

**Testimony of F. Paul Bland
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**Before the Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
United States House of Representatives**

Written Testimony on

**H.R. 1927: The “Fairness in Class Action Litigation
Act of 2015”**

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INTRODUCTION AND SUMMARY

Many Americans cannot feasibly pursue certain types of legal claims on an individual basis, particularly cases where each person's claims are too small and complex to be litigated against a corporation by a private attorney. For all sorts of situations where corporations break the law and hurt a lot of people, there are only two realistic options, given the scarce resources of government enforcers: either (a) individuals can join together to bring a class action lawsuit that holds the company accountable, or (b) the corporation gets away with violating the law. Class action suits allow consumers, workers, investors and others to pool their individual resources to recover ill-gotten sums and prevent similar misconduct in the future. This mechanism is crucial when going up against well-funded corporations.

H.R. 1927, the "Fairness in Class Action Litigation Act of 2015," would rewrite a large number of laws currently on the books. The bill would have a far broader impact than its supporters claim. Rather than its stated goal of "improv[ing] fairness in class action litigation," it would simply abolish the vast majority of class action lawsuits in the United States. While the bill strips Americans of their legal rights in a number of respects, two features are particularly disastrous. First, the bill provides that the only legal rights that can be the subject of a class action are those involving property losses or personal injury. Under the bill's "only blood or money matters" approach, the class actions that have long protected Americans against violations of their civil rights, their privacy rights, their rights to freedom of speech, and a host of other important rights, would all be eliminated. As a salient example of how extreme this new paradigm is, the American landmark case *Brown v. Board of Education of Topeka*, 347 U.S. 483

(1954), the class action where the Supreme Court declared that school desegregation was unconstitutional, could not have been brought under this bill. If America's legal system is reduced to only protecting easily-monetized property rights and personal injuries, a great deal is lost.

Second, H.R. 1927 bans any class action unless every class member has identical injuries. Under current law, a class action seeking substantial money damages may only proceed if common issues predominate over individual issues *and* if a class action is shown to be superior to other methods of proceeding. And the Supreme Court has held that courts must engage in a rigorous analysis of admissible evidence to determine if this test is met. Yet the existing strict standards limiting when class actions may be brought are not enough for the proponents of H.R. 1927. Instead, the bill requires that each class member must have suffered a property or bodily injury "of the same type and extent" as every other class member. This test is simply outlandish. By way of example, if the perpetrators of the *Enron* scam stole \$10,000 from one investor but \$75,000 from another (i.e., the two investors had bought different amounts of stock), then H.R. 1927 would bar a securities fraud class action arising from the scam. This same flaw would essentially gut enforcement of the antitrust laws. Few if any class actions in the United States would meet the extreme new test invented by the bill.

In short, this legislation will have the effect of immunizing corporations from any liability or accountability even when they have blatantly violated consumer or worker protection laws, the securities, or antitrust laws, or the constitutional rights of Americans. This is not "just" an issue of fairness to consumers, workers, investors and small businesses. The marketplace itself is

undermined when there is no enforcement of the rules of the road; honest companies are at a disadvantage against corporations willing to cheat consumers, fix prices or break other important laws.

A full catalogue of the wreckage H.R. 1927 would bring to America's legal system is not possible here, for reasons of both time and space. Accordingly, this testimony will focus on a handful of examples of the harm that would flow from this bill. For example, H.R. 1927 would eliminate class actions protecting Americans from:

- Illegal acts stripping citizens of constitutional rights;
- Corporate actions invading Americans' privacy rights;
- Practices that discriminate against the disabled;
- Injuries due to antitrust or securities law violations; and
- Deceptive, misleading and false advertising.

BACKGROUND ON PUBLIC JUSTICE

Public Justice is a national public interest law firm that specializes in precedent-setting and socially significant litigation, carrying a wide-ranging docket of cases designed to advance the rights of consumers, environmental protection, civil rights and employee rights, and to preserve and improve the civil justice system.

Public Justice was founded in 1982 and is currently supported by more than 2,000 members around the country. More information about Public Justice and its activities is available on our website at www.publicjustice.net. We are grateful for the opportunity to share our experience with respect to the important issues this Subcommittee is considering. In this

connection, we have extensive experience pursuing successful class action lawsuits that have remedied illegal behavior that has cheated consumers and workers and that have prevented the violation of constitutional rights of Americans. These lawsuits would have been impossible to bring if H.R. 1927 had been the law in America.

H.R. 1927 Would Eliminate Class Actions Protecting Constitutional Rights

As alluded to above, under H.R. 1927, *Brown v. Board of Education* – a class action -- could not have been filed. The case involved clear and substantial evidence of dignitary harms and educational and psychological damages to African-American children shunted into segregated schools. But could each of those children be said to have suffered a measureable “property” loss to the identical degree, as required by H.R. 1927 as a precondition to filing a class action? Obviously not. Under H.R. 1927’s “only money matters” and unrealistic identical damages approach, *Brown* (and many other essential civil rights class actions) would be foreclosed.

H.R. 1927 would also eliminate class actions that protect First Amendment free speech rights and Fourth Amendment rights against unlawful search and seizure. In *Hankin v. City of Seattle*, for example, the City reacted to peaceful protests concerning the World Trade Organization Ministerial Conference in 1999 by setting up a “no protest zone” around the convention center downtown. The police then began arresting peaceful protesters (and some individuals who were mistaken for protesters)—both inside and outside the zone—and detained them until the WTO meetings had concluded. Class actions were filed on behalf of both groups

of arrestees. The first case, on behalf of individuals arrested outside the no protest zone, resulted in a \$250,000 settlement. In the second case, on behalf of individuals arrested inside the zone, the federal district court found that there was no probable cause for arrest and thus that the protesters' Fourth Amendment rights were violated. A jury then found that the City was responsible for these constitutional violations. As a result of the ruling and verdict, the City agreed to pay \$1 million to the class, seal the arrest records, and—most critically—change its policies to ensure that Seattle police would not violate people's rights in this way in the future. This important case vindicated crucial constitutional rights, but because it did not involve money or personal injuries, it could never have been filed if H.R. 1927 had been the law in America.

H.R. 1927 also requires proof of injury to property and body in all cases, including those in which only injunctive relief is sought. Accordingly, in all cases where no present harm is alleged, and no damages are being sought, the bill would still require the plaintiffs to prove an actual injury to all class members. This would, in effect, write Rule 23(b)(2), which provides for injunctive relief class actions and has been a principle vehicle for advancing civil rights in America for several generations, out of the law.

H.R. 1927 Would Eviscerate Americans' Privacy Rights

Class actions have also provided Americans with significant privacy protections, and have been used to successfully stop, and to achieve a remedy for, all sorts of invasions of privacy rights. There have been successful class actions where:

- Major credit reporting agencies had systemic flaws that resulted in them telling creditors false information about consumers' credit reports;

- Morally depraved individuals installed cameras in restrooms in public places to watch women, or embedded spyware into private computers permitting someone at a corporation to activate the camera on an unsuspecting person's personal computer and surreptitiously watch them in their homes;
- Corporations made unauthorized tape-recorded phone calls to peoples' cell phones or sent unauthorized texts to their phones; and
- Certain credit agencies established sloppy systems, resulting in representations to employers that thousands of job applicants had been convicted of serious crimes when they had not been.

Under the current legal system, victims of these illegal and ugly practices have secured court orders ending the privacy-invading law breaking, received monetary compensation for the injury to their privacy rights, and were able to remove false statements about themselves from their credit reports, among other remedies.

H.R. 1927 would have eliminated and made impossible *all* of these cases, and foreclosed individual Americans from preventing these types of privacy invasions in the future. In none of them could a court have possibly found that every class member had suffered property injuries (as required in the bill), let alone in precisely the same amount (as required by the bill). In this way, H.R. 1927 would eviscerate our country's laws protecting Americans' privacy, even in truly egregious circumstances.

H.R. 1927 Would Eliminate Class Actions Protecting the Disabled

H.R. 1927 would also prevent men and women with disabilities from using the class action device to enforce their rights to access physical facilities and government programs. These rights, recognized in the federal Americans with Disabilities Act and many analogous state statutes, have been the focal point of numerous large class actions in recent years that have not sought any monetary damages or alleged physical or monetary injuries. Yet these class actions have nonetheless resulted in sweeping improvements in the lives of people with disabilities, removing barriers to navigating through the world and ensuring that both public and private services are equally available to everyone. For example, on April 1, 2015, a settlement was reached in *Willits v. City of Los Angeles*, a class action filed in 2010 on behalf of people with mobility impairments who could not safely use the city's pedestrian rights-of-way because of missing or inadequate curb ramps as well as broken and pothole-riddled sidewalks and crosswalks. Under the settlement, Los Angeles has committed to invest \$1.4 billion over the next thirty years to repair and improve its sidewalks and related infrastructure. But how would one prove that any person in a wheelchair who could not use sidewalks had lost property in the identical "type and extent" as every other person in a wheelchair? The answer is self-evident: it's impossible, and H.R. 1927 would have barred this successful and important class action. Discrimination against people with disabilities isn't readily reduced to a one-size-fits-all property loss, and thus it is treated as meaningless by the bill.

H.R. 1927 Will Encourage Deceptive Advertising

As corporations know, millions of Americans are willing to pay more for products with certain qualities. Many citizens are willing to pay more for products that are made in America, for example, or for food that is organic. Similarly, consumers are willing to spend more for (or decide to buy) products that they believe will prevent disease or improve their health. Unfortunately, from time to time, some corporations will deceptively advertise or label products that do not have such qualities.

There have been quite a few class actions over the years that have successfully protected consumers against these sorts of misleading advertisements. Many corporations have been forced to end dishonest marketing campaigns, and to give refunds to consumers through judgments or settlements in class action cases. This is frequently very substantial relief; for example, Capital One recently sent many of its customers checks averaging approximately \$175 each as a result of one of these cases. Consumers have been able to win injunctive relief where courts ordered corporations to cease misleading and predatory ad campaigns. In some cases, consumers have been able to win refunds from false advertisers, proving their cases through such recognized devices as sophisticated surveys showing the average amount consumers would pay for a product that actually was made in America (as advertised) as compared to what the typical consumer would pay for products actually made in (for example) China.

H.R. 1927 would eliminate all class actions of this sort. As a result, H.R. 1927 would encourage dishonest corporations to falsely promise cancer cures, to claim that pesticide-covered

produce was organic, and the like. This would plainly harm our marketplace and American consumers.

CONCLUSION

The foregoing are merely a few examples of the damage that H.R. 1927 would visit on the American legal system, and the country as a whole. But these are only the tip of the iceberg. The class action device serves an important public function: it supplements the ability of the government to enforce the laws by allowing groups of consumers, investors, and workers to share resources and pursue cases where a private right of action is available. The Act would eliminate most investor protection lawsuits, which would in turn encourage widespread securities fraud, and thus imperil the retirement savings and other investments that millions of people rely upon to protect their futures. The Act would also eliminate nearly all antitrust class actions which seek to protect the free market, and would instead reward cartels and put honest businesses at a huge disadvantage vis a vis their rivals. And the list could go on and on.

This legislation is profoundly harmful. It would undermine some of the key laws that protect American consumers, investors, small businesses, and citizens.