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The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

The Honorable Bob Goodlatte
Chairman, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

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

Dear Speaker Ryan, Leader Pelosi, Chairman Goodlatte, & Ranking Member Conyers:

The problems of class actions and multidistrict litigation raise serious questions, but H.R. 985 is the wrong answer. Some of the bill's provisions address real problems but propose draconian measures that would do more harm than good. Several provisions could be worth considering with revisions. But when I look at the bill as a whole, frankly, I worry that rather than reflecting a genuine push for reforms in the interest of justice, it reflects a clumsy attempt to undermine *any* effort by plaintiffs to seek justice in mass disputes.

As a lawyer, teacher, and scholar with long experience in this field, I have written extensively about what is wrong with class actions, especially the problem of class action lawyers enriching themselves with settlements that accomplish little for class members.[1] I also have written extensively about problems in multidistrict litigation and non-class aggregate settlements.[2] The proposals in H.R. 985 would not

[1] See Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 Notre Dame L. Rev. 859 (2016); Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 Geo. Wash. L. Rev. 951 (2014); Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. Penn. L. Rev. 1593 (2008).

[2] See Richard L. Marcus, Edward F. Sherman, & Howard M. Erichson, COMPLEX LITIGATION: CASES & MATERIALS ON ADVANCED CIVIL PROCEDURE (6th ed. 2015); Howard M.

solve these real problems, but instead would undermine what is good, efficient, and worth preserving in our system of aggregate litigation.

Class actions and MDL are complex systems; solving their problems requires complex analysis. Before getting into the specifics, let me state my overarching concern that this bill intervenes in matters better handled through the rulemaking process under the Rules Enabling Act, through judicial interpretation of Rule 23, and through the development of norms among experienced MDL judges in the context of real disputes. The Advisory Committee on Civil Rules, in drafting amendments to the class action rule, has conducted a serious analysis of likely effects on class action practice. Similarly, the American Law Institute undertook a thorough process in reaching its conclusions in the *Principles of the Law of Aggregate Litigation*. I did not agree with all of the conclusions, but as someone who was involved in that project, I know that it was undertaken with care by judges, lawyers, and scholars who are deeply knowledgeable about how class actions and MDL work and the role they play in our system of justice.

By contrast, the proposals in H.R. 985 appear to have been slapped together without any nuanced understanding of the law of class actions or MDL. Rather than a set of proposals to address real problems, the bill looks like a wish list for corporate defendants. Rather than offer ways to distinguish meritorious from non-meritorious claims, or to distinguish fair from unfair settlements, it looks like a crass effort to minimize any chance of liability for defendants even if they have violated the law. Surely this is not the way to achieve the stated purpose of assuring fairer and more efficient outcomes.

Sec. 3, proposed § 1716. This section would forbid class certification unless "each proposed class member suffered the same type and scope of injury." This proposal is unnecessary and unwise. The requirements of Rule 23(a) and 23(b)(3) already provide that a class action for money damages cannot be certified unless plaintiffs establish commonality, typicality, adequate representation, predominance of common questions over individual questions, and superiority of class action as a means of resolving the dispute. The bill's language is thus unnecessary to ensure that class actions are cohesive. Instead, this provision would make it impossible to certify classes in many cases that are well suited for class treatment. Despite variations in type or extent of injury, class members' claims may be highly cohesive and well suited to be adjudicated on a representative basis.

Sec. 3, proposed § 1717. This section would forbid class certification if any proposed class representative "is a present or former client of" class counsel. This proposal would make class actions work poorly in some settings. In securities class actions in particular, institutional investors often serve as named plaintiffs, and often rely on well-established class action law firms. There is no reason to bar this practice, other than a crass effort to undermine the effective use of class actions.

Erichson, *The Role of the Judge in Non-Class Settlements*, 90 Wash. U.L. Rev. 1015 (2013); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 Cornell L. Rev. 265 (2011); Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 Kansas L. Rev. 979 (2010).

Sec. 3, proposed § 1718(a). This section would forbid class certification unless "the class is defined with reference to objective criteria" and unless "there is a reliable and administratively feasible mechanism" for the court to determine exactly who is a member of the class. The bill's language about an objectively defined class is unnecessary, as this is a well-established requirement in class action law. The requirement of a mechanism for determining who is in the class, on the other hand, touches on the controversial issue of ascertainability. The Third Circuit in 2013 adopted a position along the lines of the bill's proposal. Since then, courts have split, and the Sixth, Seventh, Eighth, and Ninth Circuits have convincingly explained why an ascertainability requirement is unwarranted. Class certification requires a clearly defined class, but there is no good reason for class certification to require a mechanism for ascertaining each and every member of the defined class. This issue is percolating in the courts. The bill chooses the wrong side, but as importantly, the bill unwisely preempts development of this important issue by the Courts of Appeals and by the Supreme Court.

Sec. 3, proposed § 1718(b). This section would require that attorneys' fees be paid after class members have been paid, and that fees be limited to a reasonable percentage of the funds actually received by class members. The general thrust of this section is a good idea, but the proposal goes too far. Yes, there is a problem that class action lawyers sometimes demand fees based on inflated valuations of class settlements. They do this by using face value rather than the value of funds actually claimed and received, or by overvaluing coupons or cy pres relief. I explain these problems in *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 Notre Dame L. Rev. 859 (2016). It is possible to construct a legislative provision that addresses these problems. To require that fees be based on a percentage of the benefit actually received by class members, and to set up a system of interim fee payments to class counsel, would be a step forward. But § 1718(b)(1)'s flat-out prohibition on compensating lawyers until "the distribution of any monetary recovery to class members has been completed" makes no sense in a world where, appropriately, class recoveries sometimes extend over decades. And § 1718(b)(2)'s language "payments directly distributed to and received by class members" goes too far in that it fails to recognize the possibility of cy pres remedies that legitimately accomplish the goals of class actions. This section could be salvaged and turned into a useful fine-tuning of the law of class action attorneys' fees—most importantly by focusing courts' attention on whether the fees reflect the real value of the remedy for the class. As currently drafted, however, the section uses a sledgehammer where it should use a chisel.

Sec. 3, proposed § 1719. Gathering and reporting data on class action outcomes is an excellent idea. As long as Congress provides funding to the Federal Judicial Center to enable it to carry out this task, such reporting would be a very useful step in aiding judicial, academic, and public understanding about class actions.

Sec. 3, proposed § 1720. The question of when to allow issue class actions under Rule 23(c)(4) is a difficult question that has engaged the courts and the Advisory Committee on Civil Rules. Although there is an argument to be made in favor of the approach taken here—the approach adopted by the Fifth Circuit in

Castano—I suggest that it is unwise for Congress to create an inflexible rule on this, given the difficulty of predicting the variety of circumstances in which such use of the class action tool may prove useful for reaching efficient resolutions of complex disputes.

Sec. 3, proposed § 1721. This section would require a stay of discovery pending any of a wide variety of motions. Congress should let judges do their job. Judges are charged with exercising discretion to rule on stay motions, and the most efficient answer varies depending on context. It makes no sense to impose this as an across-the-board requirement. Worse, this provision would encourage defendants to file frivolous motions in order to get the benefit of the automatic discovery stay. This would increase the cost of litigation for other parties and for the courts.

Sec. 3, proposed § 1723. This provision on interlocutory appeals is unnecessary and inefficient. Rule 23(f) already provides for appeals from class certification decisions at the discretion of the Court of Appeals. The appellate courts have developed standards for determining whether to hear such appeals. Some class certification grants and denials are straightforward and do not need appellate attention; if a Court of Appeals declines to hear such an appeal, there is no good reason to force the appeal. Again, Congress should let judges do their job.

Sec. 4, proposed § 1447(d). This section, labeled "Misjoinder of Plaintiffs in Personal Injury and Wrongful Death Actions," really has nothing to do with *misjoinder*, in the sense of the assertion of claims whose joinder is impermissible. Rather, this section would expand federal court jurisdiction by permitting removal to federal court of actions that do not meet the complete diversity requirement. The problem that this section is aimed at solving is a genuine problem, but the proposed solution goes way too far. Yes, there is a problem that plaintiffs in mass tort litigation sometimes file their claims in so-called "magnet" jurisdictions where they hope to find plaintiff-friendly judges and juries, and they make their claims non-removable by tactically joining non-diverse plaintiffs, among other ways. To the extent a mass tort dispute reflects a national-market problem, and to the extent a plaintiff and defendant are both from states other than the forum state, it sometimes would be preferable, from an overall justice perspective, for a case to be heard by a federal court rather than by the plaintiff's selected state court. But the defendant is stuck in the state court because the action lacks complete diversity of citizenship so there is no basis for federal subject matter jurisdiction. This section aims to solve this problem by treating each plaintiff as meeting the diversity requirement individually, without regard to other plaintiffs. This proposal would be sensible if it were refined to address the particular problems of mass tort litigation. As drafted, however, the provision would apply even in a simple two-plaintiff lawsuit, and even in cases better handled by state judges. It would create a substantial expansion of federal court diversity jurisdiction. Historically, federal judges have opposed major expansions of diversity jurisdiction, as it fills their dockets with cases that do not arise under federal law. Before enacting such a shift in workload from the state courts to the federal courts, it would be better to refine the proposal to address the narrower problem of tactical joinder in magnet jurisdictions in mass tort litigation.

Sec. 5, proposed § 1407(i). This section would institute a preliminary fact submission as an automatic requirement in every personal injury MDL. This is a

terrible idea that would make the decisions of the Judicial Panel on Multidistrict Litigation ("JPML") more difficult and would render the MDL process less effective. Preliminary fact sheet requirements on pain of dismissal—known as *Lone Pine* orders—are used with some frequency in mass tort litigation. Such orders are appropriate in some cases but not others, and certainly should not be an automatic requirement at the outset of every MDL. This section would tie the judge's hands, rather than let a judge decide whether this rather harsh tool is warranted in a particular case. Mass torts vary enormously, and the way they are handled by judges has evolved over time. There is not a one-size-fits-all process that should be imposed legislatively. More importantly, consider what this requirement would do to arguments before the JPML on whether to create an MDL in a particular dispute. Currently, both plaintiffs and defendants often agree that MDL transfer is justified even if they fight over the district to which the litigation should be transferred. But if a *Lone Pine* order—a decidedly pro-defendant tool—followed automatically from the JPML's decision to transfer, then defendants would urge MDL transfer at every opportunity, and plaintiffs would actively resist MDL transfer. No longer would the JPML be able to render its transfer decision from its perch as a neutral arbiter of whether pretrial centralization makes sense. Rather, the JPML would understand that by deciding to transfer, it is putting a thumb on the judicial management scale in favor of defendants. The MDL process will function more effectively if the Panel's transfer decision does not bear this weight.

Sec. 5, proposed § 1407(j). The MDL trial prohibition is a bad idea. MDL judges have made effective use of bellwether trials as a way to provide parties with information about likely outcomes, thus enabling more efficient and informed negotiations over potential settlements. MDL achieves centralization for pretrial purposes, but the MDL transferee judge has the power to try certain cases, including those that were directly filed in the court. Keep in mind that MDLs routinely operate alongside state court proceedings, so related cases proceed to trial in state courts regardless of whether the federal judge can do so. MDL-based bellwether trials put the federal court system in the mix, which is generally a good thing because federal courts have the resources, procedures, and independence to run the process seriously. The use of bellwether trials in MDL is an example of the mass litigation system working as it ought to, permitting parties to achieve well-informed resolutions in disputes that cannot be certified as class actions.

Sec. 5, proposed § 1407(*l*). This provision, if I understand it correctly, would cap attorneys' fees and costs at 20% for any personal injury action in an MDL. This federal interference in private contracts is unwarranted and unwise. Capping fees at such a low rate would make it difficult for people to hire lawyers, and especially difficult to hire excellent lawyers. There is no good reason why fees should be capped in MDL but not in other federal cases, or in federal court but not state court, or in litigated disputes but not otherwise. If the point is that lawyers engaged in mass collective representation get the benefit of economies of scale and therefore should collect a smaller fee than lawyers engaged in individual representation, then a very different proposal could be envisioned to achieve this result. But to impose the cap for every lawyer in every personal injury MDL makes no sense. Moreover, this proposal creates the same problems as proposed section

1407(i) in terms of altering the dynamic of transfer motions before the JPML. If a cap on attorneys' fees followed automatically from the JPML's decision to transfer, then plaintiffs' lawyers would avoid federal court and would resist transfer motions. As drafted, this section is an invitation for fee-driven gamesmanship, and it would undermine the efficient use of MDL as a coordination mechanism.

I hope these comments prove helpful as the House considers the bill. There are sections of the bill, as I have tried to explain, that address real problems and that might be reworked into effective tools for reform. But if adopted as currently drafted, H.R. 985 would do significant harm to our justice system.

Very truly yours,

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