

## U.S. Chamber of Commerce, NEM, DSA Warn of "Extortionate Settlements" if Retail Energy Court Ruling Upheld

February 4, 2014

[Email This Story](#)

Copyright 2010-13 EnergyChoiceMatters.com

Reporting by Paul Ring • [ring@energychoicematters.com](mailto:ring@energychoicematters.com)

Businesses would be subject to the, "risk of extortionate settlements," if the Fifth Circuit U.S. Court of Appeals does not reverse a lower court's ruling which granted class action status to a suit against Stream Energy and affiliates without the plaintiffs first proving the alleged improper behavior, the Chamber of Commerce of the United States of America, the Direct Selling Association, and the National Energy Marketers Association said in an amicus brief.

As previously reported by [EnergyChoiceMatters.com \(click here\)](#), a district court had "certified" a class action suit against Stream Energy by applying a "fraud on the market" doctrine, which the district court said obviates the need for individualized evidence; it was enough that plaintiffs had simply alleged that Stream Energy operates an illegal pyramid scheme to proceed on a class action basis.

In particular, the class action sought by plaintiffs was filed under the Racketeer Influenced and Corrupt Organizations (RICO) Act, which the amicus briefing parties, citing precedent, said requires "[i]ndividual findings of reliance necessary to establish RICO liability and damages."

The Fifth Circuit has previously found that these required individual findings preclude class action status for such RICO cases.

"The well-established rule that a 'class action cannot be certified when individualized reliance will be an issue' should have resolved this case," the Chamber, DSA, and NEM said in the joint amicus brief.

"If left uncorrected, the district court's decision would subject businesses to the risk of extortionate settlements coerced by the improper certification of meritless class claims that could not be proved at trial," the Chamber, DSA, and NEM said.

"As this Court has recognized, 'class certification may be the backbreaking decision that places insurmountable pressure on a defendant to settle, even where the defendant has a good chance of succeeding on the merits,'" the Chamber, DSA, and NEM said.

"Requiring strict adherence to Rule 23's mandates is thus necessary to prevent the class-action device from being used as a tool for 'judicial blackmail,'" the Chamber, DSA, and NEM said.

"The district court's decision ... charts a clear -- and clearly erroneous -- path by which plaintiffs can threaten businesses with the risk of extorted settlements," the Chamber, DSA, and NEM said.

The briefing parties noted that the district court's decision has implications beyond simply direct selling.

"[I]f mere allegations of fraud sufficed to obtain class certification, a wide range of businesses, from mortgage lenders to for-profit colleges, would face the risk of being coerced into extortionate settlements without having a meaningful opportunity to present legitimate defenses," the Chamber, DSA, and NEM said in asking the Fifth Circuit to reverse the district court's order.

Case No. 4:09-CV-02056