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Subcommittee on the Constitution and Civil Justice
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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.

[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).