

H.R. 985: Unfairness in Class Actions

History of H.R. 985

In February, H.R. 985 was introduced to the House of Representatives by Rep. Bob Goodlatte (R-VA-6). H.R. 985 is titled the “Fairness in Class Action Litigation Act of 2017” but in reality is nothing more than an attempt to limit access to the court house for millions of Americans.

H.R. 985 was preceded by H.R. 1927, the Fairness in Class Action Litigation Act of 2015. H.R. 1927 was passed by the House but not considered by the Senate. However, the current composition of the Senate is much different than it was in 2015. Further troubling is that H.R. 985 is far more damaging to the civil justice system than H.R. 1927.

What is H.R. 985?

H.R. 985 impacts much more than Class Actions. It also severely restricts Multi-District Litigation (MDL) and adds further restrictions on Asbestos cases. MDL cases are different than class actions in that they involved hundreds or thousands of individual claims with differing damages against a single defendant. The Bill’s broad implications would severely limit access to Courts for millions of Americans. Among other provisions, the highlights (or lowlights) are:

1. Requires class members to suffer the same type and scope of injury as named representatives;¹
2. Alters existing Federal Rules of Civil Procedure including significant alterations to Rule 23;²
3. For class actions, the bill heightens the burden for class movants, restricts how much class counsel can be paid, and restricts when class counsel can be paid;³ and
4. Significantly limits attorney fees in MDL litigation especially in cases with subrogation. Claimants must “receive not less than 80% of any monetary recovery.” This leaves 20% for fees, expenses, and other deductions such as subrogation or liens.⁴

Solving Problems That Do Not Exist

H.R. 985 is the latest effort to solve the problem of frivolous lawsuits concocted by the Chamber of Commerce and friends that are ultimately designed to deny individuals access to the court house. Most lawyers are familiar with similar attempts made in the past, both legislatively and judicially, including CAFA⁵ and decisions such as *Iqbal*⁶ and *Twombly*⁷ and their progeny, all of which are beyond the scope of this article. Studies on the effects of tort reform on medical malpractice cases have largely found legislation to be ineffective at reducing insurance premiums and reducing “defensive medicine”.⁸

Legislative Update

¹ H.R. 985, 115th Cong. Sec. 102 § 1716(a) (2017).

² *Id.* At Sec. 103.

³ *Id.*

⁴ *Id.* at Sec. 105 (l).

⁵ Class Action Fairness Act of 2005 28 U.S.C. §§1332(d), 1454, and 1711-1715.

⁶ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)

⁷ *Bell Atlantic Corp. v. Twombly*, 500 U.S. 544 (2007)

⁸ See Generally, Daniel Waxman M.D., Ph.D., *et al.*, *The Effect of Medical Malpractice Reform on Emergency Department Care*, N. Engl. J Med 371 (October 16, 2014).

H.R. 985 passed the House on March 9, 2017, by a margin of 220-201. The ayes were 220 Republicans. Noes included 187 Democrats and 14 Republicans.⁹ H.R. 985 was passed to the Senate where it is currently in the Senate Judiciary Committee. OAJ and AAJ are actively and aggressively opposing the bill.

Practical Applications of H.R. 985's Provisions

If H.R. 985 becomes law, it will have devastating effects on the civil justice system. The class action provisions will allow large corporations to avoid liability on a massive scale. MDL cases will simply become economically infeasible. Defendants will race to the court house to ask the JPML for consolidation on small cases to limit attorney fees for Plaintiffs, in turn decreasing the likelihood cases are pursued. In short, H.R. 985 places enormous procedural and practical road blocks in front of individuals who are harmed.

Although personal injury class actions are rarely certified under Rule 23, under H.R. 985 they would become impossible. Class Action lawsuits offer Defendants an important release procedure cutting off future liability. In cases such as MDL 2284 *In re: Imprelis Herbicide Marketing, Sales Practices and Product Liability Litigation* and currently MDL 2591 *In re: Syngenta AG MIR 162 Corn Litigation* the class action mechanism is an important tool to help settle cases on behalf of hundreds of thousands of injured parties.

Simply, H.R. 985 closes Court House doors to individuals, and is yet another roadblock designed to prevent individuals from bringing legitimate claims against large corporations who have harmed them. If enacted in its current form, it would dramatically change the civil justice system for the worse.

⁹ "Fairness in Class Action Litigation Act" Roll Call Vote 148 (March 9, 2017). Available at <http://clerk.house.gov/evs/2017/roll148.xml>