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First on the House agenda: Raise the Bar on Class Actions

House of Representatives moves quickly to curtail victims' rights

By Jesse Jensen

As one of its first acts this year, the House passed a bill that deliberately attempts to curtail class action litigation through the imposition of significant new restrictions.

As recognized by the Supreme Court, class action lawsuits play an invaluable role in protecting investors, consumers, and employees by "overcom[ing] the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 133 S. Ct. 1184, 1202 (2013). Yet even after the waves of populist outcry that dominated the 2016 election, the newly-elected majority in the US House of Representatives passed as one of its first acts this year a bill striking at the heart of people's rights to class action litigation. The bill — the so-called "Fairness in Class Action Litigation Act of 2017" (H.R. 985) — seeks to frustrate class actions brought by consumers, employees, and investors while tipping the scales in favor of corporate defendants.

A remarkable coalition of consumer rights groups, civil rights advocates, and members of the legal community have united in opposition to H.R. 985. Nonetheless, the House majority passed H.R. 985 without permitting even a single hearing on its merits, and this dangerous and much-criticized legislation now resides with the Senate.

H.R. 985's radical effects on investor rights

Close examination of H.R. 985 reveals that, far from promoting "fairness," the bill relies on creative methods to delay, and ultimately dismantle, class action lawsuits.

For example, courts currently permit lawsuits to proceed as class actions only if (among other requirements) the pro-

H.R. 985, the so-called "Fairness in Class Action Litigation Act of 2017," seeks to frustrate class actions brought by consumers, employees, and investors while tipping the scales in favor of well-heeled defendants. Close examination of the bill reveals that, far from promoting "fairness," the bill relies on creative methods to delay, and ultimately dismantle, class action lawsuits.

posed class representative shows that its claims, including its injury, are "typical" of the class's claims. H.R. 985, however, would prohibit class actions unless the plaintiff demonstrates that each proposed class member suffered "the same type and scope of injury." In many types of class actions, this provision could radically pare down what a "class" could be, because the same wrongdoing may injure large groups of consumers or workers to different degrees. For instance, the same dangerous prescription medication may manifest side effects that differ in scope. While one patient may suffer a lethal heart attack, another may suffer a debilitating stroke. This provision of H.R. 985, however, could be interpreted to rob from the victims of that defect their ability to band together against the pharmaceutical company, even though all suffered from the same faulty medication.

Moreover, H.R. 985 does not explain how precisely a class representative could demonstrate that all of the class members suffered "the same type and scope of injury." Ultimately, courts could spend years of litigation attempting to settle on an accepted meaning of this restrictive requirement — preventing adjudication of the merits, and any relief to pending classes, in the meantime.

Other provisions of the bill also transparently seek to manufacture delay. For instance, while appellate courts currently have discretion as to when they will hear appeals of class certification decisions, H.R. 985 would require appellate courts to hear all appeals of class certification decisions, no matter how frivolous. This element of H.R. 985 caught experienced legal scholars and practitioners by surprise, as little-to-no commentary had suggested that appellate courts have failed to oversee appropriately district court rulings on class certification. By unnecessarily burdening appellate courts, this provision of H.R. 985 would add further time and expense to the class certification process.

Despite near-universal criticism, the bill advances to the Senate

Other than the US Chamber of Commerce — the highest-spending lobbying group in the United States — H.R. 985 has received no notable endorsement. Instead, the bill has faced widespread denunciation, including by dozens of consumer, labor, environmental, disability, investor and civil rights advocacy groups, all of whom expressed concern with how the bill would stymie the enforcement of individual legal rights. This disparate alliance includes such prominent organizations as the AFL-CIO, National Disability Rights Network, and Southern Poverty Law Center.

Even beyond this pervasive concern over the bill's impact, several legal commentators have criticized the bill for fundamentally disregarding Congress's own acknowledgment that federal courts themselves are best positioned to make rules governing their procedures. For example, on March 8, 2017, the American Bar Association — a prominent nonpartisan professional association of legal professionals — noted in a public letter to members of the House that H.R. 985 would interfere with the efforts to improve class action procedures already in progress by the policy-making body for the federal courts, the Judicial Conference of the

United States, all while wasting judicial resources and unnecessarily delaying and denying claims.

Fortunately for institutional investors, public outcry forced the elimination of one of the bill's most onerous (and arguably unconstitutional) provisions. The bill's sponsor, House Judiciary Committee Chairman Bob Goodlatte (R-VA), voluntarily removed from the legislation a provision that would have forbidden any class representative from being represented by any counsel who had previously served as counsel for the class representative in a different class action.

Nonetheless, even this pared-back version of the bill could not garner a single Democratic vote in the House, and even failed to capture over a dozen Republican votes. Ultimately, however, the substantial GOP House majority advanced the bill to the Senate in March 2017, where it has since been referred to the Senate Committee on the Judiciary.

Since that time, the Senate has apparently shown no urgency with respect to the legislation, leaving unclear H.R. 985's fate. Last year, the Senate Judiciary Committee refrained from acting on similar anti-class action legislation, also introduced by Rep. Goodlatte. Many commentators believe that, even if H.R. 985 moves forward to the Senate floor, it will face greater scrutiny — and likely revision — than it did in the House. Ultimately, perhaps the biggest wildcard facing H.R. 985 is whether the new President will attempt to play any role in its future, and what that role would be.

Quotable

> "H.R. 985 is a "thinly veiled attempt to skew the current standards decisively in favor of corporate defendants."

Rep. John Conyers (D-MI) asserting that the Fairness in Class Action Litigation Act of 2017 is the wrong way to improve the justice process.

Conclusion

H.R. 985 threatens to erect unnecessary, costly, and time-consuming barriers to class actions nationwide, and the House of Representatives disappointed the country in making its passage one of its first priorities this year. With the bill now in the Senate's control, legal experts, advocacy groups, institutional investors, and others should remain vigilant regarding this anti-investor and anti-consumer legislation.

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