

## Killing Class Actions Means Everybody Loses

Law360, New York (March 20, 2017, 11:26 AM EDT) -- Congress is trying to kill class actions again. Last year, Representative Robert Goodlatte introduced a one-paragraph dagger, H.R. 1927, requiring that all class members' damages be of "the same type and scope." To many, this language meant that class members' damages had to be identical.

This requirement was perilous because it meant, for instance, that in securities-fraud class actions, where class members necessarily buy different numbers of shares, purchasers could never bind together as a class since their damage amounts would be different. Because that bill explicably limped through the House, the Senate didn't bother voting on it.

So what did Representative Goodlatte do? He amped it up to make it even more dangerous. Now, in addition to requiring the same damage amounts — a requirement that, in addition to its case-killing effect, is impossible to know early in any class action anyway — H.R. 985 would require specific knowledge of every class member's name and address — things that are often impossible to know ever, particularly where consumers sue for lies involving retail purchases.

Added to this, if a lawyer has represented a client before, the bill suggests that this lawyer can't represent this client in a class action. This would mean that if you want to hire your family lawyer for a class-action claim, you can't. The bill concludes by attacking victims' lawyers in eight pages of other proscriptions.

Last Thursday, the bill passed the House. If it passes the Senate, what will that mean? And to whom? Though the bill targets victims and their lawyers, its carnage will extend far beyond those obvious groups.

Everyone should agree that good, righteous and sensible class actions exist. Good class actions that come to mind are those related to Volkswagen's fraudulent diesel emissions, Enron's securities fraud, the Exxon Valdez disaster, Toyota's unintended acceleration cases and GM's faulty ignition switches. (Toyota's and GM's defective cars even killed people.)

These cases resulted in refunds, retrofits, buybacks, corporate changes and other compensation for these schemes' victims. But the bill wouldn't affect only class actions like these. It would also bar human-rights cases, like the Holocaust reparation cases, where Holocaust survivors (or their heirs, if now deceased) received payments from European companies for the role these companies played in transporting them by cattle car to Nazi-run death camps to perform slave and forced labor.

If class actions were the scourge that the bill suggests, the class action rules wouldn't exist in the first place. These rules didn't just happen. They were adopted and have been repeatedly amended through a lengthy, detailed and deliberative process.

For the past 50 years, the Advisory Committee on the Federal Rules of Civil Procedure has studied and amended these rules several times with the involvement of the Judicial Conference of the United States, the Judicial Conference's Committee on Rules of Practice and Procedure (the



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Standing Committee), the United States Supreme Court, and Congress. Indeed, a subcommittee of the Advisory Committee has been studying the class-action rules for the past five years (the Rule 23 Subcommittee), and the subcommittee's proposed amendments are out for public comment.

For eons, the Judicial Conference has opposed legislative amendment to the class-action rules. It favors going through the Rules Enabling Act. (Enacted in 1934, the Rules Enabling Act is the law that gives the courts power to implement the Federal Rules of Civil Procedure, which is where the class-action rules are found.)

The Act requires participation of and review by the bench, bar, academy and public. It gives the Judicial Conference — not a partisan Congress — the job of objectively analyzing the court rules and how they operate. To achieve this, the Judicial Conference's rules committees (such as the Advisory Committee, Standing Committee and Rule 23 Subcommittee) study the rules and propose worthwhile changes.

For almost a century, this thoughtful approach has worked splendidly. Therefore, it's not surprising that the Standing Committee and Advisory Committee (along with the American Bar Association and hundreds of civil rights, environmental, consumer rights and disability organizations) strongly oppose the bill.

But neither dissuaded nor deterred by the courts' decades of insight and thoughtfulness, Congress — in concert with the U.S. Chamber of Commerce, which aggressively supports the bill — remains resolute in promoting its partisan cramjob.

The disappearance of good cases is the bill's obvious consequence. That doesn't bother Congress. But what about the bill's latent affects — the affects that Congress isn't recognizing? With courtroom doors closed and with victims' access to justice decimated, well-behaving companies will lose market share, profits and sales to cheaters who aren't policed.

What's more, the next time a company is victimized by foreign price fixers or has its investments raided and it wants to sue a class action for itself and others, forget about it. Scarier still, when the children of one of these companies' CEOs drives the next defective Toyota or GM, forget about any refund or retrofit. These kids will be stuck in their cars, hoping their cars don't kill them.

The Chamber refuses to acknowledge the crippling effect that the bill will have on its members and their customers — conscientious companies and people who will lose their access to justice in favor of get-out-of-jail-free cards for cheaters. (The Chamber certainly doesn't care about its members' lawyers — giant defense firms who uncannily support the bill, bearing witness to their professional extinction.)

By discouraging enforcement and access to justice, the Chamber is promoting a position that ultimately puts itself at peril. If the Chamber's goal is to root out bad class actions, the way to achieve that is through good class-action rules, not no class-action rules.

The bill would extinguish victims' (of whatever type) ability to pursue just and worthwhile claims, and it would destroy lives. If you're looking for winners, insurance companies can expect to prosper, since the bill will result in more individual injury and death lawsuits, thus increasing premiums for companies that make reputable products. This will lead to higher prices for consumers and businesses. And when considering that business owners are consumers, too, we come full circle.

Perhaps additional winners are members of Congress who vote on what they're making look like a pro-business bill. Maybe voting for it will get them reelected in 2018. But when the bill's true effects emerge, they can forget about 2022.

It's shocking that such twisted lawmaking exists. Or considering what we've been through lately, perhaps it's not so shocking after all. You have to commend Mr. Goodlatte, though, for his perseverance in exploiting the divisive political climate. Maybe he'll see things differently when his voters realize his motives and the bill's consequences. But by then, it will be too late for those of us who already do.

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