FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

H.R. 1927

APRIL 29, 2015

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FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015

WEDNESDAY, APRIL 29, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 3:59 p.m., in room 2141, Rayburn Office Building, the Honorable Ron DeSantis (Vice-Chairman of the Subcommittee) presiding.

Present: Representatives DeSantis, Goodlatte, Cohen, Conyers, Nadler, and Deutch.

Staff present: (Majority) Paul Taylor, Chief Counsel; Tricia White, Clerk; (Minority) James J. Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. DESANTIS. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the Chair is authorized to declare a recess of the Committee at any time.

On February 27, this Subcommittee held a hearing on the 10th anniversary of the enactment into law the Class Action Fairness Act to explore further potential reforms to our class action litigation system. One problem highlighted at the hearing was that under current rules, Federal courts are allowed to permit class action lawsuits to proceed before there has been a showing that all members of the class actually share a common injury of similar type and extent. Consequently, classes have been certified to include, for example, all owners of an allegedly defective product, when only a very small fraction of those who purchased the product suffered any bad results.

Consequently, people who have had no problems with their purchase because they suffered little or no injury have been forced into a lawsuit against their will because members of a class action lawsuit do not have the choice to opt into the lawsuit. They can only choose to opt out if they are aware that they are part of the lawsuit at all.

House Judiciary Committee Chairman Bob Goodlatte along with Subcommittee Chairman Franks introduced the Fairness in Class Action Litigation Act of 2015, which would tighten Federal class action rules so that a Federal class could only be certified upon a showing that all unnamed members of the proposed class have suf-

fered an injury of the same type and extent as the named class representatives who are supposed to have injuries that are typical of the class.

A Defense Research Institute poll showed that when asked "Would you support or oppose a law saying that in order to join a class action lawsuit a person has to show that he or she has actually been harmed," 78 percent of those surveyed they would support such a law, which includes 75 percent of women, 73 percent of people age 18 to 29, 71 percent of African-Americans, 75 percent of Hispanics, 71 percent of registered Democrats, 73 percent of liberals, 86 percent of registered Republicans, and 85 percent of conservatives.

The Fairness in Class Action Litigation Act is a simple one-page bill that makes clear that common sense principles should apply in class actions and that only those people who share the same type and extent of injuries as the class representatives should be allowed to be forced into a class action lawsuit. It would tighten the typicality requirements under the Federal class action rules such that a Federal class could only be certified upon a showing by a preponderance of the evidence that all unnamed members of the proposed class have suffered an injury of the same type and extent as the named class representatives.

Currently, under existing Federal class action rules there are requirements that a class share questions of law and fact in common, and that the claims and defenses of the representative parties would be typical of that class. But under those standards, courts have allowed classes to be certified before there has been a showing that all members of the class actually share a common injury of similar type and extent.

Consequently, classes have been certified to include, for example, all owners of a certain washing machine that allegedly produced moldy smelling laundry. But as it turned out, in that case only a very small fraction of those who purchased the washing machine suffered any adverse result. Yet those people were still lumped into the class as members, greatly inflating the class size, and thereby unduly pressuring the company to settle by dramatically growing the size of the class for which damages could be awarded. The company did not settle in that case, but instead took their case to the Supreme Court, which denied cert last year, making clear that the Court will not resolve this issue any time soon.

I look forward to hearing from our witnesses today, and it is my pleasure to recognize the Ranking Member of the Subcommittee, Mr. Cohen from Tennessee, for his opening statement.

[The bill, H.R. 1927, follows:]

I

114TH CONGRESS
1ST SESSION

H. R. 1927

To amend title 28, United States Code, to improve fairness in class action litigation.

IN THE HOUSE OF REPRESENTATIVES

APRIL 22, 2015

Mr. GOODLATTE (for himself and Mr. FRANKS of Arizona) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, to improve fairness in class action litigation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

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.—Title 28, United States Code, is amended by adding at the end the following:

"§ 1716. Limitation on certification of class

"(a) IN GENERAL.—No Federal court shall certify any proposed class unless the party seeking to maintain a class action affirmatively demonstrates through admissible evidentiary proof that each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives.

"(b) DEFINITION.—In this section, the term 'injury' means the alleged impact of the defendant's actions on the plaintiff's body or property.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 114 of title 28, United States Code, is amended by adding at the end the following new item:

"1716. Limitation on certification of class.".

○

Mr. COHEN. Thank you, Mr. Chair. Monday night we saw Baltimore, riots and flames. Riots on Saturday night in Baltimore, Maryland subsequent to the killing of an unarmed African-American male by law enforcement for doing nothing except diverting his eyes from the law enforcement officer. Spine broken in two or three places, coma, dead within a week. Mr. Gray.

Charleston, South Carolina, Walter Scott runs from a policeman. No offense. Maybe traffic. Shot down on video. Video witnesses it. Dead. Cleveland, Ohio, Tamir Rice, video, shot dead, policeman. Did nothing. Toy pistol. Eric Garner, Staten Island, dead. Michael Brown, dead.

Committee, civil rights action, zero. No action by this Committee of the United States Congress on constitutional rights, on the death of human beings. African-American lives count, too, and they are being killed on a regular basis and seen in this country, and nobody in this Congress seems to care that has authority to have a hearing or to bring a bill to a vote.

And yet we have got a hearing to destroy class actions, actions that take care of little people that have a problem with a large corporation that might have a defective product, and then we have got a rule right now that takes care of how you set up a class. But we are not concerned about civil rights. We are concerned about destroying what we have had for years, a system of class actions to protect the little guy.

The expert on this subject is a Professor Arthur Miller, pretty much an undisputed leading expert on Federal civil procedure, and he said this bill will effectively wipe out Rule 23. He noted requiring proof of injury, including the extent of injury prior to certification, will make class actions pointless to eliminating the efficiencies that class actions are supposed to provide.

And then we have got a little Joseph Heller thrown in, a little catch-22. Before you get your action filed, you have got to know every member by name. Well, by definition you cannot know that because the reason you have a class action is because there are so many plaintiffs that you cannot name them all, so you have a representative plaintiff.

Yes, Eric Garner, Michael Brown, Walter Scott, Tamir Rice, and Mr. Gray, dead. This is the civil rights committee, and we are concerned about destroying the little man's opportunity to have an action taken in a civil system for remedy of damages because a washing machine manufacturer front loader has got a problem, and people are seeking redress of grievances. But life and death, we do nothing.

Somehow or another, Mr. Chairman, we have got to put our priorities in order, and we have got to look after human life and civil rights, and care about what is happening in this country, and really care about what is significant, and not just caring about manufacturers and folks who are producing products that others are showing may be defective and they owe them damages, and make it more difficult for those little people to collect damages.

But before they can even collect damages or produce those products, they have got to be alive. And I would submit to you, Mr. Chairman, that is what this Committee should be dealing with is civil rights. I yield back the balance of my time.

Mr. DESANTIS. The gentleman yields back. The Chair now yields 5 minutes to the Chairman of the full Committee, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. 10 years ago I helped usher the Class Action Fairness Act through Congress and to the President's desk, where it was signed into law. This legislation corrected a serious flaw in our Federal jurisdictional statutes that forbade Federal courts from hearing most interstate class actions, and allowed those who abused the class action system to victimize those very little people that the gentleman from Tennessee just referenced.

While the reforms contained in the Class Action Fairness Act have been integral to improving the civil justice system in the United States, abusive class action practices still exist today, and there are further ways to improve the system to ensure that class action lawsuits are benefitting the victims they are intended to compensate. The class action device is a necessary and important part of our legal system. It promotes efficiency by allowing plaintiffs with similar claims to adjudicate their cases in one proceeding, and it promotes fairness by allowing claims to be heard in cases in which there are small harms to a large number of people that would otherwise go unaddressed because the cost for an individual plaintiff to sue would far exceed the benefits.

Yet other than the Class Action Fairness Act, no major reforms to the laws governing Federal class actions have been adopted since 1966. Judging by some of the problems that have arisen since CAFA was enacted 10 years ago, additional reform is needed. I am concerned that in the years since CAFA was enacted, there has been a proliferation of class actions filed by lawyers on behalf of classes, including members who have not suffered any actual injury. These class actions are often comprised of class members that do not even know they have been harmed, do not care about the minor or nonexistent injuries the lawsuit is based on, and generally have no interest in pursuing wasteful litigation.

When classes are certified that include members who do not have the same type and extent of injury as the class representatives, those members siphon off limited compensatory resources from those who are injured and who have suffered injuries of greater extent, and lead to substantial under compensation for consumers who have suffered actual or greater harm.

Given that class actions lawsuits involve more money and touch more Americans than virtually any other litigation pending in our legal system, it is important that we have a Federal class action system that benefits those who have been truly injured and injured in comparable ways, and is fair to both plaintiffs and defendants.

And to that end, last week I introduced the Fairness in Class Action Litigation Act. The bill requires only that a class be composed of members with an injury of the same type and extent, with "injury" defined as "the alleged impact of the defendant's actions on the plaintiff's body or property." That type and extent of alleged impact of the defendant's actions could be de minimus or even nonexistent as when statutory damages are allowed in such cases. But members whose injuries were only de minimus or nonexistent would have to bring their case in a separate class consisting of just members with *de minimus* or nonexistent injuries.

The bill would thereby achieve a very important reform: clustering actually injured or similarly injured class members in their own class. People who are injured deserve to have their own class actions in which they present their uniquely powerful cases and get the recoveries they deserve. Under this legislation, uninjured or non-comparably injured people can still join class actions, but they must do so separately without taking away from the potential recovery of actually or comparably injured people.

This is what this legislation is designed to take care of, is to help people, little people, who are truly in need. And I look forward to the witness' testimony today.

Mr. COHEN. Mr. Chairman?

Mr. DESANTIS. Yes.

Mr. COHEN. I would like to enter some letters for the record, letters from different consumer, public interest, civil rights groups: Alliance for Justice, American Antitrust Institute, the AFSCME, American Civil Liberties Union, Consumer Federation of America, Consumers Union, the NAACP, National Consumer Law Center, Public Citizen, and the Southern Poverty Law Center; letters from Wade Henderson and Nancy Zirkin of the Leadership Conference of Civil Rights; Arthur Miller, the professor I noted in my opening remarks; Professor Samuel Issacharoff of NYU School of Law;* a letter from the Committee to Support Antitrust Law; a letter from 25 healthcare professional attorneys; and Mr. Richard Seymour, among others.

Mr. DESANTIS. Without objection.

[The information referred to follows:]

*__Note:__ The referenced material, a letter from Professor Samuel Issacharoff of NYU School of Law, is not printed in this hearing record but is on file with the Subcommittee and can also be accessed at: *http://docs.house.gov/meetings/JU/JU10/20150429/103386/HHRG-114-JU10-20150429-SD003.pdf.*

April 29, 2015

Hon. Trent Franks, Chairman
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Hon. Steve Cohen, Ranking Member
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Franks and Ranking Member Cohen:

The Subcommittee on the Constitution and Civil Justice will soon consider H.R. 1927, the "Fairness in Class Action Litigation Act of 2015," a bill that would effectively eviscerate consumer, employment and civil rights class actions. The undersigned groups strongly oppose this bill.

Class members must already meet common requirements spelled out in F.R.C.P. 23, which requires that the class have the same type of injury stemming from the same unlawful conduct. However, H.R. 1927 would require that every person in a class have "an injury of the same *type* and *extent*," which they would have to prove before a class could be certified. What's more, "injury" is defined as "impact" on "the plaintiff's body or property." It is difficult to see how most class actions would ever be certified under these criteria.

First, a common sense reading of the definition of "injury" suggests the bill intends to exclude from court entire categories of class actions. Most victims of civil rights violations or discriminatory practices could not meet this definition. *Brown v. Board of Education* could not have proceeded under H.R. 1927. In addition, laws enacted to protect consumers from predatory practices, such as credit and debt collection abuses, often provide for statutory damages. This is precisely because actual damages in those kinds of cases are difficult or impossible to ascertain despite pervasive company misconduct. These class actions would be barred under this "injury" definition.

But even if this definition were broadened, the requirement that the entire class suffer the same type and extent of injury would sound the death knell for class actions. 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. There are far too many examples to list here of recent, important class actions that would fail to meet this bill's "extent of injury" requirement and that never would have been certified under H.R. 1927. However, it is worth mentioning a few examples.

Certainly many civil rights, discrimination and statutory damage cases would not satisfy these criteria. This would also be true for recent successful class actions over bank and credit card abuses, where the same corporate policy resulted in customers being cheated out of various amounts of money; home and mortgage loan abuses; antitrust violations, where class actions have recovered millions for small businesses in varying amounts over illegal price-fixing cartels; illegal for-profit colleges practices; refusals by companies to properly pay workers; many types of product defects; and denial of insurance benefits. Business owners financially injured by the BP oil spill all had different losses but all were financially injured by the same corporate misconduct. The list is endless.

It is for these reasons that federal courts have rejected such a "commonality in damages" requirement for class certification. As Judge Posner explained, a "commonality in damages" requirement:

> [W]ould drive a stake through the heart of the class action device. . . [T]he fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.[1]

Class action lawsuits are among the most important tools that harmed, cheated and violated individuals and small businesses have to hold large corporations and institutions accountable and deter future misconduct. Under H.R. 1927, federal courts will be forced to deny certification to important, worthy classes of aggrieved consumers, employees and small businesses. We urge you to oppose H.R. 1927, the "Fairness in Class Action Litigation Act of 2015."

Sincerely,

Alliance for Justice
American Antitrust Institute
American Association for Justice
American Civil Liberties Union
American Federation of State, County and Municipal Employees (AFSCME)
Arkansans Against Abusive Payday Lending
Asian Americans Advancing Justice
Bet Tzedek Legal Services
Blue Ridge Environmental Defense League
Center for Effective Government
Center for Justice & Democracy
Center for Science in the Public Interest
Citizen Works
Climate Change Law Foundation
Consumer Action
Consumer Federation of America

[1] *Butler v. Sears Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013).

Consumer Watchdog
Consumers for Auto Reliability and Safety
Consumers League of New Jersey
Consumers Union
D.C. Consumer Rights Coalition
Demand Progress
Disability Rights Education & Defense Fund
Employee Rights Advocacy Institute for Law & Policy
Equal Rights Advocates
Food & Water Watch
Georgia Watch
Homeowners Against Deficient Dwellings
Justice in Aging
Kentucky Equal Justice Center
Law Foundation of Silicon Valley
Leadership Conference on Civil and Human Rights
MFY Legal Services, Inc.
NAACP
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Consumer Voice for Quality Long-Term Care
National Consumers League
National Disability Rights Network
National Employment Law Project
National Employment Lawyers Association
National Fair Housing Alliance
National Housing Law Project
National Immigration Law Center
Natural Resources Defense Council
New Jersey Citizen Action
Protect All Children's Environment
Public Citizen
Public Justice
SC Appleseed Legal Justice Center
Science and Environmental Health Network
Southern Poverty Law Center
The Arc of the United States
U.S. PIRG
Woodstock Institute

The Leadership Conference
on Civil and Human Rights

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April 29, 2015

Oppose H.R. 1927, The Fairness in Class Action Litigation Act

Dear Member of the Subcommittee on the Constitution and Civil Justice:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States, we urge you to oppose H.R. 1927, the "Fairness in Class Action Litigation Act of 2015." H.R. 1927 would undermine the ability of civil rights litigants to bring class action cases to vindicate their legal rights.

Class actions are an essential tool for civil rights litigants to obtain relief. By banding together, victims of discrimination and unfair treatment can establish patterns to prove their claims, cover legal fees, change company-wide practices, hold corporations accountable, recover lost wages, and deter future misconduct. Class actions also promote efficient use of legal resources by allowing courts to aggregate and dispose of similar claims.

The bill's proposed limitations on class certification – both to the definition and scope of "injury" – will function to limit the ability of victims to vindicate their rights. Rule 23 of the Federal Rules of Civil Procedure has effectively governed the adjudication of class action claims for decades. Under the Rules Enabling Act, Congress vested the Judicial Conference's Advisory Committee on Civil Rules with the authority to make changes to the Federal Rules. There is no reason to circumvent this process now.

Class action cases are crucial to protecting the rights of victims and securing fairness and safety for the public. Under H.R. 1927, federal courts will be forced to deny certification to important and worthy classes of aggrieved employees, consumers, and civil rights litigants.

We urge you to oppose H.R. 1927. Thank you for your consideration. Feel free to contact Lisa Bornstein, Legal Director, at bornstein@civilrights.org or 202-263-2856 with any questions.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Executive Vice President

New York University
A private university in the public service

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Arthur R. Miller CBE

April 27, 2015

Honorable Trent Franks
Chair, Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Honorable Steve Cohen
Ranking Member, Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 1927, the Fairness in Class Action Litigation Act of 2015

Dear Chairman Franks and Ranking Member Cohen:

The bill before this Committee would effect a fundamental change to and destabilize some 50 years of legal practice in the federal courts. As one who was present at the birth of modern Rule 23, I urge the Committee to reject H.R. 1927.[1] This bill is particularly inappropriate at a time when the rulemaking process established by Congress is currently analyzing federal class action practice and considering possible amendments.

[1] I participated in the drafting of the 1966 revision of Rule 23 and the accompanying Advisory Committee Notes, and later served as Reporter to the Federal Rules Advisory Committee. Together with the late Professor Charles Alan Wright, I am the principal co-author of the *Federal Practice and Procedure* treatise. I have taught and written on civil procedure and the importance of our Federal Rules in delivering justice and securing rights in our legal system for more than 50 years. In addition, I have participated in more than one hundred class actions representing both plaintiffs and defendants or appearing as an expert. I have observed the evolution of the class action over the years as it has played a key role in our progress toward civil rights and access to justice for all Americans. Now its vitality is threatened.

Rule 23 accordingly does not "transform a $500 case into a $5,000,000 award"; it "transform[s] 10,000 $500 cases into one $5,000,000 case,"[5] but only after liability is established. Such an outcome, moreover, "has no bearing . . . on [the parties'] legal rights," and a defendant's "aggregate liability . . . does not depend on whether the suit proceeds as a class action."[6]

Further, the Supreme Court rejects the notion that a class representative—let alone all class members—"must first establish that it will win the fray" to obtain certification. For "the office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'"[7] Nothing in our jurisprudence equates membership in a class with entitlement to damages; class members are always subject to proof or verification of their damages, under court auspices and control. In short, although the class mechanism provides each class member the opportunity to prove his damages in a cost-effective way, it doesn't give anyone a free lunch.

Second, on a practical level, the scale of contemporary class litigation—itself a function of the largeness of our institutions and the mass character of modern commerce—makes it quite impossible in most cases to demonstrate that "each proposed class member" suffered an actual injury at the class certification stage. Even named plaintiffs who might try to do this through statistical proof, rather than through affidavits from thousands of persons or otherwise, would face extreme difficulties and potentially crippling costs because class certification motions must be heard at "an early practicable time,"[8] before all the necessary discovery is completed and the evidence available. 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 already is freighted with complexity and protraction; this bill would exacerbate that and create further inefficiencies.

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[5] *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 435 n.18 (Stevens, J., concurring).
[6] *Id.* at 408 (Scalia, J., plurality opinion).
[7] *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013).
[8] Fed. R. Civ. P. 23(c)(1)(A).

and businesses with longstanding state-law claims—e.g., for consumer fraud, breach of warranty, and privacy violations—effectively would be shut out of federal court as well. Thus their substantive rights would be extinguished—on the basis of class action certification and motion practice, not on the basis of an adjudication of the merits—because, as discussed above, it normally is infeasible to show injury to "each proposed class member" at a pretrial stage when discovery remains ongoing.

The same is true with respect to the constitutional provisions and the many federal laws that define—and permit recovery for—injuries other than to persons and property. For instance, the class action is a primary law enforcement mechanism for such critical public policies as voting rights,[12] fair debt collection,[13] fair credit reporting,[14] and deterring various forms of discrimination.[15] Many of the citizenry's rights other than to the security of their person or property have always been viewed as priceless and protectable under the law; yet H.R. 1927 only recognizes "alleged impact" to person or property. Injured persons therefore cannot pursue class-wide relief for any other type of alleged harm under the plain language of this bill.

The Bill Purports to Address a Problem That Does Not Exist.

Finally, H.R. 1927 is truly a "solution in search of a problem." As the current case law discloses, settled Rule 23 doctrines and procedures are more than capable of dealing with the problem of overly broad putative classes. If the evidence at the class certification stage clearly shows that a substantial portion of the putative class could not have been injured by the alleged conduct, it may be possible for the court to craft a class definition that excludes the uninjured

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[12] *E.g., Pitcher v. Dutchess Cnty. Bd. of Elections*, Case No. 7:12-cv-08017, Dkt. No. 18 (S.D.N.Y. May 14, 2013); *Stewart v. Waller*, 404 F. Supp. 206 (N.D. Miss. 1975).

[13] *E.g., Harlan v. Transworld Systems, Inc.*, 2014 WL 1414508 (E.D. Pa. Apr. 14, 2014).

[14] *E.g., Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007); *Kudlicki v. Farragut Fin. Corp.*, 2006 WL 927281 (N.D. Ill. Jan. 20, 2006).

[15] *E.g., Comer v. Cisneros*, 37 F.3d 775, 796 (2d Cir. 1994) ("Indeed, pattern of racial discrimination cases for injunctions against state or local officials are the 'paradigm' of Fed. R. Civ. P. 23(b)(2) class action cases.").

April 29, 2015

Hon. Trent Franks, Chairman
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Hon. Steve Cohen, Ranking Member
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Franks and Ranking Member Cohen:

The Committee to Support the Antitrust Laws (COSAL) respectfully submits this letter to express our strong opposition to H.R. 1927, the "Fairness in Class Action Litigation Act of 2015," 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.

COSAL was established in 1986 to promote and support the enactment, preservation and enforcement of a strong body of antitrust laws in the United States. COSAL members are law firms based throughout the country that represent individuals and businesses that have been harmed by violations of the antitrust laws. COSAL members have extensive knowledge of the critical role that class actions play in complex antitrust litigation.

Ill-Defined Terms Within H.R. 1927 Could Entirely Eliminate All Antitrust Class Actions

The requirement that "each proposed class member suffered an injury of the same type and extent" as the class representatives would radically alter class action procedural law. First, if by "same type and extent" the proposed bill means to require that every member of the class suffer identical damages, this is a standard that could rarely if ever be met. Very few antitrust classes, if any, will be composed of members with damages in the exact same dollar amount. In antitrust cases, the extent of an individual's damages depends on the number and level of his or her transactions, which almost always varies among class members. If "same type and extent" merely means that members of the class should have injuries typical or comparable to the class representatives', this is redundant of the existing requirements of Rule 23. Therefore, the best interpretation of the phrase "same type and extent" is that it means something between "typical" and "identical"—but this is an empty standard that courts will in practice find impossible to apply consistently from one case to another.

Second, 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. That will impede class certification even in cases where the defendants have pled guilty to price-fixing and where damages among the class extend into the billions of dollars.

An "Identical Injury" Requirement Would Strip U.S. Consumers and Small Business Buyers of Redress in Important Cases Where Some of the Harm is Latent

Consumer cases often include a design defect that has resulted in injury to person or property for some class members but has yet to manifest for others. An example would be the polybutylene pipes case where a design defect caused the pipes to burst behind walls flooding homes. Because not "*every*" person with a polybutylene pipe system had a failure or a catastrophic failure at the time of the suit, this law would have barred redress for everyone, wiping out a settlement that brought relief to more than 250,000 class members and was lauded by the Rand Study as an example of the important consumer benefits class actions can bring.

Another example of the flexibility of the class action mechanism to remedy both realized and unrealized harms is the Carrier Furnace case, *Grays Harbor Adventist Christian School v. Carrier Corporation*, No. 05-05437 (W.D. Wash.). After certifying a litigation class, the Court approved a nationwide settlement for current and past owners of high-efficiency furnaces manufactured and sold by Carrier Corporation. The furnaces were made of inferior materials, causing them to fail prematurely (consumers expected them to last for 20 years). The settlement

provided an enhanced 20-year warranty of free service and free parts for consumers whose furnaces had not yet failed, in addition to a cash reimbursement for consumers who already paid to repair or replace their high-efficiency Carrier furnaces. An estimated three million or more consumers in the U.S. and Canada purchased the furnaces covered under the settlement.

Increased Evidentiary Standards Would Significantly Increase Judicial Workload

This bill would collapse the class certification and the merits of a case by requiring as a condition of obtaining class certification that plaintiffs prove to the judge with "admissible" evidence that all class members have actually been injured. Such a requirement would inevitably require bench trials *on the entire case* for the judge to find sufficient facts upon which to rule that the challenged conduct had caused injury to each and every class member and by what amount. How else does one prove actual injury without also proving the alleged violation that caused that injury? Plaintiffs would need to win a bench trial simply to get the right to try their case before a jury. By eliminating the distinction between class and merits and forcing plaintiffs to actually first prove to the judge injury to all class members to then succeed in certifying a class, plaintiffs would need to win their entire case twice.

H.R. 1927 Would Eliminate Antitrust Class Actions that Recovered Billions of Dollars for Consumers and Businesses that were Victimized by Illegal Conspiracies

In most of these cases, defendants pleaded guilty to criminal activity. In prosecuting the cases, the Department of Justice does not seek restitution for the victims because it relies on the private lawsuits to provide compensation. If H.R. 1927 were enacted, it would upset this well-settled division of labor, imposing new and potentially insurmountable obstacles in the way of effective enforcement of antitrust laws.

An example of the types of antitrust class actions that would be precluded by the proposed bill is the *In Re TFT–LCD (Flat Panel) Antitrust Litigation*, which was certified as a class action and then settled on the eve of trial for nearly $1.082 billion in 2012. This "indirect purchaser" class action on behalf of U.S. consumers and businesses was litigated in tandem with the U.S. DOJ's prosecution of a global price-fixing conspiracy in the market for liquid-crystal display panels used in computer monitors, notebook computers and televisions. Multiple foreign companies (and their U.S. subsidiaries) engaged in a conspiracy from 1999 to 2006 that illegally raised the prices of LCD panels used in computer monitors, notebook computers and televisions, inflicting billions of dollars of damages upon end-purchaser consumers and businesses (small and large) that purchased such products.

The DOJ's case against the LCD cartel resulted in guilty pleas by numerous companies (including Chi Mei, Chunghwa, Epson, Hannstar, Hitachi, LG Display and Sharp) and their executives to violations of U.S. antitrust laws; criminal fines totaling $894 million; and a criminal conviction of AU Optronics Corp., its American subsidiary and two of its executives for violation of U.S. antitrust laws, which resulted in a **$500 million fine** against AUO and sentences of three years in prison for two of AUO's executives. **However, despite these convictions and criminal fines, no victims of the cartel received restitution in the government proceedings.** The government did not seek victim compensation, and instead pointed to the private civil class actions as the vehicle for cartel victims to seek recovery of their money damages. This has become standard government practice in criminal antitrust prosecutions.

In particular, the "extent of injury" proposal suggests, as a practical matter, that a California purchaser of a single TV could not be in the same class as a New York purchaser of several laptop computers, even though the LCD screens in all of these products were subject to the same price-fixing cartel. Additionally, requiring proof of injury to every class member at class certification would simply convert class certification into a summary adjudication proceeding, or trial on the merits, without key safeguards such as the completion of fact or expert discovery, Rule 56 procedures, or a Seventh Amendment right to a jury trial. By requiring a determination at the class certification stage that every potential class member has been injured, the proposal would guarantee that only classes that are under-inclusive of injured persons would be certified (if it all). This means that persons and businesses injured by anti-competitive conduct like that at issue in *LCD* would be certain to be excluded from the only process by which they could receive meaningful compensation for their injuries.

The LCD indirect purchaser class action was litigated for 7 years, and resulted in the 2014 distribution of approximately $770 million to consumers, small businesses and large corporations, including over 233,000 claimants who received, respectively, $44 and $88 each for each LCD monitor or television purchased during the class period.

The proposed bill would have precluded class certification in numerous other antitrust class actions against foreign defendants and their U.S. subsidiaries that, collectively, have resulted in billions of dollars of settlements, and payments to thousands of U.S. consumers and small and large businesses. These cases include, among many others, In re Dynamic Random Access Memory (DRAM) Antitrust Litigation (total direct and indirect purchaser settlements of $636 million) and In re Static Random Access Memory (SRAM) Antitrust Litigation (total direct and indirect purchaser settlements of $120 million). We have attached a recent study by the Center for Justice & Democracy, written in collaboration with COSAL, which includes many other

antitrust class actions that recovered hundreds of millions of dollars for consumers and small businesses. None of these cases could have been brought under any fair reading of H.R. 1927.

COSAL urges the subcommittee to reject H.R. 1927 and any attempt to limit the ability of consumers and small businesses to bring class actions to redress harms they have suffered. We encourage you to wait for the outcome of the review of class action rules that is being conducted by the Judicial Conference of the United States under the procedures of the Rules Enabling Act. When that process is complete, Congress will have an opportunity to review and revise the recommendations of the Judicial Conference.

Thank you for considering our views.

Respectfully submitted,

Daniel C. Hedlund
Gustafson Gluek PLLC
President, Committee to Support the Antitrust Laws

April 28, 2015

Hon. Trent Franks, Chairman
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Hon. Steve Cohen, Ranking Member
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Subject: HR 1927

Dear Chairman Franks and Ranking Member Cohen;

We are writing to you as health professionals and attorneys who have worked on behalf of the public throughout our professional careers. As you know, hazardous chemicals are routinely found in drinking water, consumer products, foods and other essential public resources. The regulatory system does not prevent these public health hazards in many cases, and access to the courts is an important recourse for many people who have been harmed.

The courts also serve as a deterrent to dangerous behavior on the part of irresponsible parties. That deterrent is often more compelling than what is imposed by the limited enforcement capabilities of government agencies. Consequently, the public health community and public advocates have a strong interest in maintaining the full rights of the public to seek justice when harm has occurred and to deter future harm.

This week HR 1927 will be considered by the Subcommittee on the Constitution and Civil Justice. This bill that would substantially reduce the ability of people who have been harmed to seek justice through class actions, an important recourse for the public. This bill would pose an especially onerous burden on communities of color and on lower income people, who are far more likely to live in areas where environmental contamination causes serious health problems.

In addition to the need for all people to have access to justice, the bill itself violates basic medical scientific principles. It requires that every person in a class have "an injury of the same *type* and *extent*". Fundamental medical science makes it very clear that each individual responds somewhat differently to a health hazard. Responses are based on individual genetic makeup, overall health, age, gender, previous exposures to hazards and many other factors.

The variability in human responses to exposures to radiation, toxic chemicals such as benzene and lead, asbestos and other hazards are well established in the medical literature. Depending on inherent susceptibilities, individuals may experience kidney or liver damage, neurological

damage, infertility, cancer, immune system disorders and other health problems when exposed to the same hazardous agents. This variation in responses is clearly described in all medical textbooks that discusses the effects of exposure to toxic agents.

For Congress to consider trying to "legislate" away fundamental medical science by requiring "the same type and extent" of injury makes no medical sense. If the goal is to establish an impossible bar to class actions suits, that objective might be met by the bill. But the cost would be the integrity and credibility of the US Congress. Science cannot be dictated by Congress, yet that is what this bill appears to attempt to do.

For the sake of the public whom we all serve and for the sake of scientific integrity, we urge you to carefully consider the implications of HR 1927. We believe it would undermine public trust in the Congress and the public's access to justice in the United States. We strongly urge you to reconsider the wisdom of pursuing this.

Sincerely,

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Lexington, MA

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April 27, 2015

Hon. Bob Goodlatte
Chair, House Committee on the Judiciary
U.S. House of Representatives
2309 Rayburn HOB
Washington DC 20515-4606

Hon. John Conyers
Ranking Member, House Committee on the Judiciary
U.S. House of Representatives
2426 Rayburn HOB
Washington DC 20515-2213

Re: **H.R. 1927, the "Fairness in Class Action Litigation Act of 2015"**

Dear Reps. Goodlatte and Conyers:

I write to oppose H.R. 1927, and to ask Rep. Goodlatte to withdraw the bill. Whatever the intentions of its backers, this bill strikes at the heart of the principle of accountability that must lie at the heart of any system of justice. If passed, the bill would effectively repeal many of the laws of the United States, and make important Constitutional rights unenforceable.

I have been representing plaintiffs in school desegregation cases, civil rights employment class actions, and wage & hour FLSA collective actions and State-law class actions, for the more than 45 years since I left the Federal government, and for years before that from 1966 to 1968 as a law student helping civil rights lawyers.

My specific reasons for opposition are that:

- Most civil enforcement of important rights occurs in private class actions, and not in cases brought by the government, so effectively barring class actions will leave very important parts of the law unenforced "dead letters." See Part A below.
- The bill's definition of "injury" excludes important civil rights and human rights that are neither injuries to the body nor injuries to property. See Part B and examples below.

- The bill's restriction to injuries of the "same type" does not define "type" and will lead to decades of litigation over questions such as whether a racially discriminatory refusal to hire a qualified black applicant for one job is the same "type" as a racially discriminatory refusal to hire a qualified black applicant for a different job. See Part C and examples below.

- The bill's restriction to injuries of the "same extent" will effectively bar all private class actions for racial, sexual, and other discrimination in employment, because people will have different qualifications, availability, and other factors, and the jobs for which they are qualified will have been filled at different dates, so that each person's recovery is likely to be different from the recoveries of others. See Part D below.

- The bill requires that all these issues of type and extent of injury for each class member be front-loaded into the beginning of the case, which will make the prosecution of private class actions prohibitively expensive. See Part E below.

My qualifications are set forth in Part F below.

This letter focuses on private enforcement of the civil rights laws and employment laws because that is what I know best, but the same applies to all the remainder of the laws now being enforced through private class actions.

A. Most Civil Enforcement of Legal Rights is through Private Class Actions

The U.S. Equal Employment Opportunity Commission has the authority to bring lawsuits against employers that discriminate unlawfully. The U.S. Court of Appeals for the Fourth Circuit once called the EEOC "the public avenger by civil suit of any discrimination uncovered in a valid investigation and subjected to conciliation under the Act."[1]

However, budget cuts and the failure to appropriate enough money to cover increases in the agency's expenses mean that it has suffered a massive loss of personnel. When President Reagan took the oath of office in January 1981, the EEOC had 3,696 employees. When President Obama took the oath of office in January 2009, the EEOC only had 2,556 employees. That is a loss of 38% of the Commission's workforce. In the meantime, the EEOC was given huge new responsibilities: the Americans with Disabilities Act, the Older Workers Benefit Protection Act, and the Genetic Information Nondiscrimination Act.

The government has far too few resources to handle enforcement by itself. For example, in FY 2014, the government—the EEOC and the Justice Department combined—brought only 143 enforcement cases in the "Civil Rights – Jobs" and "ADA-Employment" reporting

[1] *EEOC v. General Electric Co.*, 532 F.2d 359, 373 (4th Cir. 1976).

categories used by the courts, out of the total 13,831 such cases filed. Private enforcement does almost 99% of all the enforcement there is.

Private class actions are critical, both in proving discrimination and in getting an injunction that stops the pattern. It is very expensive to get and analyze the records to prove patterns of discrimination, but individual cases often lose because of the absence of such evidence. And courts will not grant broad injunctions in the absence of a class action. All they will do is grant an order to benefit the individual plaintiff, and they will leave the same system in place for all others.

B. The Limited Definition of "Injury" in H.R. 1927 Would Have Prevented School Desegregation and Other Important Class Actions

I am sure every member of your Committee would agree that the class action lawsuits striking down segregation were the finest hour of the Federal courts, and a step absolutely critical to the nation's moving forward. Yet they would have been stopped in their tracks if H.R. 1927 had been in effect at the time.

The "separate but equal" segregated schools were far from equal. The school desegregation cases on which I worked as a law student and then as a lawyer in the mid-1960s to early 1970s were class actions. We put on evidence that Louisiana's "separate but equal" system of public education had very unequal application: For every dollar spent for the average white school kid, Louisiana spent about twenty cents for the average black school kid. In just one case on which I worked,[2] for example, every white kid had textbooks for every class and the black kids did not, white kids had writing paper and black kids had to write on brown grocery bags they brought from home, white kinds had toilets and black kids had outside latrines that drained into a slit trench running across their playground (with a board in the center for them to use to cross the trench), and on and on.

Many employment cases in the decade after Title VII was passed involved similar systems of segregation. The first case I worked on in the Summer of 1966 involved racially segregated jobs, toilets, drinking fountains, and lockers at the Crown Zellerbach plant in Bogalusa, Louisiana. It was the usual situation, and not at all unusual.

Segregation in public education and public facilities caused an injury to the plaintiffs' human dignity, not an injury to their bodies, and not an injury to their property. If H.R. 1927 were in effect at the time, it would have blinded the courts to the injuries the plaintiffs in those cases were suffering. Employment cases would have fared no better, because employers would have argued that the plaintiffs were "at will" employees and had no property interests in the jobs they sought to obtain.

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[2] *George v. Davis, President, East Feliciana Parish School Board.*

The combination of the civil rights laws and class action procedures is that they took most disputes over racial and other forms of discrimination off the streets and into the courts. No other nation on Earth could have had the kind of massive social changes we had—including the opening up of the economy to people formerly fenced outside of it because of their race and gender. And unlike other countries in which such changes happened only with widespread violence, the availability of redress through the courts in effective class actions meant that there was little violence here. No other nation before or since has accomplished the same. One has only to look at the tragic history of Northern Ireland to see what could have happened to us.

If H.R. 1927 had been in effect sixty years ago, these changes would never have happened, and we would still have either decades of great public unrest or educational and economic systems rigidly stratified by race.

C. The Undefined Term "Same Type" of Injury Will Also Destroy Class Actions

The bill's requirement that class actions be limited to the "same type" of injury, but does not define the term. The resulting mischief will cause litigation costs to skyrocket for decades as the courts struggle with it, before the Supreme Court ultimately grants review and resolves the question. In the meantime, it will likely bar most employment discrimination class actions.

The reason is that a pattern of discrimination may affect every qualified member of a class who wants a job covered by the pattern, but it will affect them differently. Two examples will help clarify this.

1. Example 1: *Pegues v. Mississippi State Employment Service* (N.D.Miss.)

In the 1970s, I represented a class of blacks, and a class of women, who were looking for work by applying at the Bolivar County office of the Federally-funded Mississippi State Employment Service. The MSES checked with local employers for job openings, listed the openings and required qualifications on its system, interviewed applicants for referrals to the employers with these job openings, selected the persons to refer, and referred them to the employer as qualified applicants. The problem is that blacks were never referred to any jobs but low-paid and low-skilled or unskilled traditionally-black jobs, and women were never referred to any jobs but low-paid and low-skilled or unskilled traditionally-female jobs. While the U.S. Department of Labor micromanaged the State Employment Services, right down to the stationery they used, the logos on their doors, and the leases they signed, DOL refused to look at the discrimination it was financing.

I took the deposition of the manager of that office, located in Cleveland, Mississippi. He identified the traditionally-black jobs for men as unskilled labor, helper, and yard man. He identified the traditionally-white jobs for men as "everything else." He described the same drastic limitations for women. Blacks' and women's qualifications *did not matter* when it came to jobs outside their race's and gender's traditional job areas. A white male applicant with a

sixth-grade or lower education, no useful skills, and no useful experience, would readily be referred for high-paying jobs. Blacks and women with high school degrees, some college, highly desired craft experience, or a spotless work record, would have no chance whatsoever to have their qualifications considered.

I handled the trial of this racial and sexual discrimination class action. After many court proceedings,[3] the court enjoined the discrimination and opened up the full range of job openings. The revised judgment for back pay and interest was ultimately $ 5,838,543.02.

Unfortunately, if H.R. 1927 had been in effect at the time, *Pegues* could never have been certified as a class action. H.R. 1927 would have required a separate class for every job order listing vacancies, because only that would have met the "same type" of injury as the other class members.

2. Example 2: *Luevano v. Campbell* (D.D.C.)

I was one of the plaintiffs' attorneys in *Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981). It involved the former Professional and Administrative Career Examination (PACE) used by scores of Federal agencies in filling 5,000 to 6,000 vacancies a year in 118 different professional, administrative and managerial jobs. Over 140,000 applicants a year took that deeply flawed test. The test screened out black and Hispanic applicants at a much higher rate than whites, and it had a very low level of validity. The replacement job procedures as a result of the case have generally had a much lower degree of adverse impact than the PACE. Yet the sheer scope of the problems created by this one test would have barred class certification if H.R. 1927 had been in effect. We would have had to have 118 plaintiffs to cover each of the job categories for which this bad test was being used.

D. The "Same Extent" of Injury Requirement

H.R. 1927 also requires that each class member have an injury of the "same . . . extent as the injury of the named class representative or representatives."

This would kill virtually every employment discrimination class action. Class members

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[3] The trial court ruled against us. *Pegues v. Mississippi State Employment Service*, 488 F.Supp. 239 (N.D.Miss. 1980). The Fifth Circuit affirmed in part and reversed in part, entering its own findings of classwide racial and sexual discrimination as to several MSES practices. 699 F.2d 760 (5th Cir.), *cert. denied*, 464 U.S. 991 (1984). Numerous unofficially reported orders, many consented or stipulated, were entered as to the Decree and the processing of the back pay claims. See 34 E.P.D. ¶ 34,538 (N.D.Miss. 1984) (preliminary back pay issues); 35 E.P.D. ¶ 34,645 (N.D.Miss. 1984) (setting interest rate); 35 E.P.D. ¶ 34,741 (N.D.Miss., 1984) (decree approved); 36 E.P.D. ¶ 34,976 (N.D.Miss. 1986) (further back pay issues); 45 E.P.D. ¶ 37,781 (ordering classwide approach to back pay and issuing rulings on further issues); and 698 F.Supp. 116 (N.D.Miss. 1988) (ordering classwide approach to mitigation). On October 14, 1988, the district court entered judgment for $ 2,873,274.94 in back pay and interest. On May 7, 1990, the Fifth Circuit rejected defendants' arguments against the award, and reversed a limitation on the award. 899 F.2d 1449 (5th Cir. 1990).

are not fungible: they are always real people with real differences in beginning and ending dates of availability, job interests, skills, education, and qualifications. Due process and fairness require that the court take account of these differences in providing a remedy. It is unjust to waste the back pay award for particular discrimination by allocating part of the award to people who were clearly not discriminated against, so part of the task of an employment class action lawyer after winning or settling liability is to apportion the damages properly.

I describe a number of cases in this letter, but the common thread in all of my class litigation is that the same pattern or policy of discrimination affected many women or blacks or Hispanics or older employees, but affected everyone to a different extent. Some started working or applying on one date, and some started on another. Some were assigned to this group of jobs at this pay rate, and some were assigned to another. Some resigned or were terminated on one date, and some on another. Some were allowed to be promoted and some were not. There is no way in which any of these cases could ever have met the test proposed in H.R. 1927 of "admissible evidentiary proof that each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives." Every one of my race and sex discrimination class actions over the last 45 years would have failed this test.

Tailoring individual back pay awards or shares in a settlement to these details is essential for fairness. They are traditionally the second stage of an employment discrimination case because they involve the examination of a lot of employment records—far more than is needed to establish the policy or pattern—and there is no occasion for this vast expenditure of time and money until there has been a judicial finding after trial (and often appeal) that there was in fact such a policy or pattern, and the parts of the employment process it reached, and the times during which it was in effect.

Long ago, the Supreme Court recognized that insisting on perfect symmetry among class members, as H.R. 1927 does, would destroy the usefulness of class actions and leave the law unenforced. In a decision under the Fair Labor Standards Act of 1938, the Supreme Court explained:

> The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of § 1193 (c) of the Act. . . . But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case 'it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.' *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 250, 75 L.Ed. 544. . . . .

Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 688 (1946). In a case under Title VII of the

Civil Rights Act of 1964, the Supreme Court further explained:

> The Court of Appeals was also correct in the view that individual proof concerning each class member's specific injury was appropriately left to proceedings to determine individual relief. In a suit brought by the Government under § 707(a) of the Act the District Court's initial concern is in deciding whether the Government has proved that the defendant has engaged in a pattern or practice of discriminatory conduct.

Int'l Bhd. of Teamsters v. United States, 321 U.S. 324, 342 n.24 (1977).

A few cases case may provide helpful examples.

1. Example 3: *Kohne v. Imco Container Co.* (W.D.Va.)

Rep. Goodlatte, I handled one of these cases in your District. Arvella Kohne and other women in your District filed a sex discrimination class action against their employer, *Kohne v. Imco Container Company*, 480 F.Supp. 1015 (W.D.Va. 1979). This was a Title VII sex discrimination class action involving a plastic bottle manufacturing and decorating plant in Harrisonburg, Virginia. The case was tried in 1975 and 1976, and in 1979 the court found that Imco had discriminated against women in initial assignments and in promotions. We could not just spray out the eventual settlement to all women equally, because some were not interested in the higher-paid traditionally-male jobs, some had been, and the women interested in the higher-paid jobs were interested in different jobs at different rates of pay.

2. Example 4: *Sledge v. J.P. Stevens & Co.* (E.D.N.C.)

One State farther South, I handled a case against nine plants and three office facilities of J.P. Stevens & Co. I tried the case in 1972, and in 1975 Judge Dupree found massive classwide racial discrimination against black applicants and employees.[4] The case settled in 1995 for $ 20 million in back pay and interest for the named plaintiffs and the class, while the fifth appeal in the case was pending. It took four years for the monetary award to be apportioned accurately to the roughly 2,800 class members who filed claims, because the company located old application records *more than twenty years late*, and we had to conduct more than 700 interviews linking those to class members, and overcoming the problems of marital name changes for black women

[4] *Sledge v. J.P. Stevens & Co.*, 10 E.P.D. ¶ 10,585 (E.D.N.C. 1975) (decision finding classwide discrimination in hiring, initial assignments, promotions, racial reservations of various job categories for whites, etc., in nine plants and three office facilities of the defendant), 12 E.P.D. ¶ 11,047 (E.D.N.C. 1976) (issuance of decree), 585 F.2d 625 (4th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979) (affirming all findings of discrimination except as to seniority, affirming all nonquota relief and reversing quotas, reversing findings of nondiscrimination as to the named plaintiffs, reversing a ruling on the limitations period which restricted back pay recovery, and affirming other preliminary back pay rulings in the absence of evidence that they would frustrate meritorious claims), 52 E.P.D. ¶ 39,537 (E.D.N.C. 1989) (denying motion to vacate 1975 findings of liability in light of *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989)), *summarily affirmed* (4th Cir. 1990) (unreported).

by considering and interviewing every class member who had the same first name as appeared on any old application form.

We had one set of classwide notices and a fairness hearing to get approval of the overall settlement, and then after our work on allocations was complete, we mailed every class member a computer printout we created showing the best information we could get from employer records as to every application they made, every job they held and its dates and pay rates, and linked that up to the general level of hiring. The books we assembled for the court's use were some thousands of pages long, and every one of the roughly 2,800 class members had an opportunity to come to a second fairness hearing and dispute anything in their records. Some did, and helped us correct some errors that had inadvertently crept in, or provided documents we had not seen before. Every class member's award was individualized to take all of those factors into account in a way the class and the court thought was fair.

3. Example 5: *Bogan v. Fleetwood Enterprises* (D.Idaho)

This was a consolidation of several cases brought across the country, and involved Fleetwood plants nationwide. At least one—in Longwood, Texas—was in the District of one of your Committee members. The case challenged the company's inadequate responses to complaints of sexual harassment, and the alleged exclusion of women from higher-paid jobs. Unlike many of my cases, this one settled before trial.

The settlement completely changed the way that the company handled harassment claims, and was effective in curbing harassment to a few instances a year, nationwide. That was a *big* change. It also changed the way the company handled assignments and promotions, and opened up to women a lot of higher-paid jobs that were previously effectively off-limits to them. There were no monetary awards to class members, but were monetary awards to the named plaintiffs.[5]

In cases like this, the named class representatives start out on a different foot than the class members. We cannot in justice and decency advise the class representatives to take on the additional burden and delay of fighting a case as a class action where they would *also* lose their rights to individual relief. Yet that is the price H.R. 1927 would demand they pay.

And if the employer retaliated against the class representatives, as often happens, H.R. 1927 would require that they dismiss even meritorious retaliation claims in order not to be seeking more or different relief than class members.

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[5] The settlement in *Bogan v. Fleetwood Enterprises, Inc.*, Civil No. 1:00-cv-00440-BLW (D.Idaho 2002), preserved the ability of every class member to file her own lawsuit for back pay, damages, and all other relief available under Title VII, and rolled back the statute of limitations to the start of the case so that that would not have limited any women who relied on the existence of the case and did not file their own cases. In the fairness proceedings, no class members objected to the class representatives receiving money for their claims while the class members did not, and some class members wrote to say how thrilled they were at the outcome.

4. Requiring Showings of the Type and Extent of Injury Before Class Certification Will Front-Load Expenses and Make Class Actions Too Expensive to Bring

H.R. 1927 requires plaintiffs to show the type and extent of injuries to all class members early in the case, at the class certification stage. This, too, will work to kill class actions that should be brought.

The record of *Sledge v. J.P. Stevens* showed that the company drastically improved its practices as a result of the trial preparation, the findings, and the injunction. But we never would have gotten all the discovery we needed to make any of this possible if we had had to go forward on the basis of just a few individual plaintiffs. And we never could have expended the scores or hundreds of thousands of dollars—or the millions of dollars' worth of time—this took, at the beginning of the case. Even with a civil rights organization backing the case, we only kept it alive by winning stage after stage and obtaining interim fee awards that enabled us to continue.

It is also true for each of the cases mentioned above that we could never have made a showing of the "same type and extent" of injury at the beginning of the case, at the class certification stage. The only way for *Sledge* and all of these other cases to have survived H.R. 1927 is if the class had abandoned all claims for monetary relief, and simply sought an injunction to stop racial and sexual discrimination in the future. That is an onerous price to impose on class members, would effectively repeal the provisions of the employment discrimination laws allowing awards of back pay and interest, and would cancel a major deterrent to discrimination.

E. What Passage of H.R. 1927 Would Mean, in Practical Terms

Civil rights class actions brought by private citizens have been a major force in bringing our country into the 21st century as a place where employment opportunities are far less focused on who one is, and far more focused on what one can do. That is as important for human dignity and decency as it is for economic productivity.

Because private enforcement of the civil rights laws and other laws has been so important to the rights and dignity of ordinary Americans, and because public enforcement of the civil rights laws and other laws has declined so markedly in this age of constant budget cuts, the passage of H.R. 1927 would have the effect of removing the last line of defense for ordinary Americans from attacks on their human rights and their wallets.

The enactment of H.R. 1927 will allow racial, sexual, and other discrimination to flourish, and allow criminals to fleece the pocketbooks of ordinary Americans with impunity. It will shield every type of wrongdoer from being held accountable, and will harm the citizens in each of the Districts of your members.

Mr. Chairman and Ranking Member, I urge that we cannot allow the clock to be turned

backward.

F. My Qualifications

Let me close by stating a few words of identification. I graduated from Harvard Law School and was admitted to the D.C. Bar in 1968, worked for the U.S. Commission on Civil Rights for a little more than a year, and for the more than 45 years since then I've handled class actions, collective actions, and individual cases, primarily for plaintiffs.

My remarks are solely my own and not that of any organization with which I am affiliated. For purposes of identification only, I have been a Chair of the Labor and Employment Law Section of the American Bar Association (the ABA's fourth-largest entity), and am a member of the Board of Directors of the Lawyers' Committee for Civil Rights Under Law. I am a Fellow and former member of the Board of Governors of the College of Labor and Employment Lawyers, and from 1996 to 1999 was the Chair of its Committee on Standards of Practice. Along with a defense lawyer, I co-authored fifteen editions of EQUAL EMPLOYMENT LAW UPDATE (BNA Bloomberg, 1996–2008), copyright © American Bar Association (1996-2007). I speak annually to the Arizona and Pennsylvania Bars, and have in the past spoken to the American Bar Association's Section of Business Law, Section of Dispute Resolution, Section of Labor and Employment Law, Section of Litigation, and Section of Tort, Trial and Insurance Practice. I have also spoken to various State and local bar associations, including the Atlanta Bar, the Chicago Bar, the Connecticut Bar, the D.C. Bar, the Federal Bar Association, the Florida Bar, the Georgia Bar, the King County Washington Bar (Pacific Coast Labor Conference), the Montgomery County, Maryland Bar, the Minnesota Bar (Upper Midwest Employment Law Conference), the New York State and City Bars, the Ohio Bar, the South Carolina Bar, and the Wisconsin Bar. I have spoken to many private organizations, including the American Association for Justice, ALI-ABA, the American Law Institute-CLE, the Equal Employment Advisory Council, the Federalist Society, the National Employment Lawyers Association, and the like. I have much more information that can be seen on LinkedIn or on my web site, www.RickSeymourLaw.com.

G. Conclusion

I would be happy to meet with any member of the Committee who would like to discuss this further.

Sincerely,

Richard T. Seymour

Mr. COHEN. Thank you, sir.

The Chair now recognizes the Ranking Member of the full Committee, Mr. Conyers from Michigan, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman. Members of the Committee and distinguished witnesses, and particularly the one from the University of Connecticut School of Law, and visitors here in the hearing room, this H.R. 1927 Fairness in Class Action Litigation is yet another measure that would shield corporate wrongdoers from being held accountable to victims whom they have harmed. And its boldness is a little breathtaking in my view.

And here is how the bill proceeds to accomplish this shielding of wrongdoers. To begin with, H.R. 1927 will make it even more difficult for these victims, particularly those whose civil rights have been violated, to obtain relief through the procedure vehicle of class actions. Under the current law, the courts have strictly limited the grounds pursuant to which a large group of plaintiffs may be certified as a class action. It is not all that easy.

Rather than improving upon this process, however, H.R. 1927 imposes even more restrictive requirements that will make the process further unfair to plaintiffs. It does it by prohibiting a Federal court from certifying a class action unless a party can prove that every putative class member suffered the same injury to the same extent. Worse yet, the bill limits what qualifies as an injury to only those actions that impact a plaintiff's "body or property."

A literal interpretation of this language could clearly exclude civil rights and other types of class actions where the alleged injury does not have a tangible impact on a plaintiff's body or property. According to Professor Samuel Issacharoff of the New York University School of Law, *Brown v. the Board of Education*, under the bill's definition of "injury," could never have been brought as a class action because the class representative in that case could not have shown injury to the body or property of each child affected by the separate but equal policy. Arthur Miller, a foremost scholar on Federal practice and procedure, similarly warned that the bill's definition of "injury" could threaten substantive rights. While I doubt the author of this legislation intended to specifically preclude civil rights class actions or other class actions designed to vindicate fundamental constitutional rights, H.R. 1927 before us today has language that could lead to that result.

Another problem. It will make class certification more difficult and expensive to the detriment of all litigants. Class actions allow consumers injured in substantially the same manner by the same defendants the ability to hold the wrongdoers accountable without having to engage in multiple duplicative actions. Most importantly, class actions make it economically feasible for those who have smaller, but not inconsequential, injuries to obtain justice. These actions include such diverse matters as breach of warranty, products liability, and employment discrimination.

Unfortunately, since the enactment of the Class Action Fairness Act a decade ago, class actions have become more difficult, more expensive, and cumbersome to pursue, particularly in light of a number of Supreme Court decisions further restricting class actions. So taken together, these developments have denied the benefits of the class action device to many.

This measure before us today will only exacerbate this problem by forcing plaintiffs to demonstrate the same alleged impact or body or property on behalf of all putative class members before certification. Having to litigate a common factual question, such as the extent and nature of an alleged injury prior to certification and prior to full discovery defeats the point of having a class action in the first place. Undermining such efficiency would be bad, not only for plaintiffs, but for defendants as well. It would increase time an expense to the litigation that defendants could face by potentially forcing them to litigate numerous small cases rather than a single class action.

And finally, the act will increase the workload of our already overburdened Federal courts and undermine the rules enabling act process. Class actions conserve taxpayer dollars by promoting judicial efficiency. Instead of being inundated by thousands of similar lawsuits, a court can determine the issue in a unified class action proceeding. By restricting class actions, however, 1927 will substantially add to the caseload of the Federal court system, which we already know is overburdened.

Additionally, 1927 circumvents the extremely thorough rules enabling act process. Now, this process allows the Judicial Conference of the United States, the policymaking arm of the Federal judiciary, to craft amendments to Federal civil procedure rules using a multi-stage, multiyear deliberative process involving input from experts, practitioners, judges, and the public. Indeed, the Judicial Conference is currently considering amendments to the class actions rules that have been for several years. Congress ought to let that process work as intended first.

Accordingly, I look forward to hearing from today's witnesses, and I thank them for their participation. And I thank the Chairman for the time.

Mr. DESANTIS. I thank the gentleman. Without objection, other Members' opening statements will be made part of the record.

Let me now introduce our witnesses. Our first witness is John Beisner, a partner at the Skadden law firm's Mass Torts, Insurance, and Consumer Litigation Group. He focuses on the defense of purported class actions, mass tort matters, and other complex civil litigation in both Federal and State courts. He also regularly handles appellate litigations and has appeared in matters before the U.S. Supreme Court. In 2013, he received a Burton Award for Legal Achievement, which recognizes excellence in legal scholarship.

Our second witness is Mark Behrens, a partners at the Shook, Hardy & Bacon law firm. He has authored or co-authored over 150 amicus briefs on behalf of national and State business and civil justice organizations in cases before the United States Supreme Court and other State and Federal courts. He has published over 50 scholarly articles in leading national journals and law reviews.

Our third witness is Alexandra Lahav, a professor at the University of Connecticut School of Law. Her research primarily focuses on procedural justice and the limits of due process in class actions and aggregate litigation. Her work has been cited in Federal district opinions, academic articles, and treatises. She regularly presents to academics and practitioners. She is also the co-author of

the 4th edition of the popular civil procedure case book, Civil Procedure: Doctrine Practice in Context, and is currently writing a book entitled, In Praise of Litigation, which defends lawsuits in America.

Our final witness is Andrew Trask, counsel at the McGuireWoods law firm. Mr. Trask has defended more than 100 class actions involving all stages of the litigation process. While his work has concentrated on products liability and consumer fraud cases, he has also defended class actions involving telecommunications products, business contracts, securities, ERISA, the U.S. antitrust laws, and environmental claims, among others.

Each of these witnesses' written statements will be entered into the record in their entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within the time, there is a timing light in front of you. The light will switch from green to yellow indicating that you have 1 minute to conclude your testimony. When the light turns red, it indicates that the witness' 5 minutes have expired.

Before I recognize the witnesses, it is the tradition of the Subcommittee that they be sworn. So please, witnesses, stand and be sworn. If you will raise your right hand.

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

[A chorus of ayes.]

Mr. DESANTIS. You may be seated. All witnesses answered in the affirmative.

It is my pleasure to now recognize our first witness, Mr. Beisner. Please turn on your microphone before speaking, and you are recognized for 5 minutes.

TESTIMONY OF JOHN H. BEISNER, PARTNER, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, WASHINGTON, DC

Mr. BEISNER. Thank you. Good afternoon, Mr. DeSantis, Ranking Member Conyers, and Ranking Member Cohen, and Members of the Subcommittee. I appreciate the opportunity to appear today on behalf of the U.S. Chamber Institute for Legal Reform to voice support for H.R. 1927, the Fairness in Class Action Litigation Act of 2015.

Several months ago, this Subcommittee held a hearing exploring continuing problems with class action litigation since the 2005 enactment of the Class Action Fairness Act. One of the primary abuses identified in that session was the increasing frequency with which some Federal courts are certifying overbroad or no injury class actions. What I am talking about are lawsuits brought by a person who allegedly experienced a problem with a product or service, and then seeks to represent every other person who bought the product or service regardless of whether they experienced a problem.

As I have detailed in my written testimony and as shown by the record from that earlier hearing, this problem is real. These overbroad, no injury cases have a highly distortive effect at several levels. First of all, they improperly magnify the value and magnitude of the claims asserted. In some Federal courts the law seems to be that one disgruntled customer can dramatically exag-

gerate the value of an idiosyncratic product defect lawsuit by suing on behalf of thousands of others who are not disgruntled at all.

Further, these class actions can have a highly distortive effect at trial. Let me give an example. If a consumer buys a new car and experiences an oil leak, he might bring a class action on behalf of others who bought the same model of vehicle. If the proposed class is certified and the case gets to trial, that person as the class representative would tell his oil leak story to the jury, and if the jury was sympathetic to that story, it might award damages to everyone in the class, even though no one had an oil leak problem.

The distortion is clear. If a class member who had no problem with his vehicle had to present his case to a jury individually, he would be laughed out of court. His testimony would go something like this: Question, Mr. Plaintiff, have you had any problem with your vehicle? No. Are you satisfied with your vehicle? Yes. Did the vehicle meet your expectations? Yes. Did you get what you paid for? Yes. So what are you doing here presenting a claim to this jury? What do you want? Well, I want you to order the car manufacturer to pay me some money because some other guy had an oil leak in his car. Obviously this scenario is absurd, but that is what overbroad, no injury class actions are all about.

This bill presents a simple, elegant solution to the problem. It says that if a person brings a lawsuit alleging personal injury or economic loss, he can proceed on a class basis only if he shows that each proposed class member suffered an injury of the same type or extent he did. So going back to our example, our friend who had the oil leak can bring a class action and try to represent other owners of that same model of vehicle who also had an oil leak. But he would not be allowed to represent and seek compensation for people who have not had the oil leak problem.

Although very important, the enactment of this bill would not affect a sea change in class action law. The bill would simply emphasize what the Supreme Court and certain other Federal courts have already said. It would highlight and codify Rule 23(a)(3) of the Federal Rules of Civil Procedure by making clear that the claims of the class representative must be typical of those putative class members she seeks to represent.

Now, I have seen some commentary saying the bill would be the death knell of civil rights cases and intangible loss cases in which no personal injury or tangible economic loss is alleged. I do not think that is correct. The bill simply says that if the class representative alleges personal injury or economic loss, she can represent only those who suffered the same type and extent of injury, but if the class representative does not allege personal injury or economic loss, the bill would have no effect. In such a case, the bill would not require a showing of anything. It would not pose an independent barrier to class treatment in such cases.

I have also seen assertions that the bill would undermine, as one commentator put it, State common law remedies for people who buy toasters that turn out not to be able to prepare toast. The bill would not change any of that. If a person brought a class action alleging that his toaster malfunctioned, this bill would not preclude class treatment, but the class could only include persons who had that problem.

This bill is a common sense solution to a growing problem that is perverting the purposes of class actions, and I respectfully urge its enactment. Thank you.

[The prepared statement of Mr. Beisner follows:]

Statement of the U.S. Chamber of Commerce

ON: THE FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015

TO: U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

BY: JOHN H. BEISNER, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

DATE: APRIL 29, 2015

Testimony of John Beisner[1]
Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary
United States House of Representatives

"The Fairness in Class Action Litigation Act of 2015"

Good afternoon Chairman Franks, Ranking Member Cohen and Members of the Subcommittee. Thank you for the opportunity to testify on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform ("ILR"). ILR is an affiliate of the U.S. Chamber of Commerce. The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses of all sizes, sectors and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, fairer, and faster for all participants.

My testimony today focuses on the Fairness in Class Action Litigation Act of 2015 ("FICALA" or the "Act"), which was introduced in the House earlier this month. This legislation would put an end to "overbroad" or "no-injury" class actions, which have become increasingly prevalent in our federal courts. Generally speaking, an overbroad, no-injury class action is a lawsuit brought by a named plaintiff who allegedly experienced a problem with a product or service and then seeks to represent every other individual who purchased the product or paid for the service, ***regardless of whether they experienced any problems with it***. At least in some courts, the law has developed to the point where one disgruntled customer – or, more likely, one enterprising plaintiff's lawyer – can distort the value of an idiosyncratic product defect by a multiple of many thousands, even though few others have had the same problem with that product.

Overbroad class actions create a chain reaction of problems. First, they threaten the due process rights of defendants who are forced to defend against hundreds of thousands of claims based on the unique experiences of a handful of people. Second, overbroad, no-injury class actions undermine the proper administration of justice by creating a mechanism whereby absent class members can recover in a lawsuit, even though they would never recover if they brought a similar lawsuit as individuals. And third, because most defendants cannot risk the economic threat of a massive lawsuit even if it is frivolous, these suits almost always settle. At the end of the day, however, because the great majority of class members are perfectly satisfied with the product or service that is being challenged, very few class members actually claim their portion of the settlement, and the only people who benefit are the lawyers who brought the suit. The

[1] John Beisner is head of the Mass Torts and Insurance Litigation Group at Skadden, Arps, Slate, Meagher & Flom LLP. He represents defendants in a number of areas, including the pharmaceutical, tobacco, automobile and financial-services industries. He has testified numerous times on class action and claims aggregation issues before the U.S. Senate and House Judiciary Committees.

result is that overbroad class action lawsuits undermine justice and put a strain on our economy, on productivity and on innovation.

FICALA offers a simple and effective solution: limit certification to those class actions where all of the class members claim to have suffered the same type of injury as the named plaintiff. Thus, for example, if the named plaintiff brings a lawsuit claiming that his vehicle malfunctioned in a certain way, he or she cannot represent a class that includes everyone who purchased the same model vehicle without regard to whether they all encountered the same malfunction. Instead, to be considered for certification, any class would have to be limited to those individuals who encountered the same problem.

This is very modest legislation. Indeed, several federal courts have interpreted Federal Rule of Civil Procedure 23's typicality requirement to impose this very sort of limitation already. But other courts have applied looser standards, leading to an uptick in overbroad, no-injury class actions, especially in those jurisdictions where federal courts of appeal have put out a welcome mat to these sorts of cases. FICALA will restore consistency in the federal courts' treatment of overbroad class actions and in the process promote fairness in the litigation of class actions and the U.S. economy.

I. RECENT CASELAW CERTIFYING OVERBROAD, NO-INJURY CLASS ACTIONS

The past few years have witnessed a growing embrace of overbroad, no-injury class actions by various federal courts. Defendants have long argued that such class actions are illegitimate because the plaintiffs are essentially seeking a windfall – they want to recover damages for a risk that has not materialized and may never materialize over the life of a product.

For many years, courts agreed that no-injury class actions are not viable. Initially, these cases were resolved at the motion-to-dismiss stage because they were typically brought by plaintiffs who themselves had experienced no problem with the product, allowing the courts to conclude that the plaintiff was not injured and thus could not state a claim. Presumably in reaction to these rulings, plaintiffs' attorneys began recruiting named plaintiffs whose products actually manifested the alleged defect at issue in the litigation, making disposal of the claims at the motion-to-dismiss stage more difficult. But as most courts appropriately recognized, these lawsuits were just another variant of no-injury class actions because while the named plaintiffs may have suffered some injury – e.g., their vehicle actually malfunctioned – the overwhelming majority of the absent class members had not. According to these courts, this new variant of the no-injury class action was not amenable to classwide treatment for a variety of reasons, including that the claims of the named plaintiff were not typical of the absent class members – a fundamental requirement for class certification. The reasoning of these decisions was probably best expressed in the Seventh Circuit's pronouncement in the Ford Explorer/Firestone tire litigation in 2002 that "[n]o injury, no tort, is an ingredient of every state's law."[2] In that litigation, which involved allegations of defective tires, the Seventh Circuit decertified a nationwide class, recognizing that adjudication of varying consumer-fraud and breach-of-

[2] *See In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002).

warranty law would be utterly unmanageable. As part of its decision, the Seventh Circuit noted that "[i]f tort law fully compensates those who are physically injured, then any recoveries by those whose products function properly mean excess compensation."[3]

Some of the more illustrative decisions in this line of cases are summarized below, beginning with motion-to-dismiss rulings:

- *Lee v. General Motors Corp.*, 950 F. Supp. 170 (S.D. Miss. 1996). In *Lee* the plaintiffs sued General Motors, alleging that the detachable fiberglass roofs on certain vehicles did not meet GM's safety inspection standards.[4] All of the vehicles had over 100,000 miles; none of the plaintiffs had sustained any personal injuries; and the alleged defect had not been associated with any accidents.[5] Nevertheless, the plaintiffs sought to recover on behalf of a putative class under a variety of legal theories. The court dismissed all of the plaintiffs' claims on the ground that they had failed to plead sufficient damages. As the court explained, the vehicles in question operated without any problems or difficulties for multiple years, making it impossible for plaintiffs to establish that they had been injured by the alleged defect in the roofs.[6]

- *Yost v. General Motors Corp.*, 651 F. Supp. 656 (D.N.J. 1986). In *Yost*, the plaintiff brought a putative class action against the defendant car manufacturer, asserting claims for breach of warranty and fraud. Plaintiff alleged that oil and water and/or coolant tended to mix in the crankcase in certain of defendant's engines.[7] Plaintiff further averred that defendant knew of this alleged defect but failed to disclose it.[8] The defendant moved to dismiss the complaint, and the court granted that motion. According to the court, "[t]he basic problem in this case [was] that plaintiff Yost ha[d] not alleged that he ha[d] suffered any damages. . . . All he [was] able to allege [was] that the potential leak [was] '***likely***' to cause damage and '***may***' create potential safety hazards."[9] Because "[d]amage [was] a necessary element of both counts – breach of warranty and common law fraud," and plaintiff had not alleged such damage, the court dismissed the claims.[10]

- *Yu v. IBM*, 732 N.E.2d 1173 (Ill. App. Ct. 2000). In *Yu*, a physician brought a putative class action arising out of the sale of a bundled computer system that was

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3 *Id.*

4 *Lee*, 950 F. Supp. at 171-72.

5 *Id.*

6 *Id.* at 174.

7 *Yost*, 651 F. Supp. at 657.

8 *Id.*

9 *Id.* (emphases added).

10 *Id.* at 658.

supposedly not year 2000 (Y2K) compliant.[11] The plaintiff brought the suit even though he had taken advantage of a free "fix" of the defect that could be downloaded from the internet or by receiving a CD Rom.[12] The defendants moved to dismiss the class action complaint on the ground that plaintiff had suffered no injury as a result of the alleged defect. The trial court granted the defendants' motion and denied the plaintiff's motion for class certification, and the appellate court affirmed those rulings. At bottom, the fact that the plaintiff had obtained the fix meant he had no injury beyond speculation that something could go wrong in the future.[13]

Examples of class-certification rulings vindicating the same principle include the following:

- *Burton v. Chrysler Group LLC*, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720 (D.S.C. Dec. 21, 2012). In *Burton*, the court denied certification of a proposed class of "[a]ll persons and entities who purchased a new 2007-2009 Dodge Ram 2500 or 3500 truck in the United States."[14] Asserting breach-of-warranty claims, the plaintiffs alleged that "each Dodge Ram truck [was] equipped with an 'inherently and permanently defective' exhaust system which fail[ed] to 'effectively rid itself of diesel particulates, causing soot to accumulate in the DPF, turbocharger, EGR valve, oxygen sensors, and other associated parts.'"[15] The court denied the motion for class certification on multiple grounds, including typicality. In challenging typicality, Chrysler provided evidence that just a small percentage of potential class members experienced any problems with their trucks and were actually interested in being part of the class.[16] The court was persuaded, recognizing that the proposed nationwide class "would . . . include those persons and entities who ***never*** experienced problems" with their vehicles.[17] This "problem . . . highlight[ed] the lack of . . . typicality among putative class members."[18] In reaching this conclusion, the court noted that a plaintiff seeking to recover on a breach-of-warranty cause of action in his individual capacity would have to come forward with evidence that his vehicle actually

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11 *Yu*, 732 N.E.2d at 1175.

12 *Id.* at 1176.

13 *Id.* at 1177-78. Numerous other courts followed the same approach. *See, e.g.*, *Weaver v. Chrysler Corp.*, 172 F.R.D. 96, 99 (S.D.N.Y. 1997) ("It is well established that purchasers of an allegedly defective product have no legally recognizable claim where the alleged defect has not manifested itself in the product they own.") (internal quotation marks and citation omitted); *Ford Motor Co. v. Rice*, 726 So. 2d 626, 629 (Ala. 1998) (reversing denial of summary judgment with respect to fraud claims in putative class action where "[t]he plaintiffs acknowledge that their vehicles, like the overwhelmingly vast majority of Bronco IIs, have never manifested the alleged defect in such a way as to be caused to roll over").

14 *Burton*, 2012 U.S. Dist. LEXIS 186720, at *7 (internal quotation marks and citation omitted).

15 *Id.* at *3 (citation omitted).

16 *Id.* at *20 n.4.

17 *Id.* at *20 (emphasis added).

18 *Id.* at *21.

manifested the alleged defect giving rise to the lawsuit.[19] That fundamental requirement, the court implicitly recognized, did not change by dint of the class action device.

- *Kachi v. Natrol, Inc.*, No. 13cv0412 JM(MDD), 2014 U.S. Dist. LEXIS 90987 (S.D. Cal. June 19, 2014). In *Kachi*, the plaintiff initiated a putative class action against the manufacturer of certain fitness supplements. The plaintiff alleged that the products were deceptively advertised as, *inter alia*, increasing the formation of Nitric Oxide in the blood, improving male sexual performance and strengthening immunity.[20] One of the primary allegedly false statements by the defendant was that "L-Arginine 3000 helps support vasodilation to enhance blood flow to tissues . . . promotes healthy blood vessels and supports vascular health."[21] The plaintiff sought to certify a national class of purchasers of the products, or alternatively, a California class. The court denied the plaintiff's bid for class certification under the commonality and typicality prongs of Rule 23. According to the plaintiff, the central common question in the case was whether "an oral arginine supplement metabolize[s] into nitric oxide ('N.O.') in the body as does endogeneous and naturally produced arginine?"[22] The plaintiff submitted expert evidence in support of his claim that oral arginine supplementation does not increase levels of N.O. "in healthy populations."[23] However, the defendant submitted conflicting expert testimony demonstrating increased levels of N.O. in certain "unhealthy populations."[24] As the court explained, the plaintiff did not account for the class of unhealthy individuals, "who arguably actually received benefits from Natrol's products."[25] As a result, the court concluded, the proposed class was "***woefully overbroad*** and c[ould not] be maintained as proposed because it incorporate[d] class members who suffered injury and those that did not."[26] Even if the alleged misstatements were uniform, the court reasoned, "the injuries suffered by the two groups (healthy vs. unhealthy) [were] distinct and not capable of resolution by uniform proof[.]"[27] The court therefore concluded that the commonality and typicality requirements of Rule 23(a) had not been satisfied.

- *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595 (S.D.N.Y. 1982). In *Feinstein*, the plaintiffs in three consolidated putative class actions sought to recover

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19 *Id.* at *20.

20 *Kachi*, 2014 U.S. Dist. LEXIS 90987, at *3-4.

21 *Id.* at *4 (internal quotation marks and citation omitted).

22 *Id.* at *11 (internal quotation marks and citation omitted).

23 *Id.* at *11-12 (internal quotation marks and citation omitted).

24 *Id.* at *12.

25 *Id.* at *13.

26 *Id.* at *14 n.2.

27 *Id.* at *14.

with respect to defective tires.[28] The litigation arose out of a series of failures of Firestone-manufactured steel belted radial tires, which prompted various government investigations and ultimately a voluntary recall program. The plaintiffs brought suit under warranty theories, even though some of them did not experience any difficulties with their vehicles.[29] The court denied the motion for class certification due in large part to the fact that the vast majority of class members' vehicles performed satisfactorily. The court reasoned that, "[s]ince it appears that the majority of the putative class members have no legally recognizable claim, the action necessarily metastasizes into millions of individual claims. That metastasis is fatal to a showing of predominance of common questions."[30] Proceeding to a class trial would not be administratively feasible, the court explained: "Those class members whose tires had performed as warranted would have to be identified and eliminated from the action. Myriad questions would confront the survivors, including the manner in which the alleged breach of warranty manifested itself, and other possible causes of the problem encountered."[31] In short, "[t]his situation simply does not lend itself to class treatment."[32]

Over the last several years, however, a number of courts have departed from the long line of decisions rejecting no-injury class actions. These courts are certifying such cases, even where it is clear that many class members have never encountered any problem with the subject product – and likely never will. Some of the most notable decisions are summarized below:

- *Wolin v. Jaguar Land Rover North America, LLC*, 617 F.3d 1168 (9th Cir. 2010). Plaintiffs sought certification of a class of purchasers of Jaguar vehicles that contained a defect resulting in premature tire wear.[33] The district court had refused to certify the class, in part because a majority of the class members had not experienced the alleged problem with their vehicles.[34] The Ninth Circuit reversed, however, holding that "proof of the manifestation of a defect is not a prerequisite to class

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28 *Feinstein*, 535 F. Supp. at 598-99.

29 *Id.* at 601-02.

30 *Id.* at 603 (footnote omitted).

31 *Id.*

32 *Id.* A number of other federal decisions are in accord. *See, e.g.*, *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) ("Oshana's claims were not typical of the putative class" because "[m]embership . . . required only the purchase of a fountain Diet Coke" and "[s]uch a class could include millions who were not deceived and thus have no grievance under the ICFA."); *Trunzo v. Citi Mortg.*, No. 2:11-cv-01124, 2014 U.S. Dist. LEXIS 43056, at *40-42, *45 (W.D. Pa. Mar. 31, 2014) (striking class allegations in consumer-fraud case where plaintiffs did not suffer the complained-of injury and, thus, their claim "could not be typical of the purported class claims for the purpose of class-wide adjudication under Rule 23(a)(3)"); *Cunningham Charter Corp. v. Learjet, Inc.*, 258 F.R.D. 320, 327-29 (S.D. Ill. 2009) (denying certification of warranty claims because the proposed class definition included product owners who never made a warranty claim during the warranty period, much less had a claim denied, and therefore had not suffered any injury), *rev'd on other grounds*, 592 F.3d 805 (7th Cir. 2010).

33 617 F.3d at 1170.

34 *Id.* at 1171.

certification."[35] According to the Ninth Circuit, the issue of manifestation concerned the merits of the underlying claims, which could not be considered at the certification stage.

- *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466 (C.D. Cal. 2012), *cert. denied*, 134 S. Ct. 1273 (2014). The court certified a class of purchasers of front-load washing machines with an allegedly defective design resulting in "a propensity to develop biofilm, mold, mildew, bacteria and foul odors."[36] The court held that plaintiffs "need not prove that the undesirable condition . . . ***actually*** developed in every product," because the harm at issue was defendant's failure to disclose the washing machine's "***propensity*** to develop" bacteria and mold.[37] In other words, it was irrelevant for class-certification purposes whether class members' washing machines actually developed the problem that brought about the lawsuit.

- *Bruno v. Quten Research Institute, LLC*, 280 F.R.D. 524 (C.D. Cal. 2011). Plaintiff initiated a putative class action arising out of misrepresentations defendants supposedly made concerning the absorption rate of their liquid dietary supplement.[38] Defendants argued that the case should not proceed because neither the named plaintiff nor unnamed class members had suffered a concrete injury.[39] According to defendants, their product was more expensive than competitors' products because of its "***form***, not the representation that Defendants' product is six times more effective than its competitors."[40] The court certified the class, holding that plaintiff had suffered a cognizable injury because of the premium she paid for the product, especially where "Plaintiff's allegations of a premium are supported by her expert."[41] The court reached the same conclusion with respect to unnamed class members. In so doing, the court determined that the central issue in the case was whether defendants' alleged misrepresentations were objectively misleading, and it refused to consider the class members' actual experience with the product.

- *In re Zurn Pex Plumbing Products Liability Litigation*, 644 F.3d 604 (8th Cir. 2011). Minnesota homeowners brought a class action alleging that the brass fittings used in defendant's plumbing system were inherently defective.[42] The district court certified warranty and negligence claims for class treatment. The company appealed, arguing in part that those class members whose pipes had not yet leaked – the "dry plaintiffs"

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35 *Id.* at 1173.

36 289 F.R.D. at 471.

37 *Id.* at 479.

38 280 F.R.D. at 528.

39 *Id.* at 530.

40 *Id.* at 530 n.2.

41 *Id.*

42 644 F.3d at 608.

– had suffered no injury.[43] The Eighth Circuit affirmed the district court's finding that the dry plaintiffs had alleged a "current harm" because they claimed the brass fittings contained a defect upon installation in breach of Minnesota warranty law.[44] Because the plaintiffs alleged that the brass fittings exhibited a defect at the moment they were installed, the court concluded that they had sufficiently alleged injury.

- *Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2014 WL 4652283 (N.D. Cal. Sept. 18, 2014). Plaintiffs sought to certify a class of California purchasers of Jamba Juice Smoothie Kit products that were allegedly mislabeled as "All Natural."[45] The plaintiffs did not allege that they experienced any problems with the juice. Indeed, the named plaintiffs sometimes consumed other products containing the same allegedly unnatural ingredients. And when one of the named plaintiffs was asked during a deposition if she thought she was harmed from purchasing and consuming the smoothie kit, she answered "no."[46] The court nonetheless granted the motion, certifying the class for purposes of determining liability.[47]

- *Banks v. Nissan North America, Inc.*, 301 F.R.D. 327 (N.D. Cal. 2013). Plaintiffs brought this product-liability class action as a result of problems they allegedly experienced with the brake systems in their Nissan vehicles.[48] The court relied on *Wolin*, 617 F.3d 1168, in finding that the requirements of class certification were satisfied, even though the named plaintiffs' experienced "isolated" problems that were not common to the class members.[49] Quoting *Wolin*, the court held that overbreadth did not serve as an obstacle to class certification because "'proof of the manifestation of a defect is not a prerequisite to class certification.'"[50]

- *Zeisel v. Diamond Foods, Inc.*, No. C 10-01192 JSW, 2011 U.S. Dist. LEXIS 60608 (N.D. Cal. June 7, 2011). Plaintiff brought a putative class action on behalf of walnut purchasers who alleged that certain walnut products were deceptively marketed as being good for the heart.[51] The suit was brought even though the named plaintiff continued to purchase the walnuts after filing suit and testified that he would continue to purchase the walnuts, belying any real claim of injury.[52] The court nonetheless found that the plaintiff had suffered an economic injury and certified the class. The

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43 *Id.* at 616.

44 *Id.* at 616-17.

45 2014 WL 4652283, at *1.

46 *Id.* at *7.

47 *Id.* at *11.

48 301 F.R.D. at 329-30.

49 *Id.* at 334.

50 *Id.* at 335 (quoting *Wolin*, 617 F.3d at 1173).

51 2011 U.S. Dist. LEXIS 60608, at *1.

52 *Id.* at *10-12.

parties subsequently entered into a $3.45 million class action settlement that was approved in 2012.

- *Thurston v. Bear Naked, Inc.*, No. 11-CV-2985-H (BGS), 2013 WL 5664985 (S.D. Cal. July 30, 2013). Plaintiffs brought this class action on behalf of consumers who had purchased a Bear Naked food product, alleging that defendants had used deceptive and misleading labeling and advertisements.[53] Defendants argued that the class must be "defined in such a way that anyone within it would have standing," and that the definition currently included members who were unaffected by – or unexposed to – the alleged misrepresentations, and thus suffered no injury.[54] The court held that in the Ninth Circuit, standing under California's Unfair Competition Law is satisfied if at least one named plaintiff meets the requirements of standing, injury and causation.[55] The court found that this requirement had been satisfied given that the named plaintiffs claimed they purchased the Bear Naked products at least in part because of representations that the products were natural, and that they would have paid less for the products or purchased other products if they knew the representations were false.[56]

- *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). Purchasers of defendant's front-loading washing machine, the Duet, alleged that the washing machine's design led to the growth of mold and mildew in the machine.[57] Defendant argued that the class was overbroad, as the definition included Duet owners who had not experienced a mold problem and other purchasers who were pleased with their Duets, unlike the named plaintiffs.[58] Indeed, a majority of the class members did not have a mold problem with their washing machines.[59] The Sixth Circuit issued two decisions in the case, both times holding that all class members, including those who had not experienced a mold problem, suffered economic damages by paying an inflated price for their washing machines. The court went on to hold that "[i]f Whirlpool can prove that most class members have not experienced a mold problem . . . then [it] should welcome class certification."[60]

- *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). Plaintiffs, purchasers of washing machines

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53 2013 WL 5664985, at *1.

54 *Id.* at *3 (internal quotation marks and citation omitted).

55 *Id.*

56 *Id.*

57 722 F.3d at 844.

58 *Id.* at 849.

59 *Id.*

60 *Id.* at 857.

sold by Sears, brought this class action alleging defects in the machines that caused mold growth and sudden stoppages.[61] The Seventh Circuit held that defendant's argument that "most members of the plaintiff class did not experience a mold problem" was not an argument against certification, but rather an argument in favor of certifying the class and then "entering a judgment that will largely exonerate Sears."[62] In other words, whether large swaths of the absent class members experienced any problems with their allegedly defective washing machines was irrelevant to class certification.

- *Forcellati v. Hyland's, Inc.*, No. CV 12-1983-GHK (MRWx), 2014 WL 1410264 (C.D. Cal. Apr. 9, 2014). Plaintiffs initiated a putative nationwide consumer-fraud and warranty class action, alleging that the defendants' homeopathic cold and flu products were defective and deceptively marketed.[63] The defendants argued that the products "worked for some individual class members" and that a number of class members were actually satisfied with the products.[64] According to the court, these arguments did not defeat class certification because they concerned the merits of the underlying claims.

- *In re IKO Roofing Shingle Products Liability Litigation*, 757 F.3d 599 (7th Cir. 2014). Purchasers of organic asphalt roofing shingles brought this class action alleging that defendant falsely told customers that the shingles met industry standards.[65] Plaintiffs argued two theories of damages: (1) that every purchaser of a tile is injured by delivery of a tile that does not meet quality standards, regardless of actual injury or failure of the product; and (2) purchasers whose tiles actually failed are entitled to recover actual damages.[66] The district court denied the motion for class certification, and the Seventh Circuit reversed. The Seventh Circuit ruled that it did not matter that certain class members' roofing shingles did not manifest the alleged defect.[67]

- *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014). Plaintiffs asserted various claims arising out of allegedly defective windows that caused leaking.[68] The Seventh Circuit recognized that many members of the class experienced no problems with their windows, raising individualized issues with respect to causation and injury. The Seventh Circuit nonetheless ruled that certification was proper, even though the product defect had not yet manifested for many members of the class. The parties

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61 702 F.3d at 360-61.

62 *Id.* at 362.

63 2014 WL 1410264, at *1-2.

64 *Id.* at *12 (internal quotation marks and citation omitted).

65 757 F.3d at 599-600.

66 *Id.* at 603.

67 *Id.*

68 753 F.3d at 719.

> then entered into a settlement that the Seventh Circuit recently vacated as being "inequitable – even scandalous."[69] Even though 225,000 notices had been sent to class members, less than 1,300 claims had been filed before the district court approved the settlement. Those claims sought less than $1.5 million, "a long way from the $90 million that the district judge thought the class members likely to receive were the suit to be litigated."[70] One obvious reason for the low claims rate – and the windfall reaped by the plaintiffs' lawyers – was that the class action previously endorsed by the Seventh Circuit included large numbers of consumers who were satisfied with the product at issue and therefore had zero motivation to obtain compensation.

Overbroad, no-injury class actions have also seeped into the antitrust arena, where courts are certifying classes even though the absent class members lack any cognizable antitrust injury. A prime example of this is the price-fixing context, in which a number of federal courts have presumed classwide injury in the face of evidence showing that numerous class members suffered no injury. For example, the plaintiffs in *In re Urethane Antitrust Litigation*, industrial purchasers of polyurethane chemicals, asserted class claims under federal antitrust laws, alleging that Dow Chemical conspired with other polyurethane manufacturers to fix prices by issuing coordinated price increase announcements.[71] Plaintiffs and their expert contended that these announcements artificially inflated the baseline price for all market participants, even though the undisputed evidence demonstrated that a great number of absent class members avoided these price increases by negotiations or by switching to substitute products.[72] The Tenth Circuit held that class certification was proper by presuming classwide injury based on the theory that the conspiracy artificially inflated the baseline for price negotiations.[73] Relying on that presumption, the Court of Appeals concluded that injury was a common issue that could be tried on a classwide basis.[74] In so doing, the Tenth Circuit deepened a division between the federal courts on this issue, joining the Third Circuit and some district courts that have improperly presumed classwide injury in price-fixing cases where the evidence reveals that numerous class members were not injured.[75]

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[69] *Id.* at 721.

[70] *Id.* at 726.

[71] *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014), *petition for cert. filed*, 83 U.S.L.W. 3725 (U.S. Mar. 9, 2015) (No. 14-1091).

[72] *Id.* at 1254-55.

[73] *Id.*

[74] *Id.*

[75] *See, e.g.*, *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 151-52 (3d Cir. 2002) (applying presumption of classwide impact "[e]ven if the variation in price dynamics among regions or marketing areas were such that in certain areas the free market price would be no lower than the conspiratorially affected price") (internal quotation marks and citation omitted); *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 409-10 (S.D. Ohio 2007) (rejecting argument that "undisputed facts preclude [p]laintiffs from proving impact on every class member through common proof" because "[w]here, as here, [p]laintiffs have alleged a conspiracy to fix prices and allocate markets, courts have presumed class-wide impact").

Overbreadth was also an issue in the *Nexium* litigation, in which the plaintiffs alleged that AstraZeneca improperly paid three generic manufacturers to delay entry into the market of generic equivalents to Nexium, the manufacturer's heartburn drug. In opposing class certification, the defendants argued that the class was overbroad because it failed to account for "brand loyalists" – in essence, patients who refuse to take generic drugs and therefore could not have been injured. The district court rejected this argument, certifying a class, and the U.S. Court of Appeals for the First Circuit affirmed.[76] In its ruling, the Court of Appeals acknowledged that "a proper mechanism for exclusion of brand-loyalist consumers has not yet been proposed," but believed that absent class members could "establish injury through testimony by the consumer that, given the choice, he or she would have purchased the generic" and that such testimony could be provided "in the form of an affidavit or declaration."[77] In a strongly worded dissent, Judge William Kayatta expressed concern that the district court and the majority had improperly "kicked the can down the road" by assuming that it would be possible later in the litigation to determine who was injured and who was not.[78] Judge Kayatta also noted that class member affidavits would not be a proper way to establish injury because the defendant would have no feasible means of refuting them.[79]

Overbroad, no-injury class actions raise a number of serious concerns. For starters, many of these cases are based on the mistaken premise that under Rule 23(c)(4) – which governs issues classes – the court can get around the fact that many class members are not injured by certifying the question of liability as long as common questions predominate as to that issue alone, and leaving damages questions for another day. That was the case in *Butler v. Sears, Roebuck & Co.* and *Glazer v. Whirlpool Corp.*, both of which are summarized above. However, issues classes are inherently unfair to defendants because it is much easier for plaintiffs to secure a classwide verdict when the jury does not hear the actual facts of any individual plaintiff's claims – for example, in the washing-machine cases, one significant defense is that consumer misuse can cause the odor problems that form the core of the plaintiffs' complaints.[80] This approach also contravenes the Seventh Amendment, which bars a second jury from considering issues already decided by a prior jury in the same case. If the issues of injury and damages are left for later determination in individual proceedings, there has to be some way to instruct the juries in those subsequent proceedings not to redecide any issue decided by the first "liability" jury – a difficult task given the overlapping nature of the questions whether a product is defective and whether it injured the class member. To use the washing machine cases again as an example, even if there were a plaintiff verdict in the liability phase, a second jury might well question whether the mere

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[76] *In re Nexium Antitrust Litig.*, Nos. 14-1521 & 14-1522, 2015 WL 265548 (1st Cir. Jan. 21, 2015).

[77] *Id.* at *7.

[78] *Id.* at *18 (Kayatta, J., dissenting).

[79] *Id.* at *19.

[80] *See, e.g.*, *In re Paxil Litig.*, 212 F.R.D. 539, 547 (C.D. Cal. 2003) (refusing to certify class to resolve the purportedly "common" issue of general causation because such a trial would unfairly rob the defendant of the ability to present individualized "evidence rebutting the existence or cause of" the plaintiffs' alleged illnesses); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 165 (2d Cir. 1987) (rejecting issues class that "would have allowed generic causation to be determined without regard to those characteristics and the individual's exposure" as unfair and inefficient).

propensity to develop odor is really a "defect" when the class member before it has never had a problem with his machine. In short, as one court explained, "the risk that a second jury would have to reconsider the liability issues decided by the first jury is too substantial to certify [an] issues class."[81]

Another problem with the issues-class approach embraced by the Sixth and Seventh Circuits is that it sanctions the use of a dubious procedure that no one actually wants to litigate. For plaintiffs, the promise of the class action device is significantly compromised because victory in the common phase does not generate any cash for their pockets; damages, if any, would only be awarded in follow-on proceedings, which would potentially have to be litigated on an individual basis, and often for small sums of money that would never cover the costs of trying the case. Defendants likewise will often prefer to settle such matters because doing so is substantially more cost effective than litigating a common phase and countless follow-on trials. These problems are magnified in cases, like the washing machine cases, in which the claimed defect has manifested for only a small number of class members because few putative class members would have claims that could actually qualify for compensation. Only a few recent decisions have recognized these problems. As one court put it, "allowing myriad individual damages claims to go forward [after a class trial on liability] hardly seems like a reasonable or efficient alternative, particularly in a case" with a low ceiling on each class member's potential damages.[82] Most courts, however, have not even attempted to address this concern.

A surprising development in the area of issues classes was Whirlpool's decision to eschew settlement and go to trial in the *Glazer* case, which resulted in a rare defense verdict. While some may argue that Whirlpool's victory vindicates the view that defendants can win issues trials, Whirlpool should not have had to take a litigation risk that many companies cannot afford simply because class certification was improvidently granted. It remains to be seen whether Whirlpool's victory will curb plaintiffs' counsel's interest in issues classes.

Beyond these problems, overbroad class actions also undermine the proper administration of justice and put a strain on our economy. Unlike Whirlpool, most defendants opt for settlement following class certification, regardless of the merits of the underlying claims. Indeed, it is well known that "[f]ollowing certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . ."[83] As the Supreme Court has recognized, "even a small chance of a devastating loss" inherent in most decisions to certify a class produces an "in terrorem" effect that often forces settlement independent of the merits of a case.[84] In addition to existing

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81 *In re ConAgra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 698-99 (N.D. Ga. 2008).

82 *Rahman v. Mott's LLP*, No. 13-cv-03482-SI, 2014 WL 6815779, at *9 (N.D. Cal. Dec. 3, 2014).

83 Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission's Bureau of Competition).

84 *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("[C]lass certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when *(cont'd)*

pressures to settle substantively meritless claims, defendants are increasingly facing settlement pressures from wildly overbroad cases – in which only a fraction of class members are even conceivably affected by the alleged misconduct giving rise to the litigation. Classwide settlements in such cases indisputably result in overcompensation by sending free money to class members who would never be able to recover (or even think to bring suit) individually against the defendant.[85] In essence, overbroad class actions are nothing more than a mechanism for obtaining a windfall for uninjured class members and, more often, the attorneys who claim to represent their interests.

In reality, however, overcompensation is as much a problem for consumers as it is for business. As Judge Minor Wisdom once explained, damages paid in litigation to those consumers who are actually injured "are presumably incorporated into the price of the product and spread among" all purchasers.[86] But when compensation is potentially available to all consumers – injured and uninjured alike – manufacturers will act to include those costs in the price as well.[87] The result is that, "instead of spreading a concentrated loss over a large group, each [consumer] would cover his own [potential recovery] (plus the costs of litigation) by paying a higher price . . . in the first instance."[88] Echoing this same logic, Judge Easterbrook explained in a footnote in the Seventh Circuit's decision in *Bridgestone/Firestone* that allowing even modest compensation for uninjured class members could easily double a defendant's total liability for a product that rarely malfunctions and injures anyone, a result that "overcompensates buyers and leads to excess precautions" by manufacturers.[89] It is precisely this sort of economic distortion – which Judge Wisdom saw "little reason to adopt" – that the courts described above have encouraged by endorsing overbroad class actions.

II. THE FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015 WOULD ELIMINATE THESE MERITLESS CLASS ACTIONS

The growing embrace of no-injury consumer class actions among certain federal courts raises serious legal and public-policy concerns. To reverse this trend, Congress should enact the Fairness in Class Action Litigation Act of 2015. Under that legislation, "[n]o Federal court shall certify any proposed class unless the party seeking to maintain a class action affirmatively

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the probability of an adverse judgment is low.") (citation omitted).

85 *See Supreme Laundry List*, Wall St. J., Oct. 9, 2012 ("Without the governor of common injury required by *Wal-Mart*, product liability suits and consumer class actions become the tool of plaintiffs['] lawyers who gin up massive claims in the hope that companies will settle").

86 *Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991).

87 *See id.*

88 *Id.*; *see also, e.g.*, Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004) ("Class actions have had an economic impact as well. . . . Businesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices.") (internal quotation marks and citation omitted).

89 288 F.3d at 1017 n.1.

demonstrates through admissible evidentiary proof that each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives."[90]

The legislation imposes a simple requirement: class actions are only allowed to proceed in federal court if all of the class members claim to have suffered the same type of injury as the named plaintiff. Thus, for example, if the named plaintiff brings a lawsuit claiming that his vehicle malfunctioned in a certain way, he or she cannot represent a class that includes everyone who purchased the same model vehicle regardless of whether or not it malfunctioned. The legislation also requires the named plaintiff to come forward with "admissible evidentiary proof" to satisfy this requirement – i.e., expert and fact evidence. To obtain this evidence, plaintiffs would have at their disposal all of the usual discovery tools that the Federal Rules already provide. For example, to ascertain the extent of the alleged problem (if any), the plaintiff could propound discovery on the defendant seeking information 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.[91] Expert testimony would then be required to show that there is a uniform defect common across the class. Similarly, in a case involving allegedly deceptive labeling, the plaintiff would have to establish that all class members were exposed to the alleged misrepresentations and could do so by showing that all of the products in question contained the same supposed misstatement on the label – also a fact that could be gleaned during discovery. In any case, the plaintiff would remain free to revise the proposed class definition to attempt to conform it to whatever is learned during discovery, narrowing it as needed to ensure that any class is limited to individuals who sustained the same type and extent of injury as the plaintiff.

Adoption of the proposed legislation would not mark a radical change in federal class action law. After all, as already explained, federal and state courts had widely rejected these types of cases until recent years. In effect, FICALA would do no more than enforce the existing Rule 23 requirement of typicality – i.e., that the claims of the named class representative be representative of the claims of the absent class members. As previously explained, several federal courts have already interpreted Federal Rule of Civil Procedure 23's typicality requirement as precluding overbroad class actions; FICALA would ensure that the same rule would be applied consistently by all federal courts.

FICALA is also consistent with the Supreme Court's seminal commonality ruling in *Wal-Mart Stores, Inc. v. Dukes*.[92] There, the Supreme Court added heft to the long-glossed-over

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[90] Fairness in Class Action Litigation Act of 2015, H.R. 1927, 114th Cong. § 2 (2015).

[91] *Cf. In re Canon Cameras Litig.*, 237 F.R.D. 357, 359 (S.D.N.Y. 2006) (denying motion for class certification because plaintiffs "have not shown that more than a tiny fraction of the cameras in issue malfunctioned *for any reason*. Specifically, in response to defendants' showing that fewer than two-tenths of one percent of the cameras here in issue have been reported as having even arguably malfunctioned, plaintiffs have been unable to adduce any evidence to the contrary[.]").

[92] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

requirement of commonality under Rule 23(a) by holding that the key inquiry is not whether a question is "common" to the class, but rather whether the classwide proceeding will "'generate common *answers* apt to drive the resolution of the litigation.'"[93] While *Dukes* was primarily a decision about commonality, it noted that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."[94] The proposed legislation would merely effectuate what the Supreme Court implicitly recognized in *Dukes*. After all, the claims of a named plaintiff whose product actually malfunctioned as a result of the defendant's alleged conduct can hardly be "so interrelated [with those of the absent class members whose products performed satisfactorily] that the interests of the class members will be fairly and adequately protected in their absence."[95]

Because FICALA merely clarifies what the Supreme Court and certain other federal courts have already explicitly and implicitly recognized, the legislation would not signal a sea change in federal class action law. Rather, it would simply codify the requirement of typicality, forcing all federal courts to take this Rule 23 prerequisite seriously and delivering important benefits to the judicial system, our economy and American consumers.

I appreciate the Subcommittee allowing me to testify today, and I look forward to answering any questions that the Members of the Subcommittee may have.

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93 *Id.* at 2551 (citation omitted).

94 *Id.* at 2550-51 & n.5 (internal quotation marks and citation omitted).

95 *Id.* (internal quotation marks and citation omitted).

Mr. DESANTIS. I thank the gentleman.

I now recognize our second witness, Mr. Behrens. Please turn on your microphone before you speak, and you are recognized for 5 minutes.

TESTIMONY OF MARK BEHRENS, PARTNER, SHOOK, HARDY & BACON, L.L.P., WASHINGTON, DC

Mr. BEHRENS. Thank you, Mr. Chairman, Ranking Member Conyers, Ranking Member Cohen, and other Members of the Subcommittee. I am testifying today on behalf of the IADC, the International Association of Defense Counsel, which is a global organization of lawyers who practice in the area of civil defense. IADC supports fair compensation for genuine injuries. This bill would support that mission. It is about providing fairness to people with genuine injuries and not those who are not injured.

IADC is concerned about overly broad, no injury class actions. As Mr. Beisner talked about, these are cases where the named plaintiff has suffered a concrete harm, but by and large the countless others that that person seeks to represent in the class have suffered no actual injury whatsoever. This is not a case of widespread product defect. These are cases where most of the people are perfectly happy with the product they have and it has not malfunctioned. Yet what we have is somebody who is very atypical, who has a concrete injury that is trying to bring a lawsuit on behalf of everybody else who has not.

These types of lawsuits undercompensate people who have genuine harm, and at the same time they overcompensate people who have not been harmed at all and may never be. They raise prices for all consumers and put a strain on our economy. In my written testimony I mention several other problems, and I will go into an example of exactly how this could happen.

In washing machine cases, now there have been class actions filed against washing machine manufacturers that make front loading washing machines. We all probably have one in our home. These lawsuits are so large in scope, they would pull in more than 10 million American consumers. There was a case that went forward in Ohio in a bellwether case under the 6th Circuit where the Federal court in Cleveland was asked to certify a class, and did, that involved over 200,000 Ohio residents.

The two named plaintiffs both alleged that they had smelly washers, that they had washers that for them created an experience where their clothes smelled moldy. Most of the other people in the class never had any problems. The Consumer Union reports that only 1 percent of washer owners complained that they ever had this type of problem after 4 years of using their product. So here we have two named plaintiffs who are atypical of virtually everybody else that is in the class.

The case was certified and affirmed by the 6th Circuit. It went to the United States Supreme Court, came back down, was re-certified again. Went to trial in Cleveland. The jury deliberated 2 hours and came back and found that the products were not defective. The general counsel or head of litigation at Whirlpool at the time said, "Nobody has been injured, and only 1 to 2 percent of the

people have any complaints. This is lawyer driven, not customer driven, litigation."

Yet some might say that this is a victory, that Whirlpool was able to vindicate itself. Well, it spent 9 years in litigation and millions of dollars to defend a lawsuit where most of the people in the class were perfectly satisfied with the product, and the incidence of malfunction was very remote. So who ends up paying for that? The people that bought the very washers that are in the class action end up paying more for their product for something that they were already satisfied with to begin with. These are, as he said, lawyer-driven class actions.

The Fairness in Class Action Litigation Act is a modest and targeted reform that would deal with this situation. It is not going to eviscerate class actions as has been alleged. It is simply going to promote the requirement that is in Rule 23 right now that the named class representative is typical of the members of the class. It would better align the interest of the named representative and the people that that person purports to represent. That is all the legislation does, requires them to have the same type and extent of injury.

There is precedent in Congress for enacting class action reform. You all had a hearing about 2 months ago that looked at the success of the Class Action Fairness Act. That was an example back in 2005 where the Committee heard testimony of certain abuses in the class action system and focused on just dealing with those abuses, coupon settlements and having some State courts dictate nationwide policy.

And you all fixed that, but the law has evolved over the last decade. This is the problem we face today, that American businesses face, and it is one that the Committee should change. The DRI president was here also I know and testified about data and his poll that showed about 75 percent of Americans believe that if you are going to be brought into a class action lawsuit, you should have a genuine injury and not simply a potential that an injury could occur.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Behrens follows:]

TESTIMONY OF MARK BEHRENS, ESQ.
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BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

ON BEHALF OF THE
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL (IADC)

IN SUPPORT OF H.R. 1927,
THE "FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015"

APRIL 29, 2015

TESTIMONY OF MARK A. BEHRENS
SHOOK, HARDY & BACON L.L.P.
ON BEHALF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, thank you for inviting me to testify on behalf of the International Association of Defense Counsel (IADC) in support of H.R. 1927, the "Fairness in Class Action Litigation Act of 2015."

The IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

My testimony focuses on the emergence of overly broad, "no injury" class actions.[1] These are cases in which a named plaintiff with a concrete injury brings a lawsuit seeking to represent a class that includes countless others that have suffered no genuine injury at all. Typically, the cases involve a product that has malfunctioned for the named plaintiff and that has the potential to malfunction for others, but has not actually caused any problems for most of the class members. The theory is that the plaintiffs all paid a premium in light of the product's potential to malfunction or the product has diminished in value as a result of the alleged defect. "No injury" class actions can also arise in other contexts, such as employment, antitrust, privacy/data breach, and labeling and advertising cases, among others.[2]

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1 My partners Victor Schwartz and Cary Silverman have referred to "no injury" class actions as a form of "empty suit" litigation. They thoroughly discuss the subject in a forthcoming *Brooklyn Law Review* article. *See* Victor E. Schwartz & Cary Silverman, *The Rise of "Empty Suit" Litigation*, 80 Brook. L. Rev. – (forthcoming 2015).

2 *See* Edward Sherman, *"No Injury" Plaintiffs and Standing*, 82 Geo. Wash. L. Rev. 834 (2014).

"No injury" class actions game the legal system, incentivize litigation involving claims that are either premature (because no genuine injury has occurred yet) or actually meritless (because it never will), result in higher prices for all consumers, and put a strain on our economy.

The "Fairness in Class Action Litigation Act of 2015" is modest and targeted legislation that deals specifically with these problems. The legislation provides that a federal court may not certify a proposed class unless the party seeking the class action demonstrates through admissible evidentiary proof that "each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives." The named plaintiff's injury must be *typical* of the class, as many courts already interpret Rule 23 to require. There is precedent for federal class action reform and public support for the proposal in the bill.

I. OVERLY BROAD, "NO INJURY" CLASS ACTIONS ARE A PROBLEM

There are many legal and policy problems created by overly broad class actions in which named plaintiffs with concrete injuries represent class members without genuine injuries.

First, these types of cases circumvent Article III and Rule 23. Plaintiffs' theory in these cases is that the named plaintiff and the class members share a common "injury"—e.g., alleged overpayment of the product they purchased. In reality, these cases involve a named plaintiff whose claim is highly *atypical* of the class because the named plaintiff has suffered an *actual* harm while the class members merely have a *speculative* economic harm. Unlike the named plaintiff, whose product has malfunctioned, the class members' products may never malfunction.

Second, "no injury" class actions stray far from the laudable underpinnings of Rule 23. Class actions were developed mainly for civil rights litigants seeking injunctive relief in discrimination cases. Over time the use of the class action spread to other types of litigation. Through the class action, courts are able to resolve in one action many small claims that would not be brought individually because the cost of any particular suit would exceed the possible

benefit to the claimant. There is, however, an ocean of difference between bundling together meritorious small claims to provide relief to those affected and using the class action as a mechanism to pay class members who would never recover if they filed suit individually.

Third, overly broad class actions are unfair because class members that *have* an actual harm may be "forced to sacrifice valid claims in order to preserve the lesser claims that everyone in the class can assert," potentially leading to "substantial under-compensation for consumers who have suffered an actual harm."[3] Such actions are also unfair to defendants because of the "settlement pressure imposed by an artificially enlarged class."[4] Class certification imposes substantial pressure on defendants to settle, typically obviating further proceedings on the merits. Defendants are forced to overcompensate class members with no genuine harm, giving them free money because they would never be able to recover individually against the defendant.

Fourth, class members often see little benefit in these cases. Many of these types of cases are not successful and, when they do produce a settlement, there is usually little interest among class members in participating. As one commentator has explained:

> Billed as "consumer protection" measures, these cases allege causes of action under the auspices of both product liability and consumer fraud. However, these so-called "no-injury" actions are very often nothing more than an attempt by creative plaintiffs' lawyers to cash in on the class action concept—the plaintiffs themselves, if successful, would each be entitled to a relatively minimal amount of money, while their attorneys would collect millions upon millions of dollars in fees.[5]

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3 *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. (Feb. 27, 2015) (statement of the Hon. Bob Goodlatte).

4 *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. (Feb. 27, 2015) (statement of Andrew Pincus, Mayer Brown LLP, on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform).

5 Scott L. Haworth, *Dismissing No-Injury Class Actions*, For The Def., Dec. 2010, at 47.

The Subcommittee recently heard testimony on this issue from Andy Pincus of Mayer Brown LLP on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform.[6] His firm performed an empirical analysis of a neutrally selected sample set of putative consumer and employee class actions filed in or removed to federal court in 2009. They found that class members received *nothing* in two-thirds of the cases sampled and only *paltry* benefits in the rest:

- Just under one-third (31%) of the cases were dismissed on the merits.[7]
- A little more than one-third (35%) were dismissed voluntarily by the plaintiff, meaning "a payout to the individual named plaintiff and the lawyers who brought the suit—even though the class members receive nothing."[8]
- One-third (33%) of the cases were settled on a class basis, but some of those resulted in payment to a charity or injunctive relief with no monetary payment to class members and other settlements "delivered funds to only miniscule percentages of the class: .000006%, .33%, 1.5%, 9.66%, and 12%."[9]

Lastly, overly broad "no injury" class actions create enormous costs on companies, even in the vast majority of cases that are resolved with no settlement or just tiny payments to class members. The legal fees alone can be enormous. These costs are passed on to all consumers and place a strain on the economy.[10]

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6 *See supra* note 4 (statement of Andrew Pincus).

7 *See id.* at 5.

8 *Id.*

9 *Id.* at 6.

10 *See* Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 Chap. L. Rev. 201, 202 (2004) ("Businesses spend millions of dollars each year to defend against the filing and even the threat of frivolous class action lawsuits. Those costs, which could otherwise be used to expand business,

II. EXAMPLE: THE "WASHING MACHINE" CASES

Class actions brought against front-loading washing machine manufacturers illustrate the phenomenon of the overly broad "no injury" class action. In a number of nearly identical class actions against Whirlpool, Bosch, Electrolux, LG, Samsung, and other appliance manufacturers and retailers, plaintiffs seeking to represent more than 10 million consumers alleged that all high-efficiency front-loading clothes washers emit moldy odors due to laundry residue and are therefore defective—even though Consumer's Union annual reliability surveys showed that less than 1% of all washer owners reported any odor issue during the first four years of service.

In one bellwether case, *Glazer v. Whirlpool Corp.*,[11] the Sixth Circuit affirmed a district court's decision to create a liability class consisting of some 200,000 Ohio residents who bought a Whirlpool-brand front loading washer beginning in 2001, leaving damages for innumerable individual trials. The case consisted of two named plaintiffs who experienced mold issues in their washers; few of the class members had experienced any such problems with their washers. The Sixth Circuit theorized that each class member might show an injury as a consequence of paying a "premium price" for the product at retail, "even if the washing machines purchased by some class members have not developed the mold problem"[12]—and never will. In a virtually

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create jobs, and develop new products, instead are being passed on to consumers in the form of higher prices.") (internal quotation marks and citation omitted).

11 *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig. (Glazer v. Whirlpool Corp.)*, 678 F.3d 409 (6th Cir. 2012), *cert. granted, judgment vacated sub nom*, *aff'd*, 722 F.3d 838 (6th Cir. 2013).

12 *Id.* at 420.

identical case from Illinois, *Butler v. Sears, Roebuck and Co.*,[13] the Seventh Circuit "agree[d] with the Sixth Circuit's decision."[14]

The Supreme Court of the United States granted *certiorari* and summarily vacated these rulings and remanded the cases for further consideration. In doing so, the Court appeared to send a message that it expected lower courts to more closely evaluate whether damages claimed in a putative class action fit the alleged harm.[15] On remand, however, both circuit courts reaffirmed their earlier rulings. The Supreme Court denied further review.[16]

Rather than settle, Whirlpool fought on, resulting in a rare class action trial in federal district court. After just two hours of deliberation, the Cleveland jury returned a defense verdict. Whirlpool's chief litigation counsel said, "There was no doubt the jury wasn't buying what they were selling. Nobody's been injured, and only 1 to 2 percent of the owners have any complaints. This is lawyer driven, not customer driven. The evidence showed that customers love these machines."[17]

While Whirlpool received a favorable result at trial, the company had to spend millions of dollars litigating these cases for the past nine years and ultimately vindicating itself at trial. Whirlpool and its tens of thousands of shareholders and employees will never get their money

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13 *See Butler v. Sears, Roebuck & Co.*, 702 F.3d 359 (7th Cir. 2012), *reinstated*, 727 F.3d 796, 802 (7th Cir. 2013).

14 *Id.* at 363.

15 *See* John H. Beisner et al., *From Cable TV to Washing Machines: The Supreme Court Cracks Down on Class Actions*, Bloomberg Law-BNA, May 8, 2014, *available at* http://www.bna.com/from-cable-tv-to-washing-machines-the-supreme-court-cracks-down-on-class-actions/.

16 *See Sears, Roebuck and Co. v. Butler*, 134 S. Ct. 1277 (2014); *Whirlpool Corp. v. Glazer*, 134 S. Ct. 1277 (2014).

17 *See* James F. McCarty, *Federal Jury Rejects Class-Action Lawsuit Brought Against Whirlpool Front-loading Washing Machines*, Cleveland Plain Dealer, Oct. 31, 2014, *available at* http://www.cleveland.com/court-justice/index.ssf/2014/10/federal_jury_rejects_class-act.html.

back. Instead, these litigation costs were likely passed on to the very consumers that were happy with their machines and never had a problem with them.

And the litigation is not over yet. After the verdict, plaintiffs' counsel said, "This is not the end of this fight, it is the end of the beginning," telling *Forbes* he would appeal.[18] Thus, even when defendants win a no-injury class action, they are not done with their expenditures. Also, class action plaintiffs' lawyers can file copycat or tag-along actions on behalf of consumers in each of the fifty states and the District of Columbia. This is a war of attrition on manufacturers aimed at prying pretrial settlements from them.

Not all federal circuits embrace the liberal class certification procedures of the Sixth and Seventh Circuits.[19] The need for uniformity in the law among the circuits provides another reason for Congress to enact "no injury" class action reform legislation.

III. THE FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2015 IS A MODEST BUT EFFECTIVE SOLUTION TO OVERLY BROAD CLASS ACTIONS

As explained, the "Fairness in Class Action Litigation Act of 2015" provides a modest and targeted solution to the problem of overly broad "no injury" class actions. The bill simply requires a party seeking class certification in federal court to prove that "each proposed class member suffered an injury of the same type and extent as the injury of the named class representative or representatives." State court class actions are not affected.

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18 *See* Daniel Fisher, *Whirlpool Wins First Round of 'Smelly Washer' Litigation But More Trials Loom*, Forbes, Oct. 30, 2014, *available at* http://www.forbes.com/sites/danielfisher/2014/10/30/whirlpool-wins-first-round-of-smelly-washer-litigation-but-more-trials-likely/.

19 *See, e.g., Avritt v. Reliastar Life Ins. Co.*, 615 F.3d 1023, 1034 (8th Cir. 2010) ("a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves.").

The legislation certainly does not ban class actions, even those that involve claims that individually might have little value. The bill simply requires that the name plaintiff's injury is typical of the class members the named plaintiff purports to represent.

H.R. 1927 will allow courts and defendants to focus their resources on legitimate cases where genuine injury has occurred and better align the interests of named plaintiffs and class members.

IV. THERE IS FEDERAL PRECEDENT AND PUBLIC SUPPORT FOR REFORM

Congress has acted to rein in other class action abuses when they have arisen. Years ago when reports surfaced about abusive "coupon settlements" and certain magnet state courts setting nationwide policy (sometimes in conflict with the laws of the states where class members resided),[20] Congress enacted the Class Action Fairness Act of 2005 ("CAFA") to fix those problems. CAFA has worked well, as this Subcommittee heard in a recent hearing.[21]

But class action litigation has not remained static over the last decade. Over time the litigation has evolved and new problems have emerged. The rise of overly broad, "no injury" class actions is an example. The Congress of 2015 should fix the problems of today just as the Congress of 2005 enacted CAFA to fix the problem of that era.

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[20] *See* Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Forums Should Decide Multistate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. on Legis. 483 (2000); John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case of It...In State Court*, 25 Harv. J.L. & Pub. Pol'y 143 (2001).

[21] *See 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. (Feb. 27, 2015) (statements of Jessica Miller, Skadden, Arps, Slate, Meagher & Flom LLP; Andrew Pincus, Mayer Brown LLP, on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform; and John Parker Sweeney, President of DRI-The Voice of the Defense Bar).

There is also widespread public support for reform, as DRI President John Parker Sweeney recently told the Subcommittee.[22] According to Mr. Sweeney, a recent DRI National Poll on the Civil Justice System found that 78% of Americans would support a law requiring a person to show that they were actually harmed by a company's products, services, or policies to join a class action, rather than just showing the potential for harm.[23]

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Thank you again for the opportunity to testify before the Subcommittee. I look forward to answering your questions.

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22 *See id.* (statement of John Parker Sweeney).

23 *See id.* at 6.

Mr. DESANTIS. The gentleman's time has expired.

I now recognize our third witness, Ms. Lahav, for 5 minutes.

TESTIMONY OF ALEXANDRA D. LAHAV, JOEL BARLOW PROFESSOR OF LAW, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW, HARTFORD, CT

Ms. LAHAV. Thank you so much for inviting me. It is a real honor to be here. You have asked me to testify about House Bill 1927.

I think this bill is a terrible idea. It will eliminate class actions for legitimate claims and prevent people from asserting their rights and liberties. It will violate federalism principles by usurping States' rights to make their own contract and consumer protection law. It is probably unconstitutional under the 7th Amendment. It is not necessary, and it is wasteful. The rule makers are currently considering changes to Rule 23 in a fair, open, and professional process, and we should allow that process to play out.

I understand that the defense lawyers who are testifying here today are upset about a certain narrow category of class actions alleging State law contract claims. Passing this bill is like cutting off your hand if you have a splinter. This bill would wipe out class actions in civil rights cases seeking injunctive relief, in employment discrimination cases seeking back pay, in cases enforcing important laws that protect competition in our economy, like antitrust laws, and in cases enforcing our liberty and privacy interests which Congress has protected by legislation.

How will the bill do this? It is because of the language. The bill requires that in any class action—any—plaintiffs prove—that means having a full-blown trial at the outset—that they have each suffered the same "type and extent of impact on their body or property." Let us start with same type and extent. In the testimony that I read in preparation for today from Mr. Beisner and Mr. Trask, they said that this language just tracks Rule 23. So if that were true, I do not see the point in passing a law. But the fact is that the plain language reading, the reading that courts are likely to give this bill, would require that each plaintiff allege the same injury, an identical injury.

So let me give you an example since we are all about stories. Let us say that a bank decides to charge a $2 illegal fee every time you use your ATM card. John uses the ATM 5 times. He has a $10 injury. Mary uses the ATM 100 times. She has a $200 injury. They have not suffered an injury of the same extent, right? One guy has got $10, the other one has $200. Well, under this law that case could not be brought as a class action, but nobody in their right mind is going to bring a lawsuit for $10. And that means that the bank gets away with stealing $10 from John. That is not right.

Not only that, but if they did bring a lawsuit somehow, they would have to have a full-blown trial to figure out class certification, what exactly happened to prove what happened to John and Mary. So this creates a lot of needless work for everyone, not just judges, but all the lawyers involved, right? And in any event, if you have a full-blown trial before class certification, you have to ask is a jury going to be impaneled for that trial. And if not, the law violates the 7th Amendment. If the jury is impaneled, then the second jury that is going to decide the merits case is going to have to reex-

amine the finding of the first jury. That also violates the 7th Amendment.

All right. Now, let us turn to the definition of "injury." "Injury" is defined as an alleged impact on body or property. Now, the word "body" does not do any work here because generally you cannot bring a personal injury class action. But there are bigger problems here because the law does not contemplate injunctive class actions, so that would kill, as we heard, the type of class action that everyone agrees is legitimate, class actions like *Brown v. Board of Education*.

Procedural law like this should not abridge people's substantive rights, and that is what this bill would do. The purpose of procedure is not to block cases. The purpose of procedure is to help judges reach the merits of the case. I understand that defendants have raised a lot of criticisms about some consumer laws. I do not agree with their criticisms, but it really does not matter because no matter what you think about the benefit of the bargain type lawsuit, under the Uniform Commercial Code, this law is not going to solve that because these are State lawsuits, and Federal courts cannot make State law. That is the federalism problem with this legislation.

Right now the Judicial Conference is considering Rule 23. They are experts. Procedure, you have to understand, is like chess. Every time you move a piece, you have to think three steps ahead. What are all the other pieces on the board doing? All the possible implications of changing the procedural rules have to be considered, and I do not think they have been in this case. It is better to let the Rules Committee think through all the possible implications and problems and decide whether or not this type of change is a good change before you go ahead and make major, major changes to the class action rule.

Thank you so much for your time.

[The prepared statement of Ms. Lahav follows:]

Testimony of Alexandra D. Lahav
Joel Barlow Professor
University of Connecticut School of Law

Before the Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
United States House of Representatives

Hearing on H.R. 1927: The "Fairness in Class Action Litigation Act of 2015."

Mr. Chairman, Ranking Member Cohen, and Members of the Subcommittee, I am pleased and honored to be testifying here today. Thank you for inviting me.[1]

Introduction

You have asked me to comment on H.R. 1927, a bill proposing to modify class action practice in a substantial way. I believe that the bill would have negative consequences far beyond what we can predict today, but even at this stage it is clear that it would set back the rule of law. H.R. 1927 would effectively eliminate class actions in civil rights cases, including voting rights, employment discrimination and many others. This law is also likely to curtail class actions in important areas such as antitrust, securities fraud, civil RICO, and vast swaths of state consumer protection, antitrust and other laws that protect individuals and businesses small and large.

Why we have class action litigation

The purpose of class actions is to allow people or entities to join together to enforce the law. Many people with small claims or who seek injunctive relief can only hope to enforce the law, and obtain vindication and compensation for the wrongs they have suffered, through the class action. The reason for this is that most people do not have the resources to know the law or file a lawsuit. Sometimes people are appalled to learn that they were wronged when that information is revealed through lawsuits.

There are other ways to enforce the law. For example, administrative agencies can be funded to seek out wrongdoing, but that is an expensive proposition and subject to other criticisms. Since the 1960's, Congress has devolved the power to enforce the law to private actors rather than creating bureaucracies to enforce many laws, especially the civil rights and consumer protection laws. Class actions are a key part of this regime.[2]

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[1] I am the Joel Barlow Professor of Law at the University of Connecticut and an expert on class actions and aggregate litigation. I have been teaching and writing about class actions for over ten years. In addition to my position at UCONN, I have also been a visiting professor at the Columbia and Yale law schools and will be a visiting professor at Harvard Law School this fall. I am the author of a casebook on civil procedure and have written numerous articles on class actions and aggregate litigation. My work has been cited in a number of federal and state court opinions and in prominent treatises, including Wright and Miller's Federal Practice and Procedure, Newberg on Class Actions and the ALI Principles of the Law of Aggregate Litigation.

[2] Why would American legislators consistently choose to enable private litigation to enforce the law – and allow lawyers to get paid for it – when they could create a public agency to do the same thing? One intriguing answer comes from the political scientist Sean Farhang, who studied enforcement regimes that enabled private litigation. Farhang found that the decision to enable private litigation instead of empowering administrative agencies to do the same work is a strategic choice. When it creates private rights of action instead of administrative agencies, Congress takes power out of the hands of the President, who controls administrative agencies, and insulates its decisions from future leaders who might defund agencies. SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010). For a summary of the argument see pp. 16-18, 227-232.

Class actions are brought by citizens, consumers, businesses and even federal judges

Class actions are brought by people who deserve legal protection. In 1994, Denny's settled a series of class action suits against it for $54 million dollars. The lawsuits began when an African-American federal judge and his wife were forced to wait almost an hour to be seated and while white teenagers referred to them using a racial slur I will not repeat here. At another Denny's restaurant, African-American secret service agents were forced to wait to be seated while their white counterparts were seated right away. The plaintiffs alleged that the restaurant's management had been trained to limit the number of black patrons at the restaurant at any one time. The secret service agents and the federal judge in these cases suffered no impact that I can see to their body or property, but their rights were violated. Denny's ultimately agreed to a consent decree and made what appear to have been real changes – without a class action that would not have happened.[3]

Just this month, veterans facing medical or financial hardship brought a class action against the Veterans Administration for delaying their claims, sometimes for years. The Marine Corps veteran bringing the lawsuit to reform the system explained: "While waiting on the VA, my house burned down, and I've had significant medical problems, including a botched VA surgery. It's been hard to make ends meet to get treated for my diabetes and PTSD."[4] A class action may be the only way to force the Veterans Administration to reform its system, which keeps veterans like this one waiting for years on administrative appeal.

Big companies sometimes bring class actions. In 2003, Wal-Mart sued Visa and Mastercard on behalf of thousands of retailers claiming antitrust violations in their imposition of fees every time a consumer used their card. Ultimately, Wal-Mart decided it did not like the settlement in that class action and filed a lawsuit on its own (for $5 billion dollars). Businesses without the resources of Wal-Mart cannot afford to do that; they need the class action if they are going to assert their rights and be made whole.[5]

Mid-size and small businesses bring class actions too. A number of hospital chains recently settled a lawsuit alleging civil RICO violations brought against largest food services provider in the United States.[6] Absent the class action device, they would never have been able to recover what they were due. Small businesses entered into a class action settlement with BP in the aftermath of the Deepwater Horizon oil spill in the Gulf of Mexico. When BP sought to upend that class action and renege on the settlement agreement, claiming that the businesses had not proved their injuries in court, these

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[3] *See* Stephan Labaton, *Denny's Restaurants to Pay 54 Million in Race Bias Suits*, N.Y. Times, May 25, 1994 at A18; Stephen Labaton, *Denny's Gets A Bill for the Side Orders of Bigotry*, N.Y. Times, May 29, 1994, at D4.

[4] *Veterans Clinic Files Nation-Wide Class Action Challenging Delays in VA Benefits Processing*, available at http://www.law.yale.edu/news/19493.htm. The complaint is available at http://www.law.yale.edu/documents/pdf/News_&_Events/Monk_v_McDonald_Mandamus_Petition_FINAL_150406.pdf.

[5] Shelly Banjo, *Wal-Mart Sues Visa Over 'Swipe Fees': Retailer Says Card Network Charging Too Much When Shoppers Use Plastic*, Wall Street Journal, March 27, 2014.

[6] *See* In re U.S. Foodservice Inc. Pricing Litigation, 729 F.3d 108 (2d Cir. 2013). That case settled for $297 million. Maarten Van Tartwijk, *Ahold to Pay $297 Million to Settle Class Action Lawsuit*, Wall Street Journal, May 21, 2014.

businesses objected and the local chapters of the Chamber of Commerce filed a petition opposing certiorari in the Supreme Court.[7]

Workers bring class actions when they have been denied equal pay or suffered discrimination. For example, workers brought a class action against a grocery conglomerate that had three chains: a fine food chain, a supermarket and a Latino themed market. They alleged that the company violated Title VII by paying workers in the Latino-themed market (who were predominantly Latino) less than those working at the other markets (who were predominantly white) even though they performed exactly the same jobs, and that they had written pay scales kept by the company to prove these allegations.[8]

Citizens bring class actions when they are discriminated against based on disability. For years disabled Californians were not able to enjoy Taco Bell because their restaurants were not accessible. Under the Americans with Disabilities Act (ADA), restaurants of a certain size must accommodate disabled consumers, including by making adjustments to their buildings such as providing parking, accessible seating, and the like. Because of the lawsuit, Taco Bell restaurants in California are now accessible to people in wheelchairs. The plaintiff class did not receive any money (in part because money damages class actions are now so difficult to bring), but they made a major impact that benefits all disabled Americans.[9]

Consumers also bring class actions for wrongs that cannot easily fit into the box of bodily or property injury but are still injuries. For example, in a recent case wending its way through the courts on class certification, plaintiffs allege that a company which leased laptops encoded those laptops with spyware that allowed the company to secretly access the computer's camera and take photographs of the users.[10] If the company did this, it would be a violation of the Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2511, in addition to state laws. The family bringing the action found out because the company tried to repossess the laptop and showed them the spyware pictures. How would the rest of the class members know this was happening to them, if not for the publicity of the lawsuit? The victims of a surveillance scheme like this one may not experience a physical injury, but it is a harm to real liberty interests when a stranger electronically spies into your home, potentially even photographing your children without permission.

When Google was collecting data for its Street View feature it sent cars into neighborhoods equipped with antennas to collect Wi-Fi data. In addition to collecting some permissible data, Google also collected all kinds of other things, like people's passwords and personal information that the company was able to obtain from unencrypted networks. Is this legal? The plaintiff class claimed that this data collection without permission violated the Wiretap Act, 18 U.S.C. § 2511. Google argued it did not

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[7] Brief for Amici Curiae Mobile Chamber of Commerce, et al., in Support of Respondents, BP Exploration & Prod. v. Lake Eugenie Land & Dev., No. 14-123, 2014 U.S. Briefs 123 (Oct. 6, 2014), cert. denied, 135 S. Ct. 754 (2014). In that case BP had agreed to a standard of proof from claimants in the class action settlement that it later came to regret.

[8] Estrada v. Bashas', 2014 WL 1319189 (D. Ariz. 2014). The lawyers involved tell me that the company kept written differential pay scales for the Latino-themed and other markets.

[9] The settlement is available here: http://www.tacobellclassaction.com/pdfs/Notice-June-2014.pdf

[10] Byrd v. Aaron's Inc., --- F.3d ---, 2015 WL 1727613 (3d Cir. Apr. 16, 2015).

and filed a motion to dismiss, but Judge Bybee, writing for the Ninth Circuit panel, disagreed and the case will go forward to class certification.[11]

The Google case is a good example of modern class action practice. First, notice how hard it is for plaintiffs to get to class certification. The plaintiff not only survived a motion to dismiss, but that motion went all the way up to the Ninth Circuit on interlocutory appeal and then to the Supreme Court, which denied certiorari.[12] Before any class certification motion was filed, plaintiffs had to show that they had a viable case. These plaintiffs will still have to pass the class certification hurdle, and only if they can get past that stage can they try the case. If Google did something illegal, plaintiffs should have the opportunity to have a court rule that this conduct was illegal, perhaps even issue an injunction stopping Google from doing this again, and if plaintiffs suffered damages, they should be paid. That is what lawsuits are for. Of course we will only find out what Google actually did, and whether it violated the law, if there is a trial. That is how litigation works.

Existing screening mechanisms police class suits and prevent baseless claims

The way a class action works is this: A plaintiff files an action on behalf of herself and similarly situated persons. In most class actions, the first thing she will have to do is overcome a motion to dismiss for failure to state a claim and must allege facts showing that she has a plausible legal claim.[13] In some cases, she will also have to overcome a motion for summary judgment. This is all before her case can be considered for class certification, so getting to class certification is quite difficult. A 2008 study by the Federal Judicial Center, currently the most reliable source for empirical information on class actions, found that only 25% of diversity actions filed as class actions resulted in class certification motions, 9% settled and none went to trial.[14] This means that class actions are already heavily screened by the courts, with baseless cases being dismissed early on.

At the class certification motion, the plaintiff has significant hurdles to overcome under today's class action law. She must show that there was a practice or policy that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[15]

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[11] Joffe v. Google, Inc., 746 F.3d 920 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2877 (2014).
[12] Id.
[13] Fed. R. Civ. P. 12(b)(6); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (interpreting the rule).
[14] Emery G. Lee III and Thomas E. Willging, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* (Federal Judicial Center, November 2008). The authors note "in the typical class settlement case, the plaintiffs generally have to overcome at least one challenge directed at the merits of the case a motion to dismiss or for summary judgment." *Id.* at 10.
[15] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). For forty years Supreme Court has recognized that plaintiffs do not need to prove that each and every class member was injured at class certification but that they will need to prove injury at the remedies stage of the litigation. Amgen Inc. v. Connecticut Ret. Plans & Trust Funds, 133 S. Ct. 1184, 1191 (2013) ("[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case; rather, it is to select the 'metho[d]' best suited to adjudication of the controversy 'fairly and efficiently.'").

The court will look carefully at the class definition and make sure that the plaintiff has rigorously met all the requirements of Rule 23. In money damages classes, the plaintiff will have to show that common issues predominate over individual ones. By implication, class members need not be identical; there can be individual issues that differentiate class members, but the common issues must predominate. Class certification now requires extensive discovery, motion practice and a significant investment of time and energy. In addition, Rule 23(f) provides for interlocutory appeals. All of this means that it is more expensive than ever for plaintiffs to sustain class actions and that lawyers must be careful in the cases they choose.

Even if the plaintiff is able to prevail on the class certification motion, she still must answer the following questions: First, is the policy or practice that affected the class in fact unlawful? If it is, who was injured by that policy? At the class certification stage a court will look to see whether plaintiff *can* prove these things on a class-wide basis using common evidence. At the liability stage, plaintiff will have to prove that the defendant's policy or practice was illegal. At the remedial stage of adjudication, she will have to prove who was injured and deserves compensation and to what extent or what type of injunctive relief is appropriate to cure the violation. The procedural mechanism for answering these questions is a trial on the merits.

In sum, procedural screening tools already exist and defendants use them to prevent class actions from proceeding when there is no basis in law or fact for the claims alleged.

Impact of H.R. 1927 on existing class action practice

H.R. 1927 requires that, in addition to the barriers plaintiffs already face, before a class action can be certified the plaintiff must prove with admissible evidence that she has suffered an injury (defined as "alleged impact" to the "body or property" of a person) "of the same type and extent" as every one of the rest of the class members. This proposal creates several significant problems.

First, it is inefficient and likely unconstitutional in some cases. The proposed changes in H.R. 1927, sec. 2(a), would require a full blown trial at the outset of every class action. In most cases, in order to prove injury the plaintiff will also have to prove liability as the two inquiries are often intertwined. This means that judge will have to grant plaintiff access to full discovery at the outset of the litigation to prove her case, instead of the limited discovery now available in class certification motions. A bench trial on this merits question may violate the Seventh Amendment in cases where the parties are entitled to a jury trial (such as those sounding in consumer or contract law). If the judge decided to conduct a jury trial at the preliminary stage, it would likely violate the reexamination clause of the Seventh Amendment. Because the courts have held that determinations for class purposes are not binding on the merits, the parties would be required to try the merits *again* at the end of the litigation in order to obtain a judgment, wasting both judicial and party resources.[16]

[16] Abbott v. Lockheed Martin Corp., 725 F.3d 803, 810 (7th Cir. 2013), cert. denied, 134 S. Ct. 826 (2013). *See also* Newberg on Class Actions § 7:23 (5th ed.) (citing cases).

Second, the proposed requirement that everyone in the class suffer the same type and extent of injury effectively eliminates the kinds of class actions that are widely agreed to be beneficial. For example, suppose a bank charges an illegal fee of $2 to every customer when he or she withdraws funds with a debit card. During the class period, James engaged in 15 transactions and Sarah engaged in 20. Accordingly, James's loss is $30 and Sarah's is $40. Assuming that the court would interpret the loss of funds as an "impact" on their "property," under this bill the court would still not be permitted to certify this case as a class action because the extent of their losses is different: Sarah has lost $10 more than James and H.R. 1927 requires that the *extent* of their injury be the same. It would be irrational for James and Sarah to pursue an action on their own because the filing fee (even in small claims court) would nearly eclipse their likely recovery and because they are unlikely to know that this fee was illegal, yet the bank has stolen their money. As a result, under this bill the bank will get away with the theft.[17]

Because schemes to defraud often result in minimal damage to individual consumers, a class action is usually the only way for them to get back the money they were cheated out of. Individual consumers do not all suffer the same "extent" of injury when they have been defrauded – different people lose different amounts of money. A requirement that every single class member has to show *the same* injury (and at an early stage of a case) would sound the death knell for consumer fraud litigation and frustrate the purposes of countless existing federal and state laws. The same would be true of discrimination suits in which plaintiffs can prove that they all suffered lost wages, but not exactly the same amount. H.R. 1927 is a direct attack on all money damages actions.

If the proposed "same type and extent" language is interpreted more broadly by the courts, that is, if courts interpret this language to mean that the plaintiffs need not allege the *exact* same harm but rather a harm that can be determined on a class-wide basis (i.e., "similar" harm), then the bill has not changed the procedural standard of Rule 23. In that case all this provision will do is require a non-binding trial on the merits as a precondition to class certification. I do not think that this is a good use of scarce judicial resources.

The proposed changes in H.R. 1927, sec. 2(b), which defines the term injury, would so narrow the definition of what types of cases are available for class treatment as to bar plaintiffs from bringing cases that we can all agree should be brought. For example, many civil rights cases involve the deprivation of rights but no impact to the body or property of the person. This narrow definition of injury will also violate federalism principles by redefining injury in existing state statutes, effectively overruling state law and depriving citizens of the laws their legislatures have passed to protect them. Under this bill, instead of looking to how the state has defined injury in its consumer protection statutes, the federal courts will conduct a trial as to whether the plaintiffs have suffered an injury under a federal statute as a condition precedent to being heard on their state claim.

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[17] For a good example of this type of class action, see Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions* (unpublished manuscript available at http://ssrn.com/abstract=2577775). Fitzpatrick and Gilbert offer some very thoughtful suggestions for improving class action practice. *See also* In re Checking Account Overdraft Litig., MDL No. 2036, 275 F.R.D. 666 (S.D. Fla. 2011) (deceptive bank scheme to maximize overdraft fees affecting poorest segment of customer base); Hubbard v. Midland Credit Mgmt., Inc., 2008 WL 5384219 (S.D. Ind. Dec. 19, 2008) (deceptive debt collection letters).

An alternative interpretation of the bill has been suggested under which if the class alleges no impact on the body or property of the plaintiffs (as the term "injury" is defined in the statute), and that lack of injury is the same across class members, then a class can be certified. This, it is claimed, would address the concern about civil rights cases, although it does not solve the problem presented by conflicts between the applicable state and federal laws. Courts are unlikely to adopt this strained reading, even if it was the intent of the drafters, because it is inconsistent with the plain meaning of the bill's language. The reason is that the bill makes proof of injury a condition precedent to certification and injury is defined in a particular way that excludes certain categories of claims such as civil rights violations. Even in the unlikely event courts adopt this implausible reading of the bill, the results are Orwellian. As long as a class alleges no harm and wants no remedy other than to foreclose other claims, it can proceed as a class. (No plaintiff has ever brought such a case, as far as I know.) But if class members do allege a harm and seek a remedy, they cannot proceed as a class.

This legislation is unnecessary and will not achieve its intended goals

H.R. 1927 is not necessary for four reasons: (1) changes to Rule 23 are currently being contemplated by the Judicial Conference, (2) CAFA is working, (3) judges are good at policing class actions, (4) the bill is shooting at the wrong target because benefit of the bargain class actions are good for the market and for consumers.

Rule 23 is currently actively under review by the Judicial Conference

The Rules Enabling Act of 1934, 28 U.S.C. § 2072, granted the Supreme Court the authority to make the rules of civil procedure and evidence for the federal courts. That process is now handled by the Judicial Conference, the policymaking body of the courts, with approval from the Supreme Court. Congress retains authority to reject, modify or defer a rules change.

Changes to the rule are currently being considered by the Rule 23 Subcommittee of the Advisory Committee on Rules of Civil Procedure and should be proposed by sometime this calendar year. In March, that subcommittee made available a number of "sketches" including preliminary proposals on settlement approval criteria and settlement class certification for consideration.[18] The subcommittee is seeking input from other members of the Advisory Committee and subcommittee members are attending a broad range of class action conferences and meetings to receive input from practitioners, academics, and other class action experts.[19] I recommend allowing this process to run its course.

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[18] www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2015-04.pdf

[19] Id. at 243. Along with several prominent law professors, I proposed to the Rules Committee that parties be required to file an accounting regarding the distribution of funds in class action settlements. You can find this proposal at: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/cv-suggestions-2015/15-CV-H-Lahav.pdf. Many other proposals have been submitted by defense and plaintiffs' lawyers.

CAFA is effective – maybe too effective

To the extent that the purpose of CAFA was to limit class certification and increase judicial oversight over class actions, that legislation is working. The federal courts continue to be generally hostile to class actions, interpreting Rule 23 to set a high bar to class certification that extends beyond the original intent of the rule makers and the genuine concerns about overreaching or poor settlements.[20]

Combined with the availability of an appeal from class certification decisions under Rule 23(f), CAFA has increased the bar for filing class actions, requiring much more development of the facts and the claims at the initial stage of the litigation than was needed in the past. Certifying a class action is harder and more costly than ever. Defendants are empowered to fight class suits up and down the federal courts. We do not know if the law is being adequately enforced as a result of these developments, but we do know that Rule 23 is being rigorously policed.

CAFA has had unintended consequences in that it has undone some state laws aimed at curbing class actions. For example, New York law does not permit class actions in cases where statutory damages are sought.[21] That law cannot apply in class actions in federal courts – which after CAFA is most of them – and as a result it is today easier to bring a class action seeking statutory damages under New York law than it was prior to 2005.[22] In states concerned about this phenomenon, one response has been to write limitations into the specific statutory damages provision.[23] This leads to an important observation: if the complaint is that the substantive law provides an inappropriate remedy, the solution is to change the substantive law rather than to tinker with the procedural regime that applies equally to all cases in order to solve a problem only present in a small subset of those cases.

Judges appropriately police class actions

Judges are already empowered by the procedural law to determine whether there is a real allegation before a case can go forward. There are many examples of judicial good sense; I will provide just one.

A case was brought in the Seventh Circuit against the manufacturer of a children's toy called Aqua Dots. The toy consisted of brightly colored beads that could be fused together with water. The Chinese manufacturer of the toy replaced one ingredient with a far more toxic one. This was a significant problem because "[a]lthough the directions told users to spray the beads with water and stick them together, it was inevitable given the

[20] One provision of CAFA stands out as good policy in promoting beneficial settlements: the provision barring coupon settlements, 28 U.S.C. § 1712, seems from all reports to have been effective at curbing certain kinds of settlements that many, including myself, had criticized.
[21] N.Y. C.P.L.R. 901(b) (McKinney 2006).
[22] Shady Grove Orthopedic Assoc. v. Allstate, 130 S. Ct. 1431 (2010).
[23] Federal legislation does something similar in Truth in Lending Act cases by capping recoveries in class actions brought under that act. *See* 15 U.S.C. §1640(a)(2)(B) (2006).

age of the intended audience and the beads' resemblance to candy ... that some would be eaten. Children who swallowed a large quantity of the beads became sick. At least two fell into comas."[24]

The company issued a recall for the product and gave refunds to those who asked (although they did not create a refund program). Some of those who had not asked for refund brought a class action under federal and state consumer protection laws. The Seventh Circuit Court of Appeals rightly recognized that the plaintiffs had standing – after all, they had suffered a financial injury, as Judge Frank Easterbrook explained: "they paid more for the toys than they would have, had they known of the risks the beads posed to children."[25] But meeting the standing hurdle is not enough; the plaintiffs must also meet all the requirements of the class action rule. In this case, the Court held that the plaintiffs were not adequate because they were trying to get what the company had already provided – a refund and a recall. I do not agree with every part of this decision, but it is evidence that under the existing rule judges can and do use good judgment in cases that should not be brought because they seek no remedy beyond what is already available to consumers.

Benefit of the bargain class actions protect consumers and the market

A question has been raised about whether class actions based on a benefit of the bargain theory – that consumers are injured when they have bought a good of x quality but received a good of x-1 quality – ought to be permitted. (Defendants call this a "no injury class" but in fact there is an injury, as we shall see, because the consumer did not receive the benefit of her bargain.) If H.R. 1927 is trying to eliminate benefit of the bargain classes, the goal of the bill should be reconsidered. Equally important, the bill is too blunt a tool for achieving this policy goal because it would severely limit all kinds of class actions beyond benefit of the bargain cases. For those who think that the longstanding benefit of the bargain doctrine is bad policy, the best solution is to change the substantive law. Right now, judges are applying the substantive law correctly in most cases, and we cannot fault them or the procedural system for that.

It is black letter law that a financial injury is sufficient to grant a plaintiff standing.[26] It is equally well established that buying a product that is not what you contracted for is a form of financial injury. This is the essence of contract: when I pay a price for a good I should get what I bargained for, not something less valuable.

In one case, for example, the defendant sold a motor home represented as capable of towing a family's passenger car, but failed to disclose that in order to tow a car, and to be able to stop safely, an additional purchase of supplemental brakes was necessary. Judge Edith Brown Clement of the Fifth Circuit rejected an argument against class certification that some purchasers had not been injured while attempting to tow a vehicle and that others had not even tried to tow a vehicle. Judge Clement explained that it was immaterial whether any purchaser suffered physical injury or even tried to tow a vehicle,

[24] In re Aqua Dots Products Liab. Litig., 654 F.3d 748, 749-50 (7th Cir. 2011)
[25] In re Aqua Dots Products Liab. Litig., 654 F.3d 748, 751 (7th Cir. 2011).
[26] Blue Shield of Va. v. McCready, 457 U.S. 465 (1982).

because the alleged harm to class members was "not rooted in the alleged defect of the product as such, but in the fact that they did not receive the benefit of their bargain."[27]

In another Fifth Circuit decision, written by Judge Edith Jones, plaintiffs alleged that they had been promised a fiberglass boat made entirely of fiberglass, but were sold a boat actually constructed of 1.5 inches of plywood encased by fiberglass. Judge Jones reversed a dismissal of these claims, and pointed out that benefit of the bargain injury is a long-recognized marketplace harm and certainly does not give rise to a "no-injury" claim: "Along with the "out of pocket" damages formula, which measures the difference between what the plaintiff paid in consideration and what he actually received, 'benefit of the bargain' is a standard method for measuring damages in fraudulent representation and certain contract cases. The benefit of the bargain measure of damages is neither novel nor exotic." Judge Jones further provided an illustrative example to "make[] the common-sense nature of benefit of the bargain damages clear: if a man buys what is represented to him as an 18k gold ring, but later discovers that the ring is merely 10k gold, he is entitled to the difference in value between the 18k ring that he bargained for and the 10k ring that he received."[28]

Similarly, Judge Easterbrook explained in a recent product defect case that "every purchaser of a tile is injured (and in the same amount per tile) by delivery of a tile that does not meet the quality standard represented by the manufacturer. Damages reflect the difference in market price between a tile as represented and a tile that does not satisfy the D225 standard. See Uniform Commercial Code §2-714(2). This remedy could be applied to every member of the class."[29]

As yet another example, 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.

Conclusion

H.R. 1927 would not improve class action practice or cure the problems that exist in that practice. Instead, under this bill companies would have an undeterred ability to lie about their products and services, discriminate against employees, defraud customers and business partners, and commit a host of other violations of the law, subject only to sporadic government enforcement. In that world our marketplace and citizens from all walks of life would be much worse off. To the extent that the bill is aimed at a particular subset of class actions, it is too blunt an instrument for that purpose. Since the Judicial Conference is considering revisions to the class action rule, it would be sensible to wait

[27] McManus v. Fleetwood Enters., 320 F.3d 545, 552 (5th Cir. 2003).
[28] Coghlan v. Wellcraft Marine Corp., 240 F.3d 449, 452, 455 n.4 (5th Cir. 2001).
[29] In re IKO Roofing Shingle Prods. Liab. Litig., 757 F.3d 599, 603 (7th Cir. 2014).

for that process to be completed. Finally, the Supreme Court will consider next year whether Congress, by authorizing a private right of action, may confer Article III standing upon a plaintiff who suffers no concrete and particularized harm.[30] As that issue is closely related to the concerns animating this bill, the grant of certiorari also militates against legislating at this time.

I appreciate the Subcommittee allowing me to testify today and I look forward to answering any questions that the Members of the Subcommittee may have.

[30] Robins v. Spokeo, Inc., 742 F.3d 409 (9th Cir. 2014), cert. granted, Spokeo, Inc. v. Robins, No. 13-1339, 2015 U.S. Lexis 2947 (Apr. 27, 2015).

Mr. DESANTIS. Thank you.

I now recognize our fourth and final witness, Mr. Trask. You are recognized for 5 minutes.

TESTIMONY OF ANDREW TRASK, COUNSEL, McGUIREWOODS LLP, UNITED KINGDOM

Mr. TRASK. Thank you, Mr. Chairman, Ranking Member Cohen, and other Members of the Subcommittee. Thank you for the opportunity to testify today.

I think as you have heard from each of the witnesses, the real concern here that everyone has regardless of how we come out on this bill is how the bill would affect primarily the absent class member. That is, the member of the class who is not in the caption itself and who is not the one who elected to come before the court, but would be bound by the decision that occurs regardless of what happens. It is my considered opinion after litigating a number of these cases and after looking over this bill that the interests of that absent class member are best served by the language of this bill. This bill puts forward a very modest reform that would prevent some of the abuses that currently mean that absent class members do not get the relief that they ought to have.

I would like to talk about one very specific example for the few minutes that I have remaining. You have already heard about the Whirlpool cases, which are an example of what happens if an overbroad, no injury class action goes to trial. The vast majority of class actions, however, do not go to trial. They are settled or they are disposed of on the merits in another way. So let us talk about settlement for a moment and what happens when you have an overbroad, no injury class action that is settled.

The case I would like to refer to you has gone under several names, most commonly *Pella Corp. v. Saltzman* and *EUBank v. Pella Corporation*. It has been up in front of the 7th Circuit several times. The allegation here was against Pella Corporation, which makes casement windows. Those are the windows that go in your house like this, and the allegation in the complaint was that these casements had an inherent defect. Under the right conditions after a certain amount of time it is possible that these could let water into the frame. Water is in the frame is bad because it makes the wood wet, and wet wood warps and does all kinds of other things that we do not like.

A class was certified in this case. In fact, two classes were certified by Judge Zagel of the Northern District of Illinois. And before I go any further, Judge Zagel is a very good, very conscientious jurist, and what he did was he looked at what was being put forward, and he certified nationwide a no injury class where no one had an injury yet, but were all claiming that there might be a potential injury, and it gave them the opportunity to seek declaratory relief. It then certified a second set of subclasses under six sets of State law—a tongue twister if I have ever heard one. And for people who were actually seeking injury, those were the six state laws that would allow them to seek injury.

The defendants appealed the certification. If I had been the defendant there I would have advised my client to do so. The 7th Circuit Court of Appeals, led by Judge Posner in this particular case

who wrote the opinion, affirmed the certifications. Let me also say Judge Posner is a really careful, really conscientious, really very, very respectable jurist. His focus was on the inherent defect that could potentially cause harm. He believed that they could put off the injury inquiry until after there had been the trial on liability itself, and he stressed the importance of how Judge Zagel had certified these six separate state law subclasses for people who had suffered injury, pointing out that he had tried very hard to group like with like.

Now, frankly, this would have passed muster under the bill that is going forward now. The opinion affirming certification occurred in 2010. 4 years later the case settled, and I will go very briefly over what happened there. There was a single unified settlement class. It was no longer these separated classes. There was a claim procedure for injured members. There was a $750 cap or $6,000 cap, depending on the procedure you elected. The ultimate claim rate was 1 and a half percent. That means that out of 225,000 notices that were sent out to class members, 1,276 claims were submitted and paid money, on average about $1,075 per claim. That meant the aggregate value of the settlement was $1.5 million.

Most of the no injury class members received a warranty extension. That is what the settlement claimed. In fact, they received the warranty extension a year beforehand from Pella Corporation, but it was reiterated in the settlement in order to secure a release of any claims that they might have going forward. So that was a full release of claims.

So $1.5 million, warranty extension you have already received, full release of claims. The attorneys received $11 million in fees. The terms were so egregious that four of the named plaintiffs, four of the people in the caption, objected to the settlement. Their counsel removed them from the case, replaced them with more compliant-named plaintiffs, and proceeded to get the settlements certified by Judge Zagel. On appeal, Judge Posner overturned the settlement calling it scandalous.

If this statute had been in place, there would have been a certification of a trial class given Judge Zagel's considered opinion. However, there would not have been the settlement of the settlement class because it mixed together these people who did not have the same injury and should not have received the same relief.

Very briefly, under the proposed amendments that the Judiciary Committee, or not the Judiciary Committee, but the Committee on Civil Rules has put forward, in fact, there would have been almost automatic certification of the settlement class, and that is what we are dealing with on the other end of this. That is the reason why this particular bill is such a good idea in this case.

Thank you very much, and I look forward to your questions.

[The prepared statement of Mr. Trask follows:]

Testimony of Andrew Trask[1]
Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary
United States House of Representatives

The Distorting Effects of No-Injury Class Actions

Good afternoon Chairman Franks, Ranking Member Cohen and Members of the Subcommittee. Thank you for the opportunity to testify on behalf of Lawyers for Civil Justice ("LCJ"). LCJ promotes the interests of the business community with respect to proposed changes to the Federal Rules of Civil Procedure and works proactively to achieve specific rule reforms by galvanizing corporate and defense practitioners and legal scholars to offer consensus proposals to the rule makers.

My testimony today focuses on the Fairness in Class Action Litigation Act of 2015 ("FICALA" or the "Act"), which was introduced in the House earlier this month. In addition to my experience defending numerous class actions, I spend a significant amount of time writing about class actions from a strategic standpoint. My legal writing requires me to look at the tactics used by both plaintiffs and defendants, and how they are affected by rulings in various courts.

While I am here in my capacity as a representative of LCJ, I would like to note that the perspective I take in these remarks is that of someone concerned with promoting the proper use of the class action. Class actions are a device which, used properly, can serve the interests expressed in Rule 1 of the Federal Rules of Civil Procedure: promoting the "just, speedy, and inexpensive determination of every action and proceeding."[2] When specific class actions result in violations of due process, interminable proceedings, or undue expense, they serve no one's interest and detract from the fair administration of civil justice. I also believe—and these remarks reflect—that interpretations of Rule 23 work best when they seek to promote the interests of those parties who have not elected to participate in the class action, but are instead forced into the process by the plaintiff's bar: the defendant and the average absent class member. I have written frequently about how the interests of these two parties often converge.[3]

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[1] Andrew Trask is counsel at McGuireWoods London LLP. He focuses exclusively on class actions, and represents clients in a number of industries, including finance, automobile manufacturing, and telecommunications. He writes extensively on class action litigation and litigation strategy, and is the co-author of THE CLASS ACTION PLAYBOOK (fifth edition forthcoming), BETTING THE COMPANY: COMPLEX NEGOTIATION STRATEGIES IN LAW & BUSINESS, and THE ELEMENTS OF LITIGATION STRATEGY (forthcoming).

[2] Fed. R. Civ. P. 1.

[3] *See, e.g., The Strategic Dilemma of Bad Settlements* - Mirfasihi v Fleet Mortgage, *Class Action Countermeasures,* Aug. 24, 2010 (available at http://www.classactioncountermeasures.com/2010/08/articles/settlement/the-strategic-dilemma-of-bad-settlements-mirfasihi-v-fleet-mortgage/); *When Plaintiffs Sell Out Absent Class Members* - Thatcher v. Hanover Insurance Group, *Class Action Countermeasures,* Nov. 8, 2011 (available at http://www.classactioncountermeasures.com/2011/11/articles/motions-practice/when-plaintiffs-sell-out-absent-class-members-thatcher-v-hanover-insurance-group/); *The Cause Lawyer and the Class Action, Class Action Countermeasures,* Feb. 9, 2012 (available at

From that perspective, looking at the interests of both the defendant and the absent class member, "no-injury" class actions are, quite simply, a very poor idea. The reason for this is that no-injury class actions distort the substantive law underlying the claims, encourage tactics that undermine the interests of the absent class members, and impose often tremendous and undue costs on corporate defendants.

A no-injury class action is a case where the class members (or at least a majority of them) have not actually experienced the harm the complaint alleges. It is a longstanding principle of the American legal system that courts only decide actual cases or controversies, and, as the Seventh Circuit Court of Appeals stated more than a decade ago in reversing a problematic certification of a no-injury class, "No injury, no tort, is an ingredient of every state's law."[4]

Adventuresome plaintiffs' lawyers have developed a number of tactics for obscuring the no-injury nature of these cases in the class action context. They will frame their case in terms of exposure to future injury (which in most cases would require dismissal on ripeness grounds); they will allege an unspecified "diminution in value" or "premium paid" for an allegedly non-defective product; or they will recruit a named plaintiff with an idiosyncratic "actual injury" to represent a class that includes mostly non-injured class members. These classes are sometimes certified for trial purposes, but are almost never litigated to a final judgment. Nonetheless, allowing allegations like these to proceed even to the certification stage impose significant burdens for both the court and the defendant that would be better spent protecting against actual harms.

These no-injury cases are most common in the products liability sphere, but they can also appear in other areas. Environmental class actions seeking "medical monitoring" damages for asymptomatic exposure to an allegedly toxic substance are one example.[5] "Consumer fraud" cases that attack advertisements or communications that were not seen or relied on by significant percentages of the proposed class are yet another example. Similarly, "data breach" class actions tend to follow a different model, asserting "fear of injury" theories: in other words, the plaintiff claims that she fears she may be injured by the revelation of her personal data.[6]

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http://www.classactioncountermeasures.com/2012/02/articles/lawyers/the-cause-lawyer-and-the-class-action/index.html); *Selling Out Absent Class Members* - Dewey v. Volkswagen Aktiengesellschaft, *Class Action Countermeasures,* Jun. 5, 2012 (available at http://www.classactioncountermeasures.com/2012/06/articles/certification-1/selling-out-absent-class-members-dewey-v-volkswagen-aktiengesellschaft/index.html); *How to Get a Settlement Denied* - Tijero v. Aaron Bros., Inc., *Class Action Countermeasures* Jan. 8, 2013 (available at http://www.classactioncountermeasures.com/2013/01/articles/settlement/how-to-get-a-settlement-denied-tijero-v-aaron-bros-inc/); *The Real Problem with Settlement-Only Class Actions, Class Action Countermeasures* Apr. 4, 2013 (available at http://www.classactioncountermeasures.com/2013/04/articles/settlement/the-real-problem-with-settlementonly-class-actions/index.html).

[4] *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1017 (7th Cir. 2002).

[5] *See, e.g., Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468 (5th Cir. 2011).

[6] According to one study, 78% of data-breach class actions involved incidents that had resulted in no financial loss. *See* Sasha Romanosky, et al., *Empirical Analysis of Data Breach Litigation,* Temple University Legal Studies Research Paper No. 2012-30, Apr. 6, 2013, at 12, available

No-injury class actions distort the outcome of litigation.

No-injury class actions distort the outcomes of cases based on state law because they remove an essential element of state law causes of action. If each class member does not have to prove she was actually injured, then she is absolved of demonstrating injury or damages, and may also be absolved of demonstrating causation as well. This contravenes the requirements of due process. To the extent these class actions remove the requirement to either allege or prove these elements, they violate the proscriptions of the Rules Enabling Act.[7] This is not a theoretical problem. As several plaintiffs' attorneys themselves have pointed out: "Numerous courts have certified plaintiff classes even though the plaintiffs have not been able to use common evidence to show harm to all class members."[8]

Allowing these cases to proceed deprives the defendants of due process through the pretrial stage of the class action. During that time, the defendant faces liability for actions for which it may have valid individualized defenses. For example, an idiosyncratic manufacturing defect can suddenly provide the basis for nationwide class liability, despite the plaintiff's lack of evidence that the defect reached any further than herself.

Moreover, the classwide pleadings can mask the fact that a plaintiff does not have an actual theory of the case; something that may become clear only when class certification is finally briefed, particularly in courts where the class certification motion is scheduled prior to summary judgment proceedings, an all to often occurence. In many instances, the plaintiff may have no theory of how an alleged defect actually causes any harm to other class members.[9]

From a policy standpoint, this can lead to a number of bad outcomes. Compensation for no-injury cases will deter legitimate behavior by the defendant. Indeed, a number of scholars have pointed out that private enforcement of regulation is simply not reliable, tends to overdeter legitimate behavior, and can hamstring governmental attempts to effectively regulate public risks.[10]

It can also disrupt the balance regulatory agencies strive to achieve through regulation and enforcement. And it can create windfall income for uninjured claimants, much of which may be absorbed into attorneys' fees, or rolled into

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at http://ssrn.com/abstract=1986461 (last viewed Apr. 26, 2015).

[7] *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 546 (2011) (quoting 28 U.S.C. § 2072(b)); *Corder v. Ford Motor Co.*, No. 3:05-CV-00016, 2012 U.S. Dist. LEXIS 103534, *20 (W.D. Ky. Jul. 24, 2012) (Rules Enabling Act requires "a full litigation of [element] of the cause of action, and for each putative class member no less").

[8] Joshua P. Davis, et al., *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 859 (2014).

[9] *See, e.g., Burton v. Chrysler Group LLC*, No. 8:10-00209-MGL, 2012 U.S. Dist. LEXIS 186720, *13 (D.S.C. Dec. 21, 2012).

[10] David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 633-37 (2013).

increased costs for consumers.[11] As several federal judges have noted, conducting these pseudo-regulatory works to no one's benefit but the class attorneys'.[12]

No-injury cases distort substantive legal doctrine.

One of the reasons that no-injury cases can distort litigation outcomes is that the sheer size of the cases presented can warp the substantive law applied.[13] As the American Law Institute warned in its PRINCIPLES OF AGGREGATE LITIGATION:

> Aggregate treatment is … possible when a trial would allow for the presentation of evidence sufficient to demonstrate the validity or invalidity of all claims with respect to a common issue under applicable substantive law, without altering the substantive standard that would be applied were each claim to be tried independently and without compromising the ability of the defendant to dispute allegations made by claimants or to raise pertinent substantive defenses.[14]

In other words, class actions are an appropriate procedural device when they operate under the same substantive law as an independent, single-plaintiff lawsuit.

No-injury class actions change the substantive standard courts apply. They require the jury to look not at the specific facts of a specific incident, which requires proof of duty, breach of duty, causation, and resulting injury, but only at—at most—duty and breach of duty. As one trial court described the difficulty in trying a proposed no-injury automotive class action: "A personal injury case is ... tethered to the discrete facts of an identifiable accident involving specific individuals."[15] By contrast, a no-injury case "presents a more difficult and amorphous case for the jury."[16] As a result, plaintiffs will often resort to using "composite" or "averaged" evidence to prove their case, instead of focusing on actual incidents or actual claims.[17]

Indeed, the United States Supreme Court has long recognized that mixing injured and uninjured class members in the same case frequently creates

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[11] *See, e.g., Willett v. Baxter Int'l, Inc.*, 929 F.2d 1094, 1100 n.20 (5th Cir. 1991) (Wisdom, J.).

[12] *See, e.g., In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011) ("A representative who proposes that high transaction costs (notice and attorneys' fees) be incurred at the class members' expense to obtain a refund that already is on offer is not adequately protecting the class members' interests.").

[13] Among other reasons, the magnitude of class action cases can affect a judge's ability to make legal rulings in an unbiased manner. *See* Alexandre Biard, Iudex non calculat?: *Judges & the Magnitude of Mass Litigation from a Behavioural Perspective*, Working Paper at 7, available at http://ssrn.com/abstract=2517882 (last viewed Apr. 26, 2015).

[14] PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.02 cmt. d, at 89 (2010).

[15] *Lloyd v. Gen. Motors Corp.*, No. L-07-2487, 2011 U.S. Dist. LEXIS 63436, *26-27 (D. Md. Jun. 16, 2011).

[16] *Id.*

[17] *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266 (3d Cir. 2011) (noting and disapproving of use of "composite" or averaged evidence).

insurmountable conflicts within the class: those class members with manifest current injuries will have different incentives in pursuing relief than those class members who face only the possibility of future harm, yet both are often represented by both the same named plaintiffs and the same counsel.[18]

To see that conflict in action in litigation, one only needs to look at the recent trial in *Glazer v. Whirlpool Corporation.* After the United States Court of Appeals for the Sixth Circuit affirmed certification of a class that included both named plaintiffs who had encountered difficulties with their washing machines and many more class members who had not,[19] the case went to trial. The trial court issued an instruction that—given the abstract nature of the plaintiffs' "inherent defect" theory—the jury would have to consider whether all twenty washing machine models at issue were defective in a single yes-or-no determination.[20] Were the jury to find even one model was not defective, it would have to find for Whirlpool. Not surprisingly, the jury found no liability, although it is not clear whether it did so because it believed none of the machines were defective, or only some of them. (The plaintiffs, of course, have appealed the verdict, arguing that requiring them to prove that each model they claimed was defective had actually encountered problems was prejudicial.)[21]

No-injury class actions encourage plaintiffs' attorneys to waive legitimate claims.

Plaintiffs' attorneys are well aware that certification of the class is the decisive battle in class action litigation.[22] They adopt no-injury theories in large part because doing so allows them to certify larger classes on theories that elide the difficult individualized questions of causation and damage that frequently preclude certification.

But, in doing so, plaintiffs' lawyers often forgo meritorious theories that could win in court in order to sweep uninjured class members into their cases. In the process, they basically waive better claims on behalf of injured class members. In automotive class actions, for example, plaintiffs will often allege that the alleged defect poses grave safety concerns, but then specifically disclaim any personal injury claims, and shy away from proposing any technical solutions.[23] Instead of focusing on actual present harm, which may vary wildly, they focus on potential harm, which they argue is uniform.[24] Doing so allows them to claim a "common issue," but it also

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[18] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1996); *see also Dewey v. Volkswagen Aktiengesellschaft*, 681 F.3d 170 (3d Cir. 2012) (rejecting class settlement because of intra-class conflict).

[19] *See generally Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013).

[20] *Glazer v. Whirlpool Corp.*, No. 1:08-wp-6500-CAB, Doc. #485-1 at 29 (S.D. Ohio Oct. 29, 2014) (attached as Ex. 1).

[21] *Glazer v. Whirlpool Corp.*, 14-4184, Doc. 19, Brief of Appellants at 29 (6th Cir. Feb. 12, 2015) (attached as Ex. 2).

[22] See generally BRIAN ANDERSON & ANDREW TRASK, THE CLASS ACTION PLAYBOOK § 5.01 (2015 ed.).

[23] *See, e.g., Lloyd*, 2011 U.S. Dist. LEXIS 63436 at *26-27.

[24] For a vivid recent example, *see Cahen v. Toyota Motor Corp.*, No. 3:15-cv-01104, Doc. 1 Complaint (N.D. Cal. Mar. 10, 2015) (attached as Ex. 3). *Cahen* alleges that various automotive manufacturers have manufactured vehicles that are "susceptible to hacking" (¶ 6), but has not alleged that any

means that should the class prevail at trial (or settle), individual class members who are later harmed by the alleged defect will be precluded from bringing their claims of *actual* injury. For example, if relief is split between monetary damages (some lump-sum payment) and injunctive relief (a judicially-ordered repair), it is very likely that uninjured class members will opt for the lump-sum payment rather than the repair. In doing so, they may preclude themselves from receiving further relief should they actually become injured later.[25] In lawyers' parlance, this practice is referred to as "claim-splitting," and it is very common in no-injury cases.

A more practical problem also arises. As most of us know from experience, notices of a class settlement are often long and opaque, and enter trash cans unread. A class member who receives a minor payment or obscure injunctive relief as part of a no-injury settlement may have a very difficult time later establishing that she was unaware of her rights problem should she face an actual manifestation of a defect, or actual harm from a data breach. Technically this is different than claim-splitting, but that difference is for lawyers, not class members.

No-injury class actions frequently lead to problem settlements.

Since most class actions end in settlement, these problems in defining relief result in problematic class settlements that harm absent class members as much as they do defendants. Since the value of a no-injury class action is difficult to ascertain, attorneys often rely on questionable injunctive relief and *cy pres* relief (charitable donations to third parties who may bear some relation to the subject of the lawsuit) to create enough apparent value to justify releasing the claims against the defendant and paying the fees the plaintiffs' attorneys require.[26] The result is that the bulk of any monetary relief goes not to the members of the class, but to third parties that were not harmed either. Indeed, as several class action plaintiffs' attorneys have conceded, "A distinctive aspect of [*cy pres*], at least in many cases, is that it awards a recovery to class members that the court knows could not possibly have been harmed."[27]

These tactics have led to concrete grounds for reversing real class settlements.

- In *In re Dry Max Pampers Litig,*[28] a settlement of an unsubstantiated claim of diaper rash resulting from gel in diapers resulted in attorney's fees of $2.7 million for achieving injunctive relief requiring the implementation of a 1-800 line to answer questions about diaper rash. A *cy pres* monetary award of $250,000 was earmarked to fund pediatric residencies and a research program on skin care. The settlement was finally overturned on appeal, on the grounds that the

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automobile owner, not even the named plaintiffs, has suffered a hacking attempt.

[25] *Lloyd v. Gen. Motors Corp.*, No. L-07-2487, 2011 U.S. Dist. LEXIS 63436, *26-27 (D. Md. Jun. 16, 2011) (allowing uninjured class members to collect monetary relief for alleged automotive defect would defeat purpose of exception to economic loss doctrine for safety defects).

[26] For an extended discussion of these issues, *see Pearson v. NBTY, Inc.*, 772 F.3d 778 (7th Cir. 2014) (Posner, J.).

[27] Davis, et al., *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. at 878.

[28] 724 F.3d 713 (6th Cir. 2013).

settlement had no real value for the class members.[29]

- In *Eubank v. Pella Corp.*,[30] the United States Court of Appeals for the Seventh Circuit reversed a settlement of product liability claims against a window and door manufacturer in part because provisions included to protect the defendant's due process right to challenge worthless individual claims significantly reduced the value of the settlement. The appellate court estimated that the settlement as originally approved would have provided at most $8.5 million in relief to the class, versus $11 million to the plaintiffs' attorneys.[31]

- In *Jones v GN Netcom, Inc.*,[32] the United States Court of Appeals for the Ninth Circuit vacated a settlement alleging economic loss from headphones that were alleged to potentially cause hearing loss. As the court noted, "[t]he settlement agreement approved in this products liability class action provides the class $100,000 in *cy pres* awards and zero dollars for economic injury, while setting aside up to $800,000 for class counsel."[33]

- In *Pearson v. NBTY, Inc.*, the United States Court of Appeals for the Seventh Circuit reversed a settlement of food labeling claims against vitamin manufacturers. The settlement alleged that the manufacturers had made questionable claims about the vitamins' efficacy in preventing joint problems. The settlement resulted in $865,284 to class members, $1.13 million in *cy pres* relief to the Orthopedic Research and Education Foundation, and more than $2 million in attorneys' fees and expenses.[34]

In each of these cases, the attempt to settle a no-injury case resulted in terms that were favorable to attorneys but not the members of the class. It is no coincidence that these settlements occurred in the jurisdictions that have allowed some of these cases to proceed. Class action settlements in general remain problematic, but they are especially so in no-injury cases because it is extremely difficult to quantify the value of any relief when many of the class members have not been harmed to begin with.[35] Moreover, it is certain that these are not the only questionable settlements in these jurisdictions: these are only the settlements that drew objectors with the commitment and financial resources to both object to the settlement and appeal when their objections were rejected by the trial court.[36]

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[29] 724 F.3d at 721.

[30] 753 F.3d 718, 721 (7th Cir. 2014).

[31] *Id.* at 726.

[32] 654 F.3d 935 (9th Cir 2011).

[33] 654 F.3d at 938.

[34] *Pearson*, 772 F.3d at 780.

[35] *See, e.g., Eubank*, 753 F.3d at 726.

[36] For more on the difficulty of appealing settlement objections, *see* ANDERSON & TRASK, CLASS ACTION PLAYBOOK § 8.04[7] (discussing use of appeal bonds to dissuade objectors).

The consistent use of *cy pres* relief in no-injury class actions indicates another problem as well: when no one has suffered a tangible harm, it is next to impossible to identify those who are entitled to participate in the settlement, and many are not interested enough to actually claim any funds. Instead, the parties wind up donating the proceeds of the settlement to third parties. (In litigation parlance, these settlements have a low "take rate.")

The proposed legislation.

Many of the distorting effects I have described above are the result of disguising the lack of injury in no-injury class actions with a plaintiff who has arguably suffered a tangible harm. By focusing on whether the injury suffered by the named plaintiff is the same as that suffered by the absent class members, the proposed legislation focuses on the most problematic no-injury cases, and the ones likeliest to lead to settlements that do not compensate the average class member.

Specifically, this bill would prevent entrepreneurial counsel from taking an idiosyncratic manufacturing defect, an isolated incident resulting from a data breach, or an unusual reading of a marketing document and turning it into a multi-million dollar case that will take years and hundreds of thousands of dollars to defend. Instead, counsel will either have to show that everyone suffered a similar harm, or present the case as a naked no-injury claim which a court can assess on its individual merits. (Courts frequently reject no-injury class actions when they are brought by uninjured plaintiffs.)

At the same time, cases involving a uniform intangible harm—such as a uniform violation of civil rights, violation of a Congressionally-enacted statute like the Truth in Lending Act or Federal Credit Reporting Act, or a case seeking an injunction to prevent a harm from occurring—will still be able to proceed. In those cases, while the reality of the harm may be debatable, there would be no question that the named plaintiff and the remainder of the class were all in similar factual situations.

Class action litigation works best when judicial interpretation and Congressional action filter out the worst abuses of the device. The proposed legislation serves as just such a filter.

Mr. DESANTIS. Thank you for your testimony. We will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes.

You know, Mr. Beisner, if someone went to court and said, Judge someone has a problem with their washing machine, mine works fine, but give me some money anyway, I think we all would agree that that case would not be taken seriously. So then why should a class member recover money in a class action if he or she would never be able to recover an individual action?

Mr. BEISNER. They should not in that circumstance, but that is how these class actions are often brought is to include all of these individuals who have had no problem. I was taken by one of the witnesses talking earlier about this bill cutting off one's hand to address a splinter. That is sort of what we are talking about with these class actions. You create this class of millions of people because allegedly a small number had a problem, and rather than addressing the problem they had, you get this gargantuan class action.

Mr. DESANTIS. So, I mean, why would we want an individual to be paid for a product that functions properly and has satisfied his or her expectations?

Mr. BEISNER. You should not, and the reason is that, as has been noted in several decisions in my testimony by judges ranging from John Minor Wisdom to Frank Easterbrook over the years have made clear, all this does is means that the people who really are injured probably are not going to be properly compensated, and you drive up prices for everybody else because you are just redistributing money to address claims that do not involve any real injury.

Mr. DESANTIS. And so, for some courts, I mean, every product that is mass produced, there are going to be some problems somewhere along the line with some of the consumers. So basically under the approach of some courts, you could potentially have a class action for almost any product that is produced in the country, correct?

Mr. BEISNER. That is the concern, and that is the worry that is happening here that you find one person that, as I used in the example, had an oil leak, and it mushrooms into a lawsuit that frankly wastes a lot of the court's time dealing with claims that really are not out there.

Mr. DESANTIS. If the percentage of class members who typically submit claims forms in a class action settlement is between 1 and 5 percent, then who is the one benefitting from the class actions?

Mr. BEISNER. Well, I think that is one of the concerns that was highlighted at the Subcommittee's hearing several months ago was the fact that in a very large percentage of consumer class action settlements anyway, the claims rates are low. And it is commonplace that the aggregate amount that the class gets is substantially less than what the attorney's fees are that are awarded in the case.

Mr. DESANTIS. So in your opinion, do you think a class action in which one plaintiff experienced a problem and the vast majority of the class did not should satisfy the typicality requirement?

Mr. BEISNER. It should not. The class representative, if the typicality requirement is properly invoked and imposed, should

limit the class to people who had the same experience as the class representative.

Mr. DESANTIS. Now, how do victims suffer under a class action system in which those who are minimally injured or not injured at all occupy the same class action as those who do have significant injuries?

Mr. BEISNER. Well, I think the problem in that circumstance is that if a settlement is negotiated, the people who have had the bad experience, if there are some there, may be undercompensated in order to provide some benefit to those who have not had the problem. And as I said earlier, I think another problem with these is it just jacks up problems on various things because somebody has got to pay to provide relief who had a perfectly satisfactory experience with the product or service that they purchased.

Mr. DESANTIS. Now, when you have injured and non-injured members in a class, how does that, if at all, diminish due process rights for the defendant who is defending against it?

Mr. BEISNER. Well, I think the problem with the due process perspective with sort of the trial example I was talking about earlier is if you put before the jury a person who comes in with their truckload of laundry that they think is moldy and say please give me compensation, it does not fairly tell the jury about the fact that most of the people who are in the class that that person represents are perfectly happy with their product, which is a situation we have in a lot of these cases.

Mr. DESANTIS. Thank you. My time has expired, and I will now recognize for 5 minutes the Ranking Member of the Subcommittee, Mr. Cohen.

Mr. COHEN. Thank you, sir. Mr., is it Beisner?

Mr. BEISNER. It is actually Beisner. Thank you.

Mr. COHEN. Beisner. Are you familiar with Professor Arthur Miller?

Mr. BEISNER. Yes, I am.

Mr. COHEN. Tell me what you know about Professor Arthur Miller's background.

Mr. BEISNER. He is a professor who used to teach at Harvard. Was at Michigan before that, and he is now at NYU, and he is a plaintiff's lawyer. He is affiliated with a plaintiff's law firm in Houston, Texas.

Mr. COHEN. Is he considered an expert on the subject of class actions?

Mr. BEISNER. I think he appears in court. He is an advocate on that. He is an expert, and you have got a row of experts at this panel here as well.

Mr. COHEN. Professor Miller says this is a kill class actions bill. Ms. Lahav, why would you think he would say such, this expert on class actions?

Ms. LAHAV. Because it is a fact. The way the bill is drafted, it is drafted in such a way that there is no class that can meet the requirements of the bill as an ordinary court would read the language of the bill. So that is the reason why Professor Miller would say that. I just would like to say one other thing about Professor Miller is that one of his claims to fame is he actually represented the defendants in a case called Shutts, which is the most famous

class action case. So I would say he is in between everybody in terms of his position.

Mr. COHEN. Lots of suggestions that in the Whirlpool case there were no damages to a lot of people. What is your position? What do you believe about that? Is there such a thing as——

Ms. LAHAV. No. Actually Mr. Beisner said earlier, he said did you get what you paid for. That is what these types of class actions are. I like to think of them of benefit of the bargain class actions. No, I did not like litigate the Whirlpool or any case——

Mr. COHEN. Mr. Beisner, you are litigating the Whirlpool case, is that correct?

Mr. BEISNER. I am not in the Whirlpool case, no.

Mr. COHEN. Have you been in the Whirlpool case?

Mr. BEISNER. No.

Mr. COHEN. Have you been in a case that would be affected by this litigation?

Mr. BEISNER. Well, I mean, I am in a number of class actions that would be affected by the legislation.

Mr. COHEN. Okay. Go ahead, Ms. Lahav. Thank you, sir.

Ms. LAHAV. He may be doing one of the Washington cases. But at any rate, here is what I understand not being directly involved in the cases. The alleged defect was mold, that the washing machines got moldy. Sometimes that means that the laundry smells, but in any event the washing machine gets moldy.

And then what the manufacturer did is they sold a product that purported to fix the mold problem. It was called Affresh. So the idea is, well, you bought this washing machine. I do not know how much that one cost. Mine cost $750, we will call it $750. It is not an exorbitant amount, but anyway you paid $750 for it. And then they say, well now you are going to have to buy all these extra tablets to put in your washing machine for, you know, $300 over the life of the machine.

And there was a warranty, but when plaintiffs asked the company to fix the mold as part of the warranty, the company said, no, it is your fault that the machine got moldy, and thus, as I understand, the lawsuit was born.

So the real actual question and legal question is when people buy a washing machine, do they expect it to be moldy or not? I do not, but that is me. And in any event, the point is that that question is not for us to decide in this hearing. That is a question for a court to decide, whether people in that class got the benefit of the bargain. And that case did go to trial, and the jury did make a decision in that case, and that is how litigation is supposed to work.

Mr. COHEN. There is a study going on right now in the judicial branch of this particular issue, the Judicial Conference of the United States. It is a study of potential amendments to Rule 23. Why should we not let the judicial branch give us a remedy if there is a problem?

Ms. LAHAV. I think that is the way to go. First of all, the people at the FJC, the Federal Judicial Center, who do those studies, they are really superb in terms of the level of competence that they have. And I think the judges are in a position to determine what is the best course of action in terms of reforming Rule 23. It happens that they really are studying it right now, and they plan to

have a proposal this calendar year, so it does seem to me like waiting and seeing what happens with that is the better course of action.

Mr. COHEN. And there was some issue about possible civil rights cases being affected, and I think Mr. Beisner did not think they would be affected. Do you think they would be affected?

Ms. LAHAV. They certainly would be affected. All injunctive actions would be affected by this bill the way it is written. That is correct. I do not see a way around that.

Mr. COHEN. I yield back the balance of my time.

Mr. DESANTIS. The gentleman yields back. The Chair recognizes the gentleman from Michigan, the Ranking Member of the full Committee, for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman. Let me ask Attorney Lahav the following question. Professor Arthur Miller, arguably the foremost expert on Federal practice and procedure, has said this: "H.R. 1927 is truly a solution in search of a problem," because Rule 23 doctrines and procedures are capable of dealing with overly broad theoretical classes. Is that a fair statement of law as you understand it?

Ms. LAHAV. Yes, that is correct. I mean, I think that the courts have since the passage of the Class Action Fairness Act and also a procedural rule that permits appeals from class certification decisions, that the law in class actions has developed pretty significantly. And courts are very rigorous in their interpretation of Rule 23 and their application of it, and you saw in 2011 with the Walmart case that that level of rigor is being affirmed by the Supreme Court.

The plaintiffs in class actions have to show that they are typical of the class members, and if they cannot show that, then they do not get a class. And actually I think that Mr. Trask's testimony about the *Pella* case and the first judge, whose name I forget, his initial decision demonstrates how careful judges are in crafting class actions. And there are lots of cases I can cite you from Judge Easterbrook, and Judge Posner, judges on the 1st Circuit and the 2nd Circuit, you name your circuit, the 5th Circuit, who are doing a great job looking at class actions, policing class actions. And I think that we can trust them to apply the law fairly and rigorously in this area, and that is what they have been doing.

Mr. CONYERS. Thank you. Now, is there such a thing as a no injury class action? This is a kind of new one on me. What do you know about that?

Ms. LAHAV. Not that you can get certified. There is something called a benefit of the bargain theory of law. It is State consumer law under the Uniform Commercial Code, the UCC, which I have to confess I found exceedingly boring when I was in law school. And what I understand that means is if you buy something you should get what you pay for. So if you buy roofing tiles and you think that they meet the requirements of the National Roofers Association or whatever it is, and then it turns out that they are shoddy roofing tiles, you can get compensation for that under the UCC, under State law, even if your roofing tile did not fall apart. And that is the idea of did you get what you paid for.

And there are other examples that I can give. One of the cases gives a great example of if you buy a gold ring and the gold ring, they tell you it is 18-carat gold, and then it turns out it is 10-carat gold. You did not get what you paid for. You might be just as happy with the ring, right? I wear my wedding ring. I am happy with it. But if I learned that it was not 18-carat gold, well, I would think that the person who sold it to me should give me the difference of the value there. That is what a benefit of the bargain class action is.

Mr. CONYERS. Now, your fellow witness, Mr. Beisner, says that H.R. 1927 is merely a codification of an interpretation of Rule 23's typicality requirement that is already applied by some Federal courts. Do you think that that is accurate, or do you support that?

Ms. LAHAV. No, I do not. I think that is not a correct description of the law of class actions.

Mr. CONYERS. What is the problem?

Ms. LAHAV. Well, so it is correct in every court in the United States you have to have a rigorous showing by a preponderance of the evidence that you are typical of the other class members. But you do not have to show that you have the same and extent of injury. That is the language in this bill. So that is my John and Mary.

John and Mary are similar in the sense that the bank, you know, it is a story, right, an illegal fee of $2 for each transaction, but they had different transactions, so the extent of their injury is different. The John and Mary case could be certified today under the current law. It could not be certified under H.R. 1927, so that would be a difference that this bill would create.

Mr. CONYERS. I thank you very much for your responses to my question. Thank you, Mr. Chairman.

Mr. DESANTIS. Thank the gentleman. The Chair now recognizes the gentleman from New York for 5 minutes.

Mr. NADLER. Thank you. Mr. Beisner, let us go ahead with Professor Lahav's hypothetical. You have got this bank that is cheating everybody by putting a $2 illegal fee on all ATM transactions. And let us say it is a small bank, so it is 4 million people who uses its ATM machines. Now, under this bill, in order to certify a class, they have to affirmatively demonstrate through admissible evidentiary proof that each proposed class member, all 4 million of them, suffered an "injury of the same type and extent as the injury of the named class representative/representatives." So you have to show by this language.

Why does that not mean that they have to have 4 million witnesses or documentary evidence as to the extent of the damages to 4 million people by name?

Mr. BEISNER. No, they would not need that at all. This is the same sort of, first of all——

Mr. NADLER. Why would they not?

Mr. BEISNER. Why would they not? Because when you do class certification, there is a normal process where you have to already demonstrate class-wide proof of the——

Mr. NADLER. Yes, but this hinders that.

Mr. BEISNER. No, it does not because, you know, this idea of the full-blown trial is needed. There is no mention of a trial in here.

Mr. NADLER. It says "affirmatively demonstrates through admissible evidentiary proof."

Mr. BEISNER. Right.

Mr. NADLER. How else would you meet that phrase?

Mr. BEISNER. That is required now to get class certification.

Mr. NADLER. I am not talking about right now. How would you meet that phrase without bringing in all these witnesses or documentary evidence for each of these witnesses? Not witnesses——

Mr. BEISNER. You would not. As I stated in my testimony, you would get evidence from the bank of the records, and you would demonstrate that these people got less money than they were entitled to. That is how it is done.

Mr. NADLER. And you have got a different amount of less money, why would they not fall out of the class?

Mr. BEISNER. I do not——

Mr. NADLER. Actually why would they not invalidate the class because they did not suffer an injury of the same type and extent.

Mr. BEISNER. Sure. Depending, you know, if you had dramatic differences in the amounts of money, it may not qualify here.

Mr. NADLER. It does not say "dramatic." It says "the same."

Mr. BEISNER. The same type——

Mr. NADLER. Some are $2, some are $10.

Mr. BEISNER. The same type and extent. It does not say "identical amount." This would be——

Mr. NADLER. Ms. Lahav, why is he wrong? Ms. Lahav, why is he wrong or disingenuous?

Ms. LAHAV. Because it says "same." It does not say "kind of," "similar," "in the same family," you know. It says "same type and extent." So a court——

Mr. NADLER. And "extent" means $2, not $6.

Ms. LAHAV. That is my reading of it. I think that a court would read it and say you do not have the same type and extent of injury. You lost $200, and you $10, and you are different.

Mr. NADLER. And, Mr. Beisner, why are we wrong in saying that Section B of the bill, it says "The term 'injury' means the alleged impact of the defendant's actions on the plaintiff's body or property," means that civil rights lawsuits and other types of intangible or non-damage to the body are not excluded from class actions?

Ms. BEISNER. I think there is a simple answer to that. If you are in a civil rights suit and if the named plaintiff is not alleging that they had damage to property of any sort, they are then alleging the same type of injury as all class members.

Mr. NADLER. But it does not say that.

Mr. BEISNER. Yes, it does.

Mr. NADLER. "'Injury' means the alleged impact of the defendant's actions to plaintiff's body or property." As I read that, as anybody familiar with the English language would read that, it means that you have to have an injury to the body or property.

Mr. BEISNER. No, I do not think so. It said each proposed class member suffered injury to body or property of the same type or extent. He would say I——

Mr. NADLER. Section B says "The term 'injury' means the alleged impact of defendant's actions on the plaintiff's body or property."

Mr. BEISNER. Right.

Mr. NADLER. You would be correct if this bill only had Section A but not Section B.

Mr. BEISNER. No.

Mr. NADLER. Why is Section B in here? What is the point of it?

Mr. BEISNER. To deal with precisely the thing you are talking about, to take injunctive relief cases out of the bill, what they would say, let us read that in there. Each proposed class member suffered A, and then insert in there "injury to plaintiff's body or property of the same type or extent as the injury of the named class representative/representatives." What the class representative would say is I did not suffer any bodily or economic harm here. I am here for injunctive relief, and that is what the class member——

Mr. NADLER. That is very nice, but that is not what the bill says.

Mr. BEISNER. No——

Mr. NADLER. The bill says "The term 'injury,'" and you can only get a class action for an injury of the same type and extent. It has got to be an injury of the same type and extent.

Mr. BEISNER. No.

Mr. NADLER. And then it says "An 'injury' means alleged impact on the plaintiff's body or property." Ms. Lahav, is he being disingenuous?

Ms. LAHAV. Under this reading it is okay to have a no injury class action. I thought the whole point of it was that we do not want no injury class actions anymore.

Mr. BEISNER. No, that is——

Mr. NADLER. And let me ask you one last question. You say that there was no injury, for instance, in the Whirlpool washing machine case. If there is no injury there, why did the Supreme Court not throw it out on standing?

Mr. BEISNER. Well, the Supreme Court did not cite the case. They did not consider, so they did not throw it out on that ground. They did send it back to the——

Mr. NADLER. Why did they deny cert then if there is clearly no standing?

Mr. BEISNER. The vast majority of cases they do deny cert. They just do not reach the issue.

Mr. NADLER. Ms. Lahav?

Ms. LAHAV. Look under State law. There is standing. Judge Easterbrook said it. Judge Jones said it.

Mr. NADLER. And if there is standing, that means there is injury. And if there is standing that means that the court found there is injury.

Ms. LAHAV. It is a State law question.

Mr. NADLER. But if the State court said there was standing, they said there was injury. Without injury there is no standing, correct?

Ms. LAHAV. Correct, yes.

Mr. NADLER. Thank you.

Ms. LAHAV. Under State law there is an injury.

Mr. NADLER. Thank you.

Mr. DESANTIS. The gentleman's time has expired. The Chair now recognizes the gentleman from Florida for 5 minutes.

Mr. DEUTCH. If I did not have a few comments I would like to offer, I would probably just say that the defense rests. [Laughter.]

Thank you, Mr. Chairman. Look, today's hearing may be on the Fairness in Class Action Litigation Act, but it is really, I believe, a hearing on the 7th Amendment of the United States, to the U.S. Constitution. The 7th Amendment guarantees all Americans the right to a trial by jury in civil cases. It is part of the Bill of Rights. It is kind of important.

Our Nation's framers understood that the right to jury trial in civil disputes would ensure a level playing for all Americans, not just the wealthy and the well connected. Class actions are also an essential feature of our legal system because they allow individuals in similar situations to file lawsuits that would be far too expensive to file on their own. And they might be too expensive for our courts to hear on their own, too.

In an era of overloaded dockets and overstretched financial resources, class actions help our courts administer justice fairly and efficiently. They make it possible for the courts to resolve cases that involve large numbers of people harmed by a similar practice or with similar claims to be heard at the same time. Class actions also prevent and deter future actions that violate individuals' rights or threaten the health and safety of our communities. And the ability to gain access to the courts through a class action is an effective check outside the Federal regulatory system on potentially bad behavior by large and powerful entities.

Our laws already provide strong oversight to prevent class actions abuse. Under Rule 23, for example, only after confirming numerous findings may courts even grant class certification, a point that Mr. Beisner just acknowledged. And these findings allow courts to permit discovery, conduct hearings, and consider testimony, and collect evidence before issuing certification of a class. Afterwards, it is not the parties involved in the litigation that decide whether to certify, but the judge who has reviewed the evidence. In other words, we have a mechanism in place to weed out frivolous claims, and unless you consider the findings of an impartial judge to be frivolous, then the system we have works.

This legislation does not improve class actions. It is meant to add class actions. The bill would prohibit a Federal court from certifying a class unless the parties seeking class certification produces evidentiary proof that each proposed class member suffered an injury of the same type and extent as the injury of the named representative. That is the experience that we just heard.

This legislation would make it impossible for victims to form a class. It would close the doors of the courtroom to the most in need of a remedy or judicial protection. It would guarantee that only those with the financial means to file extensive litigation get their day in court, and it would shut out Americans unable to pay the toll for justice. And it would pile on the backlog that our courts face, making it harder for all Americans to have their cases heard.

Class actions are a critical component of our legal system and protect the 7th Amendment rights of people seeking relief. As former Supreme Court Justice William O. Douglas described, "The class action is one of the few legal remedies that a small claimant has against those who command the status quo." For example, this bill would make it impossible for the homeowners in *Hobby v. RCR Holdings* to be brought in the Eastern District of Louisiana in 2013

to receive relief, relief that some of my own constituents would have been denied without this class action.

This case provided relief to class members in condominiums in Boynton Beach, Florida whose homes were built with tainted Chinese drywall between 2005 and 2007 after Hurricane Katrina. The defective drywall used in these condos devastated the families who owned them. Not only did a sulfuric smell leak from their walls and permeate their homes, but it caused real damage. That damage ranged in some instances from mild to severe, corroding of electrical systems, and wires, and pipes, breaking cooling units, destruction of other household appliances. Sometimes what they endured from the Chinese drywall differed from the contaminated Chinese drywall, but the struggles that they faced were the same. Sometimes they were sick. Sometimes other members of their family became ill.

This class action compensated members for their property damage as well as other financial losses, such as foreclosure and rental vacation properties rendered impossible to rent. Under this bill, Chinese drywall victims with contaminated drywall would have been on their own and out of luck. That is how this would have affected my constituents.

Ms. Lahav, in the remaining few seconds that I have, this definition that in this bill would be a bar to bringing civil rights cases. Can you just explain that to us?

Ms. LAHAV. Yes. It says you have to have an impact on the body or property of the individual, but often in civil rights cases we are defending rights that do not have a direct impact on body or property, such as due process rights, the right to vote, the right to be free from certain kinds of discrimination. You might be seeking an injunction instead of damages for the thing that happened to you. None of that is accounted for in this bill. And it says "no Federal court shall certify any proposed class." That includes all those cases.

Mr. DEUTCH. Thus, Mr. Chairman, we would find ourselves in a situation where we would be curtailing the rights of individuals to pursue their 7th Amendment rights, at the same time that they are pursuing those rights to uphold other constitutional rights.

Mr. DESANTIS. The gentleman's time has expired. Mr. Trask, I saw you in some of these exchanges. Do you have anything to interject about some of the issues that the minority side has raised?

Mr. TRASK. Nothing that is not already in my written testimony, but I am more than happy to say that I really do believe that the way that the bill has been constructed was specific enough to make sure that civil rights class actions would, in fact, still be protected. There is a longstanding statutory canon that says expressio *unius exclusio alterius*. And if you will forgive my horrible high school Latin, what that means is when you single out one or two things, you leave everything else alone. In this case, the definition as it was written in singled out injury to body or property as being the things that have to be similar. That means that any other kinds of injuries that are asserted would be left alone.

Moreover, and I think Ms. Lahav pointed out that I was trying very hard to point out that we have some very careful and conscientious jurists on the bench. Jurists like Judge Zagel and Judge

Posner, to name just a few, are the types of judges who are not going to allow language to completely eviscerate the class action. About every 10 years it appears that there is some class action reform proposed, either CAFA or the PSLRA. And every 10 years what happens is various interests get up and claim that either the securities class action or the class action in general is going to be eviscerated and die.

And I have to tell you I keep defending the things, which means that so far they are doing fine. I do not think that this bill is going to do any worse harm than CAFA did. And frankly, I think what it is going to do is protect the interest of those absent class members that are there. Thank you.

Mr. DESANTIS. Great. Well, thank you to the witnesses. This concludes today's hearing. Thanks to all our witnesses for attending.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

Thank you again. Thanks to the Members. This hearing is adjourned.

[Whereupon, at 5:14 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Letter from John H. Beisner, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, Washington, DC

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June 30, 2015

BY E-MAIL

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RE: Question for the Record of the Hearing of the Committee on the Judiciary's Subcommittee on the Constitution and Civil Justice Regarding H.R. 1927, the "Fairness in Class Action Litigation Act of 2015," on April 29, 2015

Dear Ms. White:

I write in response to Chairman Goodlatte's letter of May 15, 2015, requesting that I respond to a question for the record from Representative Steve Cohen. The question reads as follows:

> You stated during the hearing that you had no interest in the outcome of the cases concerning Whirlpool front-loading washing machines. Can you explain why you are listed as counsel of record for the Product Liability Advisory Council on its *amicus* briefs filed with the Supreme Court in support of petitioners in the *Whirlpool v. Glazer* and *Sears Roebuck, Inc. v. Butler* cases?

My response follows:

Thank you for your question.

At the hearing, in response to the question whether I have "been in a case that would be affected by this [legislation]," I indicated that I am counsel for defendants in "a number of class actions" that stand to be affected by the proposed legislation, if enacted. Whirlpool, however, is not among them.

When asked whether I was "litigating" the *Whirlpool* case, I accurately answered that I was not, as Whirlpool is not my client and I have not represented either plaintiffs nor the defendant in that matter. I was then asked whether I was "in" the *Whirlpool* case. Again, I accurately answered "no" for the same reason.

On behalf of clients who are not parties to the *Whirlpool* litigation, I have filed amicus ("friend of the court") briefs stating their policy views on certain appellate questions presented by that case. But such submissions do not constitute "litigating" or being "in" a case. Indeed, the Supreme Court itself has distinguished between "litigants" on the one hand and "amici" on the other. *See, e.g.*, *United States v. Windsor*, 133 S. Ct. 815, 815 (2012) (mem.) (separately addressing "litigants" and "amici curiae"). That distinction makes sense given that an amicus has no direct stake in the outcome.

Sincerely,

John Beisner

Testimony of F. Paul Bland
Executive Director
Public Justice[1]

Before the Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
United States House of Representatives

Written Testimony on

H.R. 1927: The "Fairness in Class Action Litigation Act of 2015"

[1] F. Paul Bland, Jr. is Executive Director of Public Justice, overseeing its docket of consumer, environmental and civil rights cases. He has argued or co-argued and won more than 25 reported decisions from federal and state courts across the nation, including cases in six of the federal Circuit Courts of Appeal and at least one victory in nine different state high courts. He has been counsel in cases which have obtained injunctive or cash relief of more than $1 billion for consumers. He was named the "Vern Countryman" Award winner in 2006 by the National Consumer Law Center, which "honors the accomplishments of an exceptional consumer attorney who, through the practice of consumer law, has contributed significantly to the well-being of vulnerable consumers." In 2013, he received the Maryland Consumer Rights Coalition's "Legal Champion" award. In 2010, he received the Maryland Legal Aid Bureau's "Champion of Justice" Award. In the late 1980s, he was Chief Nominations Counsel to the U.S. Senate Judiciary Committee. He graduated from Harvard Law School in 1986 and Georgetown University in 1983.

INTRODUCTION AND SUMMARY

Many Americans cannot feasibly pursue certain types of legal claims on an individual basis, particularly cases where each person's claims are too small and complex to be litigated against a corporation by a private attorney. For all sorts of situations where corporations break the law and hurt a lot of people, there are only two realistic options, given the scarce resources of government enforcers: either (a) individuals can join together to bring a class action lawsuit that holds the company accountable, or (b) the corporation gets away with violating the law. Class action suits allow consumers, workers, investors and others to pool their individual resources to recover ill-gotten sums and prevent similar misconduct in the future. This mechanism is crucial when going up against well-funded corporations.

H.R. 1927, the "Fairness in Class Action Litigation Act of 2015," would rewrite a large number of laws currently on the books. The bill would have a far broader impact than its supporters claim. Rather than its stated goal of "improv[ing] fairness in class action litigation," it would simply abolish the vast majority of class action lawsuits in the United States. While the bill strips Americans of their legal rights in a number of respects, two features are particularly disastrous. First, the bill provides that the only legal rights that can be the subject of a class action are those involving property losses or personal injury. Under the bill's "only blood or money matters" approach, the class actions that have long protected Americans against violations of their civil rights, their privacy rights, their rights to freedom of speech, and a host of other important rights, would all be eliminated. As a salient example of how extreme this new paradigm is, the American landmark case *Brown v. Board of Education of Topeka*, 347 U.S. 483

(1954), the class action where the Supreme Court declared that school desegregation was unconstitutional, could not have been brought under this bill. If America's legal system is reduced to only protecting easily-monetized property rights and personal injuries, a great deal is lost.

Second, H.R. 1927 bans any class action unless every class member has identical injuries. Under current law, a class action seeking substantial money damages may only proceed if common issues predominate over individual issues *and* if a class action is shown to be superior to other methods of proceeding. And the Supreme Court has held that courts must engage in a rigorous analysis of admissible evidence to determine if this test is met. Yet the existing strict standards limiting when class actions may be brought are not enough for the proponents of H.R. 1927. Instead, the bill requires that each class member must have suffered a property or bodily injury "of the same type and extent" as every other class member. This test is simply outlandish. By way of example, if the perpetrators of the *Enron* scam stole $10,000 from one investor but $75,000 from another (i.e., the two investors had bought different amounts of stock), then H.R. 1927 would bar a securities fraud class action arising from the scam. This same flaw would essentially gut enforcement of the antitrust laws. Few if any class actions in the United States would meet the extreme new test invented by the bill.

In short, this legislation will have the effect of immunizing corporations from any liability or accountability even when they have blatantly violated consumer or worker protection laws, the securities, or antitrust laws, or the constitutional rights of Americans. This is not "just" an issue of fairness to consumers, workers, investors and small businesses. The marketplace itself is

undermined when there is no enforcement of the rules of the road; honest companies are at a disadvantage against corporations willing to cheat consumers, fix prices or break other important laws.

A full catalogue of the wreckage H.R. 1927 would bring to America's legal system is not possible here, for reasons of both time and space. Accordingly, this testimony will focus on a handful of examples of the harm that would flow from this bill. For example, H.R. 1927 would eliminate class actions protecting Americans from:

- Illegal acts stripping citizens of constitutional rights;
- Corporate actions invading Americans' privacy rights;
- Practices that discriminate against the disabled;
- Injuries due to antitrust or securities law violations; and
- Deceptive, misleading and false advertising.

BACKGROUND ON PUBLIC JUSTICE

Public Justice is a national public interest law firm that specializes in precedent-setting and socially significant litigation, carrying a wide-ranging docket of cases designed to advance the rights of consumers, environmental protection, civil rights and employee rights, and to preserve and improve the civil justice system.

Public Justice was founded in 1982 and is currently supported by more than 2,000 members around the country. More information about Public Justice and its activities is available on our website at www.publicjustice.net. We are grateful for the opportunity to share our experience with respect to the important issues this Subcommittee is considering. In this

connection, we have extensive experience pursuing successful class action lawsuits that have remedied illegal behavior that has cheated consumers and workers and that have prevented the violation of constitutional rights of Americans. These lawsuits would have been impossible to bring if H.R. 1927 had been the law in America.

H.R. 1927 Would Eliminate Class Actions Protecting Constitutional Rights

As alluded to above, under H.R. 1927, *Brown v. Board of Education* – a class action -- could not have been filed. The case involved clear and substantial evidence of dignitary harms and educational and psychological damages to African-American children shunted into segregated schools. But could each of those children be said to have suffered a measureable "property" loss to the identical degree, as required by H.R. 1927 as a precondition to filing a class action? Obviously not. Under H.R. 1927's "only money matters" and unrealistic identical damages approach, *Brown* (and many other essential civil rights class actions) would be foreclosed.

H.R. 1927 would also eliminate class actions that protect First Amendment free speech rights and Fourth Amendment rights against unlawful search and seizure. In *Hankin v. City of Seattle*, for example, the City reacted to peaceful protests concerning the World Trade Organization Ministerial Conference in 1999 by setting up a "no protest zone" around the convention center downtown. The police then began arresting peaceful protesters (and some individuals who were mistaken for protesters)—both inside and outside the zone—and detained them until the WTO meetings had concluded. Class actions were filed on behalf of both groups

of arrestees. The first case, on behalf of individuals arrested outside the no protest zone, resulted in a $250,000 settlement. In the second case, on behalf of individuals arrested inside the zone, the federal district court found that there was no probable cause for arrest and thus that the protesters' Fourth Amendment rights were violated. A jury then found that the City was responsible for these constitutional violations. As a result of the ruling and verdict, the City agreed to pay $1 million to the class, seal the arrest records, and—most critically—change its policies to ensure that Seattle police would not violate people's rights in this way in the future. This important case vindicated crucial constitutional rights, but because it did not involve money or personal injuries, it could never have been filed if H.R. 1927 had been the law in America.

H.R. 1927 also requires proof of injury to property and body in all cases, including those in which only injunctive relief is sought. Accordingly, in all cases where no present harm is alleged, and no damages are being being sought, the bill would still require the plaintiffs to prove an actual injury to all class members. This would, in effect, write Rule 23(b)(2), which provides for injunctive relief class actions and has been a principle vehicle for advancing civil rights in America for several generations, out of the law.

H.R. 1927 Would Eviscerate Americans' Privacy Rights

Class actions have also provided Americans with significant privacy protections, and have been used to successfully stop, and to achieve a remedy for, all sorts of invasions of privacy rights. There have been successful class actions where:

- Major credit reporting agencies had systemic flaws that resulted in them telling creditors false information about consumers' credit reports;

- Morally depraved individuals installed cameras in restrooms in public places to watch women, or embedded spyware into private computers permitting someone at a corporation to activate the camera on an unsuspecting person's personal computer and surreptitiously watch them in their homes;
- Corporations made unauthorized tape-recorded phone calls to peoples' cell phones or sent unauthorized texts to their phones; and
- Certain credit agencies established sloppy systems, resulting in representations to employers that thousands of job applicants had been convicted of serious crimes when they had not been.

Under the current legal system, victims of these illegal and ugly practices have secured court orders ending the privacy-invading law breaking, received monetary compensation for the injury to their privacy rights, and were able to remove false statements about themselves from their credit reports, among other remedies.

H.R. 1927 would have eliminated and made impossible *all* of these cases, and foreclosed individual Americans from preventing these types of privacy invasions in the future. In none of them could a court have possibly found that every class member had suffered property injuries (as required in the bill), let alone in precisely the same amount (as required by the bill). In this way, H.R. 1927 would eviscerate our country's laws protecting Americans' privacy, even in truly egregious circumstances.

H.R. 1927 Would Eliminate Class Actions Protecting the Disabled

H.R. 1927 would also prevent men and women with disabilities from using the class action device to enforce their rights to access physical facilities and government programs. These rights, recognized in the federal Americans with Disabilities Act and many analogous state statutes, have been the focal point of numerous large class actions in recent years that have not sought any monetary damages or alleged physical or monetary injuries. Yet these class actions have nonetheless resulted in sweeping improvements in the lives of people with disabilities, removing barriers to navigating through the world and ensuring that both public and private services are equally available to everyone. For example, on April 1, 2015, a settlement was reached in *Willits v. City of Los Angeles*, a class action filed in 2010 on behalf of people with mobility impairments who could not safely use the city's pedestrian rights-of-way because of missing or inadequate curb ramps as well as broken and pothole-riddled sidewalks and crosswalks. Under the settlement, Los Angeles has committed to invest $1.4 billion over the next thirty years to repair and improve its sidewalks and related infrastructure. But how would one prove that any person in a wheelchair who could not use sidewalks had lost property in the identical "type and extent" as every other person in a wheelchair? The answer is self-evident: it's impossible, and H.R. 1927 would have barred this successful and important class action. Discrimination against people with disabilities isn't readily reduced to a one-size-fits-all property loss, and thus it is treated as meaningless by the bill.

H.R. 1927 Will Encourage Deceptive Advertising

As corporations know, millions of Americans are willing to pay more for products with certain qualities. Many citizens are willing to pay more for products that are made in America, for example, or for food that is organic. Similarly, consumers are willing to spend more for (or decide to buy) products that they believe will prevent disease or improve their health. Unfortunately, from time to time, some corporations will deceptively advertise or label products that do not have such qualities.

There have been quite a few class actions over the years that have successfully protected consumers against these sorts of misleading advertisements. Many corporations have been forced to end dishonest marketing campaigns, and to give refunds to consumers through judgments or settlements in class action cases. This is frequently very substantial relief; for example, Capital One recently sent many of its customers checks averaging approximately $175 each as a result of one of these cases. Consumers have been able to win injunctive relief where courts ordered corporations to cease misleading and predatory ad campaigns. In some cases, consumers have been able to win refunds from false advertisers, proving their cases through such recognized devices as sophisticated surveys showing the average amount consumers would pay for a product that actually was made in America (as advertised) as compared to what the typical consumer would pay for products actually made in (for example) China.

H.R. 1927 would eliminate all class actions of this sort. As a result, H.R. 1927 would encourage dishonest corporations to falsely promise cancer cures, to claim that pesticide-covered

produce was organic, and the like. This would plainly harm our marketplace and American consumers.

CONCLUSION

The foregoing are merely a few examples of the damage that H.R. 1927 would visit on the American legal system, and the country as a whole. But these are only the tip of the iceberg. The class action device serves an important public function: it supplements the ability of the government to enforce the laws by allowing groups of consumers, investors, and workers to share resources and pursue cases where a private right of action is available. The Act would eliminate most investor protection lawsuits, which would in turn encourage widespread securities fraud, and thus imperil the retirement savings and other investments that millions of people rely upon to protect their futures. The Act would also eliminate nearly all antitrust class actions which seek to protect the free market, and would instead reward cartels and put honest businesses at a huge disadvantage vis a vis their rivals. And the list could go on and on.

This legislation is profoundly harmful. It would undermine some of the key laws that protect American consumers, investors, small businesses, and citizens.