

FAIRNESS IN CLASS ACTION LITIGATION ACT OF 2017

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MARCH 7, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 985]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 985) to amend the procedures used in Federal court class actions and multidistrict litigation proceedings to assure fairer, more efficient outcomes for claimants and defendants, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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## Purpose and Summary

Recently, an independent research firm surveyed companies in 26 countries and found that 80 percent of those that were subject to a class action lawsuit were U.S. companies, putting those U.S. companies at a distinct economic disadvantage when competing with companies worldwide.<sup>1</sup> The problem of overbroad class actions, however, does not just affect U.S. companies. It affects consumers in the United States, who are forced into lawsuits they do not want to be in. How do we know that? We know that because the median rate at which consumer class action members take the compensation offered in a settlement is an incredibly low two-hundredths of 1%.<sup>2</sup> That's right—only the tiniest fraction of consumer class action members bother to claim the compensation awarded them. That is clear proof that vastly large numbers of class members are satisfied with the product they purchased, do not want compensation, and do not want to be lumped into a gigantic class action lawsuit against their will.

Federal judges are crying out for Congress to reform the class action system, which currently allows unscrupulous lawyers to fill classes with hundreds and thousands of unmeritorious claims and use those artificially inflated classes to force defendants to settle the case. 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.<sup>3</sup> Liberal Justice Ruth Bader Ginsburg has recognized that “[a] court’s decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims.”<sup>4</sup> Judge Diane Wood of the Seventh Circuit Court of Appeals (appointed by President Clinton) has explained that class certification “is, in effect, the whole case.”<sup>5</sup> Then-Chief Judge of the Seventh Circuit Richard Posner explained that certification of a class action, even one lacking in merit, forces defendants “to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability.”<sup>6</sup> And in another Seventh Circuit decision the court wrote:

One possible solution to this problem is requiring judges to do some threshold level of review of the merits of a class action before allowing certification [that is, approval] of a class . . . [I]t is cases like the one before us that demonstrate precisely why the courts, and Congress, ought to be on the lookout for ways to correct class action abuses.

<sup>1</sup>See [http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey\\_v24-128746.pdf](http://www.nortonrosefulbright.com/files/20150514-2015-litigation-trends-survey_v24-128746.pdf).

<sup>2</sup>Declaration of Deborah McComb Re Settlement Claims April 21, 2014, at 2, available at <http://blogs.reuters.com/alison-frankel/files/2014/05/duracellclassaction-mccombdeclaration.pdf>

<sup>3</sup>AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011); see also *Castano v. American Tobacco Co.*, 84 F.3d at 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 the probability of an adverse judgment is low.”).

<sup>4</sup>*Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

<sup>5</sup>Hon. Diane Wood, Circuit Judge, Remarks at the FTC Workshop: Protecting Consumer Interests in Class Actions (Sept. 13–14, 2004), in Panel 2: Tools for Ensuring that Settlements are “Fair, Reasonable, and Adequate,” 18 *Geo. J. Legal Ethics* 1197, 1213 (2005).

<sup>6</sup>*In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

Given the complexity of our legal system, it is impossible to develop perfect standards for identifying and quickly disposing of frivolous claims. Inevitably this court and other courts will be faced with cases that waste the time and money of everybody. Beyond addressing the legal claims before us as we would in any ordinary case, we must frankly identify situations where we suspect the lawyers, rather than the claimants, are the only potential beneficiaries.<sup>7</sup>

So where is all the money going in these cases? To the lawyers who brought the lawsuits that hardly anyone wanted to be in.

The provisions included in the Fairness in Class Action Litigation Act (“FICALA”) would enact much-needed reforms governing Federal court class action and mass tort multi-district litigation proceedings. The current class action and mass action lawsuit system is deeply flawed in many ways:

*Class members receive little:* Most class actions (particularly class actions brought on behalf of consumers) produce no benefits for class members—some are dismissed by courts, some are voluntarily dismissed by counsel (with payments made only to counsel), and some are settled. In consumer cases, very few class members get any benefit (less than 5% of class members on average).

*Lawyers reap millions in fees:* When cases are settled, the fees for lawyers representing the class take up a large share of the settlement, typically millions of dollars per case. Indeed, because so few class members receive settlement payments in most cases, the amount paid to lawyers is often many times the amount actually paid to class members.

*Multidistrict litigation has been transformed into a mechanism for abusive “mass actions”:* Congress created the multidistrict litigation (“MDL”) procedure to enable courts to fairly and efficiently administer individual cases involving the same subject. But mass tort proceedings using the MDL process have become magnets for advertising-driven, poorly investigated (and often patently invalid) personal injury claims. The resulting massive proceedings, often largely consisting of claims that should never have been filed, impose unfair burdens on courts and defendants and prevent plaintiffs with trial-worthy claims from timely getting their day in court.

The fundamental problem is that far too many class actions and mass actions are initiated by opportunistic lawyers, and litigated primarily for the benefit of those lawyers, with any actual victims being used as a means of garnering vast fee awards. Who bears the cost of this litigation system? In the first instance, the businesses—

<sup>7</sup>Manistee Apartments, LLC v. City of Chicago, 844 F.3d 630, 635 (7th Cir. 2016). State court judges are also asking for reforms in the class action system. Recently, a California judicial decision reported that in a class action consisting of over 230,000 people, only two of the 230,000 wanted the coupons offered in the class action settlement. The judge in that case said the case produced “absolutely no benefit really to anybody.” Available at <http://www.courts.ca.gov/opinions/nonpub/G049611.PDF>.

small and large—that are sued in these unjustified cases, forced to pay their own legal fees and, eventually, to pay settlements coerced even in meritless cases. But ultimately these costs are paid by consumers, workers, and investors, throughout the economy—because the diversion of hundreds of millions of dollars away from productive purposes, as well as the time and attention of entrepreneurs, means prices are higher, new products are not brought to market, and new jobs are not created.

Two types of reforms are needed to fix our broken litigation system: protections against the abuse of consumers by unscrupulous lawyers, and protections against the filing of unjustified claims and other abusive litigation practices. Every single provision of H.R. 985 would maximize recoveries by deserving victims and weed out unmeritorious claims that would otherwise siphon off resources from those deserving victims.<sup>8</sup> And no provision of the bill prevents any claims from being brought as a class or mass action; the provisions simply set fair rules for bringing them.

### **Background and Need for the Legislation**

House Judiciary Committee Chairman Bob Goodlatte introduced the Fairness in Class Action Litigation Act on February 9, 2017.

Two types of reforms are needed to fix our broken litigation system: protections against the abuse of consumers by unscrupulous lawyers, and protections against the filing of unjustified claims and other abusive litigation practices. To that end, here is what FICALA’s provisions do (in the order in which they appear in the bill, with a more detailed explanation of each section following this summary in the section entitled “Section-by-Section Analysis”):

They prohibit Federal courts from certifying for class treatment an action seeking monetary relief for personal injury or economic loss absent an affirmative demonstration that each proposed class member suffered the same type and scope of alleged injury as the proposed class representative(s).

They prohibit judges from approving class actions in which any proposed class representative (that is, a named plaintiff that will be representing everyone else in the class action) is a relative of, is a present or former employee of, is a present or former client of, or has any contractual relationship with the class action lawyer. This prevents incestuous litigation-factory arrangements that exist today.

They require that, in a class action seeking monetary relief, a class cannot be certified unless the members of the class will be identifiable based on objective criteria, not simply a self-serving declaration, and that there is a “reliable and administratively feasible mechanism” for the court to determine who falls within the class and for distributing a monetary judgment to members of the class. This prevents situations we’ve seen in which classes are certified, only to find out at the end of the day that victims cannot be located or do not exist.

<sup>8</sup> Even a Task Force of the American Bar Association has written that “When it comes to fees, class counsel and class members have a fundamental conflict of interest. Every dollar not spent on fees is a dollar that would go to the class members.” Report on Contingent Fees in Class Action Litigation January 11, 2006 Task Force on Contingent Fees, Tort Trial and Insurance Practice Section of the American Bar Association, 25 Rev. Litig. 459, 495 (2006).

They require that class action lawyers should only get paid after the victims get paid, that the portion of attorneys' fee awards to class action lawyers should be limited to a reasonable percentage of the money actually distributed to and received by the victims, and class action lawyers' fees should never exceed the total amount of money received by all the victims. This ensures more compensation goes to victims, and reasonable amounts (in the discretion of the court) go to lawyers.

They require that in any Federal court-approved class action settlement, the plaintiffs' lawyers must provide the Administrative Office of United States Courts (the "AO") with an accounting of how all money paid by the defendants was distributed. The AO, in turn, would be charged with publishing annual aggregate reports on class settlement distributions derived from these data.

They make clear that a plaintiff cannot certify an "issue" class unless the entire claim for relief (not just the issue standing alone) qualifies for class treatment under Rule 23. This will prevent, for example, the certification of huge classes under the common "issue" regarding who bought a product when in fact the relevant inquiry is which of those purchasers actually suffered any injury.

They require Federal courts to stay expensive discovery pending resolution of Rule 12 motions (that is, motions to dismiss for failure to state a claim); motions to strike class allegations; motions to transfer; and other motions that would dispose of class allegations unless the court finds that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to a party.

They require that any third-party funding agreement be disclosed to the district court and all parties. That would allow the district court to take appropriate steps to protect class members' interests by monitoring the influence of certain entities that are mere funders, not lawyers, nor parties to the litigation over lawsuits and help the court ensure victims are adequately represented.

They provide that class certification decisions are appealable as of right.

They require Federal courts to consider each plaintiff's claims separately in assessing Federal jurisdiction over multi-plaintiff complaints asserting personal injury or wrongful death claims. The House Judiciary Committee recently reported out H.R. 725, the "Innocent Party Protection Act," which prevents opportunistic lawyers from adding local defendants to a lawsuit simply to keep the case in a preferred state court. The misjoinder provision in FICALA similarly prevents these lawyers from adding certain plaintiffs just to keep the case in state court.

Congress created the multidistrict litigation ("MDL") procedure to enable courts to fairly and efficiently administer individual cases involving the same subject. But mass tort proceedings using the MDL process have become magnets for advertising-driven, poorly investigated (and often patently invalid) personal injury claims. The resulting massive proceedings, often largely consisting of claims that should never have been filed, impose unfair burdens on courts and defendants and prevent plaintiffs with trial-worthy claims from timely getting their day in court. FICALA requires that for each lawsuit filed in or transferred to a Federal MDL mass tort proceeding, plaintiffs' lawyers must submit to the MDL court evidence that before filing, they properly investigated the asserted

claims. Specifically, they would be required to submit evidentiary support (including, but not limited to, medical records) for the factual contentions in each plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury. Plaintiffs' lawyers would be required to make the submission within the later of 45 days after the complaint is filed or transferred to an MDL proceeding. Within 30 days thereafter, the MDL court would be required to rule on the sufficiency of the submission. If the MDL court finds a submission insufficient, the claim must be dismissed without prejudice. If within 30 days thereafter, the insufficiency is not corrected, the claim must be dismissed with prejudice.

In enacting the MDL statute, Congress made clear that MDL courts were supposed to handle pre-trial proceedings only—and then send the cases back to the courts in which they were originally filed for trial. But some MDL courts pressure defendants to settle by insisting on “bellwether” trials—namely, pseudo-trials that supposedly test a claim's suitability for settlement. Often, however, those trials are not fair tests of the plaintiffs' claims. Rather, they're unrepresentative claims hand-picked to maximize attorneys' fees in a coerced settlement. FICALA therefore affirms Congress's original intent that MDL proceedings are for pre-trial purposes only—and that no trial may be conducted by an MDL court unless all parties consent to a waiver of venue and personal jurisdiction for that particular trial.

They authorize immediate appellate review of interlocutory MDL court orders where those rulings may apply to or affect multiple cases in the MDL proceeding or where immediate review may materially advance the ultimate termination of the MDL proceeding.

When the cost-savings economies of scale of an MDL proceeding are used by class action plaintiffs' lawyers, those savings should be passed on to the victims, and the savings enforced by the judges who take over the cases after the pre-trial MDL proceedings occur. So FICALA requires that in settlements of Federal court mass tort claims in MDL proceedings, 80% of all compensation paid must go directly to claimants.

They make clear that nothing in the bill restricts the authority of the Judicial Conference and the Supreme Court from proposing their own rule changes under chapter 131 of title 28 of the U.S. Code, which sets out the procedures under which the courts themselves can create their own rules.

Finally, they provide that the amendments made by the bill shall apply on the date of enactment.

### **Hearings**

The Committee on the Judiciary held no hearings on H.R. 985. During the last Congress, the Committee's Subcommittee on the Constitution and Civil Justice held a hearing on H.R. 1927 on April 29, 2015 (which included some of the provisions contained in H.R. 985), at which the following witnesses presented testimony at the hearing: John Beisner, Partner, the Skadden, Arps, Slate, Meagher, and Flom LLP; Mark A. Behrens, Shook, Hardy & Bacon; Andrew Trask, McGuire, Woods; and Alexandra D. Lahav, University of Connecticut School of Law.

### Committee Consideration

On February 15, 2017, the Committee met in open session and ordered the bill H.R. 985 favorably reported, without amendment, by a rollcall vote of 19 to 12, a quorum being present.

### Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 985.

1. An amendment offered by Mr. Conyers to provide an exception for civil rights claims from the bill's class action provisions. The amendment was defeated by a rollcall vote of 11 to 14.

### ROLLCALL NO. 1

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

**ROLLCALL NO. 1**—Continued

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Swalwell (CA) .....	X		
Mr. Lieu (CA) .....	X		
Mr. Raskin (MD) .....	X		
Ms. Jayapal (WA) .....			
Mr. Schneider (IL) .....	X		
Total .....	11	14	

2. An amendment offered by Ms. Jackson Lee to delay the effective date until the Administrative Office of the U.S. Courts completes an assessment of the bill's costs on litigants and the courts. The amendment was defeated by a rollcall vote of 12 to 17.

**ROLLCALL NO. 2**

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



**ROLLCALL NO. 2**—Continued

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Jeffries (NY) .....			
Mr. Cicilline (RI) .....	X		
Mr. Swalwell (CA) .....	X		
Mr. Lieu (CA) .....	X		
Mr. Raskin (MD) .....	X		
Ms. Jayapal (WA) .....	X		
Mr. Schneider (IL) .....	X		
<b>Total</b> .....	12	17	

3. An amendment offered by Mr. Deutch to strike the bill's stay of discovery provision. The amendment was defeated by a rollcall vote of 12 to 19.

**ROLLCALL NO. 3**

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

**ROLLCALL NO. 3**—Continued

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Richmond (LA) .....			
Mr. Jeffries (NY) .....			
Mr. Cicilline (RI) .....	X		
Mr. Swalwell (CA) .....	X		
Mr. Lieu (CA) .....	X		
Mr. Raskin (MD) .....	X		
Ms. Jayapal (WA) .....	X		
Mr. Schneider (IL) .....	X		
<b>Total</b> .....	<b>12</b>	<b>19</b>	

4. An amendment offered by Mr. Cicilline to provide an exception from to bill for actions, to the extent authorized by law, arising from injury caused by a firearm. The amendment was defeated by a rollcall vote of 12 to 19.

**ROLLCALL NO. 4**

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....		X	
Mr. Smith (TX) .....		X	
Mr. Chabot (OH) .....		X	
Mr. Issa (CA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....		X	
Mr. Gohmert (TX) .....		X	
Mr. Jordan (OH) .....		X	
Mr. Poe (TX) .....			
Mr. Chaffetz (UT) .....		X	
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....			
Mr. Labrador (ID) .....		X	
Mr. Farenthold (TX) .....			
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....		X	
Mr. Buck (CO) .....		X	
Mr. Ratcliffe (TX) .....		X	
Mr. Bishop (MI) .....			
Ms. Roby (AL) .....		X	
Mr. Gaetz (FL) .....			
Mr. Johnson (LA) .....		X	
Mr. Biggs (AZ) .....		X	
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....	X		
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....	X		
Mr. Cohen (TN) .....	X		
Mr. Johnson (GA) .....	X		
Mr. Deutch (FL) .....	X		

**ROLLCALL NO. 4**—Continued

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....			
Mr. Richmond (LA) .....			
Mr. Jeffries (NY) .....			
Mr. Cicilline (RI) .....	X		
Mr. Swalwell (CA) .....	X		
Mr. Lieu (CA) .....	X		
Mr. Raskin (MD) .....	X		
Ms. Jayapal (WA) .....	X		
Mr. Schneider (IL) .....	X		
<b>Total</b> .....	<b>12</b>	<b>19</b>	

5. An amendment offered by Ms. Jayapal to strike the bill's provision governing issue classes. The amendment was defeated by a rollcall vote of 12 to 19.

**ROLLCALL NO. 5**

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Goodlatte (VA), Chairman .....		X	
Mr. Sensenbrenner, Jr. (WI) .....		X	
Mr. Smith (TX) .....		X	
Mr. Chabot (OH) .....		X	
Mr. Issa (CA) .....		X	
Mr. King (IA) .....		X	
Mr. Franks (AZ) .....		X	
Mr. Gohmert (TX) .....		X	
Mr. Jordan (OH) .....		X	
Mr. Poe (TX) .....			
Mr. Chaffetz (UT) .....		X	
Mr. Marino (PA) .....		X	
Mr. Gowdy (SC) .....			
Mr. Labrador (ID) .....		X	
Mr. Farenthold (TX) .....			
Mr. Collins (GA) .....		X	
Mr. DeSantis (FL) .....		X	
Mr. Buck (CO) .....		X	
Mr. Ratcliffe (TX) .....		X	
Mr. Bishop (MI) .....			
Ms. Roby (AL) .....		X	
Mr. Gaetz (FL) .....			
Mr. Johnson (LA) .....		X	
Mr. Biggs (AZ) .....		X	
Mr. Conyers, Jr. (MI), Ranking Member .....	X		
Mr. Nadler (NY) .....	X		
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....	X		
Mr. Cohen (TN) .....	X		
Mr. Johnson (GA) .....	X		

**ROLLCALL NO. 5**—Continued

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Deutch (FL) .....	X		
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....			
Mr. Richmond (LA) .....			
Mr. Jeffries (NY) .....			
Mr. Cicilline (RI) .....	X		
Mr. Swalwell (CA) .....	X		
Mr. Lieu (CA) .....	X		
Mr. Raskin (MD) .....	X		
Ms. Jayapal (WA) .....	X		
Mr. Schneider (IL) .....	X		
<b>Total</b> .....	<b>12</b>	<b>19</b>	

6. Motion to report H.R. 985 favorably to the House of Representatives. The motion was agreed to by a rollcall vote of 19 to 12.

**ROLLCALL NO. 6**

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Goodlatte (VA), Chairman .....	X		
Mr. Sensenbrenner, Jr. (WI) .....	X		
Mr. Smith (TX) .....	X		
Mr. Chabot (OH) .....	X		
Mr. Issa (CA) .....	X		
Mr. King (IA) .....	X		
Mr. Franks (AZ) .....	X		
Mr. Gohmert (TX) .....	X		
Mr. Jordan (OH) .....	X		
Mr. Poe (TX) .....			
Mr. Chaffetz (UT) .....	X		
Mr. Marino (PA) .....	X		
Mr. Gowdy (SC) .....			
Mr. Labrador (ID) .....	X		
Mr. Farenthold (TX) .....			
Mr. Collins (GA) .....	X		
Mr. DeSantis (FL) .....	X		
Mr. Buck (CO) .....	X		
Mr. Ratcliffe (TX) .....	X		
Mr. Bishop (MI) .....			
Ms. Roby (AL) .....	X		
Mr. Gaetz (FL) .....			
Mr. Johnson (LA) .....	X		
Mr. Biggs (AZ) .....	X		
Mr. Conyers, Jr. (MI), Ranking Member .....		X	
Mr. Nadler (NY) .....		X	
Ms. Lofgren (CA) .....			
Ms. Jackson Lee (TX) .....		X	
Mr. Cohen (TN) .....		X	

**ROLLCALL NO. 6**—Continued

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Johnson (GA) .....		X	
Mr. Deutch (FL) .....		X	
Mr. Gutierrez (IL) .....			
Ms. Bass (CA) .....			
Mr. Richmond (LA) .....			
Mr. Jeffries (NY) .....			
Mr. Cicilline (RI) .....		X	
Mr. Swalwell (CA) .....		X	
Mr. Lieu (CA) .....		X	
Mr. Raskin (MD) .....		X	
Ms. Jayapal (WA) .....		X	
Mr. Schneider (IL) .....		X	
Total .....	19	12	

**Committee Oversight Findings**

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

**New Budget Authority and Tax Expenditures**

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

**Congressional Budget Office Cost Estimate**

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 985, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, March 6, 2017.*

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 985, the “Fairness in Class Action Litigation Act of 2017.”

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

Sincerely,

KEITH HALL,  
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.  
Ranking Member

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**H.R. 985—Fairness in Class Action Litigation Act of 2017.**

As ordered reported by the House Committee on the Judiciary  
on February 15, 2017.

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H.R. 985 would amend the Federal judicial code to update the standards by which a court determines whether a case meets the requirements to be heard as a class-action suit. The bill also would require the Judicial Conference of the United States to submit an annual report to the Congress on payments from class-action settlements. Finally, the bill would amend the procedures that Federal courts use when considering certain multi-plaintiff claims and multi-district litigation proceedings.

The effect that H.R. 985 would have on litigation strategy is uncertain and could lead to an increase or decrease in the number of cases brought to Federal courts. Based on an analysis of information from the Administrative Office of the United States Courts (AOUSC) and research regarding class-action suits, CBO estimates that imposing new requirements on the courts for the consideration of class-action cases would cost \$2 million over the 2018–2022 period; such spending would be subject to the availability of appropriated funds. Those additional administrative expenses to determine whether cases qualify to be considered as class-action suits would be incurred whether or not overall case-loads increased or decreased under the bill.

Under the bill, the Judicial Conference would be required to submit to the Congress an annual report summarizing the disbursement of settlement payments to class members for all ongoing class-action settlements. Based on an analysis of information from the AOUSC on the amount of work necessary to analyze the relevant data and complete the report, CBO estimates that implementing this requirement would cost less than \$500,000 over the 2018–2022 period.

Enacting H.R. 985 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 985 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 985 contains no intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

H.R. 985 would impose private-sector mandates, as defined in UMRA, by limiting the timing and amount of fees attorneys could

receive in class-action lawsuits and multi-district litigation. For example, the bill would:

- Prohibit fee awards to attorneys that exceed the total amount of money distributed to all class members;
- Prohibit the payment of fee awards to attorneys in class-action cases until the distribution of any monetary recovery to class members has been completed; and
- Limit the fees to attorneys in multi-district proceedings to no more than 20 percent of the total recovery.

The limits on attorney fees would be a mandate because it would restrict amounts that attorneys might otherwise be able to collect from their clients. The direct cost of the mandates is measured as the annual loss of net income that attorneys would experience in both pending and future cases. Based on information from legal scholars about how attorney's fees are currently structured in such cases and the possible number of cases that could be affected (some research suggests about 1,000 annually), CBO estimates that the annual cost of the mandates would exceed the threshold established in UMRA for private-sector mandates (\$156 million in 2017, adjusted annually for inflation) in each of the first 5 years the mandates are in effect.

The CBO staff contacts for this estimate are Robert Reese (for Federal costs) and Paige Piper/Bach (for private-sector mandates). The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

### **Duplication of Federal Programs**

No provision of H.R. 985 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

### **Disclosure of Directed Rule Makings**

The Committee estimates that H.R. 985 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 985 will provide greater fairness in class action litigation.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 985 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

### Section-by-Section Analysis

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

*Sec. 1. Short title; Reference; Table of Contents.* Section 1 sets forth the short title of the bill as the “Fairness in Class Action Litigation Act of 2017.”

*Sec. 2. Purposes.* Section 2 sets forth the purposes of the bill.

*Sec. 3. Class Action Procedures.*

#### **Class action injury allegations:**

*(a) IN GENERAL.—A Federal court shall not issue an order granting certification of a class action seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives. (b) CERTIFICATION ORDER.—An order issued under Rule 23(c)(1)<sup>9</sup> of the Federal Rules of Civil Procedure that certifies a class seeking monetary relief for personal injury or economic loss shall include a determination, based on a rigorous analysis of the evidence presented, that the requirement in subsection (a) of this section is satisfied.*

The purpose of a class action is to provide a fair, efficient means of litigating like claims, not to provide a way for unscrupulous lawyers to artificially inflate the size of a class to extort a larger settlement value for themselves, and in the process increase the prices of goods and services for everyone. Claims seeking monetary relief for personal injury or economic loss should be grouped in classes in which those who are the most injured receive the most compensation. No one should be forced into a class action with other uninjured or minimally injured members, only to see their own compensation reduced.

Unscrupulous lawyers work the system today in the following way. They file lawsuits, for example, against a company that sells a washing machine. Some very small percentage of those washing machines do not work the way they are supposed to, but the vast majority of them do. But the lawyers file a class action lawsuit that includes everyone who ever purchased a washing machine from the company, even the large number of people who are completely satisfied with their purchase. When these lawyers lump injured or non-comparably injured people into the same class action lawsuit, the limited resources of the parties are wastefully spent weeding through hundreds of thousands of class members in order to find those with actual or significant injuries. That’s money that could have been spent compensating deserving victims. As the Third Circuit Court of Appeals said in a recent opinion, “It is unfair to absent class members if there is a significant likelihood their recovery will be diluted by fraudulent or inaccurate claims.”<sup>10</sup>

Sometimes, because judges do not separate the injured from the non-injured in class actions early enough in the proceedings, they end up throwing out settlements because it turns out hardly any of the class members were harmed, and did not want compensa-

<sup>9</sup>Rule 23(c)(1) prescribes the rules for Federal court certification orders.

<sup>10</sup>*Carrera v. Bayer Corp.*, 727 F.3d 307, 310 (3d Cir. 2013).



tion. Other times, when judges realize they have created an overbroad class, they justify their actions by coming up with novel theories to provide some compensation to people who are entirely satisfied with the product, and do not want compensation. Either way, the solution is to direct judges to determine as best they can, *early in the proceedings*, which proposed class members are significantly and comparably injured, and those who are not, and to treat them accordingly. That’s fair to everyone.

FICALA would simply make clear what already should be clear to the Federal courts, namely that uninjured class members are incompatible with Rule 23(b)(3)’s current requirement that classes should not be certified unless common legal and factual issues predominate in the class action. This subsection’s requirement that those seeking to bring a class action “affirmatively demonstrate” that each proposed class member suffered the same type and scope of injury as the named class representatives, as well as its requirement that the Federal court conduct “a rigorous analysis” of the evidence presented that the requirements of this subsection have been met, are both drawn from existing Supreme Court precedent.<sup>11</sup>

Opponents of the bill may claim this provision will somehow interfere with the class action process. But this section of the bill does not prohibit the filing of any class actions at all. It simply requires that if class actions are filed, similarly injured people should be grouped with other similarly injured people in their own class action. Claims seeking monetary relief for personal injury or economic loss<sup>12</sup> should be grouped in classes in which those who are most injured receive the most compensation. No one should be forced into a class action with other uninjured or minimally injured members, only to see their own compensation reduced.

### **Conflicts of Interest:**

(a) *REQUIRED DISCLOSURES.*—*In a class action complaint, class counsel shall state whether any proposed class representative or named plaintiff in the complaint is a relative of, is a present or former employee of, is a present or former client of (other than with respect to the class action), or has any contractual relationship with (other than with respect to the class action) class counsel. In addition, the complaint shall describe the circumstances under which each class representative or named plaintiff agreed to be included in the complaint and shall identify any other class action in which any proposed class representative or named plaintiff has a similar role.* (b) *PROHIBITION OF CONFLICTS.*—*A Federal court shall not issue an order granting certification of any class action in which any proposed class representative or named plaintiff is a relative of, is a present or former employee of, is a present or former client of*

<sup>11</sup> *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350–51 (2011) (“A party seeking class certification must affirmatively demonstrate his compliance with the Rule . . . We [have] recognized . . . that certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied”) (internal quotations and citations omitted).

<sup>12</sup> Black’s Law Dictionary defines “personal injury” as “In a negligence action, any harm caused to a person, such as a broken bone, a cut, or a bruise; bodily injury.” “Economic loss” is defined by Black’s Law Dictionary as “A monetary loss such as lost wages or lost profits . . . [I]n a products-liability suit, economic loss includes the cost of repair or replacement of defective property, as well as commercial loss for the property’s inadequate value and consequent loss of profits or use.”

(other than with respect to the class action), or has any contractual relationship with (other than with respect to the class action) class counsel. (c) *DEFINITION.*—For purposes of this section, “relative” shall be defined by reference to section 3110(a)(3) of title 5, United States Code.<sup>13</sup>

Abraham Lincoln left behind pages of notes on a lecture he was to give to lawyers. They say “Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife, and put money in his pocket?”<sup>14</sup>

That was Lincoln in the 1850’s. Here’s *Forbes* magazine just a couple years ago:

The lead plaintiff in the 5-Hour case . . . worked in marketing for a cosmetic surgery center in California. But in a grueling, 5-hour deposition, [she] admitted she had been recruited to serve as a plaintiff by her cousin, who worked for a Texas lawyer[;] had purchased two bottles of 5-Hour Energy specifically to sue the manufacturer; had never complained to the company or sought a refund; and had signed a backdated retainer agreement with [trial lawyer] Rubinstein [the fellow seen here at his own deposition] . . . [A]nother one of Rubinstein’s clients . . . admitted she had served as a plaintiff for Rubinstein in at least four class actions over products like Swanson pot pies and lipstick . . . E-mails and other communications 5-Hour’s lawyers uncovered in their suit showed that Rubinstein belonged to a loose affiliation of lawyers who ran an assembly-line process of identifying companies to sue and then helping each other find plaintiffs.<sup>15</sup>

Lawsuits are supposed to be initiated by truly injured plaintiffs seeking redress, not invented by lawyers who hunt for a plaintiff to assert a supposed injury made up by the lawyer. Few class members bother to collect the payments available in class action settlements in large part because they do not feel injured by the supposedly wrongful conduct in the first place. In too many cases, opportunistic lawyers come up with an idea for a lawsuit and then search for a person who has bought the product—or they send a relative or employee to buy the product—so they’ll have someone who can sue on behalf of a proposed class of all other buyers. No product purchaser has actually complained or feels cheated. That’s a major reason why so few class members bother to collect the payments available in class action settlements—they do not feel injured by the supposedly wrongful conduct in the first place. This abuse of class actions—lawyer-driven lawsuits—must end. FICALA therefore requires lawyers to disclose how proposed class represent-

<sup>13</sup> 5 U.S.C. §3110(a)(3) (prohibiting the employment of relatives by Federal public officials) provides that “‘relative’ means, with respect to a public official, an individual who is related to the public official as father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister.”

<sup>14</sup> Available at <http://quod.lib.umich.edu/l/lincoln/lincoln2/1:134.1?rgn=div2;view=fulltext>.

<sup>15</sup> Available at <http://www.forbes.com/sites/danielfisher/2015/11/17/collapse-of-5-hour-energy-case-reveals-secrets/#475a827a1aa4>.

atives became involved in the class action. Further, it prohibits class actions in which any proposed class representative (that is, a named plaintiff that will be representing everyone else in the class action) is a relative of, is a present or former employee of, is a present or former client of, or has any contractual relationship with the class action lawyer.

**Class Member Benefits:**

*(a) DISTRIBUTION OF BENEFITS TO CLASS MEMBERS.—A Federal court shall not issue an order granting certification of a class action seeking monetary relief unless the class is defined with reference to objective criteria and the party seeking to maintain such a class action affirmatively demonstrates that there is a reliable and administratively feasible mechanism (a) for the court to determine whether putative class members fall within the class definition and (b) for distributing directly to a substantial majority of class members any monetary relief secured for the class.*

Because the whole purpose of class actions is to redress the injuries sustained by class members, the system should ensure that any benefits obtained in such cases can actually be delivered to those class members. And it should ensure that class members, not their lawyers, get most of those benefits. Consequently, FICALA’s section on “Class member benefits” includes the following provisions: a requirement that, in a class action seeking monetary relief, a class cannot be certified unless counsel can demonstrate that there is a “reliable and administratively feasible mechanism” for the court to identify who falls within the class (through something other than a self-serving declaration) and for distributing any monetary award that’s obtained to a substantial majority of the class members. In short, counsel have to demonstrate that the use of the class action device in a particular controversy would actually serve the purpose of compensating class members for their alleged injuries, if the class proves its case.

As one appeals court judge (nominated by President Obama) wrote in his dissent in a recent class action case, “The chief difficulty we confront in this case arises from the fact that some of the members of the class have not suffered the . . . injury upon which this entire case is predicated [and that] could constitute as many as 24,000 consumers who would have no valid claim against the defendants under the state [] laws even if the named plaintiffs win on the merits.”<sup>16</sup> He went on to chastise the other judges who allowed the class action to proceed, writing “if the district court does not identify a culling method to ensure that the class, by judgment, includes only members who were actually injured, this court has no business simply hoping that one will work.”<sup>17</sup>

Some courts of appeals have imposed this sort of “ascertainability” requirement.<sup>18</sup> But other courts, such as the Ninth Circuit,

<sup>16</sup>*In re* Nexium Antitrust Litigation, 777 F.3d 9, 32–33 (1st Cir. 2015) (Kayatta, Circuit Judge, dissenting).

<sup>17</sup>*Id.* at 35.

<sup>18</sup>*See* Carrera v. Bayer Corp., 727 F. 3d 300, 305, 306 (3d Cir. 2013) (“Many courts and commentators have recognized that an essential prerequisite of a class action, at least with respect to actions under Rule 23(b)(3), is that the class must be currently and readily ascertainable based on objective criteria . . . . If class members are impossible to identify without extensive

have rejected this rule.<sup>19</sup> America needs a rule that ensures class actions are used only where they will serve to actually get compensation to class members, where deserved. Cases that do nothing more than get lawyers lots of money are not consistent with the legitimate purposes of class actions. FICALA would establish that rule.

*(b) ATTORNEYS' FEES IN CLASS ACTIONS.—(1) FEE DISTRIBUTION TIMING.—In a class action seeking monetary relief, no attorneys' fees may be determined or paid pursuant to Rule 23(h) of the Federal Rules of Civil Procedure or otherwise until the distribution of any monetary recovery to class members has been completed. (2) FEE DETERMINATIONS BASED ON MONETARY AWARDS.—Unless otherwise specified by Federal statute, if a judgment or proposed settlement in a class action provides for a monetary recovery, the portion of any attorneys' fee award to class counsel that is attributed to the monetary recovery shall be limited to a reasonable percentage of any payments directly distributed to and received by class members. In no event shall the attorneys' fee award exceed the total amount of money directly distributed to and received by all class members. (3) FEE DETERMINATIONS BASED ON EQUITABLE RELIEF.—Unless otherwise specified by Federal statute, if a judgment or proposed settlement in a class action provides for equitable relief,<sup>20</sup> the portion of any attorneys' fee award to class counsel that is attributed to the equitable relief shall be limited to a reasonable percentage of the value of the equitable relief, including any injunctive relief.<sup>21</sup>*

The Manual for Complex Litigation (4th ed. 2004)<sup>22</sup> is a treatise published by the Federal Judicial Center, which is operated by the Federal judiciary. It was written by a group of well-respected judges, most of whom are still active. Section 21.71 of the Manual states as follows: “Compensating counsel for the actual benefits conferred on the class members is the basis for awarding attorney fees. The fundamental focus is the result actually achieved for class members. That approach is premised on finding a tangible benefit actually obtained by the class members . . . In cases involving a claims procedure or a distribution of benefits over time, the court should not base the attorney fee award on the amount of money set aside to satisfy potential claims. Rather, the fee awards should be based only on the benefits actually delivered.” However, for the

and individualized fact-finding or ‘mini-trials,’ then a class action is inappropriate.” (also holding that a plaintiff seeking class certification “must show, by a preponderance of the evidence, that the class is ‘currently and readily ascertainable based on objective criteria,’ and the trial court must evaluate this showing by employing a “rigorous analysis.”). Several other Circuits have joined that view. See *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015); *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014); *Karhu v. Vital Pharmaceuticals, Inc.*,—Fed. App'x—, 2015 WL 3560722, at \*2–3 (11th Cir. 2015).

<sup>19</sup> See *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 525 (6th Cir. 2015); *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 658 (7th Cir. 2015); and *Brieseno v. Conagra Foods, Inc.*, \_\_\_ F.3d (9th Cir., Jan. 3, 2017).

<sup>20</sup> Black's Law Dictionary (10th ed. 2014) defines “equitable remedy” as “A remedy, usu. a nonmonetary one such as an injunction or specific performance, obtained when available legal remedies, usu. monetary damages, cannot adequately redress the injury.”

<sup>21</sup> Black's Law Dictionary (10th ed. 2014) defines “injunction” as “A court order commanding or preventing an action.”

<sup>22</sup> Available at [http://www.fjc.gov/public/home.nsf/autoframe?openagent&url\\_l=/public/home.nsf/inavgeneral?openpage&url\\_r=/public/home.nsf/pages/524](http://www.fjc.gov/public/home.nsf/autoframe?openagent&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/524).

most part, Federal courts are not following this directive. Congress needs to enforce what the some Federal courts are not enforcing.

Taking a step back, it's important to realize that in class actions, no one asks the class members if they want a lawsuit brought on their behalf. Lawyers can sue for them without getting their permission. And there's good reason to suspect most people do not want to be part of most of these cases. According to a sworn declaration of a professional who administers class action settlements, the median rate at which consumer class action members take the compensation offered in a settlement is an incredibly low *0.023 percent*.<sup>23</sup>

That's right—only the tiniest fraction of a percent of consumer class action members bother to claim the compensation awarded them. Another study of the limited publicly available distributions to class members for cases filed in or removed to Federal court in 2009 found that “few class members ever even see those paltry benefits—particularly in consumer class actions. Unfortunately, because information regarding the distribution of class action settlements is rarely available, the public almost never learns what percentage of a settlement is actually paid to class members. But of the six cases in our [2009] data set for which settlement distribution data was public, five delivered funds to only miniscule percentages of the class: 0.000006%, 0.33%, 1.5%, 9.66%, and 12%. Those results are consistent with other available information about settlement distribution in consumer class actions.”<sup>24</sup> Further examples can be found in that report's Appendix A.

What that means is that the primary beneficiaries of consumer class actions are the lawyers—not the allegedly injured class members. Lawyers tend to reap millions, while the alleged victims get little or nothing. Here are a few examples:

The Subway sandwich chain was sued in a class action because trial lawyers complained their “foot-long” subs usually were not a full foot-long. As part of the settlement, Subway agreed to pay small amounts to the ten class representatives, but the millions of other class members received nothing. Not a dime. Meanwhile, the lawyers were awarded \$520,000 in fees.<sup>25</sup> The settlement was appealed to the Seventh Circuit Court of Appeals. During oral arguments in September, 2016, Judge Diane Sykes remarked that “[a] class action that seeks only worthless benefits for the class should be dismissed out of hand. . . . That's what should have happened here. . . . This is a racket.”<sup>26</sup>

The Coca Cola Company was sued in a class action lawsuit for allegedly implying in its advertising that a product called “vitaminwater” was healthy.<sup>27</sup> Class members received zero dollars in the settlement. The lawyers were awarded \$1.2 million in fees.

In *Lane v. Facebook, Inc.*, which arose out of alleged privacy violations by Facebook, the company agreed to settle the case by spending \$6.5 million to establish a new charity called the Digital

<sup>23</sup> Declaration of Deborah McComb Re Settlement Claims April 21, 2014, at 2, available at <http://blogs.reuters.com/alison-frankel/files/2014/05/duracellclassaction-mccombdeclaration.pdf>.

<sup>24</sup> Available at <http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrownclassactionstudy.pdf>.

<sup>25</sup> *In re Subway Footlong Sandwich Marketing and Sales Practices Litigation*, MDL No. 13-02439, available at <http://www.wied.uscourts.gov/sites/wied/files/documents/Subway%20MDL%20Final%20Settlement%20Approval%20Order.pdf>.

<sup>26</sup> See [http://www.abajournal.com/magazine/article/subway\\_sandwich\\_class\\_action](http://www.abajournal.com/magazine/article/subway_sandwich_class_action).

<sup>27</sup> *Volz v. Coca Cola Co.*, No. 1:10-cv-00879 (S.D. Ohio 2014).

Trust Foundation (“DTF”) whose purpose was to educate users on protection of identity and personal information online. Facebook agreed to pay class counsel \$3 million. Zero dollars were paid to class members. The Ninth Circuit affirmed this deal, but in a withering dissent, Judge Kleinfeld observed that “Facebook users who had suffered damages . . . got no money, not a nickel from the defendants . . . [while] [c]lass counsel, on the other hand, got millions.”<sup>28</sup> While the U.S. Supreme Court declined to review the Facebook settlement,<sup>29</sup> Chief Justice Roberts issued an unusual statement with respect to the Court’s denial of certiorari, stating that these charitable donation provisions (also known as *cy pres* awards) are a “growing feature” of class action settlements that warranted monitoring.<sup>30</sup>

The class action system is supposed to primarily benefit victims, not lawyers. Class action lawyers should only get paid after the victims get paid, and FICALA requires just that in the subsection entitled “Fee Distribution Timing.” Also, the portion of attorneys’ fee awards to class action lawyers should be limited to a reasonable percentage of the money actually distributed to and received by the victims, and class action lawyers’ fees should never exceed the total amount of money received by all the victims. FICALA requires that as well in the subsection entitled “Fee Determinations Based on Monetary Awards.”

Insofar as a class action seeks equitable relief (that is, non-monetary relief, including any injunctive relief that seeks to stop the defendant from doing something wrong), the portion of any class action lawyers’ fee award should be limited to a reasonable percentage of the value of that relief, as determined by the court. FICALA requires that in the subsection entitled “Fee Determinations Based on Equitable Relief.”

This provision will not affect fee awards in civil rights cases because both the monetary and equitable relief attorneys’ fees provisions in FICALA are qualified with the initial phrase “Unless otherwise specified by Federal statute.” The Civil Rights Attorney’s Fee Award Act of 1976, 42 U.S.C. § 1988,<sup>31</sup> allows a court, in its discretion, to award reasonable attorneys’ fees as part of the costs to a prevailing party in Federal civil rights lawsuits, including cases brought under 28 U.S.C. § 1983—the statute most commonly used to assert civil rights claims. Consequently, FICALA will not affect attorneys’ fees in civil rights class actions at all.

Regarding other equitable relief cases that do not involve civil rights claims, Federal courts routinely determine the value of intangible relief such as equitable or injunctive relief for purposes of

<sup>28</sup> Lane v. Facebook, Inc., 696 F.3d 811, 828 (9th Cir. 2013) (Kleinfeld, J., dissenting).

<sup>29</sup> See Marek v. Lane, 134 S. Ct. 8 (2013).

<sup>30</sup> *Id.* at 9.

<sup>31</sup> 42 U.S.C. § 1988 provides that “(b) Attorney’s fees. In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92–318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity such officer shall not be held liable for any costs, including attorney’s fees, unless such action was clearly in excess of such officer’s jurisdiction. (c) Expert fees. In awarding an attorney’s fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney’s fee.”

determining whether the amount in controversy requirement (currently \$75,000 to get into Federal court) is met.<sup>32</sup> A majority of courts consider only the value of the injunctive relief from the plaintiff's perspective or viewpoint.<sup>33</sup> Some courts determine the jurisdictional amount by evaluating the claim from the perspective of the party seeking Federal court jurisdiction.<sup>34</sup> Others have adopted the "either viewpoint" rule, which allows the court to look to either the plaintiffs or the defendant's viewpoint in establishing the amount in controversy in cases seeking some form of injunctive relief.<sup>35</sup> The bottom line is that, under FICALA, Federal courts will be able to use any method they deem best for reasonably assessing reasonable attorneys' fee awards in equitable relief class action settlements. This provision, of course, does not alter in any way the relief that would be granted to civil rights class action members, or to any other equitable relief class action members.

#### **Money Distribution Data:**

*(a) SETTLEMENT ACCOUNTINGS.—In any settlement of a class action that provides for monetary benefits, the court shall order class counsel to submit to the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts an accounting of the disbursement of all funds paid by the defendant pursuant to the settlement agreement. The accounting shall state the total amount paid directly to all class members, the actual or estimated total number of class members, the number of class members who received payments, the average amount (both mean and median) paid directly to all class members, the largest amount paid to any class member, the smallest amount paid to any class member and, separately, each amount paid to any other person (including class counsel) and the purpose of the payment. In stating the amounts paid to class members, no individual class member shall be identified. No attorneys' fees may be paid to class counsel pursuant to Rule 23(h)<sup>36</sup> of the Federal Rules of Civil Procedure until the accounting has been submitted. (b) ANNUAL SETTLEMENT DISTRIBUTION REPORTS.—Commencing not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall annually prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives for public dissemination a report summarizing how funds paid by defendants in class actions have been distributed, based on the settlement accountings submitted pursuant to subsection (a).*

Here's the way attorneys' fees in class actions generally work. Assume that to settle a class action, a defendant agrees to pay up to \$10 million—\$10 to each of one million purported class members. Under current practice, the court may award the class coun-

<sup>32</sup> See *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1050 (3d Cir. 1993) (valuing right to enjoin bank from charging fees); *Massachusetts State Pharm. Ass'n v. Federal Prescription Serv.*, 431 F.2d 130, 131 (8th Cir. 1970) (valuing right to enjoin solicitation of business).

<sup>33</sup> See 14AA Fed. Prac. & Proc. Juris. § 3703 (4th ed.) (April 2016 Update).

<sup>34</sup> See *id.*

<sup>35</sup> See *id.*

<sup>36</sup> Rule 23(h) sets out the rules for the award of attorneys' fees in class actions.

sel \$2.5 million (25% of the maximum potential settlement amount) without waiting to find out how much money actually gets to class members themselves. The court may award more or less, but 25% is a frequently used percentage. If, as usually happens, only 2.5% of the class members (2,500 persons) claim their settlement payments (for a total of \$25,000), the attorneys will receive 100 times the cash received by all class members combined: \$2.5 million to the lawyers, \$25,000 to all of the allegedly injured consumers.

Because lawyers and Federal courts are not required to make public exactly how class action settlement funds are distributed, and to whom, and in what amounts, the public and Congress is largely in the dark regarding the extent of potential abuses. To remedy that situation, FICALA requires that in any Federal court-approved class action settlement, the trial lawyers must provide the Administrative Office of United States Courts (the “AO”) with an accounting of how all money paid by the defendants was distributed. The AO, in turn, would be charged with publishing annual aggregate reports on class settlement distributions derived from these data. This data would show whether class actions are actually providing benefits to class members.

This would let the public and Congress know what comes out of its class action litigation system. Transparency in this regard would be particularly helpful in exposing the extent of the abuse of so-called *cy pres* awards. Class actions include large numbers of consumers who were satisfied with the product or service at issue and therefore have zero motivation to obtain compensation. In response to this growing reality in consumer class actions, many courts have resorted to *cy pres*, the practice of distributing money in class actions that is not claimed by real people to third-party charities that supposedly work in the interest of the public in the abstract. While the use of *cy pres* in class action settlements has benefited numerous organizations, the practice is troubling because it raises serious questions about the purpose of the class action device. As one court put it, “[t]here is no indirect benefit to the class from the defendant’s giving the money to someone else.”<sup>37</sup> And as the Third Circuit Court of Appeals stated in another case, “inclusion of a *cy pres* distribution may increase a settlement fund, and with it attorneys’ fees, without increasing the direct benefit to the class.”<sup>38</sup> And *cy pres* diminishes any incentive to identify class members since the lawyer will receive the same amount of fees even if hardly anyone gets any compensation.

In sum, consumers in many class action lawsuits are not receiving any benefits. Rather, the bulk of the money ends up going to lawyers and uninjured third-party organizations, or both. Given this troubling trend, Congress should help at least expose the extent of this abuse by requiring transparency in the allocation of class action settlement funds, including *cy pres* awards.

### Issues Classes:

(a) *IN GENERAL.*—A Federal court shall not issue an order granting certification of a class action with respect to particular issues

<sup>37</sup> *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004).

<sup>38</sup> *In re Baby Prods. Antitrust Litig.*, Nos. 12–1165, et al., 708 F.3d 163, 173 (3d Cir. 2013), available at <http://www2.ca3.uscourts.gov/opinarch/121165p.pdf>.



*pursuant to Rule 23(c)(4) of the Federal Rules of Civil Procedure unless the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites of Rule 23(a) and Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3). (b) CERTIFICATION ORDER.—An order issued under Rule 23(c)(4) of the Federal Rules of Civil Procedure that certifies a class with respect to particular issues shall include a determination, based on a rigorous analysis of the evidence presented, that the requirement in subsection (a) of this section is satisfied.*

Rule 23 of the Federal Rules of Civil Procedure—and the Supreme Court’s recent interpretations of Rule 23 in *Wal-Mart Stores, Inc. v. Dukes* and *Comcast Corp. v. Behrend*—recognize that class actions are an exception to the ordinary rules of litigation, and that the class action system may be used only when the Rule’s requirements are satisfied, particularly that issues common to all class members predominate over individualized issues that must be resolved on a plaintiff-by-plaintiff basis. Some lower courts, however, encouraged by opportunistic lawyers, are circumventing these rulings by permitting the certification of so-called “issues classes” in which a single legal or factual issue may be determined for the whole class even though the claims are dominated by individualized issues that require case-by-case evaluations.

As the U.S. Court of Appeals for the Fifth Circuit explained in a case called *Castano*,<sup>39</sup> “Reading [R]ule 23(c)(4) as allowing a court to sever issues . . . would eviscerate the predominance requirement of [R]ule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.”

That unintended result has manifested itself in the decisions of some courts, which have certified class actions to resolve general “issues” regarding a product when the result is to create a huge class in which the vast majority of class members have no complaint against the product.

In some circuits, class certification is ordered over the issue of whether the product was defective before there was any evaluation of whether the class members actually experienced a problem with their products. That’s incompatible with Rule 23(b), which requires that “questions of law or fact *common* to class members *predominate* over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Issues of law or fact cannot be held in common by a class if the class consists largely of people who do not have any injuries at all, and consequently have no legal or factual basis for being in the class.

Congress must ensure that class action standards are not circumvented through the use of “issues classes.” The subsection of FICALA entitled “Issues classes” therefore makes clear—as the Fifth Circuit made clear in *Castano*—that plaintiffs’ attorneys cannot certify an “issue” class unless the entire claim for relief (not just the issue standing alone) qualifies for class treatment under Rule 23.

<sup>39</sup> 84 F.3d 734 (5th Cir. 1996).

### Stay of Discovery:

*In any class action, all discovery and other proceedings shall be stayed during the pendency of any motion to transfer, motion to dismiss, motion to strike class allegations, or other motion to dispose of the class allegations, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.*

The discovery process (the pre-trial process in a lawsuit in which parties demand documents and other things from other parties in the lawsuit) imposes huge costs on litigants—particularly because of the astronomical costs associated with the discovery of electronic information, such as emails. Law Technology News has reported that the total cost of electronic discovery rose from \$2 billion in 2006 to \$2.8 billion in 2009 and estimated that the total cost would rise ten to fifteen percent annually over the next few years.<sup>40</sup> In a more recent case study of Fortune 500 companies, the RAND Institute found that the median total cost for electronic discovery among participants totaled \$1.8 million per case.<sup>41</sup> And these costs are asymmetric: while defendants typically are subject to gigantic discovery costs, because they are large organizations possessing large amounts of data, plaintiffs have little information in their possession and therefore are subject to a relatively small financial burden during the discovery process. Moreover, discovery conducted before a motion to dismiss is decided is unfair: why should defendants bear the burden of paying for discovery before a complaint is held legally sufficient, especially when the threat of huge costs may coerce an unjustified settlement?

The reality for most civil litigation is that the defendants' obligation to bear these exorbitant discovery costs incentivizes unscrupulous plaintiffs' attorneys to serve burdensome discovery requests on defendants with zero downside risk to themselves. As Professor Martin Redish has explained, "the fact that a party's opponent will have to bear the financial burden of preparing the discovery response actually gives litigants an incentive to make discovery requests, and the bigger the expense to be borne by the opponent, the bigger the incentive to make the request."<sup>42</sup> And because defendants seek to avoid these exorbitant costs, discovery is all too often used as a weapon to coerce settlement of claims, regardless of their merit.<sup>43</sup> Even the Supreme Court has recognized this problem, lamenting that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching" trial.<sup>44</sup>

<sup>40</sup> George Socha & Tom Gelbmann, *Climbing Back: Revenue Climbing Back for EDD Industry*, Law Tech. News (Aug. 1, 2010), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202463900292>.

<sup>41</sup> See Nicholas Pace & Laura Zakaras, Rand Institute for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, 17 (2012); see also Laura Hunt, *Trending: Proportionality in Electronic Discovery in Common Law Countries and the United States' Federal and State Courts*, 43 U. Balt. L. Rev. 279, 279 (2014) (similar).

<sup>42</sup> Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 603 (2001).

<sup>43</sup> See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 Duke L.J. 547, 549 (2010) ("Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended 'fishing expeditions' in the hope of coercing a quick settlement.").

<sup>44</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007).

For example, assume that a defendant moves to dismiss a class action because it does not assert any valid claims. Under current law, plaintiffs' attorneys can serve massive discovery requests that force defendants to spend \$10 million to collect the requested documents. A rational decision for that defendant is to settle the case for millions, even if, 4 months later, the court grants the motion to dismiss, finding the class claims to be totally without merit. That's because, without a stay in discovery, the defendants will in the meantime have been required to spend all or part of the \$10 million costs complying with the discovery requests—for, it turns out, no legitimate reason. Trial lawyers pursue discovery in this circumstance primarily in an effort to pressure the defendant to settle invalid claims.

Congress addressed this very same issue 20 years ago in the context of securities class actions. It found in the House Report for the Private Securities Litigation Reform Act that “[t]he cost of discovery often forces innocent parties to settle frivolous securities class actions,” and enacted a provision limiting discovery prior to a decision resolving the legal sufficiency of the complaint. The rationale underlying that legislation applies equally to class actions outside the securities context, and Congress should enact the same provision for class actions generally. Consequently, the subsection of FICALA entitled “Stay of discovery” would stop the use of discovery to coerce unjustified settlements by requiring Federal courts to stay discovery pending resolution of Rule 12 motions (that is, motions to dismiss for failure to state a claim); motions to strike class allegations; motions to transfer; and other motions that would dispose of class allegations unless the court finds that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to a party.<sup>45</sup>

### **Third-Party Litigation Funding Disclosure:**

*In any class action, class counsel shall promptly disclose in writing to the court and all other parties the identity of any person or entity, other than a class member or class counsel of record, who has a contingent right to receive compensation from any settlement, judgment, or other relief obtained in the action.*

An agreement for third-party funding of a class action was recently ordered produced by a Federal court in a case involving an oil rig explosion off the Nigerian coast. Under this agreement, a third-party funder agreed to provide financing to counsel for prosecuting a putative class action seeking damages for individuals allegedly incurring economic loss. There are provisions in the agreement that clearly reveal the third-party funder's influence over the case. For example, the agreement refers to a “Project OPlan” for the litigation developed by counsel and the funder, with restrictions on

<sup>45</sup> Examples of “undue prejudice” could relate to the potential loss or spoliation of evidence, such as situations in which, unless documents are collected they may be destroyed. There may also be circumstances in which witnesses may become unavailable (due to health, or leaving employment). There could also be class actions in which emergency injunctive relief is being sought where discovery might be justifiable. This provision mirrors 15 U.S.C. § 78u-4(b)(3)(B), which relates to private securities litigation and provides that “In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.”

the ability of the class action lawyer to deviate from it, particularly with respect to hiring only certain, identified experts. According to the same document, the funder agreed to provide class counsel with financing, and in exchange the class action lawyer committed, in the event of a recovery, to repay that amount plus a “Success Fee” (to the extent recovered) of six times the financed amount to be paid from attorneys’ fees—plus 2% of the total amount recovered by the putative class members. That last part is very important, because counsel are agreeing to hand over class member money without telling the class members or getting their permission. FICALA would require in every such case the disclosure of this sort of information, which is information the court needs in deciding whether the class representative is adequate, which involves determining who is really running the show.

This case underscores that the issue of funder control over litigation strategy is particularly troublesome in putative class actions. As Judge Susan Illston (of the Northern District of California) explained in ordering the disclosure of the third-party litigation funding arrangement at issue in that litigation, the “funding agreement is relevant to the adequacy [of representation] determination [required for class certification] and should be produced to [the] defendant.”<sup>46</sup> Judge Illston’s concerns proved well-founded. In addition to the provisions described above, the funding agreement provides that the lawyers shall endeavor to “recover the maximum possible Contingency Fee,”<sup>47</sup> a requirement that may conflict with class member interests.

Another example of substantial control by a funder was the elaborate funding agreement used in litigation against Chevron filed in an Ecuadorian court alleging environmental contamination in Ecuador. The litigation was financed in part by \$4 million from Burford, one of the largest third-party financing companies in the world. The funding agreement at issue in that case “provide[d] control to the Funders” through the “installment of ‘Nominated Lawyers’”—lawyers “selected by the Claimants with the Funder’s approval.”<sup>48</sup> In addition to exerting control, it was clear that the Nominated Lawyers, who among other things controlled the purse strings and served as monitors, supervised the costs and course of the litigation.<sup>49</sup> In 2014, the U.S. District Court for the Southern District of New York ruled<sup>50</sup> that the \$9.5 billion Ecuadorian judgment was the product of fraud and racketeering activity, finding it unenforceable.

These kinds of provisions inappropriately vest the funder with substantial control over key litigation decisions, undermining the primacy of the attorney-client relationship. In addition, these arrangements also undermine the adequacy of representation required under Rule 23, which requires that attorneys adequately represent the interests of class members in order to advance a case as a class action. One way to ensure that these concerns are ad-

<sup>46</sup> *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 U.S. Dist. LEXIS 103594, at \*6 (N.D. Cal. Aug. 5, 2016).

<sup>47</sup> *Gbarabe* Litigation Funding Agreement, ¶ 3.1.3 (emphasis added).

<sup>48</sup> Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (emphasis added).

<sup>49</sup> *Id.*

<sup>50</sup> Available at <http://www.theamazonpost.com/wp-content/uploads/Chevron-Ecuador-Opinion-3.4.14.pdf>.

dressed is to require disclosure of these arrangements at the outset of civil litigation. Indeed, the U.S. District Court for the Northern District of California has now issued a rule mandating the disclosure of such information in all class and representative actions,<sup>51</sup> providing an important precedent for making the practice more transparent.

In these situations, the third-party funders of the lawsuit do not represent the interests of the class members. They're in the lawsuits solely to make money for themselves, possibly including taking money away from the victims' own recovery. A lawyer should not be allowed to enter into secret agreements signing away the class members' funds. Consequently, the subsection of FICALA entitled "Third-party litigation funding disclosure" requires that any such third-party funding agreement be disclosed to the district court and all parties. That would allow the district court to take appropriate steps to protect class members' interests.

### **Appeals:**

*A court of appeals shall permit an appeal from an order granting or denying class-action certification under Rule 23 of the Federal Rules of Civil Procedure.*

The certification decision in a class action as a practical matter disposes of the case, because virtually every case in which a class is certified is settled. That's why Federal judges consistently characterize class certification as "in effect, the whole case."<sup>52</sup> But district courts' class certification decisions are not automatically appealable. Federal Rule of Civil Procedure 23(f) gives Federal courts of appeals discretionary authority to grant permission to appeal a class certification ruling. A study of class certification appeals filed over 7 years (from October 31, 2006 through December 31, 2013) found that less than 25% of the petitions to appeal were granted—a one-third decline in the grant rate from the prior 8-year period.<sup>53</sup> And the grant rate varied dramatically among the circuits, from 5.4% to 46.4%.<sup>54</sup> Importantly, a significant share of district court decisions are reversed—more than one-third.<sup>55</sup>

The provision in the bill is even-handed, as it allows an appeal as of right of a class certification decision, whether that decision went against the plaintiff or the defendant. Promoting correctness and uniformity of class certification decisions is essential given the critical role of certification in these lawsuits. And the differing treatment based on geographic location is something Congress should remedy. Consequently, FICALA's appeals provision helps

<sup>51</sup> Ben Hancock, *Northern District, First in Nation, Mandates Disclosure of Third-Party Funding in Class Actions*, The Recorder, Jan. 23, 2017, <http://www.therecorder.com/id=1202777487488/Northern-District-First-in-Nation-Mandates-Disclosure-of-ThirdParty-Funding-in-Class-Actions?slreturn=20170101100404>.

<sup>52</sup> Hon. Diane Wood, Circuit Judge, Remarks at the FTC Workshop: Protecting Consumer Interests in Class Actions (Sept. 13–14, 2004), in Panel 2: Tools for Ensuring that Settlements are "Fair, Reasonable, and Adequate," 18 Geo. J. Legal Ethics 1197, 1213 (2005). As Justice Ruth Bader Ginsburg has also explained, "[a] court's decision to certify a class . . . places pressure on the defendant to settle even unmeritorious claims." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting).

<sup>53</sup> Skadden, Arps, Slate, Meagher & Flom LLP, *Study Reveals US Courts of Appeal Are Less Receptive to Reviewing Class Certification Rulings* at 1 (April 2014), available at [https://www.skadden.com/sites/default/files/publications/Study Reveals\\_US\\_Courts\\_of%20Appeal\\_Are\\_Less\\_Receptive\\_to\\_Reviewing\\_Class\\_Certification\\_Rulings.pdf](https://www.skadden.com/sites/default/files/publications/Study_Reveals_US_Courts_of%20Appeal_Are_Less_Receptive_to_Reviewing_Class_Certification_Rulings.pdf).

<sup>54</sup> *Id.* at 1–2.

<sup>55</sup> *Id.*

ensure the correctness of class action certification rulings by providing that class certification decisions are appealable as of right. Getting class certification questions correctly decided is essential to fixing the current class action system, and that will not happen unless appellate courts weigh in.

*Sec. 4. Misjoinder of Plaintiffs in Personal Injury and Wrongful Death Actions.*

*(d) MISJOINDER OF PLAINTIFFS IN PERSONAL INJURY AND WRONGFUL DEATH ACTIONS.—(1) This subsection shall apply to any civil action in which—(A) two or more plaintiffs assert personal injury or wrongful death claims; (B) the action is removed on the basis of the jurisdiction conferred by section 1332(a)<sup>56</sup>; and (C) a motion to remand is made on the ground that one or more defendants are citizens of the same State as one or more plaintiffs. (2) In deciding the remand motion in any such case, the court shall apply the jurisdictional requirements of section 1332(a) to the claims of each plaintiff individually, as though that plaintiff were the sole plaintiff in the action. (3) The court shall sever the claims that do not satisfy the jurisdictional requirements of section 1332(a) and shall remand those claims to the State court from which the action was removed. The court shall retain jurisdiction over the claims that satisfy the jurisdictional requirements of section 1332(a).*

Congress enacted the Class Action Fairness Act in 2005 to address a serious problem: certain “magnet” state courts were handling many (if not most) class actions with national ramifications, effectively dictating results for residents of all 50 states. Now, the same problem has arisen with mass tort claims, claims in which lots of individual lawsuits are joined together into one big one.

Aggressive trial lawyers are managing to establish what are effectively full-blown, nationwide mass tort proceedings in state courts by designing their lawsuits with the goal of preventing removal of their cases to Federal court. They do this by adding parties to defeat diversity jurisdiction, even though the claims should be subject to Federal diversity jurisdiction. A few state courts have effectively become national mass tort courts, deciding cases with no relationship to the venue. The principal reason lawyers can engage in this abusive practice is that the Federal courts are divided on whether to adopt the fraudulent misjoinder doctrine—the principle that in assessing Federal subject matter jurisdiction, Federal courts should *not defer* to plaintiffs’ grouping of multiple claims in a single complaint if the apparent purpose is to avoid Federal jurisdiction, and instead conduct a jurisdictional analysis on a case-by-case basis, making sure that cases in which the real parties in in-

<sup>56</sup>28 U.S.C. § 1332(a) is the general Federal diversity statute that sets out the criteria cases must meet in order to be heard in a Federal court. It provides as follows: “(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted for permanent residence in the United States and are domiciled in the same State; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.”

terest are from different states have a Federal forum for their dispute.<sup>57</sup>

Congress needs to prevent abusive mass action litigation by ensuring Federal court jurisdiction over nationwide mass tort proceedings. That is why FICALA's section on misjoinder codifies the fraudulent misjoinder doctrine in the mass tort context by requiring Federal courts to consider each plaintiff's claims separately in assessing Federal jurisdiction over multi-plaintiff complaints asserting personal injury or wrongful death claims. The House Judiciary Committee recently reported out H.R. 725, the Innocent Party Protection Act, which prevents lawyers from adding local defendants with the same citizenship as the plaintiff to a lawsuit simply to keep the case in a preferred state court. The fraudulent misjoinder provision in FICALA similarly prevents lawyers from adding *plaintiffs* with the *same citizenship as the out-of-state defendant* to a mass torts case simply to keep the case in state court. This provision addresses the flip side of the same coin.

In *Tapscott v. MS Dealer Service Corp.*, the Eleventh Circuit held that a district court had jurisdiction over a lawsuit removed to Federal court where certain parties were "egregious[ly] misjoined and "ha[d] no real connection" to each other.<sup>58</sup> Relying on this doctrine, a number of courts have applied fraudulent misjoinder where plaintiffs attempt to join their factually dissimilar personal injury claims in a single action in an attempt to defeat diversity jurisdiction.<sup>59</sup> But many others have not, including Federal courts in California, based largely on the fact that the Ninth Circuit has never expressly adopted the fraudulent misjoinder doctrine.<sup>60</sup> A recent study of more than 2,900 cases filed against companies in Los Angeles and San Francisco counties between 2010 and 2016 found that the cases involved 25,000 individual plaintiffs, and that only 10.1% of the plaintiffs were California residents.<sup>61</sup> The remaining 89.9%—representing over 20,000 individual plaintiffs—were residents of another state.<sup>62</sup> This provision of FICALA would prevent such abuse.

Two cases provide good illustrations of the need for this misjoinder provision. *Bancroft v. Bayer Corp.*<sup>63</sup> involved a products liability lawsuit filed in St. Clair County, Illinois (adjoining the notorious Madison County). The complaint joined the claims of 45 plaintiffs, one of whom (and apparently only one) was a co-citizen of the defendant. Other plaintiffs came from all over the country. The defendant removed, asserting fraudulent misjoinder under the Eleventh Circuit's decision in *Tapscott v. MS Dealer Service*

<sup>57</sup> Compare *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996) (applying fraudulent misjoinder doctrine) with *In re Prempro Prods. Liab. Litig.*, 591 F.3d 613 (8th Cir. 2010) (declining to adopt or reject fraudulent misjoinder doctrine).

<sup>58</sup> *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1360 (11th Cir. 1996), *abrogated on other grounds* by *Cohen v. Office Depot, Inc.*, 204 F.3d 1069, 1076 (11th Cir. 2000).

<sup>59</sup> See, e.g., *In re Propecia (Finasteride) Prod. Liab. Litig.*, Nos. 12–MD–2331 (JG) (VVP), 12–CV–2049 (JG) (VVP), 2013 U.S. Dist. LEXIS 117375, at \*71 (E.D.N.Y. May 17, 2013) (“[T]he court concludes that the doctrine of fraudulent misjoinder should be applied to the claims here. There is no basis for joining, in a single action, fifty-four plaintiffs from twenty-four jurisdictions who purchased different products at different times from unidentified sources.”), *adopted*, 2013 U.S. Dist. LEXIS 118155 (E.D.N.Y. June 6, 2013).

<sup>60</sup> *In re Boston Sci. Corp.*, 2015 U.S. Dist. LEXIS 133665, at \*4.

<sup>61</sup> See Ryan Tacher, Civil Justice Ass'n of Cal., *Out-of-State Plaintiffs: Are Out-of-State Plaintiffs Clogging California Courts?* 2 (2016), [http://cjac.org/what/research/CJAC\\_Out\\_of\\_State\\_Plaintiffs\\_Exec\\_Summary.pdf](http://cjac.org/what/research/CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf).

<sup>62</sup> *Id.*

<sup>63</sup> 2010 WL 148628 (S.D. Ill. Jan. 13, 2010).

*Corp.*,<sup>64</sup> but the district court rejected Tapscott and refused to adopt the fraudulent misjoinder doctrine. The *Bancroft* case shows how current law allows plaintiffs to defeat removal that is otherwise proper by finding a single plaintiff among many (here, one out of 45) who is a co-citizen of the defendant. The misjoinder provision of the bill would allow the defendant to remove the 44 plaintiffs' claims that individually satisfy all the requirements for diversity jurisdiction.

An even more recent egregious illustration is *Jones v. Bayer Corp.*<sup>65</sup> In *Jones*, 99 plaintiffs filed a single lawsuit in the Circuit Court of St. Louis, Missouri, asserting products liability claims against Bayer and other defendants. The number 99 was hardly a coincidence; with fewer than 100 plaintiffs, the defendants could not remove the case under the "mass action" provision of the Class Action Fairness Act. The defendants argued for removal under §1332(a), but the plaintiffs' lawyers anticipated that and made sure 3 of the 99 plaintiffs were co-citizens with one or more of the corporate defendants. The district court rejected the defendants' attempt to invoke the fraudulent misjoinder doctrine and ordered remand even though the case (minus the 3 co-citizen defendants) belonged in Federal court. The misjoinder provision in the bill would remedy that.

*Sec. 5. Multidistrict Litigation Proceedings Procedures.*

**Allegations Verification:**

(i) *ALLEGATIONS VERIFICATION.*—*In any coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b), counsel for a plaintiff asserting a claim seeking redress for personal injury whose civil action is assigned to or directly filed in the proceedings shall make a submission sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury. The submission must be made within the first 45 days after the civil action is transferred to or directly filed in the proceedings. That deadline shall not be extended. Within 30 days after the submission deadline, the judge or judges to whom the action is assigned shall enter an order determining whether the submission is sufficient and shall dismiss the action without prejudice if the submission is found to be insufficient. If a plaintiff in an action dismissed without prejudice fails to tender a sufficient submission within the following 30 days, the action shall be dismissed with prejudice.*

Congress created multi-district litigation "MDL" proceedings as a special Federal legal procedure designed to speed the process of handling complex cases when "civil actions involving one or more common questions of fact are pending in different districts."<sup>66</sup> The Judicial Panel on Multidistrict Litigation decides whether cases should be consolidated under MDL, and if so, where the cases should be transferred. Cases subject to MDL are sent from one court, known as the transferor, to another, known as the trans-

<sup>64</sup> 77 F.3d 1353 (11th Cir. 1996).

<sup>65</sup> 2016 WL 7230433 (E.D. Mo. Dec. 14, 2016).

<sup>66</sup> 28 U.S.C. §1407.



feree, for all pretrial proceedings and discovery. If a case is not settled or dismissed in the transferee court, it is remanded (that is, sent back) to the transferor court for trial. The MDL proceedings concept, however, has become subject to great abuse.

Last year, one Federal MDL judge—Chief Judge Clay Land of the U.S. District Court for the Middle District of Georgia—became so disgusted with the breakdown of the MDL process as it exists today that he issued an opinion that included the following comments:

Some lawyers seem to think that their cases will be swept into the MDL where a global settlement will be reached, allowing them to obtain recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action. This attitude explains why many cases are filed . . . with so little pre-filing preparation that counsel apparently has no idea whether or how she will prove causation. . . . [B]ased on fifteen years on the Federal bench and a front row seat as an MDL transferee judge [I am] convinced that MDL consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in Federal court, many of which would not have been filed otherwise.<sup>67</sup>

When a mass tort MDL proceeding is created, a helter-skelter “gold rush” ensues. Opportunistic lawyers launch advertising campaigns that result in the rapid filing of poorly investigated—and often frivolous or fraudulent—claims that otherwise would never have been filed. As Chief Judge Land noted in his decision, “The MDL [here] began with twenty-two cases. Due to subsequent tag along transfers, it exploded to more than 850 cases, which explosion appears to have been fueled, at least in part, by an onslaught of lawyers television solicitations.”<sup>68</sup> The allegation verification provisions of FICALA would help change that.

Because of the lack of screening of these mass tort claims, they are taking over the Federal court system. Astoundingly, there are around 120,000 lawsuits pending in those MDL proceedings. That’s 35% of all civil lawsuits currently pending in all Federal courts nationwide (which number about 342,000). FICALA would correct that problem by making plaintiffs’ counsel demonstrate up front that they’ve performed an adequate investigation of each claim before filing it.

Many claims filed in MDL proceedings are bogus: there is no apparent evidence of injury or exposure to the alleged risk. As MDL Judge Land noted, MDL proceedings encourage “case filings of marginal merit”—cases “that otherwise could not be filed if they had to stand on their own.”<sup>69</sup> In the silica litigation, Judge Janis Graham Jack oversaw an MDL proceeding encompassing thousands of lawsuits alleging that plaintiffs had been harmed by

<sup>67</sup> Order, *In re Mentor Corp.* (MDL Docket No. 2004, 4:08-MD-2004 (CDL)), Document 1039 (filed September 7, 2016) (U.S. District Judge Clay D. Land, M.D.Ga.).

<sup>68</sup> Order, *In re Mentor Corp.* (MDL Docket No. 2004, 4:08-MD-2004 (CDL)), Document 1039 (filed September 7, 2016) (U.S. District Judge Clay D. Land, M.D.Ga.).

<sup>69</sup> *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, MDL No. 2004, slip op. at 4 (M.D. Ga. Sept. 17, 2016).

breathing in crystalline silica, a substance similar to sand, but smaller. She wrote, “Because of silica’s widespread use, some plaintiffs’ lawyers viewed it as the source of the next big mass tort” after asbestos.<sup>70</sup> But in the end, Judge Jack, who presided over the silica MDL proceeding, recommended that all but one of the 10,000 claims on the MDL docket should be dismissed on remand because the diagnoses were fraudulently prepared.<sup>71</sup> In a sharp ruling finding litigation screening fraud, Judge Jack resolved that the “‘epidemic’ of some 10,000 cases of silicosis ‘is largely the result of misdiagnosis’” and that “the failure of the challenged doctors to observe the same standards for a ‘legal diagnosis’ as they do for a ‘medical diagnosis’ renders their diagnoses . . . inadmissible[.]”<sup>72</sup> According to Judge Jack, “the diagnoses were . . . manufactured for money,”<sup>73</sup> and “in [the] hopes of extracting mass nuisance-value settlements because [defendants] are financially incapable of examining the merits of each individual claim in the usual manner.”<sup>74</sup>

Meritless claims are clogging the system, diverting judicial attention away from more valid claims. And because they create the misimpression that thousands have been injured, they create improper, indiscriminate pressure on defendants to settle. Thus, as Chief Judge Land observed, there is a need for “approaches that weed out non-meritorious cases early, efficiently, and justly.”<sup>75</sup>

The allegations verification provision of FICALA is just such an approach. It would require that for each lawsuit filed in or transferred to a Federal MDL mass tort proceeding, plaintiffs’ lawyers must submit to the MDL court evidence that before filing, they properly investigated the asserted claims. Specifically, they would be required to submit evidentiary support (including, but not limited to, medical records) for the factual contentions in each plaintiff’s complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury.

### **Trial Prohibition:**

(j) *TRIAL PROHIBITION.*—*In any coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b),<sup>76</sup> the judge or judges to whom actions are assigned by the Judicial Panel on*

<sup>70</sup> Julie Creswell, *Testing for Silicosis Comes Under Scrutiny in Congress*, N.Y. Times, Mar. 8, 2006, <http://www.nytimes.com/2006/03/08/business/08silica.html?pagewanted=print&r=0>.

<sup>71</sup> Victor E. Schwartz et al., *Getting the Sand Out of the Eyes of the Law: The Need for a Clear Rule for Sand Suppliers in Texas after Humble Sand & Gravel, Inc. v. Gomez*, 37 St. Mary’s L.J. 283, 291 (2006).

<sup>72</sup> *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 632, 634 (S.D. Tex. 2005) (citation omitted).

<sup>73</sup> *Id.* at 635.

<sup>74</sup> Lester Brickman, *The Use of Litigation Screenings in Mass Torts: A Formula for Fraud?*, 61 SMU L. Rev. 1221, 1316 n.512 (2008) (quoting *In re Silica*, 398 F. Supp. 2d at 676).

<sup>75</sup> Order, *In re Mentor Corp.* (MDL Docket No. 2004, 4:08–MD–2004 (CDL)), Document 1039 (filed September 7, 2016) (U.S. District Judge Clay D. Land, M.D.Ga.).

<sup>76</sup> 28 U.S.C. § 1407(b) sets out the procedures for MDL proceedings, providing that “Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.”

*Multidistrict Litigation may not conduct any trial in any civil action transferred to or directly filed in the proceedings unless all parties to the civil action consent to trial of the specific case sought to be tried.*

28 U.S.C. § 1407(a), which authorizes MDL proceedings, explicitly states that “When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated *pretrial* proceedings.” The repeated use of the word “pretrial” throughout the rest of § 1407 makes clear that *trials are not authorized to be conducted by MDL courts*. But while the MDL statute provides only for consolidated *pre-trial* proceedings, some MDL courts pressure defendants to agree to so-called “bellwether” trials—namely, pseudo-trials that supposedly test a claim’s suitability for settlement—in order to pressure a settlement in the case. Often, however, those trials are not fair tests of the plaintiffs’ claims because they consist of claims hand-picked by plaintiffs’ counsel that do not fairly represent the claims of all the plaintiffs in the MDL proceedings.

In enacting the MDL statute, Congress made clear that MDL courts were supposed to handle pre-trial proceedings only—and then send the cases back to the courts in which they were originally filed for trial: “Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.”<sup>77</sup> The MDL trial prohibition in FICALA would prevent the unfair, improper use of the MDL process to deprive defendants of their due process right to individual trials by affirming *Congress’s original intent* that MDL proceedings are for pre-trial purposes only—and that no trial may be conducted by an MDL court unless all parties consent to a waiver of venue and personal jurisdiction for that particular trial.

### **Review of Orders:**

*(k) REVIEW OF ORDERS.—(1) IN GENERAL.—The Court of Appeals having jurisdiction over the transferee district shall permit an appeal to be taken from any order issued in the conduct of coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b),<sup>78</sup> provided that an immediate appeal from the order may materially<sup>79</sup> advance the ultimate termination of one or more civil actions in the proceedings. (2) REMAND ORDERS.—Notwith-*

<sup>77</sup> 28 U.S.C. § 1407(a).

<sup>78</sup> 28 U.S.C. § 1407(b) sets out the procedures for MDL proceedings, providing that “Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.”

<sup>79</sup> Black’s Law Dictionary (10th ed. 2014) defines “material” as “Of such a nature that knowledge of the item would affect a person’s decision-making; significant; essential.”

*standing section 1447(e),*<sup>80</sup> a court of appeals may accept an appeal from an order issued in any coordinated or consolidated proceedings conducted pursuant to subsection (b) granting or denying a motion to remand a civil action to the State court from which it was removed if application is made to the court of appeals within 14 days after the order is entered.

Some MDL judges have issued questionable rulings on pivotal issues that are not subject to immediate appellate review, including the admissibility of expert evidence and the appropriateness of multi-plaintiff trials. Given the high stakes of these cases, and the likelihood of a coerced settlement based on incorrect legal rulings, interlocutory review is critical. Moreover, greater appellate court attention to mass tort MDL proceedings is warranted, because these proceedings now encompass more than 35% of all civil cases pending in the Federal court system nationwide.

Indeed, MDL courts have sometimes forced defendants to proceed with consecutive trials without the benefit of appellate review, even though the same judicial errors will likely be repeated. For example, in *In re E. I. du Pont de Nemours & Co.*, the MDL judge recognized that “some issues on appeal may impact the cases that are not yet tried in th[e] MDL.”<sup>81</sup> Nonetheless, the court refused to stay further trials pending the resolution of the appeal, reasoning that bellwether “trials are meant not only for determination of the rights and obligations of the litigants, but for a special purpose . . . information gathering that may lead to a global settlement.”<sup>82</sup> But that does not make sense, because if the information gathered is a result of uncorrected legal errors, then any resulting settlement is tainted.

To help prevent these problems, the “review of orders” provision in FICALA would authorize immediate appellate review of interlocutory MDL court orders where immediate review may materially advance the ultimate conclusion of one or more cases in the MDL proceeding.

### **Ensuring Proper Recovery for Plaintiffs:**

*(l) ENSURING PROPER RECOVERY FOR PLAINTIFFS.—The claimants in any civil action asserting a claim for personal injury transferred to or directly filed in coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b)*<sup>83</sup> *shall re-*

<sup>80</sup> 28 U.S.C. § 1447(d), which will become § 1447(e) if FICALA becomes law, states “An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.” The text of FICALA makes clear that discretionary review by an appeals court of jurisdictional remand rulings by an MDL court are authorized, notwithstanding the prohibitions on such review in 28 U.S.C. § 1447(d).

<sup>81</sup> *In re E. I. du Pont de Nemours & Co.*, MDL 2433, 2016 U.S. Dist. LEXIS 43337, at \*1198 (S.D. Ohio Mar. 29, 2016).

<sup>82</sup> *Id.* at \*1198–99.

<sup>83</sup> 28 U.S.C. § 1407(b) sets out the procedures for MDL proceedings, providing that “Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district

*ceive not less than 80 percent of any monetary recovery obtained in that action by settlement, judgment or otherwise. The judge or judges to whom the coordinated or consolidated pretrial proceedings have been assigned shall have jurisdiction over any disputes regarding compliance with this requirement.*

When the cost-savings economies of scale are achieved by trial lawyers in an MDL proceeding, those savings should be passed on to the victims. But unfortunately, mass tort litigation matters suffer from the same problem as class actions: lawyers manipulate the system to take an unfair share of settlement payments. Even though trial lawyers may be handling thousands of copycat individual cases asserting similar personal injury or wrongful death claims and theories—and thereby realizing substantial economies of scale—they still demand a 33–40% fee, which is standard for a standalone case, but a huge windfall when the lawyer is handling a large number of copycat mass tort cases under the streamlined MDL process.

The provision of FICALA entitled “Ensuring Proper Recovery for Plaintiffs” therefore requires that in settlements of Federal court mass tort claims in MDL proceedings, 80% of all compensation paid must go directly to claimants, regardless of what the lawyer-client fee arrangement may provide. Plaintiffs’ lawyers who file lawsuits do not operate in a free market environment. Instead, they have the unique ability to simply give another party a piece of paper—a legal complaint—which requires the other party to spend money in their defense, regardless of the merits of the complaint against them, or else risk a default judgment for not defending themselves. Unscrupulous lawyers can then simply point out to the parties served that the costs of paying off the lawyers will be less than the costs of the other parties’ defending themselves. And so innocent parties served with complaints are pressured to settle.

The Supreme Court has also noted the institutionally coercive role lawyers are allowed to play in society, stating in one case “As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. . . . [A]s an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.”<sup>84</sup>

This understanding has a long history in America. Indeed, fear that the legal profession would abuse its power to generate lawsuits led to limits on attorneys’ fees in all the states at the Founding of our country. In 1778, in Virginia, attorneys’ fees were fixed by statute in the General Court and the High Court of Chancery depending on the nature of the action.<sup>85</sup> Delaware had its own unique method for reducing litigiousness. In 1793, Delaware passed

for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.”

<sup>84</sup> *In re Snyder*, 472 U.S. 634, 644 (1985).

<sup>85</sup> 9 Statutes at Large of Virginia 529 (Hening ed. 1823).

the Act for Regulating and Establishing Fees providing that for all pleadings in an action subsequent to a declaration, the fee would be one cent for every written line, twelve words to a line.<sup>86</sup>

Given the unique power of lawyers filing lawsuits to coerce settlements, it's reasonable to require that when lawyers use the Federal MDL system to consolidate multiple, identical claims while streamlining their own lawsuit costs, Federal rules should require them to pass along those savings to victims. Because if they do not, the MDL system will continue to incentivize lawyers to treat it less as a means of efficiently resolving claims for victims, and more as a means of allowing unscrupulous lawyers to increase their coercive settlement leverage and thereby pad their own bank accounts.

*Sec. 6. Rulemaking Authority of Supreme Court and Judicial Conference.*

This section makes clear that nothing in the bill restricts the authority of the Judicial Conference and the Supreme Court to propose their own rule changes under chapter 131 of title 28 of the U.S. Code, which sets out the procedures under which the courts themselves can create their own rules.

*Sec. 7. Effective Date.*

This section provides that the amendments made by the bill shall apply on the date of enactment.

**Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

**TITLE 28, UNITED STATES CODE**

\* \* \* \* \*

**PART IV—JURISDICTION AND VENUE**

\* \* \* \* \*

**CHAPTER 87—DISTRICT COURTS; VENUE**

\* \* \* \* \*

**§ 1407. Multidistrict litigation**

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the conven-

<sup>86</sup>2 Laws of the State of Delaware 1116, c. 27 (1797).

ience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action

is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

(i) *ALLEGATIONS VERIFICATION.—In any coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b), counsel for a plaintiff asserting a claim seeking redress for personal injury whose civil action is assigned to or directly filed in the proceedings shall make a submission sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury. The submission must be made within the first 45 days after the civil action is transferred to or directly filed in the proceedings. That deadline shall not be extended. Within 30 days after the submission deadline, the judge or judges to whom the action is assigned shall enter an order determining whether the submission is sufficient and shall dismiss the action without prejudice if the submission is found to be insufficient. If a plaintiff in an action dismissed without prejudice fails to*



tender a sufficient submission within the following 30 days, the action shall be dismissed with prejudice.

(j) *TRIAL PROHIBITION.*—In any coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b), the judge or judges to whom actions are assigned by the Judicial Panel on Multidistrict Litigation may not conduct any trial in any civil action transferred to or directly filed in the proceedings unless all parties to the civil action consent to trial of the specific case sought to be tried.

(k) *REVIEW OF ORDERS.*—

(1) *IN GENERAL.*—The Court of Appeals having jurisdiction over the transferee district shall permit an appeal to be taken from any order issued in the conduct of coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b), provided that an immediate appeal from the order may materially advance the ultimate termination of one or more civil actions in the proceedings.

(2) *REMAND ORDERS.*—Notwithstanding section 1447(e), a court of appeals may accept an appeal from an order issued in any coordinated or consolidated proceedings conducted pursuant to subsection (b) granting or denying a motion to remand a civil action to the State court from which it was removed if application is made to the court of appeals within 14 days after the order is entered.

(l) *ENSURING PROPER RECOVERY FOR PLAINTIFFS.*—The claimants in any civil action asserting a claim for personal injury transferred to or directly filed in coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b) shall receive not less than 80 percent of any monetary recovery obtained in that action by settlement, judgment or otherwise. The judge or judges to whom the coordinated or consolidated pretrial proceedings have been assigned shall have jurisdiction over any disputes regarding compliance with this requirement.

\* \* \* \* \*

**CHAPTER 89—DISTRICT COURTS; REMOVAL OF CASES FROM STATE COURTS**

\* \* \* \* \*

**§ 1447. Procedure after removal generally**

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just

costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

*(d) MISJOINDER OF PLAINTIFFS IN PERSONAL INJURY AND WRONGFUL DEATH ACTIONS.—*

*(1) This subsection shall apply to any civil action in which—*

*(A) two or more plaintiffs assert personal injury or wrongful death claims;*

*(B) the action is removed on the basis of the jurisdiction conferred by section 1332(a); and*

*(C) a motion to remand is made on the ground that one or more defendants are citizens of the same State as one or more plaintiffs.*

*(2) In deciding the remand motion in any such case, the court shall apply the jurisdictional requirements of section 1332(a) to the claims of each plaintiff individually, as though that plaintiff were the sole plaintiff in the action.*

*(3) The court shall sever the claims that do not satisfy the jurisdictional requirements of section 1332(a) and shall remand those claims to the State court from which the action was removed. The court shall retain jurisdiction over the claims that satisfy the jurisdictional requirements of section 1332(a).*

**[(d)]** *(e) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.*

**[(e)]** *(f) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.*

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**PART V—PROCEDURE**

\* \* \* \* \*

**CHAPTER 114—CLASS ACTIONS**

\* \* \* \* \*

**§ 1716. Class action injury allegations**

*(a) IN GENERAL.—A Federal court shall not issue an order granting certification of a class action seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives.*

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

presented, that the requirement in subsection (a) of this section is satisfied.

**§ 1717. Conflicts of interest**

(a) **REQUIRED DISCLOSURES.**—In a class action complaint, class counsel shall state whether any proposed class representative or named plaintiff in the complaint is a relative of, is a present or former employee of, is a present or former client of (other than with respect to the class action), or has any contractual relationship with (other than with respect to the class action) class counsel. In addition, the complaint shall describe the circumstances under which each class representative or named plaintiff agreed to be included in the complaint and shall identify any other class action in which any proposed class representative or named plaintiff has a similar role.

(b) **PROHIBITION OF CONFLICTS.**—A Federal court shall not issue an order granting certification of any class action in which any proposed class representative or named plaintiff is a relative of, is a present or former employee of, is a present or former client of (other than with respect to the class action), or has any contractual relationship with (other than with respect to the class action) class counsel.

(c) **DEFINITION.**—For purposes of this section, “relative” shall be defined by reference to section 3110(a)(3) of title 5, United States Code.

**§ 1718. Class member benefits**

(a) **DISTRIBUTION OF BENEFITS TO CLASS MEMBERS.**—A Federal court shall not issue an order granting certification of a class action seeking monetary relief unless the class is defined with reference to objective criteria and the party seeking to maintain such a class action affirmatively demonstrates that there is a reliable and administratively feasible mechanism (a) for the court to determine whether putative class members fall within the class definition and (b) for distributing directly to a substantial majority of class members any monetary relief secured for the class.

(b) **ATTORNEYS’ FEES IN CLASS ACTIONS.**—

(1) **FEE DISTRIBUTION TIMING.**—In a class action seeking monetary relief, no attorneys’ fees may be determined or paid pursuant to Rule 23(h) of the Federal Rules of Civil Procedure or otherwise until the distribution of any monetary recovery to class members has been completed.

(2) **FEE DETERMINATIONS BASED ON MONETARY AWARDS.**—Unless otherwise specified by Federal statute, if a judgment or proposed settlement in a class action provides for a monetary recovery, the portion of any attorneys’ fee award to class counsel that is attributed to the monetary recovery shall be limited to a reasonable percentage of any payments directly distributed to and received by class members. In no event shall the attorneys’ fee award exceed the total amount of money directly distributed to and received by all class members.

(3) **FEE DETERMINATIONS BASED ON EQUITABLE RELIEF.**—Unless otherwise specified by Federal statute, if a judgment or proposed settlement in a class action provides for equitable relief, the portion of any attorneys’ fee award to class counsel that

*is attributed to the equitable relief shall be limited to a reasonable percentage of the value of the equitable relief, including any injunctive relief.*

**§ 1719. Money distribution data**

(a) *SETTLEMENT ACCOUNTINGS.*—*In any settlement of a class action that provides for monetary benefits, the court shall order class counsel to submit to the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts an accounting of the disbursement of all funds paid by the defendant pursuant to the settlement agreement. The accounting shall state the total amount paid directly to all class members, the actual or estimated total number of class members, the number of class members who received payments, the average amount (both mean and median) paid directly to all class members, the largest amount paid to any class member, the smallest amount paid to any class member and, separately, each amount paid to any other person (including class counsel) and the purpose of the payment. In stating the amounts paid to class members, no individual class member shall be identified. No attorneys' fees may be paid to class counsel pursuant to Rule 23(h) of the Federal Rules of Civil Procedure until the accounting has been submitted.*

(b) *ANNUAL SETTLEMENT DISTRIBUTION REPORTS.*—*Commencing not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall annually prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives for public dissemination a report summarizing how funds paid by defendants in class actions have been distributed, based on the settlement accountings submitted pursuant to subsection (a).*

**§ 1720. Issues classes**

(a) *IN GENERAL.*—*A Federal court shall not issue an order granting certification of a class action with respect to particular issues pursuant to Rule 23(c)(4) of the Federal Rules of Civil Procedure unless the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites of Rule 23(a) and Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3).*

(b) *CERTIFICATION ORDER.*—*An order issued under Rule 23(c)(4) of the Federal Rules of Civil Procedure that certifies a class with respect to particular issues shall include a determination, based on a rigorous analysis of the evidence presented, that the requirement in subsection (a) of this section is satisfied.*

**§ 1721. Stay of discovery**

*In any class action, all discovery and other proceedings shall be stayed during the pendency of any motion to transfer, motion to dismiss, motion to strike class allegations, or other motion to dispose of the class allegations, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.*

**§ 1722. Third-party litigation funding disclosure**

*In any class action, class counsel shall promptly disclose in writing to the court and all other parties the identity of any person or entity, other than a class member or class counsel of record, who has a contingent right to receive compensation from any settlement, judgment, or other relief obtained in the action.*

**§ 1723. Appeals**

*A court of appeals shall permit an appeal from an order granting or denying class-action certification under Rule 23 of the Federal Rules of Civil Procedure.*

\* \* \* \* \*

**Dissenting Views**

H.R. 985, the “Fairness in Class Action Litigation Act of 2017,” represents the latest attempt to tilt the civil justice playing field in favor of corporate defendants and to deny consumers and members of the public access to justice. The bill aims to eliminate the use of class actions by imposing numerous new and unnecessary requirements for the certification and consideration of class action lawsuits and also by creating new onerous requirements for multidistrict litigation. In addition, the bill amends the remand statute in a way that could make it easier for defendants to have certain personal injury and wrongful death actions be heard in Federal court.

Class actions are a critical tool for allowing those injured by corporate wrongdoing to receive some measure of justice by making it economically feasible to pursue claims that are too small or too burdensome to pursue on an individual basis, but are nonetheless meritorious. Class actions are also an important enforcement mechanism and are particularly vital in consumer protection, civil rights, antitrust, personal injury, and employment cases. Finally, they promote the efficient consideration of numerous cases raising substantially the same factual and legal questions, thereby lessening burdens on courts. By making most class actions very difficult if not impossible to pursue, H.R. 985 undermines these important goals.

H.R. 985 is highly problematic for many reasons. To begin with, the bill is a solution in search of a problem because it appears to be based on the false premise—offered with no supporting evidence—that Federal courts are routinely failing to comply with the rigorous requirements for certifying class actions specified in Federal Rule of Civil Procedure 23. Indeed, the false notion that many class actions and multidistrict proceedings are somehow inherently fraudulent or improper is implicit throughout the bill. In fact, what proponents appear to be concerned with is not the fact that the requirements of class certification and multidistrict litigation are unfair, but that they are not skewed decisively in corporate defendants’ favor.

In addition, H.R. 985 undermines the core purpose of class actions and multidistrict litigation, which is to ensure efficiency in the disposition of numerous but substantially the same claims or factual questions and to provide access to courts for parties that,

individually, would not have the incentive or resources to pursue otherwise meritorious claims. Rather, the bill's numerous, vague or impossible-to-meet certification and other requirements will only foster more litigation, increase burdens and costs that would fall disproportionately on plaintiffs, and allow more opportunities for corporate defendants to have a case dismissed or to engage in dilatory tactics. Also, its attorneys' fee and "conflict of interest" provisions aimed specifically at class counsel appear designed to make it harder for plaintiffs to obtain legal representation in the first place.

Finally, the bill would substantially and needlessly increase resource burdens on the Federal courts, significantly reduce judicial discretion in many respects, and unnecessarily circumvent the careful and thorough Rules Enabling Act process for amending Federal civil procedure rules.<sup>1</sup> In fact, the Judicial Conference of the United States reports that it has been "studying class action for the last five years" and "has considered many of the issues addressed in H.R. 985."<sup>2</sup> Accordingly, the Judicial Conference "strongly urge[s] Congress not to amend the class action procedures found in Rule 23 outside the Rules Enabling Act process."<sup>3</sup>

We are also concerned that the Majority has failed to accord any deliberative process to this legislation, which was introduced only days before the Committee considered it for markup. No hearings have been held this Congress and the version of the bill considered last Congress only consisted of one section of H.R. 985. Indeed, the Committee's markup of H.R. 985 represented the first vetting of any kind for most of these provisions. In its opposition to this measure, the American Bar Association correctly notes the many shortcomings of "advancing comprehensive class action reform without a hearing to examine all the complicated issues involved with so many rule changes."<sup>4</sup>

In recognition of these many concerns, numerous labor, consumer rights, and public interest groups oppose H.R. 985, including the AFL-CIO, the Alliance for Justice, the American Antitrust Institute, the Center for Science in the Public Interest, Consumer Federation of America, Consumers Union, the Committee to Support the Antitrust Laws, the NAACP, the National Association of Consumer Advocates, the National Consumer Law Center, the National Employment Law Project, Public Citizen, Public Justice, and the Southern Poverty Law Center.<sup>5</sup> The bill is also opposed by a coalition of 121 civil rights groups as well as a coalition of 37 dis-

<sup>1</sup> 28 U.S.C. §§ 2071 *et seq.* (2017).

<sup>2</sup> Letter from Daniel G. Campbell, U.S. District Judge, D. Ariz., Chair, Comm. on Rules of Practice and Procedure, & John D. Bates, U.S. District Judge, D.D.C., Chair, Advisory Comm. on Civil Rules, Judicial Conference of the United States, to Bob Goodlatte (R-VA), Chair, H. Comm. on the Judiciary (Feb. 14, 2017) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter "Judicial Conference Letter"].

<sup>3</sup> *Id.*

<sup>4</sup> Letter from Thomas M. Susman, Director, Governmental Affairs Office, American Bar Association to Bob Goodlatte (R-VA), Chair, H. Comm. on the Judiciary (Feb. 14, 2017) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter "ABA Letter"].

<sup>5</sup> Letter from 72 consumer rights, public interest, and labor groups to Bob Goodlatte (R-VA), Chair, & John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary (Feb. 14, 2017) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter "Groups Letter"]; Letter from the National Association of Shareholder & Consumer Attorneys to Paul Ryan, Speaker of the House, *et al.* (Feb. 16, 2017) (on file with H. Comm. on the Judiciary Democratic staff); Letter from National Association of Consumer Advocates to Bob Goodlatte (R-VA), Chair, & John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary (Feb. 15, 2017) (on file with H. Comm. on the Judiciary Democratic staff).

ability rights groups.<sup>6</sup> In addition, the Obama Administration threatened to veto legislation last Congress that consisted of just one section of H.R. 985 because “it would impair the enforcement of important Federal laws [and] constrain access to the courts.”<sup>7</sup> Finally, Professor Arthur Miller, the Nation’s foremost scholar of Federal civil practice and procedure, wrote in opposition to this earlier iteration of the bill because it violated the central mandate of the class action device, which is to promote judicial efficiency through the use of class representatives to establish injury on behalf of all similarly situated. Rather than addressing these concerns, the current version of H.R. 985 greatly exacerbates them.

For the foregoing reasons and those discussed below, we must respectfully oppose H.R. 985.

#### DESCRIPTION AND BACKGROUND

##### DESCRIPTION

H.R. 985 would impose a series of new and burdensome statutory requirements for the certification and consideration of class actions. In addition, with respect to multidistrict litigation, it would, among other things, impose a heightened burden on plaintiffs in personal injury actions to demonstrate evidentiary support for their factual allegations. Finally, the bill amends the remand statute to require Federal courts in diversity cases involving two or more plaintiffs in personal injury or wrongful death cases to consider each plaintiff separately when determining whether they have met the requirements of the Federal diversity statute. All of these provisions will have the effect of fueling increased litigation and costs for plaintiffs with the apparent goal of dissuading future plaintiffs from filing suit, even when they have meritorious claims. The following described provisions will be the primary focus of these views.

Section 3(a) amends chapter 114 of title 28 of the United States Code by adding after section 1715 several new sections governing class actions. For example, new section 1716 would prohibit a Federal court from certifying any proposed class seeking monetary relief for personal injury or economic loss unless the party seeking the class action proves that each proposed class member suffered the same type and scope of injury as the putative class representative. The terms “economic loss” and “scope of injury” are undefined. Section 1716 further requires a court, in issuing a class certification order for any class subject to subsection 2(a), to also certify that the requirements of subsection 2(a) have been met “based on a rigorous analysis of the evidence presented[.]”

New section 1717 prohibits a Federal court from certifying any class action in which a proposed class representative or named plaintiff is a relative of, a present or former client of (other than with respect to the class action), a present or former employee of, or has any contractual relationship (other than with respect to the

<sup>6</sup> Letter from 121 civil rights groups to Bob Goodlatte (R-VA), Chair, & John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary (Feb. 15, 2017) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter “Civil Rights Letter”]; Undated letter from 37 disability rights groups to Bob Goodlatte (R-VA), Chair, & John Conyers, Jr. (D-MI), Ranking Member, H. Comm. on the Judiciary (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter “Disability Rights Letter”].

<sup>7</sup> Executive Office of the President, Office of Management and Budget, Statement of Administration Policy on H.R. 1927, the “Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2015,” Jan. 6, 2016.

class action) with class counsel. Section 1717 requires that in a class action complaint, the attorney for the class representative or named plaintiff disclose the existence of such a relationship, describe the circumstances under which each class representative or named plaintiff agreed to be included in the complaint, and identify any other class action to which the class representative or named plaintiff has a similar role.

New section 1718 imposes an “ascertainability” requirement for class action certification. Specifically, it prohibits class certification unless “the class is defined with reference to objective criteria and the party seeking to maintain such a class action affirmatively demonstrates that there is a reliable and administratively feasible mechanism (a) for the court to determine whether putative class members fall within the class definition and (b) for distributing directly to a substantial majority of class members any monetary relief secured for the class.” The bill offers no guidance as to the meaning of terms such as “reference to objective criteria,” “affirmatively demonstrates,” “reliable and administratively feasible mechanism,” and “substantial majority.” There is currently a circuit split on whether such a standard as would be codified in new section 1718—which reflects the most corporate-defendant friendly view—should be imposed.

Section 1718(b)(1) prohibits attorneys’ fees from being determined or paid until any monetary recovery is distributed to all class members, even when it is impossible to identify or find all class members. This provision contains no “good faith” or “honest efforts” exception, nor does it impose a graduated scheme, such as partial payment of fees pending complete payment to class members. Rather, it takes an absolutist approach, leaving open the real possibility that many class counsel will not be paid at all.

Section 1718(b)(2) specifies that in class actions where a judgment or proposed settlement provides for monetary recovery, attorneys’ fee awards must be limited to “a reasonable percentage of any payments directly distributed to and received by class members” and, in no case may the fee award exceed the total amount of money distributed to and received by all class members. Section 1718(b)(3) similarly limits attorneys’ fees in cases seeking equitable relief to “a reasonable percentage of the value of the equitable relief, including any injunctive relief.” The bill fails to offer any guidance as to what would constitute a “reasonable percentage” as used in the foregoing subsections, nor is there any guidance regarding how to monetize equitable relief. Moreover, there is no “good faith” or “honest efforts” exception from the prohibition on payment of attorneys’ fees where an attorney makes honest and exhaustive efforts to find all class members, but is unable to do so, thereby potentially resulting in an unduly harsh outcome.

New section 1719, among other things, prohibits the payment of attorneys’ fees to class counsel until they submit certain information regarding the distribution of monetary awards and settlements to the Federal Judicial Center and the Administrative Office of the United States Courts. As with the attorneys’ fee provision in section 1718, there is no “good faith” or “honest efforts” exception from the prohibition on attorneys’ fees being paid for less-than-full compliance with this requirement.



New section 1720 prohibits a Federal court from certifying a class action with respect to particular issues unless the entire cause of action from which the particular issues arise satisfies all of the class certification requirements of Rule 23. Under current law in all circuits, such “issue” class actions need not satisfy all of the certification requirements of Rule 23.

New section 1721 provides that in any class action, discovery must be stayed whenever any motion to transfer, motion to dismiss, motion to strike class allegations, or other motion to dispose of class allegations, is pending. Discovery is not stayed when any party files a motion asking the court to find that “particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.” The bill does not define or provide guidance as to the meaning of the terms “particularized discovery” and “undue prejudice.” Under current law, a court has discretion whether to stay discovery in response to a motion. This provision effectively makes a stay on discovery the default outcome absent certain circumstances that are not well defined.

New section 1723 provides for mandatory appeal from an order granting or denying class certification. Current Rule 23(f) already provides for discretionary appeals from such orders, but at any rate any appeal must be made within 14 days of the order.

Section 4 of the bill amends the remand statute, 28 U.S.C. § 1447, by adding a new subsection (d). New subsection 1447(d)(1) applies to any civil action with two or more plaintiffs alleging personal injury or wrongful death claims where the action is removed to Federal court on the basis of diversity jurisdiction and a motion to remand is made on the ground that one or more defendants is a citizen of the same state as one or more plaintiffs.

Subsection 1447(d)(2) requires a court considering a remand motion to apply the diversity statute’s various requirements for establishing diversity jurisdiction to each plaintiff’s claims individually, as if each plaintiff was the sole plaintiff in the civil action. Subsection 1447(d)(3) requires a court, in such circumstances, to sever claims and remand to state court only the claims of those plaintiffs that do not meet the diversity statute’s requirements. The practical effect could be to make it easier to establish diversity jurisdiction in multi-plaintiff cases involving personal injury or wrongful death claims, increasing the number of diversity cases in Federal court where diversity might otherwise be defeated because of the lack of complete diversity.

Section 5 of the bill adds new subsections to 28 U.S.C. § 1407, which governs multidistrict litigation. Section 1407(b) provides that a judge or judges may be assigned by the Judicial Panel on Multidistrict Litigation to preside over coordinated or consolidated pre-trial proceedings in cases where civil actions involving one or more common questions of fact are pending in different districts. Proposed new section 1407(i) requires that, in any such proceeding involving redress for personal injury, plaintiff’s counsel must make a submission “sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff’s complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury.”

Additionally, section 1407(i) requires that such submission be made within 45 days after the civil action is transferred to or filed in the consolidated pretrial proceedings, with no extensions. The presiding judge must, within 30 days of the submission deadline, determine whether the submission is “sufficient” and must dismiss the action without prejudice if it is not. If a plaintiff whose action is dismissed does not tender a “sufficient” submission within 30 days following dismissal, the action must be dismissed with prejudice. The bill does not provide any guidance as to what would constitute a “sufficient” submission to “demonstrate . . . evidentiary support” for factual contentions regarding an alleged injury. New section 1407(i) essentially codifies a practice that some courts use at their discretion in certain cases. This provision would essentially mandate that every court impose this standard in every personal injury multidistrict proceeding.

New subsection 1407(l) requires that claimants in a multidistrict proceeding receive no less than 80 percent of any monetary recovery obtained by judgment, settlement, or otherwise. It also provides judges assigned to the multidistrict proceeding with jurisdiction over any disputes regarding compliance with this requirement. In essence, this provision codifies a 20 percent cap on attorneys’ contingency fees, which may present an insurmountable disincentive for counsel to undertake such litigation. It also overrides state laws governing such fees in personal injury and wrongful death cases. Moreover, the provision fails to define or offer any guidance as to how the 80 percent monetary recovery is to be calculated or who qualifies as a “claimant” under this provision.

Section 7 of the bill provides, among other things, that its provisions will apply to any civil action pending on the date of enactment.

#### BACKGROUND

H.R. 985 pertains to class actions and multidistrict litigation. A class action is a type of lawsuit filed by one or more individuals on behalf of a larger group of people. Class actions can be beneficial to consumers and courts. They are beneficial to consumers because they give a potentially large group of individuals who are injured in the same manner by the same defendants the ability to hold the wrongdoers accountable. Class actions make it economically feasible for these plaintiffs to seek justice for smaller, but not inconsequential, injuries in areas as diverse as products liability, wage and hour litigation, and employment discrimination. As a result, class actions help level the playing field between injured consumers and powerful corporate defendants. They also help promote private enforcement of public policy, particularly when there is large-scale wrong-doing by an institutional actor.<sup>8</sup>

<sup>8</sup>For outlines of the policy reasons supporting the existence of the class action mechanism, see *Fairness in Class Action Litigation Act of 2015: Hearing on H.R. 1927 Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015) [hereinafter “Subcommittee Hearing”] (statement of Alexandra Lahav, Joel Barlow Professor, University of Connecticut Law School, at 2); *The State of Class Actions Ten Years After The Enactment of the Class Action Fairness Act: Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary*, 114th Cong. (2015) [hereinafter “CAFA Hearing”] (statement of Patricia W. Moore, Professor of Law, St. Thomas University School of Law, at 2).

Additionally, class actions can be beneficial for courts because they promote judicial efficiency. The class action is an efficient mechanism to deal with what would otherwise be a large number of small and repetitive cases involving common legal and factual questions. Through class certification, courts can consolidate similar cases and conserve judicial resources.<sup>9</sup>

Federal Rule of Civil Procedure 23 governs class actions filed in Federal courts. Rule 23(a) specifies four prerequisites necessary for the certification of a class:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.<sup>10</sup>

Additionally, Rule 23(b) specifies the findings that a court must make prior to certifying a class action, assuming that the requirements of Rule 23(a) have been met. These findings include, among other things, whether the prosecution of separate actions by or against individual class members would create the risk of inconsistent or varying adjudications, whether the party opposing the class has acted or refused to act on grounds that apply generally to the class such that relief would be appropriate for the class as a whole, and whether common questions of law or fact predominate over any other questions affecting only individual class members and that a class action would be superior to other methods of adjudicating the controversy fairly and efficiently.<sup>11</sup>

Multidistrict litigation is a Federal legal procedure allowing cases that have one or more common factual questions to be consolidated and transferred from one court, the transferor, to another court, the transferee, “for the convenience of parties and witnesses” and to “promote the just and efficient conduct of such actions.”<sup>12</sup> The Judicial Panel on Multidistrict Litigation decides whether cases should be consolidated and transferred.<sup>13</sup> Cases are sent from one court to another for all pretrial proceedings and discovery and are remanded to the transferor court at or before the conclusion of such proceedings.<sup>14</sup> Proceedings for transfer may be initiated by the Judicial Panel on its own initiative or by a motion filed with the Panel by any party.<sup>15</sup>

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<sup>9</sup>*Id.*

<sup>10</sup>Fed. R. Civ. P. 23(a).

<sup>11</sup>Fed. R. Civ. P. 23(b). Rule 23 contains a number of other provisions that are not relevant to this bill.

<sup>12</sup>28 U.S.C. § 1407(a) (2017) (“When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.”).

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at § 1407(c)(i)-(ii).

## CONCERNS WITH H.R. 985

## I. H.R. 985 IS A SOLUTION IN SEARCH OF A PROBLEM

There is no need for H.R. 985 because plaintiffs already must satisfy many rigorous requirements in order to pursue a class action, and the bill's proponents offer no evidence that the Federal courts systematically fail to apply these standards. As explained above, Rule 23 requires plaintiffs seeking class action certification to make substantial showings, including commonality of factual and legal questions and typicality of the putative representative's claims compared to those of putative class members. Moreover, case law demonstrates that the Federal courts vigorously enforce Rule 23's requirements. Pursuing a class action also requires extensive discovery and motion practice, which mandate a significant expenditure of time and resources. H.R. 985 would only make these procedural hurdles even more burdensome and potentially cost-prohibitive. Indeed, the real aim of the bill does not seem to be to make class actions fairer, but to tilt the playing field decisively in defendants' favor.

Much of the initial justification of this bill from the 114th Congress was based on the false notion that too many class actions were fraudulent or otherwise improper because most putative class members suffered no actual injury. In support of this allegation, the bill's proponents cited "benefit of the bargain" cases and cases asserting statutory damages for violations of consumer protection statutes. In fact, however, these are not "no injury" cases. As Professor Alexandra Lahav explained in testimony before the Subcommittee on the Constitution and Civil Justice in the 114th Congress, plaintiffs in such cases have suffered a real injury. In "benefit of the bargain" cases, for instance, plaintiffs have suffered financial injury in the form of paying a price for what turned out to be a defective product that is, in reality, worth less than what the plaintiff bargained for. Similarly, in many state consumer protection statutes, and in civil rights, employment, or privacy statutes, the injury, while very real, is difficult to quantify in monetary terms. Legislatures, therefore, set statutory damage levels to simplify the process of quantifying damages, to deter corporate wrongdoing, and to encourage access to the courts.

Other than proposed new section 1716, the Judiciary Committee has held no hearing on any of the other provisions of H.R. 985. As a result, none of these provisions or the purported justifications for them has ever been vetted by our Committee. For instance, the bill's proponents offer absolutely no evidence warranting H.R. 985's so-called "conflict of interest" provision, which prohibits class certification where a class representative or named plaintiff is a relative of, current or former client of, current or former employee of, or has a contractual relationship with the plaintiffs' counsel. We are unaware of any justification supporting the implication that such relationships are *per se* problematic. As it is, courts must exercise judgment as to whether a particular relationship with class counsel poses a conflict of interest pursuant to Rule 23(a)(4), which

requires a court to consider whether class counsel “will fairly and adequately protect the interests of the class.”<sup>16</sup>

II. H.R. 985 UNDERMINES THE ABILITY OF PLAINTIFFS TO PURSUE MOST CLASS ACTIONS AND MULTIDISTRICT LITIGATION BY IMPOSING NUMEROUS BURDENSOME REQUIREMENTS

H.R. 985 presents many obstacles to the pursuit of class actions and multidistrict litigation. These include: (1) requiring that a putative class representative prove that every class member suffered the “same type and scope of injury;” (2) requiring a putative class representative to ascertain all class members at the certification stage; (3) effectively eliminating courts’ ability to certify “issue” class actions; (4) a default stay of discovery in response to any motion to dispose of class allegations absent a finding by a court on the need for “particularized” discovery in certain circumstances; (5) providing for mandatory appeal from any order granting or denying a motion for class certification; (6) imposing a significant threshold of proof and draconian deadlines on plaintiffs and courts in multidistrict personal injury litigation, and (7) imposing harsh attorneys’ fee and “conflict of interest” provisions aimed specifically at class counsel. Taken together, these provisions undermine the core purpose of class actions and multidistrict litigation, which is to provide for efficiency in the disposition of numerous, but substantially the same claims or factual questions and to provide access to courts for parties that, individually, would not have the incentive or resources to pursue otherwise meritorious claims.

A. *Section 1716 Imposes Impossible Standard to Establish Same Type and Scope of Injury*

H.R. 985’s requirement that a plaintiff show that, for class actions seeking monetary relief for personal injury or economic loss, each proposed class member suffered the exact same “type and scope” of injury would be virtually impossible to meet as a practical matter, especially for many types of claims where the exact “scope” of an injury, such as in antitrust, employment discrimination, or privacy matters, cannot be measured with any precision. Moreover, by requiring a putative class representative to make such showings at the certification stage—a nascent stage of litigation, before there has been any substantial discovery—H.R. 985 effectively requires a decision on the merits before trial and before appropriate class members can even be identified, an extremely difficult if not impossible standard to meet.

To prove injury, a plaintiff would have to prove the alleged violation that caused the injury for each possible class member—i.e., litigation on the merits. As Professor Arthur Miller, the Nation’s foremost expert of Federal practice and procedure, noted in a letter in opposition to prior legislation that was nearly identical to H.R. 985’s proposed section 1716:

<sup>16</sup>Fed. R. Civ. P. 23(a)(4). Professor John C. Coffee, Jr. of Columbia Law School has written that H.R. 985’s conflict of interest provision arguably is unconstitutional, as the Fifth Amendment’s Due Process Clause has been interpreted to preclude the government in a civil case from unreasonably interfering with a citizen’s choice of hired counsel. John C. Coffee, Jr., *How Not to Write a Class Action “Reform” Bill*, The CLS Blue Sky Blog, Feb. 21, 2017, available at <http://clsbluesky.law.columbia.edu/2017/02/21/how-not-to-write-a-class-action-reform-bill/>.

[the] core function of a class representative is to try to establish injury on behalf of similarly situated persons. Thus the bill effectively wipes out Rule 23, under which class representatives litigate common questions on behalf of the class. The represented persons are *absent* until after entry of a judgment that binds them, at which point (upon a favorable judgment) they are asked to come forward to prove their damages. Until that time, the identity of many of the class members is unknown, indeed possibly even unknowable.<sup>17</sup>

Professor Miller further noted that the Supreme Court has rejected the notion that a class representative must first establish that it will win on the merits in order to obtain class certification.<sup>18</sup> He observed that class membership does not equate to entitlement to damages, a distinction that H.R. 985's proponents appear deliberately to be trying to blur.<sup>19</sup>

Other civil procedure experts concur. For example, Professor John C. Coffee, Jr., wrote that this provision only adds unnecessary "ambiguity" to current law, noting that "under this proposed standard, a person who suffered a slightly different economic or personal injury from the class representative might have to be excluded" from a class.<sup>20</sup> Professor Elizabeth Chamblee Burch wrote that "this proposal demands a degree of similarity that is both ill defined and unnecessary," and noted that the Supreme Court held last year that "parties should be able to enjoy the benefits of class actions even when damages vary" and that "[p]ersonal injury and economic losses will inevitably affect class members differently."<sup>21</sup> Professor Myriam Gilles noted that "it is impossible to exclude zero-damage plaintiffs from a class because 'many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown.'"<sup>22</sup> Moreover, excluding "zero-damage plaintiffs from class actions . . . serves no policy purpose" because the "presence of uninjured members within a defined class does not increase the aggregate damages that the defendant must pay."<sup>23</sup> Also, "the 'scope' requirement would eliminate damages class actions, period" because "the amount of damage always (or almost always) varies across class members."<sup>24</sup>

The American Bar Association, writing in opposition to H.R. 985, noted that the "same type and scope of injury" requirement "places a nearly insurmountable burden for people who have suffered per-

<sup>17</sup> Letter from Arthur R. Miller, University Professor, New York University School of Law, to Trent Franks (R-AZ), Chair, & Steve Cohen (D-TN), Ranking Member, Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary (Apr. 27, 2015) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter "Miller Letter"].

<sup>18</sup> *Miller Letter* at 3.

<sup>19</sup> *Id.*

<sup>20</sup> Memorandum Regarding *A Brief and Selective Overview of the "Fairness in Class Action Litigation Act of 2017"* from John C. Coffee, Jr., Adolf A. Berle Professor of Law, Columbia Law School, to Democratic Staff, H. Comm. on the Judiciary Democratic Staff, at 1-2 (Feb. 13, 2017) [hereinafter "Coffee Memo"].

<sup>21</sup> Letter from Elizabeth Chamblee Burch, Charles H. Kirbo Chair of Law, The University of Georgia School of Law, to Democratic Staff, H. Comm. on the Judiciary, at 1 (Feb. 13, 2017) [hereinafter "Burch Letter"].

<sup>22</sup> Letter from Myriam Gilles, Vice Dean, & Paul R. Verkuil Research Chair Professor of Law, Benjamin N. Cardozo Law School, to Democratic Staff, H. Comm. on the Judiciary, at 2 (Feb. 13, 2017) (quoting *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009)) [hereinafter "Gilles Letter"].

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 3.

sonal injury or economic loss at the hands of large institutions with vast resources, effectively barring them from bringing class actions.”<sup>25</sup> Similarly, a coalition of 121 civil rights groups observed that at the class certification stage of a civil rights class action, “it is frequently impossible to identify all of the victims or the precise nature of each of their injuries” and that “even if this information were knowable, class members’ injuries would not be ‘the same,’” thereby precluding most civil rights class actions were this requirement to be enacted.<sup>26</sup> Indeed, as another coalition of consumer rights, labor, environmental, and public interest groups explained, “virtually never does every member of the class suffer the same ‘scope’ of injury from the same wrongdoing” and that this requirement “alone would sound the death knell for most class actions.”<sup>27</sup>

*B. Section 1718(a)’s Ascertainability Requirement Has Been Rejected by Most Courts for Good Reason*

Proposed section 1718(a) creates a statutory “ascertainability” requirement in money damages class actions, under which a plaintiff must identify every class member in order to obtain class certification, a virtual impossibility in most consumer cases where individual claims may be small, where consumers who purchased a product at issue may not come forward or may not have kept a receipt or other evidence of purchase. The kind of rigid “ascertainability” requirement contained in H.R. 985 has been debated among the Federal courts of appeals, and most courts of appeals have rejected it. This provision essentially codifies the more corporate-defendant-friendly view that classes are ascertainable at the certification stage, with the practical effect that in many small-claim consumer cases, where class members are inherently difficult to identify, defendants can escape liability because the class is not ascertainable even if there is overwhelming evidence of the defendant’s wrongdoing.<sup>28</sup> Moreover, section 1718(a)’s vague requirement that the class be “defined with reference to objective criteria” and that the putative class representative “affirmatively demonstrate[] that there is a reliable and administratively feasible mechanism” for the court to determine whether putative class members fall within the class and for distributing monetary relief to a substantial majority of such class members is unnecessary, cumbersome, costly, and invites further litigation over their meaning.

*C. Section 1720 Will Have a Particularly Devastating Impact on Civil Rights Class Actions*

Proposed section 1720 in H.R. 985 further threatens to undermine class actions, particularly in civil rights cases. This provision would prohibit certification of “issue” class actions unless the entire cause of action meets all of Rule 23’s class action certification requirements, changing current law dramatically and effectively barring or at least severely limiting issue class actions. Rule 23(c)(4) provides that “when appropriate, an action may be brought or

<sup>25</sup> ABA Letter.

<sup>26</sup> Civil Rights Letter.

<sup>27</sup> Groups Letter.

<sup>28</sup> Plaintiffs’ counsel typically define class members in terms of people harmed by the defendant’s conduct, employ a mix of subjective and objective criteria, and invoke criteria dependent on the merits. Plaintiffs’ counsel often revise their class definition after receiving class discovery from defendants. Burch Letter at 2 and fn.2.

maintained as a class action with respect to particular issues.”<sup>29</sup> Currently, all Federal circuit courts read Rule 23(c)(4) to permit courts to certify a class for the limited purpose of deciding an issue common to a group of plaintiffs within a case even when the putative class has not yet been certified. This allows a court, for example, to decide the issue of liability only, rather than also consider damages and other questions in the case. Being able to decide common questions within a case while allowing other issues to be decided on an individual basis would be in keeping with one of the purposes of class actions, namely, promoting judicial efficiency. Yet, as Professor Gilles noted, H.R. 985 “would *abolish* such issue classes” using an approach that “is maximalist and harsh” and not justified by any evidence that defendants’ due process rights are threatened by the use of issue classes.<sup>30</sup>

In particular, making issue class actions harder to pursue would have an especially adverse impact on civil rights class actions, which depend on issue class actions to a greater extent than other kinds of claims. Doing so would have a devastating impact on race and gender class actions that often can only be maintained as to particular issues such as liability. Requiring that an entire cause of action be certified as a class before any common issue can be decided will have the practical effect of denying many such plaintiffs their day in court, where it may not be practicable for individual plaintiffs to pursue individual cases on their own. As a coalition of civil rights groups has written in opposition to H.R. 985, “the bill’s limitation on ‘issue classes’ will impede the enforcement of civil rights laws” because such classes “can promote both efficiency and fairness” by allowing “class certification for the core question of liability (often a complex proceeding).”<sup>31</sup>

For the foregoing reasons, and, in particular, because of the potentially disproportionate impact that this provision would have on civil rights cases, including legal challenges to President Donald Trump’s Executive Order banning refugees and travelers from certain majority-Muslim countries, Representative Pramila Jayapal (D-WA) offered an amendment to strike the bill’s “issue classes” provision. The Committee, however, rejected her amendment by a party-line vote of 12 to 19.

#### *D. Section 1721’s Default Stay of Discovery Will Exponentially Increase Litigation*

Proposed section 1721 in H.R. 985 would needlessly extend class action litigation, which is already an expensive and cumbersome process. The provision would stay discovery and other proceedings while any motion to dispose of the class allegations is pending, including motions to strike class allegations, motions to dismiss, and motions to transfer unless the court finds, on motion of a party, that “particularized discovery” is needed to preserve evidence or to prevent undue prejudice to that party. Currently, motions to stay discovery may be granted at the discretion of the district court. Section 1721 appears to significantly reduce this discretion, making a stay mandatory unless a party can either show the need to preserve evidence, notwithstanding the potential absence of any dis-

<sup>29</sup> Fed. R. Civ. P. 23(c)(4).

<sup>30</sup> Gilles Letter at 7.

<sup>31</sup> Civil Rights Letter at 2.



covery up to that point in the case, or satisfy the vague standard that it would suffer “undue prejudice.” Even under such circumstances, discovery can only be “particularized,” though the bill provides no guidance as to what this term means in this context. The effect of this provision would be to increase litigation burdens and costs on plaintiffs, provide another opportunity for corporate defendants to engage in dilatory tactics by filing multiple motions each of which would trigger a stay of discovery and litigation over whether discovery should then be permitted, and dissuade future plaintiffs from pursuing meritorious claims.

As Professor Coffee wrote, the bill’s stay of discovery “provision can easily be exploited by defendants to delay class litigation indefinitely by making each of these motions [to dispose of class allegations] in seriatim fashion. Predictably, motions will follow motions in order to delay discovery.”<sup>32</sup> Professor Burch noted that this “proposal will unduly prolong litigation that is already protracted” and “would make it difficult for the court and the parties to conduct discovery and make informed decisions about whether to certify the class.”<sup>33</sup>

For the foregoing reasons, Representative Ted Deutch (D-FL) offered an amendment to strike the bill’s stay of discovery provision. The Committee, however, rejected the amendment by a party-line vote of 12 to 19.

*E. Section 1723’s Mandatory Right of Appeal Provides More Chances for Delay and Increases Burdens and Costs*

Proposed new section 1723 establishes a mandatory right of appeal to a Federal court of appeals of the grant or denial of a motion to certify a class. Under current Rule 23(f), such appeals *may* be heard at the discretion of the appeals court and must be filed within 14 days of the entry of such order.<sup>34</sup> As with most other provisions in H.R. 985, this mandatory appeal provision would give defendants yet another opportunity to delay consideration of class actions and thereby further increase litigation burdens and costs for plaintiffs.

*F. The Bill Imposes Unreasonable Restrictions on Class Counsel*

Various provisions in H.R. 985 appear intended to target class counsel and threaten the ability of plaintiffs to obtain legal representation in class actions. For instance, several provisions, including proposed sections 1718(b) and 1719, would delay the payment of any attorneys’ fees under certain strict conditions or until class counsel complies with certain settlement information accounting requirements, respectively. These provisions, which do not apply to defense counsel, appear to be unduly harsh and aimed at discouraging lawyers from taking the risk of representing class action plaintiffs by creating a strong financial disincentive.

Section 1718(b)(1) delays payment of attorneys’ fees until *all* monetary recovery has been paid to class members. Yet some class settlements may take many years to distribute, and under this provision, plaintiffs’ counsel would have to wait potentially years before receiving any payment. Moreover, as discussed earlier, some-

<sup>32</sup> Coffee Memorandum at 5.

<sup>33</sup> Burch Letter at 5.

<sup>34</sup> Fed. R. Civ. P. 23(f).

times it is simply impossible to identify all class members. Under this provision, which makes no exception for honest, good faith efforts by class counsel to identify and ensure payment to all class members, it is possible that counsel will not be paid at all. While ensuring class members are paid is an important goal, H.R. 985's proponents appear to be more interested in disincentivizing plaintiffs' lawyers, rather than fashioning a reasonable solution, such as an interim fee distribution or some other less draconian approach.

Similarly, although section 1718(b)(2) limits payments to class counsel to a reasonable percentage of the class members' monetary recovery, it fails to account for situations where funds may remain because class members may be difficult to identify, monetary awards are too small to distribute to individual class members, or funds are simply unclaimed. As with other provisions, this ambiguity could lead to further litigation and increased costs, as well as disincentivizing attorneys from representing class plaintiffs.

A similar concern arises with respect to section 1718(b)(3), which applies a similar "reasonable percentage" standard in cases where the class members are awarded or agree to equitable relief, such as in many civil rights cases. In these cases, there is the additional ambiguity of determining how to monetize equitable relief for purposes of determining a reasonable attorneys' fee award, further heightening concerns about the ability of plaintiffs to obtain adequate legal representation in such cases.

Finally, the already-discussed "conflict of interest" provision of section 1717(b) would deny class certification in *all* cases where the class representative or named plaintiff is a relative of, present or former client of, present or former employee of, or has a contractual relationship with the class counsel, without exception. This unnecessary provision wrongly assumes that all of these relationships raise impermissible conflicts of interest *per se* and, based on this false premise, effectively denies plaintiffs the right to choose their counsel.

H.R. 985's class action provisions aimed at class counsel will have a particularly adverse impact on civil rights plaintiffs. As civil rights organizations opposing H.R. 985 note, the bill's "reasonable percentage of equitable relief" standard is arbitrary and unworkable.<sup>35</sup> These organizations rightly ask "how is a judge to determine the cash value of an integrated school, a well-operating foster care system, the deinstitutionalization of individuals with disabilities, or myriad other forms of equitable relief secured by civil rights class actions?"<sup>36</sup> The ultimate result, they explain, is that "[n]on-profit organizations cannot bear the risk of these long and expensive cases if, at the end, their fees are calculated under this incoherent and capricious standard. Indeed, the bill creates an incentive for defendants to prolong the litigation so as to make it economically impossible for plaintiffs' attorneys to continue to prosecute the litigation."<sup>37</sup>

For the foregoing reasons, Ranking Member John Conyers, Jr. (D-MI) offered an amendment that would have exempted all civil

<sup>35</sup> Civil Rights Letter at 3.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*; see also Disability Rights Letter at 1 ("By severely limiting attorneys' fees in cases seeking only injunctive relief, [H.R. 985] would remove class actions as an essential tool for those who seek to improve the systems that serve people with disabilities.").

rights cases from H.R. 985's class action provisions. The Committee, however, rejected his amendment by a party-line vote of 11 to 14.

The bill's various class action provisions would similarly stifle the ability of plaintiffs in a wide spectrum of cases to pursue justice. For instance, those injured by fraudulent conduct, including the former students of Trump University who sued President Donald Trump for allegedly bilking thousands of dollars out of students while never providing the University's advertised educational services, would effectively be precluded from having their day in court. To address this particular shortcoming of the bill, Representative Hank Johnson (D-GA) offered an amendment that would have exempted all fraud cases from all of the bill's class action provisions. The Committee, however, rejected this amendment as well by voice vote.

*G. Section 4's Remand Provisions Would Unnecessarily Burden Federal Courts*

Section 4 of the bill would amend the remand statute, 28 U.S.C. § 1447, to add a new provision that applies: (1) in personal injury or wrongful death cases; (2) where there are two or more plaintiffs; (3) the case has been removed to Federal court on the basis of diversity jurisdiction; and (4) a motion to remand the case is made on the ground that one or more plaintiffs is a citizen of the same state as one or more defendants. In such a case, the court deciding the remand motion must apply the requirements of the Federal diversity statute<sup>38</sup> to the claims of each plaintiff individually and remand only those claims of the plaintiff that does not satisfy the diversity statute's requirements.

While it is unclear exactly what problem the bill's sponsors intend for this provision to address, it seems that in cases where one plaintiff is a citizen of the same state as one defendant and another plaintiff is a citizen of a different state as that defendant, this provision would make it easier for defendants to keep at least one of the plaintiffs' cases in Federal court, even if the plaintiffs assert the same legal claims arising from the same set of operative facts. This would seem to unnecessarily burden Federal courts with parallel consideration of a case at the same time that a proceeding on the same facts and legal claims takes place in state court.

*H. Section 5's Multidistrict Litigation Evidentiary Support Requirement Is Unreasonable and Unjustified and Its Arbitrary Cap on Attorneys' Fees Could Undermine the Ability of Plaintiffs to Obtain Representation*

Section 5 of the bill amends 28 U.S.C. § 1407, the statutory provision governing multidistrict litigation. Under that provision, cases in different districts raising common issues of fact may be transferred to a designated judge or judges for pretrial proceedings. H.R. 985 would add a new section 1407(i) requiring plaintiffs to produce proof of their allegations early on in such proceedings. Specifically, it requires that plaintiffs in personal injury cases make a submis-

<sup>38</sup>28 U.S.C. § 1332(a) (2017). Under this provision, in order for a Federal court to exercise diversity jurisdiction over what would otherwise be a state law case, there must be at least \$75,000 amount in controversy and the plaintiff and the defendant must be citizens of different states.

sion “sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff’s complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury” within the extremely strict deadline of 45 days after the civil action is transferred to or filed in the consolidated pretrial proceedings, with no extensions. The presiding judge must, within 30 days of the submission deadline, determine whether the submission is “sufficient” and must dismiss the action without prejudice if it is not. If the action is dismissed, a plaintiff would then have only 30 days to make a “sufficient” submission or the case must be dismissed with prejudice.

This provision places a significant burden on plaintiffs to prove their allegations to a considerable degree at the beginning of their case, denying them the ability to further develop their claims through the discovery process. It also codifies a procedure that some courts have adopted in some cases, but, as with the “ascertainability” requirement, there is no consensus among courts as to whether it is even appropriate to impose such a high burden at such an early stage on plaintiffs.<sup>39</sup>

New section 1407(j) would prohibit trials in multidistrict proceedings unless all the parties consent. This provision may be aimed at preventing “bellwether trials,” or trials of randomly selected cases in multidistrict litigation to test the parties’ arguments and help to resolve the overall litigation. The requirement that all parties consent to trial means that it is unlikely that any such cases would go to trial, meaning further cost and delay for plaintiffs.

Section 5 would also add a new section 1407(l) to title 28, United States Code, which would require that 80 percent of any monetary recovery in personal injury multidistrict litigation be paid to plaintiffs, effectively codifying a 20 percent cap on attorneys’ contingent fees in personal injury multidistrict litigation. By codifying a 20 percent cap on attorneys’ contingency fees, this provision may present an insurmountable disincentive for counsel to undertake such litigation. It also may conflict with state laws governing such fees in personal injury and wrongful death cases. The provision is also ambiguous in some respects, leaving unclear, for example, who would pay for experts or reimburse insurers on plaintiffs’ medical bills. It is not even clear who might be a “claimant” entitled to part of the 80 percent of the monetary recovery. As with other provisions in the bill, this ambiguity opens the door to more litigation, cost, and delay.

#### *I. H.R. 985’s Will Impose New Burdens on Pending Cases*

Section 7 makes the bill’s various provisions applicable to all cases pending on the date of enactment. In this way, the bill unjustly changes class action and other procedural rules on cases in the midst of litigation, burdening plaintiffs with new requirements they had no way of preparing for.

<sup>39</sup> Professor Burch further notes that, in addition to denying courts the necessary flexibility to adapt case management orders to specific circumstances, this provision may also raise federalism concerns to the extent that it conflicts with state law that may not require an allegation of specific cause of harm. Burch Letter at 6-7.

Given the tremendous costs and increased burdens of the bill's various provisions on litigants and courts, Representative Sheila Jackson Lee (D-TX) offered an amendment to delay the bill's effective date until the Administrative Office of the United States Courts completed an assessment of the costs the bill would impose on litigants and the courts. The Committee, however, rejected this sensible amendment by a party-line vote of 12 to 17.

Because the bill would impose onerous requirements on plaintiffs and effectively make much civil litigation cost-prohibitive in Federal court, Representative David Cicilline (D-RI) offered an amendment that would have exempted from the entire bill all civil actions, to the extent permitted by law, concerning injuries caused by a firearm. The Committee, however, rejected this amendment by a party-line vote of 12 to 19.

### III. H.R. 985 WOULD STRAIN LIMITED JUDICIAL RESOURCES, OVERRIDE JUDICIAL DISCRETION, AND CIRCUMVENT THE RULES ENABLING ACT PROCESS

H.R. 985 would strain already-limited judicial resources. Without doubt, the bill's numerous new and vaguely-worded standards would foster extensive litigation to resolve their meaning and application. This would be in addition to the already resource-intensive process that courts must follow when considering class action certification motions. For instance, as Professor Coffee noted, the bill's mandatory appeal provision alone could substantially increase the burdens on appellate courts possibly by as much as five-fold because appeals courts currently permit relatively few appeals under Rule 23(f).<sup>40</sup> Similarly, the automatic third-party litigation funding disclosure requirement in proposed section 1722 will needlessly burden Federal courts by creating more chances for discovery disputes.

The bill also significantly reduces judicial discretion in a number of ways. For example, its stay of discovery provision significantly reduces the discretion that courts currently have to stay, or to allow, discovery in response to a motion. Similarly, the bill's mandatory appeal provision adds to the burden of appellate courts while taking away their authority to determine when an appeal of a class certification order might be warranted. Likewise, the bill's "conflict of interest" provision denies courts any discretion to determine whether certain relationships actually pose a conflict of interest, imposing instead a *per se* rule requiring denial of class certification if certain relationships exist between class counsel and a named plaintiff or class representative. Finally, the bill's multidistrict litigation provision imposes draconian deadlines on both plaintiffs and courts to make determinations about the sufficiency of a plaintiff's factual allegations, with no "good cause" or other exception to allow a court some flexibility in setting deadlines. It also requires dismissal by the court if it makes certain findings, rather than leaving that decision to the court's discretion.

Finally, H.R. 985 circumvents the highly prudential and deliberative Rules Enabling Act process, a process that reflects input not only from the Federal judiciary, but also from other interested

<sup>40</sup> Coffee Memorandum at 6.

parties and the public generally.<sup>41</sup> In fact, the Judicial Conference of the United States is in the midst of a multi-year study of Rule 23 that “has considered many of the issues addressed in H.R. 985.”<sup>42</sup> Accordingly, the Conference has “strongly urge[d] Congress not to amend the class action procedures found in Rule 23.”<sup>43</sup> Although H.R. 985 includes a provision stating that nothing in the bill should be interpreted to prohibit the Supreme Court or the Judicial Conference from using the Rules Enabling Act process, the measure nonetheless clearly circumvents that process. Indeed, several provisions contained in H.R. 985, such as the bill’s “ascertainability” standard and its changes to consideration of “issue” class actions, have already been considered and rejected by the Advisory Committee on Civil Rules as part of the Judicial Conference’s consideration of Rule 23 amendments.

#### CONCLUSION

H.R. 985 purports to help plaintiffs, but it will in fact deny plaintiffs any justice by greatly diminishing the availability of class actions and multidistrict litigation. The bill’s proponents offer no credible evidence that such draconian legislation is needed and, in the absence of any hearing to assess most of the bill’s provisions, the justifications for those provisions are unclear at best. If anything, the bill is so skewed in favor of corporate defendants’ interests that the obvious inference is that its aim is to rig the procedural rules governing class actions and multidistrict litigation to ensure defendant-friendly outcomes rather than to guarantee fairness or address abuses. In addition, H.R. 985’s various requirements are so vague or impossible to meet that they would provide numerous opportunities for defendants to engage in dilatory tactics, raising litigation costs and burdens for plaintiffs to the point of dissuading future plaintiffs from even filing suit. Finally, the bill would substantially and needlessly increase resource burdens on the Federal courts, significantly reduce judicial discretion in many respects, and unnecessarily circumvent the Rules Enabling Act process.

For all of the foregoing reasons, we respectfully dissent and we urge our colleagues to oppose H.R. 985.

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<sup>41</sup> 28 U.S.C. §§ 2071 *et seq.* (2017).

<sup>42</sup> Judicial Conference Letter.

<sup>43</sup> *Id.*

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