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## Federal Legislative Attacks on Class Actions

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# FEDERAL LEGISLATIVE ATTACKS ON CLASS ACTIONS

*Joanne Doroshow\**

February 9th, 2017 began one of most shameful periods of legislative malpractice that I can remember in my thirty years working on civil justice issues. That evening, we became aware of a massive, new piece of legislation that was haphazardly written by corporate lobbyists, and would completely alter class action law in the United States. Although not yet formally introduced, the legislation was already scheduled to be marked-up and voted on by the House Judiciary Committee within the week. The Committee would vote without holding a single legislative hearing, despite the fact that the bill would create massive confusion while completely upending well-established law. The bill would also directly interfere with the deliberative work of the Advisory Committee on the Federal Rules of Civil Procedure, which had just gone through a painstaking process considering and making changes to class action rules that were supported by both plaintiff and defense representatives; these changes were set to go into effect in December 2018.<sup>1</sup>

This bill was eventually identified as H.R. 985, the Fairness in Class Action Litigation Act. It would largely fulfil a dream that major corporate lobby groups have had since the 1970s - getting rid of class actions in America.<sup>2</sup>

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<sup>1</sup> See, e.g., Niki Mendoza, Changes To Rule 23 Are Coming, Are You Prepared?, LAW360, March 16, 2018.

<sup>2</sup> See generally STEPHEN A. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017) [hereinafter Burbank]; Letter from Howard M. Erichson, Professor of Law, Fordham University School of Law, to Hon. Paul Ryan, Speaker, et al. (Feb.18, 2017) (as soon as the bill was introduced, legal experts began critiquing it. Fordham Law Professor Howard Erichson wrote to the committee that the legislation was “slapped together without any nuanced

## THE HISTORY OF CLASS ACTIONS

Before examining how and why certain lobby groups want to destroy class actions, it is crucial to understand the process by which class actions were created, the rationale underlying the creation, and the significance of such proceedings. Despite what some may think, class actions were not the invention of the U.S. plaintiffs' bar. In fact, legal historians assert class actions are rooted in 17th century English law.<sup>3</sup> Even before the 17th century, however, there was an English tradition of bringing complaints of communal harm in organized groups.<sup>4</sup> In their book *Rights and Retrenchment, The Counterrevolution against Federal Litigation*, Stephen B. Burbank and Sean Farhang write, “[p]rior to the Federal Rules[,] class actions were permitted in a limited set of circumstances marked out by the practice of courts of equity in England.”<sup>5</sup>

In the early part of the 20th Century, growing industrialization and the mass accumulation of capital by corporations was starting to lead to inequality between the “two classes of legal persons - corporate and human - that the law presumes are, and treats as, equals.”<sup>6</sup> The perceived need to level the playing field between these two classes was accomplished by allowing people to file claims collectively.<sup>7</sup> As litigators Elizabeth J. Cabraser and Michael D. Hausfeld write,

The class action was perceived as the procedural mechanism that would restore, to individuals, the practical ability to pursue redress of corporate wrongdoing, would provide cost-effective access to the courts, and would enable civil justice to be done

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understanding of the law of class actions or MDL. . . [T]he bill looks like a wish list for corporate defendants”); Letter from Myriam Gilles, Vice Dean, Cardozo School of Law, to James J. Park, Chief Counsel, Democratic Staff (Feb.13, 2017) (Cardozo School of Law professor Myriam Gilles wrote that the bill would “radically restrict access to justice for injured consumers, employees and small businesses by, among other things, imposing requirements upon class plaintiff that are both unrealistic and unnecessary.”).

<sup>3</sup> DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 10 (2000).

<sup>4</sup> *Id.*

<sup>5</sup> BURBANK, *supra* note 2, at 72.

<sup>6</sup> Elizabeth J. Cabraser & Michael D. Hausfeld, The Necessity of Class Actions in a Global Economy, Paper presented at the National Institute on Class Actions C-26 (1997).

<sup>7</sup> *Id.*

between adversaries of otherwise unequal economic means and bargaining power.

Class actions were thus a self-consciously corrective measure, borrowed from equity and applied to suits at civil law, and employed to counteract the tendency of economic power to grant practical immunity. In modern American society, where all persons are equal, it was perceived that a civil justice system that did not adjust to correct the prejudicial ramifications of the inequality between company and individual, actively promoted injustice.

In 1938, the United States adopted the Federal Rules of Civil Procedure (FRCP) which codified the class action device in Rule 23.<sup>8</sup> Eventually, class actions became one of the most powerful mechanisms to secure justice in America. For example, *Brown v. Board of Education*, which outlawed school segregation and set the stage for the entire civil rights movement, was a class action lawsuit.<sup>9</sup>

In the 1960s, a new Advisory Committee was appointed to look at the FRCP to “turn federal jurisprudence from abstract inquiries to functional analysis that considered the practical effects of litigation.”<sup>10</sup> In 1966, the Supreme Court issued a new version of Rule 23, including Rule 23(a) that specified “four requirements applicable to all litigation if it was to proceed as a class actions, colloquially called numerosity, commonality, typicality, and adequacy of representation.”<sup>11</sup> The new Rule 23 “reformulated the categories appropriate for class action treatment and specified different procedural requirements depending on the category.”<sup>12</sup>

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<sup>8</sup> UNITED STATES COURTS, CURRENT RULES OF PRACTICE AND PROCEDURE, <http://www.uscourts.gov/rules-policies/current-rules-practice-procedure> (“The rules were first adopted by order of the Supreme Court on December 20, 1937, transmitted to Congress on January 3, 1938, and effective September 16, 1938”); see FED. R. CIV. P. 23.

<sup>9</sup> *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954), *supplemented sub nom. Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

<sup>10</sup> BURBANK, *supra* note 2, at 72.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 72-3.

## THE IMPORTANCE OF CLASS ACTIONS

The Center for Justice & Democracy (CJ&D), the national consumer rights organization that I founded and run, has produced two studies that compile recent important class actions that have compensated victims and protected individuals and businesses from a wide array of abuses.<sup>13</sup> CJ&D's studies show overwhelming evidence that class actions have helped victims of corporate law-breaking and led to changes in corporate behavior that protect all consumers.<sup>14</sup>

When Wells Fargo charged illegal fees and ruined its customers' credit, for example, class actions helped remedy the fraud for many customers.<sup>15</sup> Class actions have compensated many small businesses when they were forced to pay price-fixed overcharges, allowing them to recover their stolen money.<sup>16</sup>

Other class actions have remedied discriminatory practices, including for #MeToo survivors of sexual harassment, abuse and discrimination in the workplace.<sup>17</sup> For many individuals

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<sup>13</sup> See Center for Justice & Democracy, *First Class Relief: How Class Actions Benefit Those Who Are Injured, Defrauded and Violated* (Oct. 15, 2014), <http://centerjd.org/content/first-class-relief-how-class-actions-benefit-those-who-are-injured-defrauded-and-violated>.

<sup>14</sup> *Id.*

<sup>15</sup> See NATIONAL CONSUMER LAW CENTER, FORCED ARBITRATION AND WELLS FARGO: THE CFPB'S RULE PROTECTS VICTIMS OF BANK FRAUD, <https://www.nclc.org/issues/forced-arbitration-and-wells-fargo.html>.

<sup>16</sup> In one recent case, for example, Dow Chemical agreed to an \$835 million class action settlement – the largest ever recovered in a price-fixing case from a single defendant – on behalf of roughly 2,200 furniture, roofing material, appliance and other product manufacturers who were victims of a polyurethane price-fixing scheme. See *In re Urethane Antitrust Litig.*, 041616-JWL, 2016 WL 4060156, at \*1,3,5 (D. Kan. July 29, 2016); see also, Margaret Cronin Fisk, *Dow Loses \$1.2 Billion Verdict as Top 2013 Award*, BLOOMBERG (January 14, 2014), <http://www.bloomberg.com/news/articles/2014-01-14/dow-loses-1-2-billion-verdict-as-top-2013-award>; URETHANE ANTITRUST LITIGATION, <http://polyetherpolyolsettlement.com/docs/notice.pdf>; Settlement Agreement, *In re Urethane Antitrust Litig.*, 041616-JWL, 2016 WL 4060156, at \*1,3,5 (D. Kan. July 29, 2016); *In re Urethane Antitrust Litig.*, 768 F.3d 1245 (10th Cir. 2014).

<sup>17</sup> In 2016, for example, Valeant settled with 225 female sales representatives who had been subjected to “unwelcome sexually-charged ‘jokes’ and commentary, name-calling, and offensive stereotypical comments about women, pregnancy, and caregiving,” expected to drink alcohol, socialize with and tolerate sexual advances from co-workers, denied promotions and paid less than their male counterparts. Medicis/Valeant agreed to pay class members \$7.15 million and institute extensive new company training and protocols as well as fairer compensation and promotion processes. Final Approval of Class

experiencing discrimination filing an individual suit, as opposed to joining a class action, is an unrealistic option. First, class actions may be the only way to prove or remedy systemic discrimination. As explained by the NAACP Legal Defense & Educational Fund, Inc. (LDF) in its Amicus Brief submitted to the U.S. Supreme Court in *AT&T Mobility LLC v. Concepcion*, “[w]ithout a broad discovery of company-wide statistical and other data that class actions facilitate, it is difficult for civil rights plaintiffs to prove a pervasive pattern and practice of discrimination.”<sup>18</sup> Second, it is extremely expensive to prove institutional discrimination without class actions. As noted by LDF,

In many civil rights cases, most, if not all, pertinent information is within the exclusive province of the defendant—through its agents, employees, records,

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Settlement, *Brown v. Medici's Pharmaceutical Corp.*, No. 1:13-cv-01345 (July 11, 2016), <http://medicisgendersettlement.com/blog/wp-content/uploads/2016/07/52-Order-Granting-Final-Approval-of-the-Class-Settlement.pdf>; *see also* Modified Settlement Agreement, *Brown v. Medici's Pharmaceutical Corp.*, No. 1:13-cv-01345 (Jan. 14, 2015), <http://medicisgendersettlement.com/blog/wp-content/uploads/2016/07/Fully-Executed-Modified-Settlement-Agreement-1-14-15-FINAL.pdf>; Class Action Complaint, *Brown v. Medici's Pharmaceutical Corp.*, No. 1:13-cv-01345 (Sept. 5, 2013), <http://medicisgendersettlement.com/blog/wp-content/uploads/2016/07/1-Complaint.pdf>. That same year, BAE Systems Norfolk Ship Repair settled with female shipyard workers for horribly discriminatory practices, which in addition to relegating women to lower-level jobs and denying promotions, also created a work environment where managers and supervisors often “shared or displayed sexual photographs at work while making sexual comments,” “frequently and regularly us[ed] the words ‘bitch’ and ‘whore’ to refer to women, and discuss what they did sexually with women, including graphic descriptions of sex acts.” Victims who spoke out faced retaliation and termination. BAE agreed to \$3 million in class relief as well as to “changes in workplace policies and procedures, including the implementation of relief addressing BAE’s hiring, promotion, training, and complaint investigation process.” Victims who spoke out faced retaliation and termination. BAE agreed to \$3 million in class relief as well as to “changes in workplace policies and procedures, including the implementation of relief addressing BAE’s hiring, promotion, training, and complaint investigation process.” Class Action Settlement, *Aviles v. BAE Sys. Norfolk Ship Repair*, No. 2:13-cv-00418 (Feb. 10, 2016).; *see also* Matthew Bultman, *BAE Systems To Pay \$4.6M In Gender Discrimination Row*, (Feb. 10, 2016), <http://www.law360.com/articles/757931/bae-systems-to-pay-4-6m-in-gender-discrimination-row>; Complaint, *Aviles v. BAE Sys. Norfolk Ship Repair*, 2013 WL 11330973 (E.D.Va.).

<sup>18</sup> *AT&T Mobility LLC v. Concepcion*, 2010 WL 3934619, at 19 (9<sup>th</sup> Cir. 2010).

and documents. Discovery of this evidence—especially in challenges to institution-wide practices of large corporate defendants—is expensive; thus, the ability to spread the costs over a class is key to obtaining redress.<sup>19</sup>

## CLASS ACTIONS, FORCED ARBITRATION, AND THE FEDERAL CONSUMER FINANCIAL PROTECTION BUREAU

In recent years, companies have inserted pre-dispute forced arbitration clauses and class action waivers in employment and consumer contracts, requiring harmed individuals to resolve disputes in rigged arbitration systems.<sup>20</sup> The U.S. Supreme Court has recently endorsed corporate use of such contracts. In the 2011 decision *AT&T v. Concepcion*, the Supreme Court allowed culpable companies to unilaterally ban class actions against them via forced arbitration clauses for the first time.<sup>21</sup> The Court stated that the class action ban was legal even though California law, where the case was brought, dictated that class action bans were “unconscionable” and could not be imposed.<sup>22</sup>

*AT&T v. Concepcion* initiated a trend towards corporate deference in forced arbitration disputes that was further applied in *American Express v. Italian Colors Restaurant*.<sup>23</sup> The case involved an antitrust class action suit brought by Alan Carlson, longtime owner of Italian Colors restaurant in Oakland, California. Italian Colors is a successful restaurant, but like most local restaurants, its profit margins are slim.<sup>24</sup> A significant

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<sup>19</sup> *Id.*

<sup>20</sup> See, e.g., Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>; see also Jessica Silver-Greenberg and Michael Corkery, *A Privatization Of the Justice System*, N.Y. TIMES, Nov. 2, 2015, <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>.

<sup>21</sup> *AT&T Mobility LLC*, 131 S. Ct. at 1748.

<sup>22</sup> *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 153 (2005) *abrogated by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>23</sup> *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013).

<sup>24</sup> See *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers and*

portion of the restaurant's earnings came from customers who used American Express cards. Mr. Carlson's restaurant could not survive if he refused to accept these card payments. But American Express's standard merchant contracts required restaurants accepting *any* American Express card to accept *all* types of American Express cards, including cards that carried extremely high fees. The higher fees hurt Mr. Carlson's business, and believing this practice violated antitrust laws, he filed a class action lawsuit against American Express on behalf of other small businesses like his own.

The Court dismissed the class action, upholding the forced arbitration clause and class action waiver in American Express's standard merchant contract. It found such clauses valid even where they prevented an injured party from vindicating important rights guaranteed to them by other federal laws. Mr. Carlson was then left with a terrible choice: pursuing a complex and costly-to-prove antitrust case in a private arbitration system alone, or giving up and continuing to accept high-fee cards.<sup>25</sup> He decided to give up.<sup>26</sup>

Even before these court decisions, Congress was concerned with the spread of forced arbitration clauses and class action waivers. When it enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010,<sup>27</sup> it instructed the Consumer Financial Protection Bureau (CFPB) to study the forced arbitration clauses being used in consumer financial products or services.<sup>28</sup> In March 2015, the CFPB produced an extraordinary 700-page study finding that class actions deliver cash relief to vastly more consumers – especially those with small dollar claims – than individual arbitration.<sup>29</sup>

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*Small Businesses?: Hearing Before the S. Comm. on the Judiciary*, 113<sup>th</sup> Cong. (2013) (testimony of Alan Carlson), <https://www.judiciary.senate.gov/imo/media/doc/12-17-13CarlsonTestimony.pdf>.

<sup>25</sup> Respondent's Brief, *American Express Co. v. Italian Rest.*, 2013 WL 267025 at 7 (2013).

<sup>26</sup> Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

<sup>27</sup> 15 U.S.C. § 78o.

<sup>28</sup> 12 U.S.C. § 5518.

<sup>29</sup> CONSUMER FINANCIAL PROT. BUREAU, *Arbitration Study: Report to Congress, pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, Mar. 10, 2015,



It was no surprise that the CFPB study was attacked by banks and lenders who asserted the study proves that consumers on average receive greater relief in arbitration (\$5,389) than class action lawsuits (\$32).<sup>30</sup> The Economic Policy Institute (EPI) found the claim to be “enormously misleading” because consumers only win relief in nine percent of arbitration disputes.<sup>31</sup> What is far more typical is that the company fights consumers in arbitration with claims and counterclaims.<sup>32</sup> In those situations, arbitrators grant the companies relief ninety-three percent of the time, and then order the consumer to pay the bank. So considering “both sides of this equation,” in arbitration, the average consumer is actually paying \$7,725 to the bank.<sup>33</sup>

EPI also examined whether arbitration was cheaper and faster than class actions. They found that while consumers generally pay nothing to join a class action, they must pay, on average, \$161 to file an arbitration claim. Moreover, “[c]onsumers typically wait 150 days for a decision in arbitration, compared with a typical wait of around 215 days for a conclusion in most class actions.” That’s it – just a few months faster in exchange for owing the bank \$7,725. As to the banking industry’s claim of increased consumer costs as a result of class action exposure, EPI explains “[t]his claim is *contradicted by real-life experience*. Consumers saw *no increase* in price after Bank of America, JPMorgan Chase, Capital One, and HSBC dropped their arbitration clauses as a

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[http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

<sup>30</sup> Letter from Am. Bankers Ass’n, et al., to Richard Cordray, Chairman, Bureau of Consumer Financial Prot. (July 13, 2015), <https://www.aba.com/Advocacy/commentletters/Documents/cl-jointArbitration2015.pdf>; see also Evan Weinberger, *CFPB Arbitration Report Takes Center Stage At House Hearing*, May 18, 2016, <https://www.law360.com/articles/797403/cfpb-arbitration-report-takes-center-stage-at-house-hearing>.

<sup>31</sup> Heidi Shierholz, *Correcting the record, Consumers fare better under class actions than arbitration*, Economic Policy Institute (Aug. 1, 2017), <http://www.epi.org/publication/correcting-the-record-consumers-fare-better-under-class-actions-than-arbitration/>.

<sup>32</sup> According to the National Center for State Courts (NCSC), “the majority of civil cases are consumer-debt-collection, landlord/tenant, small-claims, and small-contract cases.” In other words, most civil cases involve the “little guy” being sued, not suing. National Center For State Courts, *Trends In State Courts* (2016), <http://www.ncsc.org/~media/Microsites/Files/Trends%202016/Meeting-the-Challenges.ashx>.

<sup>33</sup> Shierholz, *supra* note 31.

result of court-approved settlements, and mortgage rates *did not increase* after Congress banned forced arbitration in the mortgage market.<sup>34</sup>

In May 2016, the CFPB proposed a limited rule,<sup>35</sup> which would allow defrauded individuals to file class actions against banks, lenders, credit card companies and other financial institutions that violate the law. Initially, the rule had clear bipartisan support, but its finalization was delayed until 2017 after the election of a new Congress and Administration who were hostile to the rule.<sup>36</sup> As a result, in 2017, congressional resolutions were introduced in both Houses to permanently repeal the rule under the Congressional Review Act (CRA). Resolutions to repeal rules under the CRA require only majority votes, and cannot be filibustered in the Senate.<sup>37</sup> In October 2017, the House voted to block the rule.<sup>38</sup> The Senate soon followed in a vote so close that Vice President Pence's presence was needed to break a tie. President Trump signed the rule's repeal into law.<sup>39</sup>

## HISTORY OF LEGISLATIVE ATTACKS ON RULE 23 AND BEYOND

Soon after Rule 23 was amended in 1966, it became the subject of legislative and judicial attacks by Republicans and corporate-friendly lawmakers and judges. In their recent book *Rights and Retrenchment, The Counterrevolution against*

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<sup>34</sup> *Id.*

<sup>35</sup> Consumer Financial Prot. Bureau, 82 FR 33210, codified in 12 C.F.R. § 1040 (2017).

<sup>36</sup> See Sylvan Lane, *GOP polling firm: Bipartisan support for consumer bureau arbitration rule*, THE HILL (Oct. 5, 2017), <https://thehill.com/policy/finance/354143-gop-polling-firm-finds-bipartisan-support-for-consumer-bureau-arbitration-rule>.

<sup>37</sup> *Id.*

<sup>38</sup> See Sylvan Lane, *GOP lawmakers introduce measures to repeal consumer bureau arbitration rule*, THE HILL (July 20, 2017), <https://thehill.com/policy/finance/342900-gop-lawmakers-introduce-measures-to-repeal-consumer-bureau-arbitration-rule>; see also Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html>.

<sup>39</sup> Julia Horowitz, *Trump kills rule that made it easier for people to sue bank*, CNN MONEY (Nov. 1, 2017, 6:20 PM), <http://money.cnn.com/2017/11/01/news/trump-repeals-cfpb-arbitration-rule/index.html>.

*Federal Litigation*, Burbank and Farhang write:

[I]n the wake of an outpouring of rights-creating legislation for the Democratic Congresses in the 1960s and 1970s, much of which contained provisions designed to stimulate private enforcement, the conservative legal movement within the Republican Party – and more specifically, within the first Reagan administration – devised a response. Recognizing the political infeasibility of retrenching substantive rights, the movement’s strategy was to undermine the infrastructure for enforcing them.<sup>40</sup>

This included, among other things, attacks on class actions. Large corporations opposed “the very concept of using class actions to deter illegal conduct or prevent unjust enrichment.”<sup>41</sup> Bills were introduced through the 1980s, including one that would make class actions unavailable for claims valued at less than \$10.<sup>42</sup> The conservative legal movement that initiated these bills had a friend in then Chief Justice Warren Burger. As Burbank and Farhang note, Burger “made no secret of his antipathy toward the ‘litigation explosion.’”<sup>43</sup> In the 1970s, he “frequently spoke out against what he and many others perceived as excessive litigation.”<sup>44</sup> His views “had normative weight, which seemed to increase in the 1980s, after the counterrevolution [against plaintiffs] became a partisan [Republican] issue in the elected branches.”<sup>45</sup>

Burger’s rhetoric about the “litigation explosions” dovetailed perfectly with the “tort reform” movement at the state level, which began in the mid-1970s and escalated in the mid-1980.<sup>46</sup> The tort reform movement, however, was largely driven by something completely different: rising liability insurance rates, which evolved into a national “liability insurance crisis.” In the mid-1970s and again in the mid-1980s, insurance companies hit businesses and professional groups, such as doctors, with dramatic

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<sup>40</sup> BURBANK, *supra* note 2, at 3.

<sup>41</sup> *Id.* at 42.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 99.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> The movement to impair the ability of injured victims to obtain compensation from the companies responsible for causing their injuries, is commonly known as “tort reform.”

increases in liability insurance premiums. Insurance companies and their lobbyists claimed rate increases were due to a “litigation explosion.” These assertions were false and lacked supporting data.<sup>47</sup> The insurance industry had created this crisis through its own mismanaged accounting and underwriting practices. Nonetheless, insurance companies and other major special interest groups argued to state lawmakers that the only way to bring rates under control was to limit the legal rights of injured victims.<sup>48</sup>

Many states legislatures succumbed to industry pressure. Most notable was California, which enacted the Medical Injury Compensation Reform Act (MICRA) in 1975. Among other things, MICRA placed a \$250,000 cap on non-economic damages for malpractice victims.<sup>49</sup> In the early to mid-1980s, the “liability insurance crisis” was broader and hit virtually every commercial customer of liability insurance. This crisis was also manufactured by the insurance industry, rather than being driven by litigation. Insurance industry lobbying, however, led a large number of additional states to enact limits on individuals’ legal rights during this period.<sup>50</sup>

As the insurance industry and special interest groups continued to apply pressure on the states, a parallel “tort reform” effort began at the federal level. In the early 1980s, anti-consumer federal product liability legislation was introduced in Congress.<sup>51</sup> This legislation became a major civil justice focus for the business community for several years. It was re-introduced in every Congress throughout the 1980s.<sup>52</sup> In 1991, the Bush administration tried to push the legislation forward by appointing a White House Council on Competitiveness led by Vice President Dan Quayle. This body embraced tort reform as a priority issue and assigned

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<sup>47</sup> See generally J. Robert Hunter and Joanne Doroshow, *Premium Deceit 2016: The Failure of “Tort Reform” To Cut Insurance Prices*, CTR. FOR JUSTICE & DEMOCRACY (Nov. 2016), <http://centerjd.org/system/files/MasterPremiumDeceit2016F4.pdf>.

<sup>48</sup> *Id.*

<sup>49</sup> See Cal. CIV. Code §3333.2 (West 2018).

<sup>50</sup> Hunter & Dorshow, *supra* note 47.

<sup>51</sup> See S. 2631, 97th Cong. (1981).

<sup>52</sup> In 1983, Senator Bob Kasten (R-WI) reintroduced the bill as S. 44. In 1985, he reintroduced the bill again as S. 100. In June 1986, Senator John Danforth (R-MO) introduced a modified version of the bill, S. 2760. This bill was reported out of the Senate Commerce Committee, but it died later that year. In 1987, Representative Bill Richardson (D-NM) introduced H.R. 1115, which was reported out of committee but died in 1988. In 1989, Kasten introduced similar bill, S. 1400, and in 1991, he introduced S. 640.

Solicitor General Ken Starr the task of developing a plan to overhaul the country's civil liability laws.<sup>53</sup> Starr had represented tobacco companies and General Motors, among other clients, in products liability litigation.<sup>54</sup> In August 1991, the "Starr report," which presented 50 tort reform recommendations, was released. The White House Council on Competitiveness alleged that the tort reform recommendations were necessary to "maintain America's competitiveness."<sup>55</sup> Then, in 1994, the issue exploded onto the national scene with the Republican takeover of Congress and the inclusion of tort reform in House Speaker Newt Gingrich's Contract with America.<sup>56</sup>

While broad federal tort reform efforts ultimately failed, smaller bills were enacted. In 1994, President Clinton signed into law the General Aviation Revitalization Act, establishing an eighteen-year statute of repose for general aviation aircraft.<sup>57</sup> In 1996, the Republican Congress actually passed the product liability bill; although President Clinton vetoed the bill, Congress responded by passing another bill that was far more limited.<sup>58</sup> President Clinton did sign the second bill which immunized from liability most suppliers of "raw materials" and "components" used in the manufacture of medical implants.<sup>59</sup>

During this period, Congress also began focusing on investor protection class actions. In the 1990s, Congress passed the

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<sup>53</sup> See Agenda for Civil Justice Reform in the United States, reprinted at 60 U. CIN. L. REV. 979, 1005 (1992).

<sup>54</sup> See, e.g., Keith Hammond & Suzie Larsen, *Starr Helped GM Cover Up Possible Perjury*, MOTHER JONES (Feb. 27, 1998, 8:00 AM), <https://www.motherjones.com/politics/1998/02/starr-helped-gm-cover-possible-perjury/>; see also Robert Scheer, *Setting Fire to Tobacco Legislation* L.A. TIMES (July 28, 1998), <http://articles.latimes.com/1998/jul/28/local/me-7795>.

<sup>55</sup> Agenda for Civil Justice Reform in the United States, *supra* note 53 (Among the major recommendations were: caps on punitive damages and instituting a "loser pays" rule, as well as various rules to discourage litigation).

<sup>56</sup> See Neil A. Lewis, *HOUSE G.O.P. QUILTS TORT REFORM PLAN*, N.Y. TIMES (Mar. 7, 1996), <https://www.nytimes.com/1996/03/07/us/house-gop-quits-tort-reform-plan.html>.

<sup>57</sup> General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (codified as amended at 49 U.S.C. §40101).

<sup>58</sup> John F. Harris, *Clinton Vetoes Product Liability Measure*, WASH. POST (May 3, 1996), [https://www.washingtonpost.com/archive/politics/1996/05/03/clinton-vetoes-product-liability-measure/cf8e0f50-cc01-41b7-9e88-1a2c6d6dd01c/?utm\\_term=.08a952fc9091](https://www.washingtonpost.com/archive/politics/1996/05/03/clinton-vetoes-product-liability-measure/cf8e0f50-cc01-41b7-9e88-1a2c6d6dd01c/?utm_term=.08a952fc9091).

<sup>59</sup> William J. Clinton, *Statement on Signing the Biomaterials Access Assurance Act of 1998*, THE AMERICAN PRESIDENCY PROJECT (Aug. 13, 1998), <http://www.presidency.ucsb.edu/ws/index.php?pid=54777>.

Private Securities Litigation Reform Act (PSLRA)<sup>60</sup> and the Securities Litigation Uniform Standards Act of 1998 (SLUSA).<sup>61</sup> The PSLRA and SLUSRA hinder the process for bringing securities fraud class actions and force class actions based on state law fraud into federal court. As with the products liability bill, President Clinton vetoed the PSLRA but this time, his veto was overridden and the bill became law.<sup>62</sup> Clinton then signed the SLUSA.

The last major congressional change to class action law came in 2005 when Congress passed the so-called “Class Action Fairness Act” (CAFA) after years of lobbying pressure from the U.S. Chamber of Commerce.<sup>63</sup> This law provides corporations with the authority to decide, in most cases, which court will hear a class action case that accuses them of wrongdoing. Specifically, CAFA makes it easier for defendants in state class actions to remove cases to the much smaller and already clogged federal court system,<sup>64</sup> a system that is generally more favorable to defendants.<sup>65</sup>

CAFA was opposed by virtually every consumer, environmental, and civil rights group, as well as state Attorneys General.<sup>66</sup> Civil rights groups argued that the law would cause federal courts to be overburdened with state court cases, causing

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<sup>60</sup> Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (1995).

<sup>61</sup> Securities Litigation Uniform Standards Act of 1997, Pub. L. No. 105-353, 112 Stat. 3227 (1998).

<sup>62</sup> U.S. SENATE, WILLIAM J. CLINTON, <https://www.senate.gov/reference/Legislation/Vetoes/Presidents/ClintonW.pdf>.

<sup>63</sup> See 28 U.S.C. § 1332(d) (2018) (According to CAFA, defendants in class actions that involve more than \$5 million when any class member resides in a different state than any defendant (unless two thirds of the class and the primary defendants are in the state where the case was originally filed) can remove them to federal court).

<sup>64</sup> The federal system has often struggled with budget cuts. See e.g. Todd Ruger, *Sequestration Outlook Bleak for Federal Courts*, NAT'L L. J., (2013), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202591488315>.

<sup>65</sup> Several years before CAFA was enacted, the late Cornell University Law Professor Theodore Eisenberg demonstrated “that removals of cases from state to federal courts greatly improved defendants’ chances [and] concluded that the federal forums were ‘more favorable [to defendants] in terms of biases and inconveniences.” Terry Carter, *A Step Up In Class*, ABA JOURNAL (May 1, 2008), [http://www.abajournal.com/magazine/article/a\\_step\\_up\\_in\\_class/](http://www.abajournal.com/magazine/article/a_step_up_in_class/).

<sup>66</sup> Amanda Griscom Little, *Erin Brockovich, Drop Dead*, SALON (Feb. 12, 2005, 9:00 AM), [http://www.salon.com/2005/02/12/class\\_action/](http://www.salon.com/2005/02/12/class_action/).

civil rights cases to be unfairly pushed out of federal court.<sup>67</sup> Evidence suggests their fears may have been valid; federal court judges are often unable to deal with the increased caseloads, and are bouncing meritorious cases out of court.<sup>68</sup> Given that these federal judges are “hamstrung by the increased attention to state law that these cases require,”<sup>69</sup> with no guidance on how to proceed with multiple state laws in play, it may be no surprise that some judges are reluctant to grant class certification. As one practitioner testified before the House Judiciary Committee in 2012:

Worse yet, these certification refusals deny American citizens their Constitutional guarantee to a day in court and the opportunity to have their claims adjudicated. If consumers must band together in a class action to seek redress for their injuries, because any single individual’s claim is too small to justify the costs of litigation, and if such class actions can only proceed in federal courts that will not certify their claims, the courthouse doors effectively close, leaving consumers with no remedy.<sup>70</sup>

While some detrimental laws have gone into effect, Congress has been reluctant to enact broad legislation that strips away the legal rights of Americans despite the desires of the U.S. Chamber of Congress. One reason may be what Burbank and Farhang describe as “negativity bias” which, they say:

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<sup>67</sup> Thomas Henderson, Chief Counsel and Senior Deputy for the Lawyers’ Committee for Civil Rights, testified against CAFA noting it “would tear cases from state judicial systems, equipped with thousands and thousands of judges, who administer the laws involved on a daily basis, and thrust them on a relatively tiny federal judiciary that is not equipped to handle them and is ill-equipped even to handle the volume and complexity of cases now on its docket. In the end, access to the federal courts and to the class action device to secure justice in matters where truly federal issues are at stake will be casualties of this legislation.” *Class Action Litigation: Hearing Before the Comm. on the Judiciary U.S. S.*, 107th Cong. 120 (2002) (testimony of Thomas Henderson, Chief Counsel and Senior Deputy, Lawyers’ Committee for Civil Rights).

<sup>68</sup> *Class Actions Seven Years After the Class Action Fairness Act: Hearing Before the Subcomm. on the Const. of the Comm. on the Judiciary U.S. H.R.*, 112th Cong. 6 (2012) (testimony of Thomas M. Sobol, Partner, Hagens Berman Sobol Shapiro LLP).

<sup>69</sup> *Id.* at 7.

<sup>70</sup> *Id.* at 6.

“leads people to be substantially more likely to mobilize to avoid the imposition of losses of existing rights and interests as compared to securing new ones. It also leads voters to be more likely to punish politicians who have impaired their interests than to reward politicians who have benefited them, and politicians know this.”<sup>71</sup>

For “negativity bias” to work, however, the public must first note and be aware of Congress’ actions. Business lobbyists, on the other hand, appear to hope the public remains oblivious.

### AMENDING RULE 23 WITH H.R. 985

In enacting the Rules Enabling Act, Congress directed the U.S. Supreme Court to prescribe general rules of practice and procedure for the federal courts.<sup>72</sup> Over the last few years, the Advisory Committee on the Federal Rules of Civil Procedure undertook a long, thorough, and deliberative process by which it considered and implemented bipartisan changes to Rule 23. These changes will go into effect December 2018.<sup>73</sup> By choosing to amend Rule 23 with federal legislation—let alone take a sledgehammer to the rule—Congress decided to circumvent the process it established for the promulgation of federal rules.

The “Fairness in Class Action Litigation” bill was first introduced in 2015. It was known as H.R. 1927. At that time, the bill contained one main provision: a change to Rule 23’s commonality prerequisite with a new requirement that every class member have “an injury of the same type and scope.”<sup>74</sup> Moreover, proof of the same “scope” of injury must be established before the case could even proceed as a class. In a letter to the House leaders, consumer, civil rights, labor, environmental, and many other

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<sup>71</sup> BURBANK, *supra* note 2, at 51.

<sup>72</sup> Rules Enabling Act, 28 U.S.C. § 2072 (1934).

<sup>73</sup> See e.g. Ryan DiClemente, *Are Significant Changes To Class Actions On The Horizon? (Part Two)*, INSIDE ARM, (June 29, 2017), <https://www.insidearm.com/news/00043061-are-significant-changes-class-actions-hor/>.

<sup>74</sup> The word “scope” replaced the word “extent” found in the bill’s earlier version, but this was a distinction without a difference. See e.g., Letter from Groups to Speaker Paul Ryan and Minority Leader Nancy Pelosi, U.S. House of Representatives (Jan. 7, 2016), <https://centerjd.org/system/files/H.R.1927classactionletterF2.pdf>



public interest organization described how this provision would be fatal to most class actions. Classes inherently include a broad range of affected individuals that virtually never suffer the same “scope” of injury from the same wrongdoing.<sup>75</sup> As the groups wrote, cases, in addition to most civil rights and employment discrimination cases, that could not meet such a standard include:

[R]ecent successful class actions brought over bank and credit card abuses, where the same corporate policy resulted in customers being cheated out of various amounts of money; home and mortgage loan abuses; antitrust violations, where class actions have recovered millions for small businesses in varying amounts from illegal price-fixing cartels; illegal for-profit colleges practices; refusals by companies to properly pay workers; many types of product defects; and denial of insurance benefits. Business owners financially injured by the BP oil spill all had different losses but all were financially injured by the same corporate misconduct. Many more examples could be cited.

It is for these reasons that federal courts have rejected such a “commonality in damages” requirement for class certification. As Judge Posner explained, a “commonality in damages” requirement:

[W]ould drive a stake through the heart of the class action device. . . [T]he fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual

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<sup>75</sup> *Id.*; see Letter from Elizabeth Chamblee Burch, Charles H. Kirbo Chair of Law, University of Georgia School of Law, to James J. Park, Chief Counsel, Democratic Staff, Subcommittee on the Constitution and Civil Justice, Committee on the Judiciary, House of Representatives (Feb. 13, 2017), <http://lawprofessors.typepad.com/files/burch-final-comments-on-fairness-in-class-action-litigation-act-1.pdf> (citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1049-50 (2016)) (notably, as recently as 2016, the U.S. Supreme Court has “said that parties should be able to enjoy the benefits of class actions even when damages vary.”).

suits.<sup>76</sup>

When H.R. 1927 was up for a vote on the House floor, it was combined with another bill that limited the rights of asbestos victims, becoming the “Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2015.” By a vote of 211– 188, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act passed the House on January 8, 2016 without bi-partisan support<sup>77</sup> and with 16 Republicans voting against it.

Undeterred by what might be considered a politically-weak vote, House leaders in the next Congress decided to re-introduce the Fairness in Class Action Litigation Act. But there were changes from the previous bill. The legislation had a new bill number, H.R. 985, as well as 10 pages of brand new provisions.<sup>78</sup> Among them was one that would prevent class certification if any class representative was “a present or former client of” class counsel. This bizarre clause would directly interfere with the right to contract, denying people the freedom to choose their own attorney while permitting corporate defendants to repeatedly use the same attorneys. The bill also creates impossible limits on plaintiffs’ attorneys fees, preventing plaintiff attorneys from being paid anything until all monetary recovery has been paid to class members, with no concern whatsoever that some settlements take years to distribute. By way of example, in the recent NFL Concussion class action brought by former NFL players suffering traumatic brain injury, the settlement process will take 65 years.<sup>79</sup> In other words, such a restriction would chill firms from even bringing even meritorious cases like this. It would also deprive

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<sup>76</sup> Letter from Groups to Speaker Paul Ryan and Minority Leader Nancy Pelosi, U.S. House of Representatives, (Jan. 7, 2016), <https://centerjd.org/system/files/H.R.1927classactionletterF2.pdf>.

<sup>77</sup> “Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency: Roll Vote No. 33” 211:16 (Jan. 8, 2016), <http://clerk.house.gov/evs/2016/roll033.xml>.

<sup>78</sup> See, e.g., Alison Frankel, *The most intriguing idea in House Republicans’ bill to gut class actions*, REUTERS, (Feb. 13, 2017), <https://www.reuters.com/article/us-otc-classaction/the-most-intriguing-idea-in-house-republicans-bill-to-gut-class-actions-idUSKBN15S2GR>.

<sup>79</sup> Letter from Elizabeth Chamblee Burch, Charles H. Kirbo Chair of Law, University of Georgia School of Law, to James J. Park, Chief Counsel, Democratic Staff, Subcommittee on the Constitution and Civil Justice, Committee on the Judiciary, House of Representatives (Feb. 13, 2017), <http://lawprofessors.typepad.com/files/burch-final-comments-on-fairness-in-class-action-litigation-act-1.pdf>

courts of any flexibility to make their own considered fee decisions.

It would amend Rule 23's "ascertainability" requirement in a way that "has been rejected [by] most circuits . . . as well as by the Advisory Committee on Civil Rules."<sup>80</sup> Specifically, the bill would prohibit class actions from proceeding where the exact membership of a class may be difficult to determine. This will result in the denial of small claim consumer classes, whose members are inherently difficult to identify. For example, thousands of consumers may have been fraudulently overcharged on the retail price of a product but stores would have no records of customers' names and purchasers would be unlikely to maintain proofs of purchase. As a result, corporations engaged in fraud or misconduct will be "released from liability regardless of how strong the evidence of wrongdoing might be."<sup>81</sup>

An additional section would abolish issue classes under Rule 23(b)(4). This provision "contradicts every current circuit court decision to date" as well as the Advisory Committee on Civil Rules<sup>82</sup> As Cardozo School of Law professor Myriam Gilles wrote in her letter to the House Judiciary committee,<sup>83</sup>

Issue classes are critically important vehicles in cases where it would be unfair to the defendant to allow damages to be determined on a class-wide basis. . . . Under Rule 23(c)(4) → the court may bifurcate proceedings. It can certify an issues class on liability, and leave damages to individual proceedings in which the defendant may examine each plaintiff. . . . The proposed legislation would *abolish* such issue classes.

Other sections would directly interfere with judges' ability to sensibly manage a case. For example, as Fordham Law Professor Howard Erichson described in his letter to the House Judiciary Committee, the bill<sup>84</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> Letter from Myriam Gilles, Vice Dean, Paul R. Verkuil Research Chair and Professor of Law, Cardozo School of Law to James J. Park, Chief Counsel, Democratic Staff, Subcommittee on the Constitution and Civil Justice, Committee on the Judiciary, U.S. House of Representatives, (Feb. 13, 2017), <http://lawprofessors.typepad.com/files/gilles-letter-to-james-park-on-hr-985-1.pdf>.

<sup>84</sup> Letter from Howard M. Erichson, Professor of Law, Fordham University

. . . would require a stay of discovery pending any of a wide variety of motions. Congress should let judges do their job. Judges are charged with exercising discretion to rule on stay motions, and the most efficient answer varies depending on context. It makes no sense to impose this as an across-the-board requirement. Worse, this provision would encourage defendants to file frivolous motions in order to get the benefit of the automatic discovery stay. This would increase the cost of litigation for other parties and for the courts.

Another section would burden Courts of Appeals by requiring them to allow appeals from any order granting or denying a class certification motion, even if such motions are frivolous. Courts of Appeals, however, already have discretion to hear such appeals when it is appropriate. As a result, there is no reason for this provision.

There are a number of other sections of this bill that deal with mass tort cases and multidistrict litigation, which are beyond the scope of this article. They are all severely problematic. They would knock many injured victims out of court, force cases into federal court, burden appellate courts, and impose unfair and arbitrary limits on attorneys' fees.

Although the House Judiciary Committee majority tried to ram the bill through committee in order to quash the chance of opposition building against the legislation, opponents responded in record time. Because of its reckless intrusion into the federal rules process, the bill garnered immediate opposition from the Judicial Conference's Committee on Rules of Practice and Procedure, and the Advisory Committee on the Federal Rules of Civil Procedure. Chaired by Supreme Court Justice Neil Gorsuch, the Advisory Committee on the Federal Rules of Civil Procedure responded to the House Judiciary Committee, "strongly urg[ing]" Congress not to proceed on this legislation.<sup>85</sup> The American Bar Association

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School of Law, to Hon. Paul Ryan, Speaker, et al., (Feb. 18, 2017), <http://lawprofessors.typepad.com/files/erichson-hr985-letter-3.pdf>.

<sup>85</sup> Letter from the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Honorable Bob Goodlatte, Chairman, Committee on the Judiciary, U.S. House of Representatives, (Feb. 14, 2017), [http://disabilityrights-law.org/sites/default/files/documents/Impact\\_Fund-HR985\\_Judicial-Conference-Letter.pdf](http://disabilityrights-law.org/sites/default/files/documents/Impact_Fund-HR985_Judicial-Conference-Letter.pdf).

attacked the bill on this basis, as well.<sup>86</sup> And as *Reuters'* Allison Frankel wrote a few days after the bill's introduction:

Democrats in the House Judiciary Committee have already begun to push back against the bill, contacting class and mass litigation scholars for their analysis of Goodlatte's suggestions. At least two leading class action law profs - Myriam Gilles of Cardozo [who called the bill "partisan, kill-all-class-actions bill,"] and Elizabeth Burch of the University of Georgia - have submitted comments.<sup>87</sup>

Despite their valuable analysis, these comments were not allowed into the record of the House Judiciary Committee proceeding. On February 15, 2017, less than a week after it was introduced, H.R. 985 was marked up and voted out the House Judiciary Committee on a party-line 19 to 2 vote and sent to the House floor.<sup>88</sup> As with the last Congress' H.R. 1927, this bill was combined with other legislation that limited the rights of asbestos victims, becoming the "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017." It passed the House on March 9, 2017 by a close 220 to 201 vote.<sup>89</sup> As with H.R. 1927, it passed with no bi-partisan support and with 14 Republicans voting against it.<sup>90</sup> It now sits in the Senate Judiciary Committee, awaiting action that might never come.<sup>91</sup>

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<sup>86</sup> Letter from Thomas M. Susman, Director, Governmental Affairs Office, American Bar Association, to the Honorable Bob Goodlatte, Chairman, Committee on the Judiciary, U.S. House of Representatives, (Feb. 14, 2017), [https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2017Feb14\\_ClassActions\\_L.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/uncategorized/GAO/2017Feb14_ClassActions_L.authcheckdam.pdf).

<sup>87</sup> Alison Frankel, *The most intriguing idea in House Republicans' bill to gut class actions*, REUTERS, (Feb. 13, 2017), <https://www.reuters.com/article/us-otc-classaction/the-most-intriguing-idea-in-house-republicans-bill-to-gut-class-actions-idUSKBN15S2GR>.

<sup>88</sup> U.S. House Committee on the Judiciary, Authorization and Oversight Plan; H.R. 985; H.R. 906, (Feb. 15, 2017), <https://judiciary.house.gov/markup/authorization-oversight-plan-h-r-985-h-r-906/>.

<sup>89</sup> "Fairness in Class Action Litigation Act: Roll Vote No. 148" 220:201 (Mar 9, 2017), <http://clerk.house.gov/evs/2017/roll148.xml>.

<sup>90</sup> "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency: Roll Vote No. 33" 211:16 (Jan. 8, 2016), <http://clerk.house.gov/evs/2016/roll033.xml>.

<sup>91</sup> See Bruce Kaufman, *Business-Friendly Litigation Overhaul Stalls in Senate*, BLOOMBERG BNA (July 27, 2017), <https://www.bna.com/businessfriendly-litigation-overhaul-n73014462386/>.

## WHY H.R. 985? POLITICS AND MONEY

While it might have felt that a monstrous bill like H.R. 985 came out of nowhere, it represented decades of corporate lobbyists' efforts. Since the 1970s, class actions have had a target on their back as major corporate lobbies and conservative legal organizations have sought to eliminate them. During this time, Congress and the Supreme Court have significantly reduced plaintiffs' access to them. Class actions, a powerful tool for justice for many victims of wrongdoing, remain in jeopardy.

In 2017, Republican control of both Houses of Congress and the White House had initially filled class action opponents with hopeful prospects that Congress might finally destroy class actions. In the words of top tort reform lobbyist Victor Schwartz, "[t]he 'clouds are finally parting."<sup>92</sup> Schwartz made these remarks to *Bloomberg/BNA* reporter, Bruce Kaufman, who wrote several articles quoting key players in the legislative fight over a series of new anti-civil justice bills introduced in early 2017, including H.R. 985.<sup>93</sup> In February 2017, after the bills had been reported out of the House Judiciary Committee but before the March 2017 floor votes, Kaufman wrote:

The "fast-track" approach is important, said Victor E. Schwartz . . . "It gets things done early before they get too politicized," he told Bloomberg BNA.

All House Republicans have promised to support the litigation overhaul measures in [Speaker Paul Ryan's] "A Better Way," Schwartz said. . . .

[Lisa A. Rickard, president of the U.S. Chamber of Commerce's Institute for Legal Reform] said, early action by the House Judiciary Committee "signals

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<sup>92</sup> Bruce Kaufman, *Trump to Weigh Litigation Changes Long Coveted by Business*, BLOOMBERG BNA (Feb. 27, 2017), <https://www.bna.com/eyes-trump-probiz-n57982084448/>.

<sup>93</sup> See Bruce Kaufman, *Trump Seen as Supportive of Business-Backed Litigation Bills*, BLOOMBERG BNA (Mar. 2, 2017), <https://www.bna.com/trump-seen-supportive-n57982084705/>; see also Bruce Kaufman, *Push to Enact Civil Justice Bills Follows Industry Playbook*, BLOOMBERG BNA (Feb. 28, 2017), <https://www.bna.com/push-enact-civil-n57982084551/>; see also Kaufman, *supra* note 91.

that Congress recognizes the need for urgent action on legal reform” and that the issue will receive “priority consideration this year.”<sup>94</sup>

But they were wrong. Following close House votes on all of the Chamber’s anti-civil justice bills, including H.R. 985, Kaufman promptly responded by stating “[t]he strategy was to fast-track legislation through the House, to give the bills more time to advance in the more deliberative Senate. . . Today, those plans appear to be in disarray.”<sup>95</sup>

Unsurprisingly, the bill had strong opposition from consumer, civil rights and other public interest groups.<sup>96</sup> But the strength of conservative opposition to H.R. 985 was an unexpected factor that may have had some impact on the vote. In a move that surprised many, the conservative House Liberty Caucus wrote a letter to the House supporting class actions and opposing H.R. 985, noting:

Class action lawsuits are a market - based solution

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<sup>94</sup> Bruce Kaufman, *Push to Enact Civil Justice Bills Follows Industry Playbook*, BLOOMBERG BNA (Feb. 28, 2017), <https://www.bna.com/push-enact-civil-n57982084551/>.

<sup>95</sup> Kaufman, *supra* note 91.

<sup>96</sup> *Group Letter to U.S. House of Representatives Opposing Class Action Bill*, Center for Justice and Democracy (Mar. 8, 2017), <https://centerjd.org/content/group-letter-us-house-representatives-opposing-class-action-bill> (In their letter to the House Judiciary Committee, over 50 organizations opposing the bill, began by telling committee members, “[l]ike last year’s legislation (H.R. 1927), the bill begins with the requirement that every person in a class have ‘an injury of the same type and scope’ before the case can proceed. This alone would sound the death knell for most class actions. . . [b]ut . . . that’s just the beginning of what’s wrong with this appalling piece of legislation.”); *see also* Letter from Civil Rights Groups to Speaker Paul Ryan and Minority Leader Nancy Pelosi, U.S. House of Representatives (Mar. 7, 2018), <https://static1.squarespace.com/static/559b2478e4b05d22b1e75b2d/t/58bf37c73e00be8bb74c3dd8/1488926663702/HR985+Ryan+Pelosi.pdf> (in their letter to the House, 123 civil rights organizations and advocates wrote, “[T]he bill’s limitation on ‘issue classes’ will impede the enforcement of civil rights laws. Under current practice, the district court will decide in some cases that the best approach is to resolve the illegality of a discriminatory practice in an initial proceeding, and then allow class members to pursue individual remedies on their own. In such cases, class certification for the core question of liability (often a complex proceeding) will be tried and resolved just once for the benefit of the many affected individuals. These issue classes can promote both efficiency and fairness. [H.R. 985], however, would deprive courts of this ability that they currently have to manage class actions to ensure justice.”).

for addressing widespread breaches of contract, violations of property rights, and infringements of other legal rights. They are a preferable alternative to government regulation because they impose damages only on bad actors rather than imposing compliance costs on entire industries. They also help the judiciary by consolidating a multitude of similar cases, which decreases burdens on the already clogged court system.<sup>97</sup>

As consumer advocate and bill opponent, Pamela Gilbert, told Kaufman, “[t]he growing unease that many Republicans feel about blocking access to the courts is very interesting and it isn’t something we have seen for many years.”<sup>98</sup> The Chamber is hardly giving up, however, telling Kaufman, “[w]e’re realistic. We believe there’s a path forward for legal reform in this Congress, and are doing everything we can to advance our priorities.”<sup>99</sup> Indeed, that’s where the money comes in.

## THE MONEY

In 1998, the U.S. Chamber of Commerce created its Institute for Legal Reform (ILR) to pursue the Chamber’s national anti-civil justice, tort reform agenda. Even when considered separately from the massive lobbying muscle of the U.S. Chamber of Commerce, ILR now constitutes one of the largest federal lobbying forces in the nation. In 2017, ILR spent \$23 million lobbying; the Chamber spent \$82 million.<sup>100</sup> Over the last decade, ILR, which opposes the American Association for Justice (AAJ)’s position on generally the same portfolio of bills including H.R. 985, spent over \$260 million lobbying Congress.<sup>101</sup> That amount, \$260 million, is more than five times the amount spent by AAJ during

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<sup>97</sup> House Liberty Caucus (@libertycaucus), TWITTER (Mar. 9, 2017, 2:32 PM), <https://twitter.com/libertycaucus/status/839967179495837696>.

<sup>98</sup> Kaufman, *supra* note 91, at 14.

<sup>99</sup> *Id.*

<sup>100</sup> See *US Chamber Institute for Legal Reform*, OPENSECRETS: CENTER FOR RESPONSIVE POLITICS (Apr. 24, 2018), <https://www.opensecrets.org/lobby/firmsum.php?id=D000022405&year=2017>.

<sup>101</sup> See *Top Spenders*, OPENSECRETS: CENTER FOR RESPONSIVE POLITICS (2018), <https://www.opensecrets.org/lobby/top.php?showYear=2017&indexType=s>.



the same time period.<sup>102</sup>

With respect to H.R. 985, the U.S. Chamber of Commerce's lobbying reports greatly outnumber those of entities lobbying against it.<sup>103</sup> In 2017, it filed 32 lobbying reports, which is twice the number of those filed by its closest competitor, AAJ.<sup>104</sup> Further, ILR's massive expenditures on H.R. 985 were supplemented by lobbying money from industries that would directly benefit from class action limits, including insurance, chemical, tobacco, financial, consumer product, drug, and telecommunications.<sup>105</sup> Yet, what did it buy them?

H.R. 985 barely made it out of the House of Representatives. Never had opposition to federal tort reform legislation been so sharp from House conservatives. The legislation passed the House with no bi-partisan support.<sup>106</sup> As of publication, there is no sign of any Senate action.

## CONCLUSION

House Republicans who voted "yes" on H.R. 985 in March 2017, did so with the knowledge that voters did not send them to Washington DC to pass laws blocking constituents' ability to access the courts or file class actions. Yet many on Capitol Hill are beholden to major industry groups, like the U.S. Chamber of Commerce, which want Congress to do just that.

At the beginning of the 115<sup>th</sup> Congress in 2017, with Republicans in control of the executive and legislative branches of government, it seemed like the U.S. Chamber of Commerce might get its wish – federal legislation to decimate class actions in the United States. At least so far, they have failed; perhaps they did not factor in conservative opposition to their bill, or perhaps they know this is not a politically popular bill.

However, there is no reason to believe industry groups have given up. Corporate lobbyists have already poured many millions

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<sup>102</sup> *Annual Lobbying for U.S. Chamber of Commerce*, OPENSECRETS: CENTER FOR RESPONSIVE POLITICS (Apr. 24, 2018), <https://www.opensecrets.org/lobby/clientsum.php?id=D000019798&year=2017>

<sup>103</sup> *Clients lobbying on H.R. 985: Furthering Asbestos Claim Transparency (FACT) Act of 2017*, OPENSECRETS: CENTER FOR RESPONSIVE POLITICS (2018), <https://www.opensecrets.org/lobby/billsum.php?id=hr985-115>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> "Fairness in Class Action Litigation Act: Roll Vote No. 148" 220:201 (Mar 9, 2017), <http://clerk.house.gov/evs/2017/roll148.xml>.

of dollars into lobbying efforts to eviserate class actions. With huge sums of lobbying money still at their disposal, there will be fresh opportunities to buy influence once a new Congress begins in 2019.

Industry lobbyists want results. Based on the sheer strength of their lobbying muscle, they may eventually get their wish. The only way to stop them is for the public to push back, and to let public officials know that their class action rights must be protected. The real question is whether anyone is paying attention.