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James J. Park
Chief Counsel, Democratic Staff
Subcommittee on the Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives

Dear Mr. Park:

Thank you for inviting me to share my thoughts on H.R. 985. I have, over the past decade, written extensively on class action practice and procedure, and appreciate the opportunity to weigh in.

In my view, the bill would radically restrict access to justice for injured consumers, employees and small businesses by, among other things, imposing requirements upon class plaintiffs that are both unrealistic and unnecessary. I will address three of these requirements here.

1. Commonality – § 1716(a)

Section 1716(a) of the bill requires that "class plaintiffs [must] demonstrate that each proposed class member suffered the same type and scope of injury" as the class representative. This required showing has several components, each of which raises substantial problems.

a. The Exclusion Of Zero-Damages Class Members Is Both Impossible And Pointless

First, the plaintiff under § 1716(a) must show that "each" class member has suffered injury – i.e. that there were no uninjured members included within the class definition. But courts recognize that, by necessity, classes routinely include some individual members who did not suffer any damages. *See, e.g., Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) ("a class will often include persons who have not been injured by the defendant's

conduct. . . Such a possibility or indeed inevitability does not preclude class certification") (Posner, J.). The inclusion of uninjured persons within a defined class is, in most cases, inevitable. *In re Nexium Antitr. Litig.*, 777 F.3d 9, 22 (1st Cir. 2015) ("excluding all uninjured class members at the certification stage is almost impossible in many cases").[1] Among other reasons, 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." *Kohen*, 571 F.3d at 677. Or in an antitrust case, for example, some large class members may have sufficient marketplace clout to resist an overcharge stemming from price-fixing, and so have zero damages. It is impossible to define the class to exclude these zero-damage plaintiffs (unless the class is defined tautologically as all persons injured by the practice – a definition that courts universally reject).[2]

Not only is it impossible to exclude zero-damage plaintiffs from class actions but it serves no policy purpose. The presence of uninjured members within a defined class does not increase the aggregate damages that the defendant must pay. Damages are generally calculated as the amount of injury imposed *upon the class* as a whole. Where class damages are determined based on the aggregate injury to the class as a whole, "the identity of particular class members does not implicate the defendant's due process interest at all. The addition or subtraction of individual class members affects neither the defendant's liability nor the total amount of damages it owes to the class." *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 670 (7th Cir. 2015); *see also* NEWBERG ON CLASS ACTIONS § 12:2. Courts recognize that "a defendant has no interest in how the class members apportion and distribute a[n] [aggregate] damage [award] among themselves." *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003), *aff'd*, 545 U.S. 546 (2005). *See also*, *In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1269 (10th Cir. 2014) (defendant "has no interest in the method of distributing the aggregate damages award among the class members"); *In re Pharmaceutical Industry Average Wholesale Price Litig.*, 582 F.3d 156, 197-98 (1st Cir. 2009) (same); *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir.

[1] Other courts are in accord. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (vacating denial of class certification despite presence of potentially uninjured class members); *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc*., 502 F.3d 91, 107-8 (2d Cir. 2007) (same); *Pella Corp. v. Saltzman*, 606 F.3d 391, 394 (7th Cir. 2010) (affirming class certification despite possibility that class included uninjured members); *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198, (10th Cir.2010) ("[C]ertification requirements neither require all class members to suffer harm ... nor Named Plaintiffs to prove class members have suffered such harm."); *Mims v. Stewart Title Guar. Co*., 590 F.3d 298, 308 (5th Cir.2009) ("Class certification is not precluded simply because a class may include persons who have not been injured by defendant's conduct.").

[2] A so-called "fail-safe" class is "defined so that whether a person qualifies as a member depends on whether the person has a valid claim." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). Courts have universally held such class definitions impermissible. *See McCaster v. Darden Restaurants, Inc.*, 845 F.3d 794 (2017); *Mazzei v. Money Store*, 288 F.R.D. 45 (S.D.N.Y.2012); *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347 (6th Cir.2011); *Kamar v. Radio Shack Corp.*, 375 Fed.Appx. 734, 736 (9th Cir.2010).

1996) (noting that defendant's interest is "only in the total amount of damages for which it will be liable," not "the identities of those receiving damage awards").[3]

Moreover, in those cases where damages are not arrived at on an aggregate basis, but rather by tallying class members and multiplying by a per-plaintiff damage figure, courts *already* require the exclusion of uninjured persons from the damages calculation. In these cases, courts hold that "the defendant must be given the opportunity to raise individual defenses and to challenge the calculation of damages awards for particular class members." *Mullins*, 795 F.3d at 671. *See also*, *Allapattah Services*, 333 F.3d at 1259; NEWBERG ON CLASS ACTIONS § 12:2. As the Seventh Circuit explained in *Mullins*, due process concerns mandate this result: "In this situation, the defendant's due process interest is implicated because the calculation of each class member's damages affects the total amount of damages it owes to the class. That's why the method of determining damages must match the plaintiff's theory of liability and be sufficiently reliable." 795 F.3d at 671, *citing Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). If "aggregate damages cannot be established and there is no common method for determining individual damages," then certification of a damages class is already improper under existing law. *Mullins*, 795 F.3d at 671, *citing Comcast*.

In the end, the requirement of § 1716(a) that class plaintiffs show that "each" class member has suffered injury would jettison a carefully considered body of law to no apparent ends, other than eliminating many or most class actions.

b. <u>The "Type" And "Scope" Of Injury Showings Required By § 1716(a) Are Incoherent</u>

Section 1716(a) requires a representative plaintiff to show not only that every person falling within the class definition suffered injury – which is largely impossible and pointless, as discussed above – but also that the injury suffered by each member was of the same "type and scope" as that of the class representative.

i. The "Scope" Requirement

Construing the text literally, as one must with a statute, the "scope" requirement would eliminate damages class actions, period. The word "scope" is synonymous with "extent," according Merriam-Webster and other dictionaries. And the *extent* of class members' injuries are never all the "same." The amount of damage always (or almost always) varies across class members. So either the inclusion of "scope" in the text of the bill is inadvertent, or the drafters' intent is to eliminate damages class actions altogether. (If it is the latter, the merits of the proposal certainly warrant a more thorough response than I aspire to provide here).

[3] Conceivably, one could argue that the defendants are impacted by the presence of uninjured members if they bear the cost of sending notice to all class members. But as the First Circuit has held, "the district court can easily assure that defendants will not pay for notice to uninjured members." *Nexium*, 777 F.3d at 22.

ii. The "Type" Requirement

In any event, the requirement that class representatives demonstrate that "each" class member has suffered the same "type" of injury raises two problems. The first is the same problem discussed above: it is impossible, in most cases, for the class representative to show that "each" member falling within the class definition was injured at all. Even less possible, for all the same reasons, is showing that each suffered the same "type" of injury.

Second, the federal courts have 50 years of experience applying the commonality requirement of Rule 23(a)(3) to class actions and, over that time, they have developed a nuanced understanding of just when class member interests are sufficiently cohesive to warrant class-wide adjudication. Presently, *Wal-Mart Stores v. Dukes*, 564 U.S. 338 (2011), represents the apotheosis of this common law development. Justice Scalia's majority decision acknowledges that class members must have suffered the "same injury" in order to warrant class certification, citing *General Telephone Co. Southwest v. Falcon*, 457 U.S. 147, 157 (1982), but it also makes clear just how dynamic that standard is, and how it constantly begs the sort of refinements that only common law development can provide – all of which would be eviscerated by the proposed statutory "same type…of injury" requirement of § 1716(a).

"Commonality," Justice Scalia noted in *Dukes*, "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.' [Citation omitted]. This does not mean merely that they have all suffered a violation of the same provision of law." 564 U.S. at 349-50. As an example, Justice Scalia noted that Title VII "can be violated in many ways," including "by intentional discrimination, or by hiring and promotion criteria that result in disparate impact," and other ways as well. *Id.* Merely saying that each class member was injured by Title VII is insufficient to meet the "same injury" requirement of *Falcon*, according to *Dukes*. *Id.* at 350. It is likewise insufficient, Justice Scalia tells us, merely to assert that each class member suffered "a disparate impact Title VII injury." *Id.* So just how narrowly must "same injury" be defined? *Dukes* leaves that question for case-by-case common law development, guided by the polestar question of whether any given definition of "same injury" would "give[]… cause to believe that all [plaintiffs'] claims can productively be litigated at once." *Id.*

The proposed legislation, § 1716(a), throws out Justice Scalia's nuanced conception of what constitutes "same injury" and replaces it with a terse statutory requirement. Statutory requirements of this nature are fixed. They are interpreted literally, in the first instance, according to their plain meaning. And the plain meaning of "same type of injury," as used in § 1706(a), is diametrically opposed to the standard that comes out of *Dukes.* Take the example Justice Scalia gave. If each class member suffered "a disparate impact Title VII injury" at the hands of defendant, then – as a matter of straightforward literal statutory construction – each class member has the "same type of injury" under § 1716(a), and the class could be certified. Not so in *Dukes.* There, unconstrained by statutory text, Justice Scalia was free to define the "same injury" requirement more narrowly.

The point here is not a partisan one. The statutory standard proposed in § 1716(a) – "same … type of injury" – is more liberal than *Dukes*. The problem does not lie in the statutory words (which after all are almost identical to the *Falcon-Dukes* "same injury" standard), but rather in the very *fact* of their statutory enactment. The delivery of this (or any) statutory text from the Congressional mountaintop undercuts Justice Scalia's aim of defining "same injury" by reference to the policies behind Rule 23. Plaintiffs' lawyers in any particular case might cheer the more liberal statutory standard, but it should not please anyone concerned with the rational development of the law.

2. <u>Ascertainability – § 1718(a)</u>

Under § 1718(a) of the proposed legislation, "class plaintiffs [must] demonstrate that there is a reliable and feasible… mechanism for distributing directly to a substantial majority of class members any monetary relief secured for the class." This provision is plainly aimed at codifying the so-called "ascertainability" doctrine that some courts have developed in recent years, under which the members of a putative class must be objectively ascertainable in order for a class action to proceed. Principally, the ascertainability doctrine – which courts have grafted onto Rule 23(a) as a threshold requirement – is concerned with small-value consumer cases where class members are unlikely to have documentary proof that they purchased the item in question.

The ascertainability doctrine is very much a work-in-progress in the federal courts, with different courts taking different positions and the Supreme Court yet to weigh in.[4] The job of the courts in this area is one of balancing. On the one hand, in the absence of a rigorous ascertainability requirement, the risk is that uninjured people will be compensated in the damages distribution process. Where the court allows class members simply to affirm that they bought the item in question, without producing proof of purchase, one can easily suppose that some uninjured persons might falsely or mistakenly attest that they bought the item in question during the class period, and so receive the benefit (often a coupon or a small cash award) being

[4] The Third Circuit provides a robust example of a court engaged in the appropriate judicial exercise of considering and reconsidering its approach to and articulation of the ascertainability requirement, in a series of thoughtful, well-written decisions. *See, e.g., Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593–94 (3d Cir.2012) (adopting an implicit ascertainability requirement to deny class certification where "class members are impossible to identify without extensive and individualized fact-finding or 'mini-trials'"); *Hayes v. Wal–Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013) (requiring plaintiffs to "offer some reliable and administratively feasible alternative that would permit the court to determine" whether the class was ascertainable); *Carrera v. Bayer Corp.*, 727 F.3d 300, 306-8 (3d Cir. 2013) (rejecting plaintiffs' offer of retailer records and class member affidavits attesting to purchase of diet supplement as sufficient methods of proving ascertainability in this case – but observing that ascertainability only requires the plaintiff to show that class members *can be identified*") (emphasis added); *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 184–85 (3d Cir. 2014) (cautioning that predominance and ascertainability inquiries are distinct because "the ascertainability requirement focuses on whether individuals fitting the class definition may be identified without resort to mini-trials, whereas the predominance requirement focuses on whether essential elements of the class's claims can be proven at trial with common, as opposed to individualized, evidence"); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 165 (2015) ("The ascertainability inquiry is narrow.").

distributed to class members. In addition, the argument has been made that the allowance of false claims dilutes or reduces the value available to compensate the truly injured purchasers (though one wonders how disallowing the class action altogether is supposed to help these purchasers.)

On the other hand, as I have discussed elsewhere, "rigorous application of the ascertainability requirement will often entail impunity for corporate defendants who perpetrate harms in relatively modest increments upon large numbers of consumers." Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions,* 59 DEPAUL L. REV. 305, 309 (2010). Even the most intentional and venal actions of consumer-facing companies are insulated from the risk of private litigation if their products are the type for which most consumers will not have a receipt (including, for example, most items one could buy in a drug store or a supermarket). And without a robust threat of private litigation, what we lose above all else is deterrence.

Further, rigorous proof-of-purchase requirements keep compensation away from the truly injured. People generally do not retain proof of purchase of inexpensive goods. The argument that fraudulent claims might dilute the funds available to compensate injured consumers, a shaky argument to begin with, is surely swamped by the realization that rigorous proof requirements keep the injured from obtaining compensation and remove important deterrence. And for what? Keep in mind – the interests of defendants are not affected by any post-settlement false claiming activity.

Through ordinary common law development, courts are working to strike the right balance between these competing interests. The price of keeping the uninjured from sharing in the damages pot is losing deterrence and the ability to compensate injured persons. And the price of maximizing deterrent impact is, quite likely, allowing uninjured persons to share in the damages pot. The proposed legislation, § 1718(a), is ham-handed in terminating the common law process and announcing that the goal of keeping the uninjured from sharing in damages is so critically important that it is worth sacrificing the values of deterrence and the compensation of injured parties.

3. Issue Classes – § 1720

Issues classes are critically important vehicles in cases where it would be unfair to the defendant to allow damages to be determined on a class-wide basis – for example, in cases where the defendant has an interest in questioning whether each class member was damaged. In such a case, Rule 23(b)(3) certification is inappropriate, because individual issues will predominate. Under Rule 23(c)(4), however, the court may bifurcate proceedings. It can certify an issues class on liability, and leave damages to individual proceedings in which the defendant may examine each plaintiff.

The proposed legislation would *abolish* such issues classes. Specifically, § 1720 of the bill provides that a court shall not certify a Rule 23(c)(4) issues class unless the claim from which the issue arises also "satisfies all the class certification prerequisites of Rule 23(a), and Rule 23(b)(1), Rule 23(b)(2) or Rule 23(b)(3)." But the entire utility of issues classes is in cases where Rule 23(b)(3) is *not* satisfied.

Courts routinely recognize that "a class action limited to determining liability on a class-wide basis, with separate hearings to determine – if liability is established – the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed." *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013). Accord, *In re Nassau Cty. Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) ("courts may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"); NEWBERG ON CLASS ACTIONS § 18:7 (4th ed. 2002) (same). Other courts are in agreement.[5]

The logic behind using Rule 23(c)(4) to bifurcate liability and damages is compelling: "As long as the defendant is given the opportunity to challenge each class member's claim to recovery during the damages phase, the defendant's due process rights are protected." *Mullins*, 795 F.3d at 671. *See also Johnson v. General Mills, Inc.*, 276 F.R.D. 519, 524 (C.D. Cal. 2011) ("If [the class representative] establishes liability for the class, Defendants may challenge reliance and causation individually during a determination of damages, after the issues that are common have been litigated and resolved."); *Godec v. Bayer Corp*., 2011 WL 5513202, at *7 (N.D. Ohio 2011) ("In any event, to the extent Bayer has individualized defenses, it is free to try those defenses against individual claimants.").

The logic behind refusing to allow issues classes is less clear. Presumably, the rationale behind §1720 relates to protecting defendants' interests. But one would have to articulate how those interests are compromised by the use of issues classes to bifurcate liability and damages. Even anecdotally, I am aware of no evidence – or serious scholarship – suggesting that courts have been lax in safeguarding defendants' interests in using issues classes. Here again, the proposed legislation appears as a solution in search of a problem. And here again, that solution is maximalist and harsh, in this instance wiping out efficiency-enhancing tools at the disposal of federal judges.

[5] *See Gates v. Rohm & Haas Co.*, 655 F.3d 255, 272-73 (3d Cir. 2011); *Gunnells v. Healthplan Servs., Inc*., 348 F.3d 417, 439 (4th Cir. 2003) (same); *Valentino v. Carter-Wallace, Inc*., 97 F.3d 1227, 1234 (9th Cir. 1996) (same). On the other hand, the Fifth Circuit took a contrary view in *Castano v. Am. Tobacco Co*., 84 F.3d 734, 745 n.21 (5th Cir. 1996), a decision that has been widely criticized by courts and commentators. *See* Robert H. Klonoff, *The Decline Of Class Actions*, 90 WASH. U. L. REV. 729, 808-09 (2013).

Thank you again for the opportunity to address these issues.

Best,

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