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ABA Urges You to Oppose Passage of H.R. 985, the Fairness in Class Action Litigation Act of 2017

Dear Representative:

On behalf of the American Bar Association, which is the largest voluntary membership organization of legal professionals in the United States, consisting of more than 400,000 members from all 50 states, the District of Columbia, and other jurisdictions, I write in opposition to approving comprehensive class action reform, especially without holding a single hearing to examine all the complicated issues involved with so many rule changes. I understand you intend to bring up H.R. 985, the Fairness in Class Action Litigation Act of 2017, as early as this week. The ABA has long recognized that we must continue to improve our judicial system; however, in the last Congress we opposed H.R. 1927, the Fairness in Class Action Litigation act of 2016, because it would unnecessarily circumvent the Rules Enabling Act, make it more difficult for large numbers of injured parties to efficiently seek redress in court, and place added burdens on an already overloaded court system. H.R. 985 is much more comprehensive than H.R. 1927, so we would respectfully urge you to request the Judiciary Committee to hold at least one hearing on this legislation to examine these complex issues before proceeding to floor consideration.

This legislation would circumvent the time-proven process for amending the Federal Rules of Civil Procedure established by Congress in the Rules Enabling Act. Rule 23 governs determinations whether class certification is appropriate. This rule was adopted in 1966 and has been amended several times utilizing the procedure established by Congress. The Judicial Conference, the policymaking body for the courts, is currently considering changes to Rule 23, including settlements, attorneys' fees and notice; we recommend allowing this process to continue. In addition, the Supreme Court recently ruled on a case where there were questions surrounding class certification; the Court held in *Tyson Foods v. Bouaphakeo* that while a class can be certified when it contains some members who have not been injured, allocation methods can be challenged. The Court stated: "the ability to use a representative sample to establish classwide liability will depend on the purpose for which the sample is being introduced and on the underlying cause of action."

We urge you to allow these processes for examining and reshaping procedural and evidentiary rules to evolve as provided in the Rules Enabling Act, which reflects a healthy respect for the Separation of Powers doctrine and the role of the federal courts in determining their own rules. Courts have the inherent authority to control the proceedings in their courtrooms, including the power to regulate attorneys. Federal statutory changes in these areas would have substantial adverse effects on the fairness, efficiency, and timeliness of relief under class action processes, ultimately usurping the traditional regulatory authority of the courts.

Currently, to proceed with a class action case, plaintiffs must meet rigorous threshold standards. A study by the Federal Judicial Center found that only 25 percent of diversity actions filed as class

actions resulted in class certification motions, nine percent settled, and none went to trial. These data show that current screening practices are working. However, if the proponents of this legislation are concerned about frivolous class action cases and believe that screening can be even more effective through rule changes, those changes should be proposed and considered utilizing the Rules Enabling Act process.

In addition to circumventing the traditional judicial rulemaking process, the legislation would severely limit the ability of victims who have suffered a legitimate harm to seek justice collectively in a class action lawsuit. The legislation mandates that no federal court shall certify any proposed class “seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury” as the named class representative(s). This requirement places a nearly insurmountable burden for people who have suffered personal injury or economic loss at the hands of large institutions with vast resources, effectively barring them from bringing class actions. For example, in a class action against the Veterans Administration, several veterans sued for a variety of grievances centered on delayed claims. The requirement in this legislation that plaintiffs suffer the same type of injuries might have barred these litigants from forming a class because each plaintiff suffered harms that were not the same.

Class actions have been an efficient means of resolving disputes. Many of the legitimate complaints about lawsuit abuses through class-action litigation have already been addressed through the evolution of class-action standards by the courts themselves; others are currently being considered by the Judicial Conference. Making it harder for victims to utilize class actions could add to the burdens on our court system by forcing aggrieved parties to file suit in smaller groups, or individually.

We appreciate the opportunity to provide our input and urge you to keep these concerns in mind as you continue to debate class action reform legislation. If the ABA can provide you or your staff with any additional information regarding the ABA’s views, or if we can be of further assistance, please contact me or ABA Governmental Affairs Legislative Counsel, David Eppstein (202-662-1766 or david.eppstein@americanbar.org).

Sincerely,

A handwritten signature in black ink that reads "Thomas M. Susman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Thomas M. Susman