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# H.R. 985 – Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017 (Rep. Goodlatte, R-VA)

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## FLOOR SCHEDULE:

Expected to be considered on March 9, 2017 under a structured rule.

## TOPLINE SUMMARY:

H.R. 985 would amend the federal judicial code to prevent federal courts from certifying a class seeking monetary relief for economic loss or personal injury, unless the party maintaining the class action suit certifies each member of the class action has suffered a similar injury in type and scope as the injury of the named representative. This legislation would also impose several new restrictions on class action lawyers and plaintiffs and rules for certain consolidated cases that were not included in the previous iteration of the legislation passed in the 114th Congress. Title II of the legislation would include text of H.R. 906, the Furthering Asbestos Claim Transparency (FACT) Act, to amend the Bankruptcy Code to provide for transparency from bankruptcy trusts created to pay asbestos claims.

## COST:

The Congressional Budget Office (CBO) estimates "that imposing new requirements on the courts for the consideration of class-action cases would cost $2 million over the 2018-2022 period."

CBO also estimates "that enacting H.R. 906 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028."

## CONSERVATIVE CONCERNS:

- **Expand the Size and Scope of the Federal Government?** No.
- **Encroach into State or Local Authority?** No.
- **Delegate Any Legislative Authority to the Executive Branch?** No.
- **Contain Earmarks/Limited Tax Benefits/Limited Tariff Benefits?** No.

## DETAILED SUMMARY AND ANALYSIS:

Federal class action rules presently require that the class in question have questions of law and fact in common, and that the claims and defenses of the class are "typical" for the class. Despite this requirement, courts have at times allowed classes to be certified when they do not actually share a comparable injury of the same type and scope. Combining uninjured and injured parties greatly expands the class size, increases the pressure to settle, and often creates higher prices for consumers, who are essentially forced to bear the burden of companies offsetting the cost of litigation. Lumping parties together also often decreases recovery for actually injured parties, as resources get directed to the uninjured.

H.R. 985 would prohibit a federal court from certifying any class seeking monetary damages from personal injury or economic loss, unless the parties of the class demonstrate each member shares the same type and scope of injury as the named representative of the class. Uninjured or lesser injured parties could still file class action suits, they would just have to do so separately. Judges would be prohibited from certifying class actions in which any representative is a relative, former employee, current or former client, or has a contractual relationship with the class action lawyer.

An order issued under Rule 23(c)(1) of the Federal Rules of Civil Procedure that certifies a class seeking monetary damages for economic loss or personal injury would be required to include a determination, using an analysis of the evidence presented, that the requirements of this legislation are met. To do so, the plaintiff would be required to present evidence of a common, class-wide injury.

This legislation would require that lawyers in class action suits only be paid following payment to victims, and would limit the attorney's fees awarded to a reasonable percentage. Lawyer's fees should not be greater than the amount received by all of the victims involved in the suit. This legislation would also require that for any federally approved settlement of a class action suit, trial lawyers must submit an accounting of money distributed to the Administrative Office of the U.S. Courts (AO). This data would be published in annual reports.

Plaintiffs would be prohibited from certifying issue classes, unless the whole claim qualifies for Rule 23 class treatment. This change would prevent certification of huge classes which could include those who were not actually injured.

This legislation would require federal courts to stay costly discovery until Rule 12 motions for dismissal for failure to state a claim, motions to strike class allegations, motions to transfer, and other motions for the disposal of class allegations have been resolved, unless the discovery must be performed to preserve evidence or prevent undue prejudice. This legislation would also require disclosure of third-party funding agreements to all parties and to the district court. It would also make class certification decisions appealable as a general right.

This legislation would require federal courts to examine each plaintiff's claims individually when assessing federal jurisdiction in multi-plaintiff complaints alleging personal injury or wrongful death. It would also call for, in the case of multidistrict litigation, each suit filed in, or transferred to, multidistrict mass-tort proceeding, that trial lawyers submit of properly investigating the claims in advance evidence. If a submission is insufficient, the claim would be dismissed without prejudice. Lawyers would be permitted to correct the insufficiency—if they do not do so within 30 additional days, the claim would be dismissed with prejudice.

This legislation would address pressure by multidistrict litigation (MDL) courts to settle in "bellwether" trials, often unfair trials that purport to test a claim's suitability for settlement, by enforcing Congress's original intent for MDL proceedings. Namely, that MDL courts handle pre-trial proceedings only. MDL courts would only be permitted to conduct trials if all parties consent. This legislation would authorize immediate appellate review of interlocutory MDL court orders, if those rulings could apply to multiple cases in the proceeding, or if the review could advance a timely conclusion of the proceeding. If cost savings economies of scale are used in MDL proceedings, these savings should be passed to the victims, so that 80% of compensation goes to claimants.

Nothing in this legislation would restrict the ability of the Judicial Conference and the Supreme Court from proposing rule changes under chapter 131 of Title 28 of the U.S. Code. Amendments made by the legislation would go into effect upon enactment.

Title II would amend would amend Title 11, section 524 of the U.S. Code to require a trust created to address asbestos claims to file a public report with the bankruptcy court each quarter, detailing the name and exposure history of any one that has filed a claim with such trust, and any payments made to any claimants, including the basis for making payments. It would also require each trust to provide upon written request, any information related to demands for payment to any party in an action involving asbestos exposure in addition to information on payment form.

According to a past Committee report, asbestos litigation is the longest-running mass-tort litigation in the United States. In the past, individuals exposed only had recourse through worker's compensation claims; however, following a Fifth Circuit decision in 1973 allowing liability suits, the volume of asbestos litigation exploded. Though this volume does include those grievously injured by asbestos exposure, it has also given rise to a number of suits by individuals with nonmalignant injuries, including those with little-to-no functional impairment. Comprehensive resolution to asbestos litigation has yet to be reached.

Committee reports can be found here and here. Similar legislation was passed on January 8, 2016 by a vote of 211-188. A past legislative bulletin can be found here.

## AMENDMENTS:

1. Rep. Goodlatte (R-VA) – Manager's Amendment – This amendment would strike the same class counsel prohibition if the named plaintiff is a present or former client, or has a contractual relationship with the class counsel. It would carve out private securities litigation class actions from the conflict of interest and stay of discovery requirements, and would give federal courts 90 days to review the allegations verification submissions for multi-district litigation. It would also make technical and conforming corrections.
2. Rep. Deutch (D-FL) – This amendment would strike the provision addressing fee determination based on equitable relief.
3. Rep. Deutch (D-FL) – This amendment would strike the provision on conflicts of interest.
4. Rep. Soto (D-FL) – This amendment would strike section 1721, to allow discovery to continue while the listed motions are pending.
5. Rep. Johnson (D-GA) – This amendment would exempt civil actions alleging fraud.
6. Rep. Conyers (D-MI) – This amendment would exempt civil rights actions from the class action provisions of the legislation.
7. Rep. Jackson Lee (D-TX) – This amendment would replace text of the bill with the requirement that the bankruptcy asbestos trust report an aggregate list of demands received and payments made on a quarterly basis.
8. Rep. Espaillat (D-NY) – This amendment would exempt from the legislation class action suits that allege discrimination based on race or gender.

## COMMITTEE ACTION:

H.R. 985 was introduced on February 9, 2017 and was referred to the House Committee on the Judiciary.

## ADMINISTRATION POSITION:

A Statement of Administration Policy is not yet available.

## CONSTITUTIONAL AUTHORITY:

Congress has the power to enact this legislation pursuant to the following: Article I, Section 8, Clause 9; Article III, Section 1, Clause 1; and Article III, Section 2, Clause 2 of the Constitution, which grant Congress authority over federal courts.