



The University of Georgia

School of Law

Elizabeth Chamblee Burch
Charles H. Kirbo Chair of Law

February 13, 2017

Comments on the Fairness in Class Action Litigation Act of 2017

These are my own opinions and do not necessarily represent the opinions of the University of Georgia or the Law School.

§ 1716 Class Action Injury Allegations:

By requiring that class members suffer “the same type and scope of injury,” this proposal demands a degree of similarity that is both ill defined and unnecessary. It is likewise unwise, for almost every court, including the Supreme Court in *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049-50 (2016), has said that parties should be able to enjoy the benefits of class actions even when damages vary. And courts already conduct a “rigorous analysis” to determine that the plaintiffs have met the class certification requirements.¹

Personal injury and economic losses will inevitably affect class members differently. In the NFL Concussion cases, for example, some plaintiffs experienced Parkinson’s while others suffered from Alzheimer’s. What’s important from the standpoint of adequate representation is that a named representative will have a self-interested reason to care about the same remedial measures (damages, injunctive relief, etc.) as the class members—not that each suffers from precisely the “same type and scope of injury.”

§ 1717: Conflicts of Interest:

People naturally turn to those that they trust the most to prosecute their claims. Whether those previous relationships create disabling conflicts of interest is something that the courts already monitor. Conflicts of interest are policed through procedural and ethical requirements. Ethically, class counsel must act in the best interests of the class, not the named representative. Procedurally, judges already test the relationship between class members and the named representative through the adequate representation requirement in Rule 23(a). Judges must likewise ensure that, when a class action settles, the settlement is fair, reasonable, and adequate. As such, restricting a client’s freely chosen counsel is unnecessary.

§ 1718(a) Distribution of Benefits to Class Members:

This provision addresses a debate among the federal circuits over whether a class is “ascertainable.” To identify the class and meet standing requirements, plaintiffs’ lawyers have defined members in terms of people harmed by the defendant’s conduct, employed subjective and

¹ *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

objective criteria, and invoked criteria dependent on the merits.² Defendant corporations invoke “non-acertainability” as a rationale against certifying small-claims consumer classes whose members are inherently difficult to identify, which threatens to release defendants from liability regardless of how strong the evidence of wrongdoing might be.³ The proposed bill would codify corporate defendants position and substantially endanger consumer class actions.

As such, this proposal is highly problematic. It violates the purpose and structure of Rule 23(b)(3), as well as Rule 8. It adopts an “ascertainability” requirement that has been rejected by most circuits, most convincingly by the Seventh Circuit,⁴ as well as a proposal considered and rejected by the Advisory Committee on Civil Rules.⁵ It should be rejected for the same reasons here. So long as the class can be meaningfully defined, as the Newberg on Class Actions treatise explains, that should be enough.⁶ Otherwise, this proposal threatens to mire the courts and the parties in unnecessary and costly discovery over class membership and stifle most consumer class actions.

§ 1718(b)(1) Attorneys’ Fees in Class Actions – Fee Distribution Timing:

This provision proposes to delay attorneys’ fees until all monetary recovery has been paid to class members. Yet, some class settlements take many years to distribute. In the recent NFL Concussion class action, for example, the settlement will last for 65 years.⁷ In cases like that, it does not make sense to make class counsel wait to receive fees until payments are completed. Interim fee distributions would be much more reasonable.

§§ 1718(b)(2) and (3): Fee Determinations Based on Monetary Awards, Fee Determinations based on Equitable Relief:

I generally support the need to link class counsel’s fee to class members’ actual recovery. A method that requires fees to be awarded as a percentage of the monetary recovery (or the value of equitable relief) makes sense and complies with a restitution theory of attorneys’ fees.

My one concern is that tying fees only to the monetary award class members receive does not always account for the value that some cy pres remedies may provide as a deterrent to wrongdoing. Cy pres settlements are controversial, but as the American Law Institute has recommended in its *Principles of the Law of Aggregate Litigation* (which courts have widely adopted), cy pres awards may occasionally be appropriate.⁸

Of course, if class members can be identified and it makes sense to pay them directly, then that should come first. Still, funds may remain because class members may be difficult to identify, monetary amounts may be too small to distribute to individual class members, or funds may remain unclaimed. As this suggests, there may be valid reasons for creating cy pres awards in the first place. For example, if a taxi company overcharged its patrons and the patrons couldn’t be identified, then

² Plaintiffs’ attorneys often revise their class definition after receiving class discovery from defendants, and thus should be given latitude to re-define the class, not have the complaint dismissed under Rule 12(b)(6).

³ Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 308 (2010).

⁴ *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657-58 (7th Cir. 2015).

⁵ Committee on Rules of Practice and Procedure Agenda Book, at 37, 260-61, June 6-7, 2016, available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2016>.

⁶ WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 3.2 (5th Ed. 2016).

⁷ NFL Concussion Settlement, <https://www.nflconcussionsettlement.com/Un-Secure/FAQDetails.aspx?q=5#5>.

⁸ *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 3.07 (AM. L. INST. 2010).

creating a settlement that would reduce taxi fares for some time period would produce a remedy as near as possible to compensating the victims.⁹ Accordingly, in situations where cy pres awards are appropriate, the court should have some discretion in fashioning appropriate attorneys' fees.

§ 1719 Monetary Distribution Data:

I support initiatives to gather data on class action settlements. The lack of data on the number of opt-outs, objectors, and claims filing fuels debates on both sides, for little is known about how well or poorly class members actually fare.

Creating a workable system for data collection, however, is no easy task. Conversations with claims administrators suggest that hundreds of data points are available and that numbers might easily be skewed through methodology. As such, housing data collection within the auspices of the Federal Judicial Center could draw on its researchers' substantial expertise to develop uniform reporting requirements. Consulting with the Federal Judicial Center in advance to help craft legislation that produces the information that they would need would be well advised.

As for the types of data, several nonpartisan entities have pinpointed critical data needs. First, the Subcommittee on Rule 23 has identified several criteria as points of comparison for judges scrutinizing class settlements: "the actual outcomes of other cases," "other litigation about the same general subject on behalf of class members," the claims-processing procedures, opt-out rates, and "take" rates, which consider how many class members have filed claims.¹⁰ Second, the American Law Institute's Principles of the Law of Aggregate Litigation propose that when awarding attorneys' fees, judges should "require the parties to submit . . . a final accounting describing the amount and distribution of all benefits to class members, other beneficiaries, and counsel."¹¹ Perhaps the bill's drafters could find this proposal particularly useful. Third, the Federal Trade Commission is studying both the effectiveness of class notice and the factors that influence consumers' decisions to object, opt out, or participate in a class settlement.¹² As part of that study, the agency has ordered eight claims administrators to provide information about notice methods and response rates, which could serve both as a current information source for judges and a resource for data collection methods.

The point is that data is sorely needed, but the kind of data required goes beyond what this proposal entails. Likewise, this proposal raises concerns. For example, the Federal Judicial Center would likely need case-level data to make a report of this sort, and requiring an accounting before paying plaintiffs' attorneys could create a bottleneck and backlog. As such, this provision appears to be less concerned about delivering the necessary data to judges and more concerned with holding up plaintiffs' attorneys' funds in administration so as to prevent them from investing in new lawsuits.

⁹ *Daar v. Yellow Cab Co.*, 433 P.2d 732 (Cal. 1967).

¹⁰ Committee on Rules of Practice and Procedure Agenda Book, at 257-58, June 6-7, 2016, available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2016>.

¹¹ PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.13(e) (AM. LAW INST. 2010).

¹² Press Release, Federal Trade Commission, FTC Seeks to Study Class Action Settlements (Nov. 14, 2016), available at: <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-seeks-study-class-action-settlements>.

§ 1720 Issues Classes:

The Advisory Committee on Civil Rules appointed a Subcommittee on Rule 23 that studied issue classes extensively and decided that no changes were necessary.¹³ The bill's proposed change would contradict every current circuit court decision to date. The courts have formed a consensus as to how to read Rule 23(c)(4) within the predominance requirement in Rule 23(b)(3).¹⁴

The principal disagreement in the debate once centered on Rule 23(b)(3)'s predominance inquiry: could litigants slice an issue from the constellation of questions in a case and conduct a predominance inquiry as to only that issue, or must a court first decide that the constellation of common questions predominate over individual ones such that Rule 23(c)(4) becomes a tool to manage what is already a manageable class? For a while, the Fifth Circuit consistently adhered to this latter view,¹⁵ but it recently changed course in *In re Deepwater Horizon* where it commented favorably on the district court's plan to use Rule 23(c)(4) to sever and try damages separately from issues related to liability.¹⁶ The First,¹⁷ Second,¹⁸ Third,¹⁹ Fourth,²⁰ Sixth,²¹ Seventh,²² Ninth,²³ and

¹³ Committee on Rules of Practice and Procedure Agenda Book, at 38, June 6-7, 2016, available at <http://www.uscourts.gov/rules-policies/archives/agenda-books/committee-rules-practice-and-procedure-june-2016> (“Issue classes. The Subcommittee has concluded that whatever disagreement among the circuits there may have been on this issue at one time, it has since subsided.”).

¹⁴ Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1891-92 (2015).

¹⁵ *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745-46 (5th Cir. 1996).

¹⁶ *In re Deepwater Horizon*, 739 F.3d 790, 804 (5th Cir. 2014) (observing that the district court had planned to sever liability from damage issues and try them separately, noting that plan accorded “with this court’s previous case law and Rule 23(c)(4),” and favorably citing *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013) (“[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.”)).

¹⁷ The First Circuit has not said explicitly how it would evaluate the predominance inquiry within issue classes but has noted that “even if individualized determinations were necessary to calculate damages, Rule 23(c)(4)(A) would still allow the court to maintain the class with respect to other issues.” *Smilow v. Southwestern Bell Mobile Sys., Inc.*, 323 F.3d 32, 41 (1st Cir. 2003).

¹⁸ *In re Nassau County Strip Search Cases*, 461 F.3d 219, 227 (2d Cir. 2006) (“[A] court 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.”).

¹⁹ *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011) (adopting the approach advocated by the Principles of the Law of Aggregate Litigation).

²⁰ *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438-39 (4th Cir. 2003) (“According to the dissent, a district court must first ‘determine that’ an entire lawsuit ‘as [a] whole’ . . . satisfies the predominance and superiority requirements imposed by 23(b)(3) and only if the entire lawsuit does satisfy these requirements may a court ‘manage[] through orders authorized by 23(c).’ The dissent’s argument finds no support in the law—not in Rule 23 itself nor in any case or treatise. Indeed, in addition to ignoring the plain language of Rule 23, and rendering a subsection of the rule superfluous, the dissent’s argument is contrary to the Supreme Court’s interpretation of Rule 23, our own precedent and that of every other court (including eight federal appellate courts), and every scholarly treatise that has addressed the issue.”).

²¹ The Sixth Circuit has not yet commented specifically on issue class certification under Rule 23(c)(4) but has certified a liability-only class action. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 860-61 (6th Cir. 2013) (quoting the dissent in *Comcast*, “[W]hen adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate[.]” noting the availability of Rule 23(c)(4) and (c)(5), and concluding that certifying a liability class would further economies of scale and make a negative value consumer class possible) (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1437 (2013)).

Eleventh²⁴ have taken various approaches that facilitate issue class certification to different degrees. No circuit takes the approach posed by the proposed bill.

In 2010, the American Law Institute approved the *Principles of the Law of Aggregate Litigation*, which sets forth a workable view of predominance that considerably eases the presumed friction between Rule 23(b)(3) and (c)(4). Richard Nagareda, the principal author of that section, suggested that courts should certify issue classes where resolving the issue would “materially advance the resolution of multiple civil claims by addressing the core of the dispute in a manner superior to other realistic procedural alternatives, so as to generate significant judicial efficiencies.”²⁵

Accordingly, courts should certify classes even if aggregate treatment as to just one issue materially resolves class members’ claims. The superiority requirement is embedded in both the “materially advance” language and, more obviously, as a condition that certifying the issue would be “superior to other realistic alternatives” such that it “generate[s] significant judicial efficiencies.”²⁶

In short, change is neither needed nor warranted.

§ 1721 Stay of Discovery:

This proposal will unduly prolong litigation that is already protracted. For example, one could read this section to say that a motion to “strike class allegations” would prevent the parties from engaging in discovery that goes to whether to certify a class action in the first place. Class allegations should be considered through the tried and true methods of motions to certify a class, not through motions to strike before the parties have engaged in discovery related to the class certification. This provision would make it difficult for the court and the parties to conduct discovery and make informed decisions about whether to certify a class.

§ 1722 Third-Party Litigation Funding Disclosure:

This provision appears to be aimed at disclosing third-party financing. Anytime a third party finances class actions, valid concerns arise with regard to notifying class members, identifying parameters for absent class members’ consent to the funding arrangement, deciding whether financiers are allowed to communicate with class members, and determining who controls the eventual decision to settle. When third parties fund lawsuits, there is a risk that publically traded financiers might pressure plaintiffs to settle early to report a higher quarterly profit. Moreover, in product-liability cases that give rise to personal injury, financiers could erode what little autonomy plaintiffs have in conducting their suit.

So, while valid concerns currently exist about third-party funding, requiring class counsel to identify anyone other than a class member or class counsel of record who has a right to receive compensation from a settlement may be overly broad. For instance, class counsel may farm work

²² *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 800 (7th Cir. 2013); *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012); *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911-12 (7th Cir. 2003).

²³ *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996).

²⁴ *Williams v. Mohawk Indus., Inc.*, 568 F.3d 1350, 1359-60(11th Cir. 2009) (permitting hybrid class actions under Rule 23(b)(2) and Rule 23(c)(4)); *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004) (conducting the predominance inquiry as to the RICO claim and certifying that claim but not a claim for breach of contract).

²⁵ PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.02(a)(1), 2.02 cmt. a, 2.08, 2.08 cmt. a (2010); *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.24 (2004) (suggesting that aggregate treatment should “materially advance[] the disposition of the litigation as a whole”).

²⁶ PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.02(a)(1), 2.08.

on the class action out to multiple law firms. It's not clear to me why those firms would need to be identified, but as the language is drafted, their disclosure would be required.

§ 1723 Appeals:

Courts of appeal have already developed guidelines as to when they will hear class action appeals. Making appeals mandatory will unnecessarily delay class certification decisions and waste appellate resources in the face of well established law.

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

I found this language confusing and was unsure about its intended purpose. Unless the language is read to apply solely to § 1332(a) (which it may be), then the change appears to partially repeal the Multiparty, Multiforum Trial Jurisdiction Act codified in § 1369 and § 1332(d)(11)(b) of the Class Action Fairness Act.

Sec. 5 Multidistrict Litigation Proceedings Procedures

(a)(i) Allegations Verification:

This provision demands that plaintiffs produce proof of their allegations early on in the proceedings. First, this change is unnecessary. As they see fit, some courts have adopted procedures as part of their own case management orders that require plaintiffs to produce information via “fact sheets.” Courts have issued these orders at various points during the litigation and my study of the data over the past three years shows that no consensus has emerged as to a universally best time for such an order. Indeed, there is some debate as to whether these orders are even appropriate given that our civil system relies on the parties themselves to conduct and execute case-specific discovery. Placing a significant threshold of proof on plaintiffs at the beginning of litigation robs plaintiffs of the ability to further develop and narrow their claims through the discovery process—a core feature of our civil justice system.

Second, even if these orders are warranted at some point during the multidistrict proceeding, courts need flexibility to adapt them to various circumstances, substantive laws, and causes of action. For instance, what does “exposure to risk that allegedly caused the injury” mean across various types of personal injury claims? Statutorily imposing this kind of case management order in a federal forum might also unintentionally interfere with state rights, raising federalism concerns. What if state law provides a right for a “medical monitoring” claim? Must one allege a specific “cause” of harm when state law doesn't require evidence of specific causation to make the claim to begin with?

Third, judges cannot feasibly work through every plaintiff's allegations within 30 days. These proceedings often have thousands of plaintiffs involved and the judges who accept these proceedings still carry a full caseload.

Finally, imposing a mandatory disclosure period of 45 days is overly restrictive. That type of information can take time to develop and instituting such a requirement may even prolong the proceeding. Courts deserve some deference to flexibly work with parties and manage their own schedules. While the short limit is draconian, if some time limit is set, there should at least be a “good cause” exception that allows plaintiffs to correct their submissions or file later if good cause is shown.

(a)(j) Trial Prohibition:

This section of the bill proposes to prohibit trials in multidistrict proceedings unless “all parties to the civil action consent to trial of the specific case.” Multidistrict cases routinely settle within the coordinated proceeding. Less than three percent of cases are ever remanded to their courts of origin. Preventing the judge from conducting trials of any sort unless every party consents will often mean conducting no trials at all. The Vioxx litigation, for example, included over 40,000 plaintiffs. Requiring that many plaintiffs’ counsel to reach consensus on triable cases will prove impossible and will mean that even bellwether trials, which are tried by consent of the parties to those suits, will not be available to help inform the parties’ positions before settlement. This risks substantially mispricing settlement values. If anything, to promote justice, we should encourage judges to engage with the merits more before provoking private settlements that are non-reviewable on appeal (the Review of Orders provision proposed in subsection (k) does nothing to change this).

(a)(k) Review of Orders:

(a)(k)(1) In General:

Multidistrict proceedings could use more appellate involvement. But the language in this proposal, “*shall* permit an appeal to be taken from *any* order issued” is far too broad and creates the likelihood of unnecessary satellite litigation that would further delay compensation for plaintiffs. I am also concerned by standard “materially advance the ultimate termination of one or more civil actions.” If the legislature decides to enact a provision that opens the doors to the appellate courts, the standard for appeals should adhere to the well-established case law developed under Rule 23(f). This would accomplish same goals, but strike a better balance between the interests of the district court in overseeing the action and the interests of the appellate courts in avoiding a flood of multidistrict litigation appeals.

(a)(k)(2) Remand Orders:

This provision appears to permit appellate courts to accept appeals of the decision to retain or remand a case where cases have been removed from state to federal court. The issue for plaintiffs, however, is often getting the transferee judge to *rule* on their motions to remand, which are often placed on the backburner once coordinated proceedings begin. So, appeals may do little. Remand motions are typically straightforward legal decisions that transferee judges should be able to determine quickly. So, a better bill would require judges to decide remand motions within a month or two of receiving them.

On a different but related measure, I support the greater use of remand to a plaintiff’s *court of origin* (the place where the plaintiff initially filed suit) in multidistrict proceedings. This is the federal court from which the case was transferred. Transferee judges often retain cases in hopes of forcing a global settlement, which can lead to substantive concerns about whether state laws are being undermined and whether multidistrict proceedings undercut democratic participation ideals that are fulfilled by holding trials in the affected communities. Remanding cases after overseeing discovery into common issues could alleviate those concerns while avoiding inconsistent rulings and streamlining discovery into common issues. I have detailed these arguments in a short article, *Remanding Multidistrict Litigation*, 75 LA. L. REV. 399 (2014).

Accordingly, I would support a proposal that remanded nonsettling plaintiffs to their court of origin after lead lawyers negotiate a master settlement or after courts begin conducting bellwether

trials.²⁷ If the litigation has reached a point that bellwether trials are appropriate, that seems to indicate that pretrial discovery on common issues has concluded. The cases are then ready for individualized discovery and trial in their court of origin.

(a)(l) Ensuring Proper Recovery for Plaintiffs:

While ensuring that more recovery goes to plaintiffs is a laudable goal, this provision raises a number of concerns. First, in personal injury cases, the insurance companies, Medicare, and Medicaid programs typically assert liens on plaintiffs' recoveries. The liens reimburse the insurers for the money they spent on plaintiffs' medical bills. It is unclear to me how the 80 percent change would affect these rights. Second, this change seems to undercut state laws on contingent fees, which allow plaintiffs' lawyers to recover between 30 and 40 percent of a plaintiffs' monetary award.

Third, the proposed language suffers from a number of definitional problems. When is the 80 percent calculated—is it before common-benefit attorneys' fees are awarded to the lead lawyers? Does it apply after the leaders are reimbursed for the costs of the lawsuit but before attorneys' fees are awarded? Who counts as a "claimant"? The provision appears to cover only plaintiffs who have filed suit in federal court, but private multidistrict litigation settlements often cover state court plaintiffs, and unfiled claims as well. Does the provision include only plaintiffs who have already filed suit? Tag along cases? Definitional problems continue to abound in discerning who is a member of an "action" under the Class Action Fairness Act of 2005. So, if some kind of 80 percent rule is going to be adopted (which I have concerns about), the statute would need a better definition as to what that number is based on.

Fourth, this provision seems to give the transferee judge the power to oversee private settlements. Is that oversight intended? If so, should judges determine whether private settlements are fair, reasonable, and adequate as they would under Rule 23(e)?

Finally, who decides whether the percentage is met if cases are remanded to their courts of origin before settlement? Why should the transferee judge have jurisdiction to make this determination when the case is returned to its original court?

²⁷ I have proposed remands after private, aggregate settlements in *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 69, 152-54 (2017).