panel discuss class certification in this Rule 23(f) interlocutory appeal. The panel vacated the grant of class certification and remanded with instructions to dismiss the claims with prejudice.

[2] To the extent that this paragraph also suggests Plaintiffs' claims are preempted, that issue was not before the panel in this interlocutory appeal and was not briefed on appeal.

REASONS FOR GRANTING REHEARING *EN BANC*

I. The Panel Decision Is Contrary to the Supreme Court's Repeated Admonitions that Standing Must Be Determined Prior to and Independently of the Merits.

The panel's decision should be vacated because it is flatly contrary to the Supreme Court's jurisprudence holding that Article III standing must be determined prior to and independently of the merits, including the merits determination whether a plaintiff has stated a cause of action. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Supreme Court expressly rejected the view that merits questions, such as whether the plaintiff has a cause of action, may ever be decided before the jurisdictional standing question, explaining that deciding the merits first "carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers," and that that "the first and fundamental question is that of jurisdiction." *Id.* at 94 (quoting *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)).

And *Steel Co.* could not have been clearer that the jurisdictional question cannot rest on whether a plaintiff has stated a claim, emphasizing that "[i]t is firmly established in our cases that the absence of a valid . . . cause of action does not implicate subject-matter jurisdiction," *id.* at 89, and that "jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover," *id.* (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)) (internal alterations omitted). If that were not clear enough, the Court also stated that "the nonexistence of a cause of action [is] no proper basis for a

jurisdictional dismissal." *Id.* at 96; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm.*, 135 S. Ct. 2652, 2663 (2015) ("one must not confuse weakness on the merits with absence of Article III standing") (internal quotations and alternations omitted).

The panel decision, however, does the exact opposite of what this Supreme Court precedent requires. First, the analysis—to the extent it exists—*begins* by focusing on whether Plaintiffs have a cause of action and finding that they do not. Before ever mentioning standing or subject-matter jurisdiction, the opinion explains that its hypothetical disgruntled cat owners have "no cause of action" and that "[i]t's the same here." Op. 4. The opinion repeats the determination that Plaintiffs "have no cause of action" at the beginning of the paragraph in which it finally discusses standing—in the last substantive paragraph of the decision. *Id.* at 5. But that takes things out of order: The standing question must be decided at the outset because without standing, a federal court lacks jurisdiction to review the merits question whether Plaintiffs have a cause of action. *Steel Co.*, 523 U.S. at 94.

Perhaps even more problematically, the panel decision impermissibly conflates that merits question with the standing inquiry. When it finally gets to standing, the panel decision imports its determination that there is no cause of action wholesale, beginning the paragraph with its "no cause of action" determination and concluding that there is no standing because Plaintiffs "failed to allege 'an invasion of a legally protected interest,'" as a way to describe the injury-in-fact requirement. Op. 5 (quoting *Spokeo v. Robins*, 136 S. Ct. 1540, 1548 (2016)).

Though the opinion uses the words "injury" and "standing," it is apparent that the panel's view that Plaintiffs lack a cause of action represents the sum total of the reasons for its decision. And that analysis is plainly flawed because "whether a plaintiff states a claim for relief goes to the merits . . . , not the justiciability of the dispute." *Bond v. United States*, 564 U.S. 211, 219 (2011); *see Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal").

The determination that Plaintiffs do not have a cause of action is also troubling because this Court lacks appellate jurisdiction over the question whether Plaintiffs have stated a claim. The district court twice denied Defendants' motion to dismiss for failure state claims under Missouri and Illinois law, Dist. Ct. Dkt. Nos. 147, 199; there is no final decision under 28 U.S.C. § 1291; and that issue has not been certified for interlocutory review. (Indeed, as explained earlier, the district court declined to certify that issue for interlocutory review.) Rather, without a finding of pendent appellate jurisdiction (for which no party has argued), the only issues this Court has appellate jurisdiction to review are the class certification order—on interlocutory review under Rule 23(f)—and Article III jurisdiction—which can be examined at any time. *See Abelesz v. OTP Bank*, 692 F.3d 638, 646-47 (7th Cir. 2012) (discussing standards for pendent appellate jurisdiction where there is jurisdiction to review a particular interlocutory order).

It bears emphasis, too, that the panel's improper analysis of whether Plaintiffs had alleged a cause of action was conducted without any discussion of the

causes of action actually alleged in the complaint: that Defendants' actions are an unfair business practice under the standard laid out by the Federal Trade Commission and prohibited by express provisions of Missouri and Illinois consumer protection statutes. Indeed, freedom from unfair business practices (that cost Plaintiffs money) is the "legally cognizable interest" Plaintiffs allege was invaded. *See* Dist. Ct. Dkt. No. 44. To put it mildly, it is a curious decision that holds that a plaintiff has no cause of action without mentioning the causes of action she actually brings and without citing any authority interpreting those causes of action.

Because the panel's decision directly conflicts with decades of Supreme Court precedent making clear that standing cannot rest on whether a plaintiff has a cause of action, *en banc* review is warranted to ensure that the panel's erroneous decision is not followed.

II. The Panel Decision Conflicts with this Court's Holdings that Financial Loss, Including Overpayment in the Consumer Product Context, Can Give Rise to Article III Standing.

Moreover, the panel's ostensible conclusion that Plaintiffs lack standing is at odds with this Court's repeated recognition that, in the context of claims about consumer products, spending too much money on the product can be sufficient to establish an Article III injury. Here, Plaintiffs contend that their Article III injury is the loss of the money Defendants' illegal conduct forced them to spend on necessarily wasted medication. *See* Appellees' Br. 18. Although the panel's decision acknowledges that Plaintiffs allege a "pocketbook injury," Op. 3, it never explains why that alleged injury is insufficient for Article III purposes. Nor does it even

acknowledge, let alone attempt to distinguish, cases in which this Court has recognized that economic injury satisfies Article III in similar circumstances. For example, in *In re Aqua Dots Products Liability Litigation*, 654 F.3d 748, 751 (7th Cir. 2011), this Court had no hesitation in finding that the plaintiffs, purchasers of an allegedly dangerous product, had an Article III injury based on the amount they overpaid for the product. *Id.* ("A financial injury creates standing."). That principal was articulated again in *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 694-95 (7th Cir. 2015), which reiterated that it was appropriate for overpayment to constitute Article III injury in the context of purchases of particular products, as in this case. *Id.* (distinguishing injury vis-a-vis a particular product with the claims at issue in *Remijas* involving every purchase made at a particular store); *see also id.* at 695 (collecting district court cases holding that overpayment in a product claim is an Article III injury); *Payton v. County of Kane*, 308 F.3d 673, 677 (7th Cir. 2002) (plaintiffs required to make extra payment "easily" met Article III injury requirement); *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 291, 293 (3d Cir. 2005) (Alito, J.) (economic injury is a "paradigmatic form[ ]" of Article III injury-in-fact that "is often assumed without discussion").[3]

[3] On the subject of the merits of Defendants' appeal, it bears recalling that this is a Rule 23(f) appeal challenging class certification. The panel's failure to appreciate that the class members' classic pocketbook injury—that all of them are out of pocket because Defendants' allegedly unlawful conduct caused them to spend money on wasted medication—bears directly on the class-certification question that the panel ignored. The panel's incorrect determination that the class members did not suffer injury-in-fact has thus masked the reality that Defendants' allegedly unlawful conduct would, as the district court found, necessarily be resolved, either in the

On its face, the panel decision, which acknowledges that Plaintiffs have claimed a monetary injury, is at odds with this Court's recognition that just such an injury gives rise to Article III standing, and the decision should reheard *en banc* for that reason as well.

III. Because a Determination on Standing Is Not a Ruling on the Merits, Dismissal Without Prejudice Is Required Under this Court's Precedents.

Finally, rehearing *en banc* is also warranted because, contrary to this Court's precedent, after purportedly holding that Plaintiffs lacked standing, the panel instructed the district court to dismiss the case *with* prejudice. Op. 5. But this Court, consistent with other Circuits, has repeatedly held that when a court determines that a plaintiff lacks Article III standing, i.e., the court lacks jurisdiction, it lacks the authority to do anything but dismiss *without* prejudice. *See, e.g.*, *Harris v. Quinn*, 656 F.3d 692, 701 (7th Cir. 2011), *rev'd in part*, 134 S. Ct. 2618 (2014) ("Generally, when a complaint is dismissed because it is not ripe (or because the plaintiffs lack standing, for that matter) it is dismissed without prejudice[.]"); *Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004) ("'No

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class's favor or Defendants' favor, "in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see* Appellants' Br. 28-31. That is, if Defendants' conduct was unlawful under applicable state law, the class members have all been harmed in the same way; if Defendants' conduct was lawful, Defendants are off the hook with respect to the whole class. *Suchanek v. Sturm Foods, Inc.*, 764 F.3d 750, 757 (7th Cir. 2014) ("The claims of every class member will rise or fall on the resolution of that question."); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013) ("[T]he class is entirely cohesive: It will prevail or fail in unison. In no event will the individual circumstances of particular class members bear on the inquiry.").

jurisdiction' and 'with prejudice' are mutually exclusive."). That is because a dismissal *with* prejudice is a ruling on merits and, as explained in Part I, a ruling on standing is not a ruling on the merits. *See Am. Bottom Conservancy v. U.S. Army Corps of Eng'rs*, 650 F.3d 652, 660 (7th Cir. 2011) (Where the district court dismissed for lack of standing, it "could only dismiss without prejudice. Were we to decide the case on the merits we would be directing the entry of judgment with prejudice[.]"); *Ramsay v. Mayer*, 420 Fed. App'x 586, 588 (7th Cir. 2011) ("If plaintiffs indeed lack standing, and there is no jurisdiction, then dismissal must be *without* prejudice; a court cannot adjudicate a claim over which it lacks jurisdiction."). That the panel instructed the district court to dismiss *with* prejudice indicates that its reasoning is, as discussed in Part I, impermissibly based on the merits, which are not before this Court. *See HyperQuest, Inc. v. N'Site Solutions, Inc.*, 632 F.3d 377, 381 (7th Cir. 2011) ("Had its dismissal of HyperQuest's suit really been on the basis of Article III standing, the dismissal would have been without prejudice."). On the other hand, if the panel were "correct that there is no jurisdiction"—as the decision ostensibly held—"[it] should have dismissed the suits without prejudice." *In re African-Am. Slave Descendants Litig.*, 471 F.3d 754, 758 (7th Cir. 2006). Either way, the panel's actions were improper.[4]

[4] Other circuit courts of appeal agree with this Court's with-without prejudice distinction. *See, e.g.*, *Hochendoner v. Genzyme Corp.*, 823 F.3d 724, 736 (1st Cir. 2016); *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 54 (2d Cir. 2016); *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013); *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1234-35 (11th Cir. 2008) (per curiam); *Brereton v.*

CONCLUSION

The petition for rehearing *en banc* review should be granted.

Respectfully submitted,

March 20, 2017

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Bountiful City Corp., 434 F.3d 1213, 1216 (10th Cir. 2006); *County of Mille Lacs v. Benjamin*, 361 F.3d 460, 464-65 (8th Cir. 2004); *B. & V. Distrib. Co. v. Dottore Cos.*, 278 F. App'x 480, 487 (6th Cir. 2008).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this brief contains 3,613 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word 2013. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a) and Local Rule 32 because this brief has been prepared in proportionally spaced typeface using 12-point Century Schoolbook font.

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March 20, 2017

CERTIFICATE OF SERVICE

I certify that on March 20, 2017, I electronically filed the foregoing Appellees' Petition for Rehearing *En Banc* via the CM/ECF system and served all parties or counsel via CM/ECF system.

/s/ Leah M. Nicholls
Leah M. Nicholls

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 16-3334

CHARLENE EIKE, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

ALLERGAN, INC., *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Illinois.
No. 3:12-cv-01141-SMY-DGW — **Staci M. Yandle**, *Judge*.

ARGUED FEBRUARY 7, 2017 — DECIDED MARCH 6, 2017

Before BAUER, POSNER, and SYKES, *Circuit Judges*.

POSNER, *Circuit Judge*. The defendants appeal from an order certifying eight classes (which for simplicity we'll pretend are just one class), consisting of persons in Illinois and Missouri who take eye drops manufactured by six pharmaceutical companies—the defendants in the case—for treatment of glaucoma. The claim is that the defendants' eye drops are unnecessarily large, in violation of the Illinois

Consumer Fraud Act, 815 ILCS 505/1 *et seq.*, and the Missouri Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010 *et seq.*, because each eye drop exceeds 16 microliters (equal to a tenth of one percent of a tablespoon), and the class contends that the optimal size of an eye drop for treatment of glaucoma is 16 microliters, no more. In places it says that drops as small as 5 microliters would be safe, but its claim is merely that anything larger than 16 microliters is wasteful because, it contends, the additional microliters add no therapeutic value.

The difference between the price per drop of the eye drops at their present size, and the presumably lower price if the drops were smaller, multiplied by the number of drops that have been bought by the members of the class, are the damages the class is seeking.

Yet it does not argue that the price of the current eye drops is a result of collusion, whether tacit or express, among the defendants; this is not an antitrust case. Nor is there any allegation of misrepresentation. The argument is only that the price of the eye drops is excessive because a smaller drop, costing less to produce and (especially) to package, could be sold at a lower price yet still cover the producers' costs, and therefore the only benefit of the larger drop is to the producers' profits, which is why, the class argues, the producers are not motivated to make the change. This assumes that profits would decline if the defendants switched to selling the smaller, cheaper-to-produce eye drops. But that's far from certain; lower prices might result in greater sales and as a result higher rather than lower profits.

The class further alleges that the large eye drops have a higher risk of side effects—but does not explain what the side effects are—and are more likely to be used up faster. Yet there is no claim that members of the class have experienced side effects from the large drops, or have been harmed because they ran out of them early (on the theory that the larger the drops the fewer there are in each bottle). Unsurprisingly, therefore, the only damages sought are for the "pocketbook" injury of paying what the class contends to be an unnecessarily high price for the defendants' eye drops because of the size of those drops.

Given the lack of any suggestion of collusion by the defendants either with each other or with other producers (if there are other producers) of eye drops for treatment of glaucoma, or of any claim that the defendants misrepresent the quality of their product, we are asked to decide a case based simply on dissatisfaction with a product made by multiple firms, or with its price. Suppose the class members all happened to own pedigreed cats, and the breeders who had sold the cats to the class members had told them that as responsible cat owners they would have to feed the cats kibbles during the day and Fancy Feast at night and buy a fountain for each cat because cats prefer to drink out of a fountain (where gravity works for them) rather than out of a bowl (where gravity works against them) and they don't like to share a fountain with another cat. And suppose the buyers do as told, buying what they are told to buy from pet stores, but it turns out that the cats have large appetites, the cat food is quite expensive, and the fountains are expensive and not wholly reliable. The breeders had made no misrepresentations, concealed no information, answered all questions of prospective buyers truthfully. Nevertheless many of

the buyers are dissatisfied. They think—maybe correctly—that the cat food is needlessly expensive and the fountain a fragile luxury. Yet would anyone think they could successfully sue the breeders? For what? The breeders had made no misrepresentations. Had a prospective buyer asked one of the breeders what the annual cost of maintaining the cat would be, the breeder would, let's assume, have given him a realistic estimate. There would be disappointment in the example given, but no cause of action.

It's the same here. The only eye drops sold by the defendants for the treatment of glaucoma are larger than 16 microliters. There are reasons for this, or so the defendants argue. Each eye drop consists mostly of inactive ingredients; the active pharmaceutical ingredient that is what treats the glaucoma is only about 1 percent of the drop, and only 1 to 7 percent of *that* ingredient crosses the cornea into the eye itself, where it can exert its therapeutic effect. The amount of fluid the eye can hold without overflowing varies from person to person and, the defendants assert, often exceeds 16 microliters. The smaller the drop, therefore, the weaker its likely therapeutic effect for patients whose eyes could have absorbed a larger drop. In addition, elderly patients, patients with unsteady hands, and patients who already have serious eye problems, often have trouble getting eye drops into their eyes, and the smaller the drop the likelier they are to miss.

The defendants' large eye drops have been approved by the Food and Drug Administration (FDA)—in other words have been determined to be safe and effective for treatment of glaucoma. That doesn't exclude the possibility that a smaller drop would be as or even more effective, and also cheaper. But those are matters for the class members to take

up with the FDA. See 21 C.F.R. § 10.30. A court can review a determination by the FDA, but it cannot bypass the agency and make its own evaluation of the safety and efficacy of an unconventionally sized eye drop for treatment of glaucoma. Not that the class members are likely to get far with the FDA. They don't want the agency to rescind its approval of the large drops—they don't argue that the large drops are unsafe or ineffective. They just want the defendant companies to start manufacturing smaller drops. But the agency can't force a private company to manufacture a product the company doesn't want to make—all it can do is approve or disapprove drugs that a company does make.

Even supposing it were demonstrable that a smaller eye drop would be more effective and cheaper than the ones manufactured by the defendants, the class members would have no cause of action. You cannot sue a company and argue only—"it could do better by us"—which is all they are arguing. In fact, such a suit fails at the threshold, because there is no standing to sue. One cannot bring a suit in federal court without pleading that one has been injured in some way (physically, financially—whatever) by the defendant. That's what's required for standing. The fact that a seller does not sell the product that you want, or at the price you'd like to pay, is not an actionable injury; it is just a regret or disappointment—which is all we have here, the class having failed to allege "an invasion of a legally protected interest." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

And so the grant of class certification is vacated and the case remanded with directions to dismiss the suit with prejudice.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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FINAL JUDGMENT

March 6, 2017

Before: WILLIAM J. BAUER, Circuit Judge
RICHARD A. POSNER, Circuit Judge
DIANE S. SYKES, Circuit Judge

No. 16-3334	CHARLENE EIKE, et al., Plaintiffs - Appellees v. ALLERGAN, INC., et al., Defendants - Appellants
Originating Case Information:	
District Court No: 3:12-cv-01141-SMY-DGW Southern District of Illinois District Judge Staci M. Yandle	

The grant of class certification is **VACATED** and the case **REMANDED** with directions to dismiss the suit with prejudice. The above is in accordance with the decision of this court entered on this date. Costs should be awarded to the appellant, Allergan.

form name: **c7_FinalJudgment**(form ID: **132**)