National Association of Consumer Advocates

H.R. 985 Would Rob Americans of Their Best Tool to Hold Corporations Accountable

BACKGROUND

Class actions are a critical device for American consumers, workers and small businesses to seek remedies when ripped off or exploited by corporations. They have resolved widespread and systemic harm related to violations of state and federal consumer protection, civil rights, investor rights, workplace rights and fairness, fair competition laws, and other protections.

For decades, class actions have effectively halted illegal corporate conduct, prevented risky behavior, and compensated injured victims.[1] Class actions help level the playing field for small businesses against big corporations whose dominant practices have exploited smaller players in the marketplace.

The ability of consumers, workers, and small businesses to band together in class or collective actions, gives corporations much-needed incentive to comply with laws. As federal court judge Richard Posner has said, "A class action, like litigation in general, has a deterrent as well as a compensatory objective."[2] *Without* class actions, corporations would lose incentive to avoid risky conduct, and individual Americans would lose a key tool to seek remedies for widespread or systemic injuries caused by lawbreakers.

Supporters of H.R. 985 have failed to explain why it is necessary. The U.S. House Judiciary Committee literally refused to examine the policy considerations, reporting H.R. 985 without even a hearing. This refusal to discuss the bill's potential impact is a betrayal to American consumers, investors, and workers who would be harmed by the harsh proposal.

H.R. 985 IS AN UNWARRANTED ATTACK ON AMERICANS' ACCESS TO COURT

• The bill's provisions to delay and deny participation in class actions would harm the public interest.

A) H.R. 985 proposes to bar class certification unless the plaintiff demonstrates that each proposed class member suffered "the same type and scope of injury" as the named class representative. The terms *type* and *scope* are incredibly vague. The litigation necessary to resolve these questions will cost courts and private litigants significant time and expense. In any case, classes typically include a range of individuals, who almost never suffer precisely the same degree of injury. If the terms are defined restrictively, the requirement would rob consumers and workers of their ability to band together.

[1] See, e.g, Benjamin Mueller, *Victims of Debt Collection Scheme in New York Win $59 Million in Settlement*, THE NEW YORK TIMES, Nov. 13, 2015, http://nyti.ms/2lXzqKf.
[2] *Hughes v. Kore of Indiana Enterprises, Inc*., 731 F.3d 672, 677 (7th Cir. 2013).

B) The bill would bar class actions where the class attorneys have previous ties to the named plaintiff or class representative including being a relative, present or former client. It would obstruct the ability of nonprofit attorneys, including legal services organizations, to represent low-income Americans and vulnerable populations who are in need of legal services. Class action representatives and named plaintiffs in legal services' cases are often prior or current clients. Moreover the proposed restrictions are unnecessary. Under federal rules, courts are already required to scrutinize class counsel and named plaintiffs to ensure that absent class members are treated fairly.

C) The bill would place obstacles to block payment of class attorneys' fees, including delaying payment until the distribution of benefits to class members is completed. Some class settlements take years to distribute among class members. This burdensome scheme would discourage attorneys from representing consumers and workers injured by widespread or systemic wrongdoing, and the bill's supporters have not explained why it is necessary or identified problems that it would solve.

• It would undermine judges' decision-making and ability to manage their cases.

H.R. 985 demonstrates an unwarranted lack of confidence in courts' administration of class action litigation. Courts generally have well-established procedures for managing their cases. However, the proposal would remove courts' discretion in managing litigation as they review motions; deny them the flexibility to consider circumstances during the discovery process and in calculation of fees and costs; and substantially add to the caseload of appellate courts by requiring them to hear every appeal, no matter how frivolous, after certification determinations.

• It disregards the authority and experience of the federal courts' policy making body.

Congress itself established a process under the Rules Enabling Act for the making of rules governing federal court procedures. The Judicial Conference of the United States, the policy making body for the federal courts, is working to improve class action procedures under Rule 23 of the Federal Rules of Civil Procedure. H.R. 985 would interfere with the already established process for changing federal court rules on class actions, while wasting resources and unnecessarily delaying and denying claims.

• Already existing obstacles block consumers from seeking redress in court for widespread harm.

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. Corporations require claims to be resolved in private, secret arbitration proceedings on an individual basis.[3] Due to prohibitive costs, individual arbitration is virtually impossible for most individuals. Congress should work on restoring consumer, investor and worker access to remedies rather than further restricting it.

Vote NO on H.R. 985

H.R. 985 would foster a prolonged and protracted process for class actions that would unduly delay or deny justice for ordinary Americans, without any countervailing benefit. Ultimately, the proposal would wipe out consumer, investor and worker claims regardless of the extent of harm caused by bad actors.

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[3] See, e.g. Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, THE NEW YORK TIMES, Oct. 31, 2015, http://nyti.ms/2lZBCza.