114TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { 114–328

FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015

NOVEMBER 5, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 1927]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1927) to amend title 28, United States Code, to improve fairness in class action litigation, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

CONTENTS

59–006

The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fairness in Class Action Litigation Act of 2015".

SEC. 2. CLASS MEMBER INJURY REQUIRED.

(a) IN GENERAL.—No Federal court shall certify any proposed class seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives.

(b) CERTIFICATION ORDER.—An order issued under Rule 23(c)(1) of the Federal Rules of Civil Procedure that certifies a class seeking monetary relief for personal injury or economic loss shall include a determination, based on a rigorous analysis of the evidence presented, that the requirement in subsection (a) of this section is satisfied.

Purpose and Summary

The Fairness in Class Action Litigation Act is a simple, one-page bill that will help ensure common sense principles apply in class action lawsuits. Federal class action rules currently require that a class share questions of law and fact in common, and that the claims and defenses of the representative parties are "typical" of those of the class.[1] Despite those standards, some courts have allowed classes to be certified absent a showing that all the members of the class actually share a common injury of the same type, and of comparable scope.[2] For example, in a case brought against Whirlpool, the U.S. Court of Appeals for the Sixth Circuit affirmed certification of a class of all owners of a certain washing machine that allegedly produced moldy smelling laundry, even though the overwhelming majority of the absent class members experienced no problem with their machines.[3] Similarly, in a case involving allegedly defective roofing shingles, the U.S. Court of Appeals for the Seventh Circuit recently held that the district court abused its discretion in rejecting class certification on the ground that certain class members' roofing shingles did not manifest the alleged defect.[4] And in a case brought on behalf of purchasers of Jaguar vehicles that allegedly contained a defect resulting in premature tire wear, the U.S. Court of Appeals for the Ninth Circuit held that "proof of the manifestation of a defect is not a prerequisite to class certification."[5]

---

[1] *See* Fed. R. Civ. P. 23(a)(3).

[2] Examples of class actions involving uninjured or non-comparably injured members include the following: *Wolin v. Jaguar Land Rover North America, LLC,* 617 F.3d 1168 (9th Cir. 2010); *Eubank v. Pella Corp.,* 753 F.3d 718 (7th Cir. 2014); *Butler v. Sears, Roebuck & Co.,* 702 F.3d 359 (7th Cir. 2012), *cert. granted, judgment vacated,* 133 S. Ct. 2768 (2013), *judgment reinstated,* 727 F.3d 796 (7th Cir. 2013) and *cert. denied,* 134 S. Ct. 1277 (2014); *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation,* 722 F.3d 838 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 1277 (2014); *In re Zurn Pex Plumbing Products Liability Litigation,* 644 F.3d 604 (8th Cir. 2011); *Lilly v. Jamba Juice Co.,* No. 13-cv-02998–JST, 2014 WL 4652283 (N.D. Cal. Sept. 18, 2014); *Zeisel v. Diamond Foods, Inc.,* No. C 10–01192 JSW, 2011 U.S. Dist. LEXIS 60608 (N.D. Cal. June 7, 2011); *Tait v. BSH Home Appliances Corp.,* 289 F.R.D. 466 (C.D. Cal. 2012), *cert. denied,* 134 S. Ct. 1273 (2014); *Volz v. Coca Cola Co.,* No. 1:10-cv-00879–MRB (S.D. Ohio 2014); *Banks v. Nissan North America, Inc.,* 301 F.R.D. 327 (N.D. Cal. 2013); *Forcellati v. Hyland's, Inc.,* No. CV 12–1983–GHK (MRWx), 2014 WL 1410264 (C.D. Cal. Apr. 9, 2014).

[3] *In re Whirlpool Corp. Front-Loading Washer Products Liability,* 722 F.3d 838, 849 (6th Cir. 2013), *cert denied,* 134 S. Ct. 1277 (2014).

[4] *In re IKO Roofing Shingle Products Liability Litigation,* 757 F.3d 599, 603 (7th Cir. 2014).

[5] *Wolin v. Jaguar Land Rover North America, LLC,* 617 F.3d 1168, 1173 (9th Cir. 2010).

Class actions like these undermine the proper administration of justice and hurt the U.S. economy by lumping uninjured people and injured into the same classes, greatly inflating the class size, and unduly pressuring companies to settle, at the expense of consumers who are forced to pay higher prices in order to offset the cost of litigation to U.S. companies. At the same time, these courts are potentially shortchanging recovery for any legitimately injured class members by redirecting limited resources to those who were uninjured or non-comparably injured.

The Fairness in Class Action Litigation Act would overrule the unfavorable precedent discussed above by clearly requiring that a class be composed of members with injuries of the same type and scope. Those injuries could be de minimis, or even nonexistent, but members whose injuries were only de minimis or nonexistent would have to bring their case in a separate class action consisting of only such members. While allowing de minimis or no-injury class actions to proceed as long as they are brought as separate class actions, the bill would achieve a very important reform: clustering actually injured and similarly injured class members in their own class. People who are injured, or injured much more significantly, deserve to have their own class actions in which they can present their uniquely powerful cases and get the larger recoveries they deserve. Uninjured or less significantly injured people can still file class actions under this legislation, but they must do so separately, without diminishing the potential recovery of actually injured or more significantly injured people. This legislation also ensures that plaintiffs cannot circumvent state laws that bar no-injury lawsuits by having one allegedly injured plaintiff represent thousands of uninjured consumers.

Background and Need for the Legislation

Following the tenth anniversary of the enactment of the Class Action Fairness Act, the House Subcommittee on the Constitution and Civil Justice held a hearing on February 27, 2015, to explore further potential reforms to our class action litigation system. One problem highlighted at that hearing was that, under current rules, Federal courts are permitting class action lawsuits to proceed before there has been a rigorous analysis evaluating whether all the members of the class actually share comparable injuries. Consequently, classes have been certified that include people who are perfectly satisfied with a product, but have been forced into a class action lawsuit against their will.

House Judiciary Committee Chairman Bob Goodlatte introduced the Fairness in Class Action Litigation Act on April 22, 2015, which would tighten Federal class action rules such that a Federal class could only be certified upon a showing that all unnamed members of the proposed class have suffered injuries of the same type and scope as those of the named class representatives.

Hearings

The Committee's Subcommittee on the Constitution and Civil Justice held a hearing on H.R. 1927 on April 29, 2015. The following witnesses presented testimony at the hearing: John Biesner, Partner, the Skadden law firm; Mark A. Behrens, Shook, Hardy &

Bacon; Andrew Trask, McGuire, Woods; and Alexandra D. Lahav, University of Connecticut School of Law.

Committee Consideration

On June 24, 2015, the Committee met in open session and ordered the bill H.R. 1927 favorably reported with an amendment, by a rollcall vote of 24 to 8, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 1927.

1. Amendment #1, offered by Mr. Conyers, to exempt from the bill claims for monetary relief under title VII of the Civil Rights Act of 1964. Defeated 12 to 13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)			
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)			
Mr. Buck (CO)			
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Bass (CA)			
Mr. Richmond (LA)	X		
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	12	13	

2. Amendment #2, offered by Ms. Jackson Lee, to prevent the bill from taking effect until the Administrative Office of the United States Courts completes an assessment of the likely financial and resource cost of the bill on litigants and courts. Defeated 13 to 15.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)			
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)			
Mr. Buck (CO)			
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Ms. Bass (CA)			
Mr. Richmond (LA)	X		
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	13	15	

3. Amendment #3, offered by Mr. Cohen, to strike the words "or economic loss" from the bill. Defeated 13 to 15.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)			
Mr. Buck (CO)			
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)	X		

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	13	15	

4. Amendment #4, offered by Mr. Johnson, to strike the words "and scope" from the bill. Defeated 11 to 17.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)		X	
Mr. Marino (PA)			
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)		X	
Mr. Buck (CO)			
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)	X		
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	11	17	

5. Amendment #5, offered by Mr. Johnson, to exempt from the bill claims of a violation of Federal or State antitrust law. Defeated 10 to 15.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)			
Mr. Labrador (ID)			
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)		X	
Mr. Buck (CO)			
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Peters (CA)	X		
Total	10	15	

6. Amendment #6, offered by Mr. Cicilline, to prevent the bill from taking effect until the Judicial Conference of the United States approves the changes to class certification provided under section 2 of the bill. Defeated 10 to 15.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)		X	
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)		X	
Mr. DeSantis (FL)		X	
Ms. Walters (CA)		X	
Mr. Buck (CO)			
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Peters (CA)	X		
Total	10	15	

7. Motion to report H.R. 1927 as amended. The motion was agreed to by a rollcall vote of 15 to 10.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Issa (CA)	X		
Mr. Forbes (VA)	X		
Mr. King (IA)	X		
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)			
Mr. Jordan (OH)			
Mr. Poe (TX)	X		
Mr. Chaffetz (UT)			
Mr. Marino (PA)			
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)			
Mr. Farenthold (TX)			
Mr. Collins (GA)	X		
Mr. DeSantis (FL)	X		
Ms. Walters (CA)	X		
Mr. Buck (CO)			
Mr. Ratcliffe (TX)	X		
Mr. Trott (MI)	X		
Mr. Bishop (MI)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)			
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)		X	
Mr. Peters (CA)		X	

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Total	15	10	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1927, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 30, 2015.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1927, the "Fairness in Class Action Litigation Act of 2015."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marin Burnett, who can be reached at 226–2860.

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 1927—Fairness in Class Action Litigation Act of 2015.

As ordered reported by the House Committee on the Judiciary on June 24, 2015.

H.R. 1927 would amend the Federal judicial code to prohibit Federal courts from certifying any proposed class unless the party seeking to maintain a class action demonstrates that each member of that class suffered an injury of the same type and degree.

According to information from the Administrative Office of the United States Courts (AOUSC), the legislation would probably reduce both the number of class action suits filed and the number of plaintiffs in them, while increasing the administrative burden on the courts to review class action suits that would be filed after enactment of H.R. 1927.

Based on information from the AOUSC, CBO estimates that the additional costs to Federal courts under H.R. 1927 would not be significant. Enacting H.R. 1927 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 1927 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The CBO staff contact for this estimate is Marin Burnett. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 1927 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 1927 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 1927 will provide greater fairness in class action litigation.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 1927 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Fairness in Class Action Litigation Act of 2015."

Sec. 2. Class Member Injury Required. Section 2 provides that no Federal court shall certify any proposed class seeking monetary relief for personal injury or economic loss unless the party seeking

to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives. Section 2 further provides that an order issued under Rule 23(c)(1) of the Federal Rules of Civil Procedure that certifies a class seeking monetary relief for personal injury or economic loss shall include a determination, based on a rigorous analysis of the evidence presented, that the requirements in the bill are satisfied.

To satisfy the requirement set forth above, the named plaintiff must come forward with evidence of a common, classwide injury. To ascertain the extent of the alleged injury in a given case, the plaintiff might propound discovery on the defendant seeking certain basic information. For example, in a case involving an allegedly defective product, the plaintiff could seek discovery regarding incidence of failure in testing or the number of complaints received regarding the claimed defect at issue in the litigation. The plaintiff could then rely on that information in demonstrating that he or she suffered the same type of injury as others in the proposed class. Expert testimony would then be required to show that there is a uniform defect common across the class that affected all class members.

In addition, any order certifying a class action seeking money damages must include a specific determination that the requirement described above is satisfied.

Dissenting Views

INTRODUCTION

H.R. 1927, the "Fairness in Class Action Litigation Act of 2015," as amended, represents the latest attempt to shield corporate wrongdoers and deny plaintiffs access to justice. Specifically, H.R. 1927 will make it virtually impossible for plaintiffs to pursue most class actions in Federal court by adding a new freestanding provision to the end of Title 28 of the United States Code that would prohibit a Federal court from certifying any class action unless: (1) the party pursuing the class action demonstrates; (2) through admissible evidentiary proof; (3) that each proposed class member; (4) suffered an injury; (5) of the same type and scope as the injury of the named class representative.

H.R. 1927 is highly problematic for several reasons. To begin with, the bill is a solution in search of a problem as it is based on the false premise that Federal courts are routinely certifying class actions where not all putative class members have suffered the alleged injury or where the alleged injury is insufficient to meet constitutional standing requirements. In addition, by requiring that class action plaintiffs effectively prove the merits of their case as a condition of class certification—which is only a preliminary stage of litigation—the bill would make many class actions almost impossible to pursue. In particular, in many types of cases—including civil rights, antitrust, and privacy cases—it is virtually impossible to prove that all class members suffered the exact same "type" or "scope" of injury at the certification stage, as the bill requires. This requirement would undermine judicial efficiency and limit access to Federal courts for those with claims that are too small or too burdensome to pursue on an individual basis.

The bill will raise litigation costs by effectively requiring plaintiffs to prove the merits of their case twice, once at the certification stage and once during the trial on the merits of their case, potentially dissuading plaintiffs from pursing meritorious claims and straining Federal court resources. Finally, the bill is yet another attempt by Congress to circumvent the careful and thorough Rules Enabling Act process for amending Federal civil procedure rules. This is particularly disconcerting given that the Judicial Conference of the United States, the Federal judiciary's policymaking arm, is currently in the midst of studying changes to Rule 23, which governs certification of class actions.

For the foregoing reasons and others, numerous groups oppose H.R. 1927 [1], including the American Civil Liberties Union, the American Federation of State, County, and Municipal Employees, the American Antitrust Institute, the Center for Effective Government, the Center for Science in the Public Interest, Consumer Federation of America, Consumers Union, the NAACP, the National Association of Consumer Advocates, the National Consumer Law Center, the National Employment Law Project, the National Fair Housing Alliance, the National Immigration Law Center, the Natural Resources Defense Council, Public Citizen, Public Justice, and the Southern Poverty Law Center.[2] Similarly, the Leadership Conference on Civil and Human Rights wrote in opposition to H.R. 1927, noting that the bill would "undermine the ability of civil rights litigants to bring class action cases to vindicate their legal rights."[3] The Committee to Support Antitrust Laws opposes H.R. 1927 because "it could entirely eliminate all antitrust class actions, including those against international cartels causing billions of dollars in damages to U.S. consumers and companies."[4] Finally, Professor Arthur Miller, the Nation's foremost scholar on Federal civil practice and procedure, wrote in opposition to H.R. 1927 stating that the bill violates the central mandate of the class action device, which is to promote judicial efficiency through the use of class representatives to establish injury on behalf of all similarly situated persons.[5]

For the foregoing reasons and those discussed more fully below, we respectfully dissent and urge our colleagues to oppose this misguided legislation.

---

[1] Although the bill was amended at markup to be limited to claims for monetary relief for physical injury or economic loss, it still raises many of the same basic concerns expressed in these letters and could still effectively preclude many types of claims from class action treatment in Federal court, including antitrust claims and employment discrimination claims.

[2] Letter from 55 groups to Chairman Trent Franks (R-AZ) & Ranking Member Steve Cohen (D-TN), Subcomm. on the Constitution and Civil Justice of the H. Comm on the Judiciary (Apr. 29, 2015) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter "Groups Letter"].

[3] Letter from Wade Henderson, President and CEO, & Nancy Zirkin, Executive Vice President, The Leadership Conference on Civil and Human Rights to Members of the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary (Apr. 29, 2015) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter "LCCHR Letter"].

[4] Letter from Daniel C. Hedlund, President, Committee to Support the Antitrust Laws, to Chairman Trent Franks (R-AZ) & Ranking Member Steve Cohen (D-TN), Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary (Apr. 29, 2015) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter "COSAL Letter"].

[5] Letter from Arthur R. Miller, University Professor, New York University School of Law, to Chairman Trent Franks (R-AZ) & Ranking Member Steve Cohen (D-TN), Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary (Apr. 27, 2015) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter "Miller Letter"].

DESCRIPTION AND BACKGROUND

DESCRIPTION

H.R. 1927, as amended, would prohibit a Federal court from certifying any proposed class seeking monetary relief for personal injury or economic loss unless the party seeking the class action proves that each proposed class member suffered the same type and scope of injury as the putative class representative.[6] The bill does not define the terms "economic loss" and "scope of injury." As introduced, the bill had required a demonstration of the same "extent" of injury, but it does not appear that replacing the term "extent" with "scope" in the Manager's Amendment actually changed the meaning of this requirement in substance.[7]

The bill requires a court, in issuing a class certification order for any class subject to the bill's requirements, to also certify that those requirements have been met "based on a rigorous analysis of the evidence presented. . . ."[8]

BACKGROUND

A class action is a type of lawsuit filed by one or more individuals on behalf of a larger group of people. Class actions can be beneficial to consumers and courts. They are beneficial to consumers because they give a potentially large group of individuals who are injured in the same manner by the same defendants the ability to hold the wrongdoers accountable. Class actions make it economically feasible for these plaintiffs to seek justice for smaller, but not inconsequential, injuries in areas as diverse as products liability, wage and hour litigation, and employment discrimination. As a result, class actions help level the playing field between injured consumers and powerful corporate defendants. They also help promote private enforcement of public policy, particularly when there is large-scale wrong-doing by an institutional actor.[9]

Additionally, class actions can be beneficial for courts because they promote judicial efficiency. They are an efficient mechanism to deal with what would otherwise be a large number of small and repetitive cases involving common legal and factual questions. Through class certification, courts can consolidate similar cases and conserve judicial resources.[10]

---

[6] H.R. 1927, 114th Cong. § 2(a) (as ordered reported by H. Comm. on the Judiciary, June 24, 2015).

[7] The term "scope of injury" is inherently vague and uncertain, as there are multiple dictionary definitions for "scope," including the following definition: "extent of treatment, activity, or influence." Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/scope (last visited Oct. 26, 2015). As Representative Jerrold Nadler (D-NY) noted during the Committee markup, the term "scope" is vague enough that it could lead to substantial litigation over its meaning, leading to increased litigation costs. Tr. of Markup of H.R. 1927, the "Fairness in Class Action Litigation Act of 2015," by the H. Comm. on the Judiciary, 114th Cong., at 40–41 (Jun. 24, 2015) [hereinafter "Markup Transcript"].

[8] H.R. 1927, 114th Cong. § 2(b) (as ordered reported by H. Comm. on the Judiciary, June 24, 2015).

[9] For outlines of the policy reasons supporting the existence of the class action mechanism, *see H.R. 1927, the "Fairness in Class Action Litigation Act of 2015": Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary,* 114th Cong. (2015) [hereinafter "Subcommittee Hearing"] (statement of Alexandra D. Lahav, Joel Barlow Professor, University of Connecticut Law School, at 2–5); *The State of Class Actions Ten Years After The Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary,* 114th Cong. (2015) (statement of Patricia W. Moore, Professor of Law, St. Thomas University School of Law, at 2).

[10] *Id.*

Federal Rule of Civil Procedure 23 governs class actions filed in Federal courts. Rule 23(a) sets forth the prerequisites necessary for the establishment of a class, which are that:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.[11]

Additionally, Rule 23(b) specifies the findings that a court must make prior to certifying a class action, assuming that the requirements of Rule 23(a) have been met. These findings include, among other things, whether the prosecution of separate actions by or against individual class members would create the risk of inconsistent or varying adjudications, whether the party opposing the class has acted or refused to act on grounds that apply generally to the class such that relief would be appropriate for the class as a whole, and whether common questions of law or fact predominate over any other questions affecting only individual class members and that a class action would be superior to other methods of adjudicating the controversy fairly and efficiently.[12]

CONCERNS WITH H.R. 1927

I. H.R. 1927 IS A SOLUTION IN SEARCH OF A PROBLEM.

There is no need for H.R. 1927 because plaintiffs already must satisfy rigorous requirements in order to pursue a class action. As explained above, Rule 23 requires a plaintiff seeking class action certification to make substantial showings, including commonality of factual and legal questions and typicality of the putative representative's claims compared to those of putative class members. Moreover, Federal courts vigorously enforce Rule 23's requirements, and pursuing a class action already requires discovery and motion practice, which mandate a significant expenditure of time and resources.[13] H.R. 1927 would only make these procedural hurdles even more burdensome and potentially cost-prohibitive.

Additionally, the bill is based on the false premise that Federal courts are inappropriately certifying classes where putative class members have not suffered any injury. In particular, the bill's proponents claim that "benefit of the bargain" cases constitute such "no-injury" class actions. In such cases, plaintiffs allege that they have been injured after purchasing a defective product because they did not receive the full value of what they thought they were paying for (i.e., a non-defective product.)[14] As Professor Alexandra Lahav explained at the hearing on this bill before the Subcommittee on the Constitution and Civil Justice, plaintiffs in such cases have, in fact, suffered a real injury—namely, financial injury

[11] Fed. R. Civ. P. 23(a).
[12] Fed. R. Civ. P. 23(b). Rule 23 contains a number of other provisions that are not relevant to this bill.
[13] Subcommittee Hearing (Lahav Statement at 5–6, 9–10).
[14] *Id.* at 10.

in the form of paying a price for a product that is, in fact, worth less than what the plaintiff bargained for.[15] In the product liability context, this means that where a consumer purchases a product with a design defect, that consumer has suffered an injury regardless of whether the defect manifests in any other harm to the consumer.[16] In sum, the consumer has not received the product that he or she paid for, but, instead, one that is worth less than what the consumer thought he or she was buying at the time of purchase.[17] It is perhaps telling that, in two "benefit of the bargain" cases involving Whirlpool front-loading washing machines that H.R. 1927's proponents point to as a reason to support the bill, the Supreme Court has denied appeals of class certification based on the argument that these class actions amounted to "no-injury" class actions.[18]

Similarly, the claim by the bill's proponents that class actions based solely on statutory damages provisions are examples of "no-injury" class actions is without merit. In many state consumer protection statutes, and in employment, civil rights, or privacy statutes, the injury, while very real, is difficult to quantify in monetary terms. Congress and state legislatures, therefore, set statutory damage levels to simplify the process of quantifying damages, to deter corporate wrongdoing, and to encourage access to courts. The individual class members, however, may only be entitled to a small amount of damages under the statute, so these cases can only feasibly be brought as a class action. The injury such actions seek to remedy, however, is very real.[19]

II. H.R. 1927 EFFECTIVELY MAKES MOST CLASS ACTIONS IMPOSSIBLE TO PURSUE, DENYING ACCESS TO JUSTICE FOR PLAINTIFFS

By requiring that a plaintiff show that each potential class member suffered the exact same type and scope of injury at the class certification stage, H.R. 1927 undermines the core purpose of class actions, which is to provide for efficiency in the disposition of numerous but substantially the same claims and to provide access to courts for parties that, individually, would not have the incentive or resources to pursue otherwise meritorious claims. Moreover, its requirement that the plaintiff show the that each proposed class member suffered the exact same injury is virtually impossible to meet as a practical matter at the certification stage. While the

---

[15] *Id.*

[16] *Id.*

[17] *Id.* By way of further example, Professor Lahav testified

> if I purchase a car that has a faulty ignition switch, which has a propensity to turn off while I am driving on the highway, I should not have to wait until I suffer a potentially catastrophic accident to bring a lawsuit to assert my rights. In fact, the law should not want me to wait, as I will have created a much greater risk for myself and those around me and increased the damages the defendant would have to pay. A car that has a faulty ignition switch is worth less than full price, and that gives me standing to sue before I get on the road and prove that there is a defect by endangering innocent lives.

Id at 11.

[18] Glazer v. Whirlpool Corp., 722 F.3d 838 (6th Cir. 2013), *cert. denied,* 134 S. Ct. 1277 (2014); Butler v. Sears, Roebuck & Co., 702 F.3d 369 (7th Cir. 2012), *cert. denied,* 134 S. Ct. 1277 (2014).

[19] To the extent that H.R. 1927's proponents base their support for the bill on the argument that violation of a statute, alone, does not constitute a sufficient "injury" for purposes of meeting the Constitution's standing requirements, the bill may be premature, as the Supreme Court will be considering this issue this term. *See* Robins v. Spokeo, Inc., 732 F.3d 409 (9th Cir. 2014), *cert. granted,* 135 S.Ct. 1892 (2015).

Manager's Amendment changed the bill's language by replacing the requirement that a plaintiff demonstrate the same "extent" of injury with a requirement that she demonstrate the same "scope" of injury for each proposed class member, this change makes no substantive difference in our view and does not vitiate our concerns.

By requiring a putative class representative to *prove* injury of *every* absent member of the putative class *at the certification stage,* H.R. 1927 requires a decision on the merits before trial and before appropriate class members can even be individually identified. To prove injury, a plaintiff would have to prove the alleged violation that caused the injury for each possible class member, i.e., litigation on the merits. As Professor Arthur Miller, the Nation's foremost expert of Federal practice and procedure, noted in his letter in opposition to H.R. 1927, the

> core function of a class representative is to try to establish injury on behalf of similarly situated persons. Thus the bill effectively wipes out Rule 23, under which class representatives litigate common questions on behalf of the class. The represented persons are *absent* until after entry of a judgment that binds them, at which point (upon a favorable judgment) they are asked to come forward to prove their damages. Until that time, the identity of many of the class members is unknown, indeed possibly even unknowable.[20]

Professor Miller further noted that the Supreme Court has rejected the notion that a class representative must first establish that it will win on the merits in order to obtain class certification.[21] He further noted that class membership does not equate to entitlement to damages.[22]

In short, class actions exist in order to resolve claims of large groups of similarly situated people. Particularly when the individual damages are small, it is economically viable to bring suit for wrongdoing only through a class action. If, as H.R. 1927 requires, each proposed class member's injury must be proven at the certification stage—often a practical impossibility at a time when each class member cannot be individually identified—in order to even proceed as a class, this requirement defeats the point of the class action device, which is to promote the efficient adjudication of substantially the same claims based on substantially the same facts by a class representative on behalf of absent class members. As Professor Miller notes, the bill's requirement that potential class representatives prove that each proposed class member suffered that exact same injury as a condition of class certification inappropriately conflates the class certification inquiry with a decision on the merits and an assessment of each individual class member's damages.

To address these concerns in part, Representative Steve Cohen (D-TN), the Ranking Member of the Subcommittee on the Constitution and Civil Justice, offered an amendment that would have stricken claims for monetary relief alleging economic loss from the bill's reach. He explained that the concerns expressed by Professor

---

[20] Miller Letter at unnumbered 2.
[21] *Id.* at unnumbered 3.
[22] *Id.*

Miller and others about the impact of H.R. 1927 on the ability of plaintiffs to pursue class actions were particularly heightened in the case of economic loss claims because it is especially difficult to identify plaintiffs at the earliest stages of such a case and to assess whether every potential class member suffered the exact same injury in such cases.[23] Notwithstanding these concerns, the Committee defeated the amendment by a 13 to 15 vote.[24]

The bill's requirement that a plaintiff prove each potential class member suffered the exact same injury at the certification stage would essentially undermine the ability of plaintiffs to obtain class action certification. As a broad coalition of consumer and civil rights groups noted in opposing H.R. 1927, this requirement "would sound the death knell for class actions" because classes "inherently include a range of affected individuals, and virtually never does every member of the class suffer the same extent of injury even from the same wrongdoing."[25] This kind of "commonality of damages" requirement for class certification, as this coalition noted, has been rejected by the Federal courts.[26] Similarly, a group of health professionals and attorneys criticized the required showing of the exact same injury for each class member, noting that such a requirement "violates basic medical scientific principles" that make "very clear that each individual responds somewhat differently to a health hazard" based on the person's genetic makeup, health, age, gender, and many other factors.[27]

At a minimum, the terms "type" and "scope" of injury as used in H.R. 1927 are inherently vague and undefined. As a result, the bill will spawn litigation over their meaning as well as preclude a large number of class actions depending on how these terms are interpreted. For example, it is unclear whether a civil rights plaintiff whose employment is terminated because of race suffered the same "type" or "scope" of injury as another plaintiff of the same race who is terminated from a different position by the same employer because of race. Under the bill, these plaintiffs arguably would not be able to pursue a class action because, although they may have been subject to the same racially discriminatory employment policy or practice based on their shared race, they each may have been affected in a different manner or to a different degree.

For these reasons, Ranking Member John Conyers, Jr. (D-MI) offered an amendment at markup that would have exempted claims for monetary relief under Title VII of the Civil Rights Act of 1964, which prohibits discriminatory employment practices on the basis of race, sex, and other protected characteristics and allows recovery of back pay and compensatory and punitive damages.[28] The amendment, however, was defeated by a 12 to 13 vote.[29]

Representative Hank Johnson (D-GA), the Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, also offered an amendment to address concerns about

---

[23] Markup Transcript at 53–54.
[24] *Id.* at 63.
[25] Groups Letter.
[26] *Id.*
[27] Letter from 25 Health Care Professionals and Attorneys to Chairman Trent Franks (R-AZ) and Ranking Member Steve Cohen (D-TN), Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, (Apr. 28, 2015) (on file with H. Comm. on the Judiciary Democratic staff).
[28] 42 U.S.C. § 2000e *et seq.* (2015).
[29] Markup Transcript at 34.

the required showing that each proposed class member suffered the same scope of injury. That amendment would have struck the bill's requirement that a plaintiff demonstrate the same "scope" of injury for each proposed class member in order to obtain class certification, but was defeated by an 11 to 17 vote.[30]

The Committee to Support the Antitrust Laws (COSAL), which represents the private antitrust bar, also criticized H.R. 1927's requirement that class representatives prove that every potential class member suffered the exact same injury, noting that "this is a standard that could rarely if ever be met" because very "few antitrust classes, if any, will be composed of members with damages in the exact same dollar amount."[31] COSAL also noted that the "100% injury requirement will make class certification impossible even in cases where the vast majority—above 95% or more—of class members have suffered harm."[32]

In light of this concern, Representative Johnson offered an amendment that would have exempted antitrust claims from the bill. The Committee, however, defeated this amendment by a 10 to 15 vote.[33]

III. H.R. 1927 WILL INCREASE THE COSTS AND RESOURCE BURDENS FOR COURTS AND LITIGANTS

Given the already resource-intensive nature of class actions, H.R. 1927 would further burden courts and litigants. As Professor Lahav testified, H.R. 1927 would be "inefficient" because it would require a "full blown trial at the outset of every class action" and another trial on "the merits again at the end of the litigation in order to obtain a judgment, wasting both judicial and party resources."[34] Similarly, Professor Miller told the Committee that by "demanding a pre-certification determination of 'injury,' the bill would create enormous work and litigation burdens—for the Federal judges as well as the litigants—that would destroy the utility of the class procedure. The class certification process is already freighted with complexity and protraction; this bill would exacerbate that and create further inefficiencies."[35]

The increased costs and burdens to plaintiffs that H.R. 1927 would impose could dissuade them from pursuing class actions in the first place, even when their claims have merit. Even if it did not have such an effect, however, there is little doubt that courts would bear the burden of holding trials on the entire case twice—first at the certification stage in order to find sufficient facts to determine whether every class member suffered the same type and scope of injury, and then a second time before a jury. For these reasons, Representative Sheila Jackson Lee (D-TX) offered an amendment at markup that would have delayed the bill's effective date until the Administrative Office of the United States Courts completed an assessment of the bill's likely financial and resource costs on litigants and courts. The amendment, however, was defeated by a 13 to 15 vote.[36]

---

[30] *Id.* at 73.
[31] COSAL Letter at 2.
[32] *Id.*
[33] Markup Transcript at 84.
[34] Subcommittee Hearing, Lahav Statement at 6.
[35] Miller Letter at unnumbered 3.
[36] Markup Transcript at 51.

IV. H.R. 1927 CIRCUMVENTS THE RULES ENABLING ACT PROCESS

H.R. 1927, like many other civil justice bills designed to deny plaintiffs their access to courts, also circumvents the exhaustive and deliberative Rules Enabling Act process, which permits public participation.[37] This process also incorporates the judiciary's day-to-day, real-world experience with the application of the Federal civil procedure rules, including Rule 23. Moreover, Congress retains the power to review those rules and to accept, modify, or reject any proposed changes pursuant to the extensive Rules Enabling Act process. In fact, the Judicial Conference of the United States is currently considering changes to Rule 23, and the process should be permitted to run its course.

To address this concern, Representative David Cicilline (D-RI) offered an amendment to condition the bill's effective date on the Judicial Conference approving the amendments to class action certification made by the bill. This amendment was defeated by 10 to 15 vote.

CONCLUSION

H.R. 1927 is an unnecessary bill that threatens to deny millions of plaintiffs access to Federal courts by creating potentially insurmountable obstacles to class action certification and raising litigation costs. Moreover, it disrespects the Federal courts by imposing new burdens on them and by circumventing the congressionally-created Rules Enabling Act process by which Federal civil procedure rules are amended after extensive input from the bench and bar. For all the foregoing reasons, we strongly oppose H.R. 1927.

MR. CONYERS, JR.
MR. NADLER.
MS. LOFGREN.
MS. JACKSON LEE.
MR. COHEN.
MR. JOHNSON, JR.
MS. CHU.
MR. DEUTCH.
MR. GUTIERREZ.
MS. BASS.
MR. RICHMOND.
MS. DELBENE.
MR. JEFFRIES.
MR. CICILLINE.

○

[37] 28 U.S.C. §§ 2071 *et seq.* (2015).