February 15, 2017

Hon. Bob Goodlatte, Chairman
House Judiciary Committee
Washington, DC 20515

Hon. John Conyers, Jr., Ranking Member
House Judiciary Committee
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

The National Association of Consumer Advocates, a nonprofit association actively engaged in promoting a fair and open marketplace that forcefully protects the rights of consumers, particularly those of modest means, writes to urge your opposition to H.R. 985, the "Fairness in Class Action Litigation Act of 2017." The legislation's extreme proposals would disrupt class action proceedings with onerous and unnecessary requirements, cutting off access to justice for millions of Americans injured by corporations that break the law. Meanwhile, corporations would be free to disregard state and federal protections for consumers and workers without fear of being held accountable. We urge you to vote NO on this bill.

NACA members – private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus is the protection and representation of consumers – have represented hundreds of thousands of consumers victimized by fraudulent, abusive, and predatory business practices. In many cases, where a corporation's conduct is so rife and pervasive that it harms a group or groups of individuals, individual dispute resolution has not been sufficient to enforce consumer protection laws for all persons affected by the bad behavior. As is typical in these cases, most individuals lack the resources to take their cases to court individually.

The class action device, on the other hand, for decades has proven effective in efficiently resolving groups' claims by rectifying harmful corporate conduct and compensating injured victims. They enable consumers to seek remedies under consumer protection laws when their rights are violated. The ability of consumers to band together in class or collective actions also gives corporations much-needed incentive to comply with the law.

Already, there are considerable obstacles that block consumers from banding together to seek redress. Increasingly, corporations use their fine-print contracts to prohibit consumers and workers from going to court or joining their claims in class or collective actions. Instead, corporations require claims to be resolved in private, secret arbitration proceedings on an individual basis. The recent Wells Fargo "fake account" scandal is a prime example of how forced arbitration clauses prevent groups of consumer claims from going forward. Wells Fargo is relying on its fine-print consumer contract terms to deny its customers the ability to band together in court to pursue claims for losses they suffered when the bank's employees opened millions of fake accounts in the customers' names without permission.[1]

The provisions of H.R. 985 would exacerbate the corporate attack on consumers' access to justice. Meanwhile, it would do nothing to improve class action adjudication. Instead, the bill appears to be a cynical maneuver simply meant to wipe out a crucial mechanism in the civil justice system that remedies widespread harms and systemic wrongdoing.

For example, a requirement in the bill that each class member suffer the same type and scope of injury from the conduct would drastically reduce recovery for individuals with different injuries even though they are harmed by the same misconduct. For example, the provision potentially would exclude consumers who had different monetary losses caused by the same wrongful action. The wrongdoer would benefit, because without class actions it could avoid being held accountable for the harm it causes.

The bill provision that bars consumer lawyers from having ties to the named plaintiffs or class representatives, including being a relative, present or former client or any contractual relationship with class counsel, is overbroad and may be a potential violation of their constitutional rights of free speech and association. The bill would also obstruct the ability of legal services organizations to represent low-income Americans who are in need of free legal services. Class action representatives and named plaintiffs in legal services' cases are often prior or current clients. Many class actions, specifically those brought by non-profit lawyers, seek to effect systemic change and right wrongs suffered by vulnerable populations.

The legislation also indicates an unwarranted lack of confidence in courts' administration of class action litigation. It removes courts' discretion in managing litigation as they consider motions; denies them the flexibility to consider circumstances in calculation of fees and costs; and burdens appellate courts by requiring them to hear every appeal, no matter how frivolous, after certification determinations. These provisions would foster a prolonged and protracted process that would unduly delay justice for injured consumers. Ultimately, this legislation would discourage and deny outright individuals' ability to file or participate in class actions to expose wrongdoing and seek redress against corporate lawbreakers.

It is clear that restricting consumers' and workers' participation in class actions through exclusionary provisions and unreasonably burdensome requirements is contrary to the public interest and would deprive millions of Americans of their rights. We urge you to reject H.R. 985.

Sincerely,

Christine Hines
Legislative Director
National Association of Consumer Advocates

[1] Michael Corkery et al, *Wells Fargo Killing Sham Account Suits by Using Arbitration*, THE NEW YORK TIMES, DEC. 6, 2016, https://nyti.ms/2k4ygJo.

Recent class actions provide redress for consumers, stop predatory business practices (These class actions likely could not have been brought under the proposals of H.R. 985)

In Sykes v. Mel Harris and Associates (Southern District of New York, 2016), consumers obtain significant remedies and change debt collectors' allegedly fraudulent conduct.

New York consumers acting on behalf of themselves and others in a class action alleged that a debt buyer engaged in abusive debt collection practices to obtain default judgments against hundreds of thousands of consumers in New York state court, in violation of the federal Fair Debt Collection Practices Act, the federal Racketeer Influenced and Corrupt Organizations Act (RICO) and New York state laws.[2].

Specifically, they alleged that defendants filed fraudulent affidavits attesting that summons and complaints to collect debt were properly served to the consumers to give notice of lawsuits against them. But the consumers were not served. According to the allegations, consumers were unaware of the lawsuits and default judgments then were entered against them. The defendants used the judgments to collect money from the class members by freezing their bank accounts and garnishing their wages, among other ways.[3]

After more than six years of litigation, the parties settled the claims in May 2016. They agreed to contribute to a $60 million settlement fund to pay damages to class members who had judgments entered against them, and who suffered losses as a result. About 8,300 class members were scheduled to receive between approximately 96-98% of their money back, another 7,400 class members would receive approximately 81-83% of their money back, and another 1,700 class members with weaker claims would receive approximately 66-68% of their funds back.

Further, the defendants agreed to vacate all default judgments entered against class members, extinguishing more than $1 billion in judgments and outstanding notes. Some of the defendants agreed to no longer participate in the debt-buying business, and a process service company would no longer participate in consumer debt collection cases. A defendant debt collector agreed to stop buying debt and agreed to transfer all debts it owns to a not-for-profit entity, which in turn agreed to stop all collections and forgive the debt as a gift to the class members.

In its factual findings, the court noted that the class action settlement brought "concrete and extraordinarily meaningful benefits to tens of thousands of individuals."[4]

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[2] *Sykes v. Mel Harris and Associates, LLC*. 09 Civ. 8486 DC (S.D.N.Y. May 2016). https://www.sykesclassaction.com/en/Home/FAQ.
[3] Findings of Fact and Conclusions of Law, *Sykes v. Mel Harris and Associates, LLC*, 09 Civ. 8486 DC (S.D.N.Y. May 2016), http://bit.ly/2lMy2YI.
[4] *Id.* and https://www.sykesclassaction.com/en/Home/FAQ.

In Inetianbor et al. v. CashCall (Southern District of Florida, 2017), consumers obtain a multimillion dollar settlement and stop loan sharking operation.

Florida residents received consumer loans from Western Sky Financial, LLC, a South Dakota company purportedly operating within the exterior boundaries of an Indian Tribe. Western Sky offered unsecured installment loans over the Internet to Florida residents in amounts varying from approximately $300 to $10,000 and bearing annual interest rates from approximately 90 percent to over 300 percent. Defendant CashCall, Inc, a California corporation, was the real or de facto lender for the Western Sky loans.[5]

The consumers filed a class action against CashCall and its sole shareholder/CEO alleging that the loans violated Florida's usury statute, Florida's Deceptive and Unfair Trade Practices Act, and RICO. The loan agreements asserted that tribal law would apply to the loans as well as a predispute mandatory tribal arbitration procedure. The consumers spent several years of litigation, including an appeal to the Eleventh Circuit Court of Appeals and the United States Supreme Court, regarding threshold issues of choice of law and an attempt to compel arbitration. According to the Eleventh Circuit, the tribal arbitration procedure was a sham and was non-existent.[6]

Florida's Attorney General and the Florida Office of Financial Regulation also filed a joint action against the same lenders in Florida state court. The state action and the consumer class action complimented each other in pursuit of remedies for Florida consumers caught in the debt trap of these loans.[7]

The settlements collectively provide more than $27 million in monetary relief to approximately 14,000 Florida borrowers with more than $14 million specifically designated to the private class action settlement fund. Consumers who paid back the loan and the interest are entitled to a refund of the illegal interest.

- The lenders are prohibited from enforcing or collecting on more than $15 million in outstanding loan balances;
- The lenders are banned from future lending in Florida, including collecting, funding, making, offering, selling, servicing, soliciting or transferring any loans;
- CashCall's lending license is revoked in Florida;
- The CEO is barred for life from obtaining any lending or other license from Office of Financial Regulation (OFR);
- The lenders are required to request the credit bureaus to remove any credit reporting entries relating to these loans appearing on borrowers' credit reports.
- The lenders paid $1.25 million to the state of Florida: a $500,000 civil penalty to the Florida Attorney General's Office, a $500,000 administrative fine to OFR, and $250,000 to Florida for costs.[8]

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[5] Stipulation and Agreement of Settlement, *Inetianbor et al. v. CashCall*, 0:13-CV-60066-JIC (S.D. Fla. 2016), http://bit.ly/2lOLkno.

[6] *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1354 (11th Cir. 2014).

[7] Attorney General Pam Bondi News Release, *Attorney General Bondi and OFR Reach Multimillion Dollar Settlements with Online Lender*, Jan. 12, 2017, http://bit.ly/2iMs6ze.

[8] Attorney General Pam Bondi News Release, *Attorney General Bondi and OFR Reach Multimillion Dollar Settlements with Online Lender*, Jan. 12, 2017, http://bit.ly/2iMs6ze.

Because the amount of the loans and the interest rates varied slightly (although all usurious) this class action could not have been filed under H.R. 985.

In Friedman v. Guthy-Renker, et al, (Central District of California, 2014), consumers recover significant remedies for injuries caused by hair care products.

The beauty product WEN Cleansing Conditioner began as an internet sensation and promised to provide consumers with an "All Natural" alternative to traditional shampoos and conditioners. More than seven million Americans purchased WEN through infomercials and retailers. However, a significant number of consumers experienced moderate to severe hair loss after using the product. By early 2016, retailers had received more than 20,000 customer complaints and the U.S. Food and Drug Administration had received more than 1,300 complaints.[9]

In 2014, three consumers filed a class action lawsuit alleging that WEN caused hair loss and that the company made material misrepresentations about the safety of the product. They alleged violations of federal and state consumer protection laws, including the Magnuson-Moss Warranty Act and California's Unfair Competition law. After extensive discovery and nearly two years of litigation, the parties reached an agreement which allows for damages to be paid to consumers suffering hair loss based upon the amount of hair lost and the duration of time required for re-growth.[10]

Under the settlement, customers suffering from the most severe hair loss may receive up to $20,000 for the injuries they suffered. Those suffering from limited hair loss will receive proportionately less. A retired federal court magistrate judge designated "Special Master" will determine compensation for each class member based upon established criteria and the respective consumer's claim form. The settlement also provides for compensation for the alleged misrepresentations. A settlement fund of $26 Million was established to cover the class members' claims and the costs of the suit.

Critically, all class members must show that they used the product and suffered hair loss. It is clear that the vast majority of class members would not have received compensation without the class action due to the expense of experts and counsel necessary to bring their claims individually. A final fairness hearing for the district to grant final approval is schedule for June 2017.

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[9] U.S. Food and Drug Administration, *FDA Information for Consumers About WEN by Chaz Dean Cleansing Conditioners*, http://bit.ly/2acXi78, last updated December 2016.

[10] Settlement Agreement and Release of Claims, *Friedman, et al v.Guthy-Renker, LLC et al*., Case 2:14-cv-06009-ODW-AGR, http://bit.ly/2ljbuB6.