Bloomberg Law

Product Safety & Liability Reporter™

Congress's Judicial Mistrust

The Senate should reject the ''Fairness'' in Class Action Litigation Act of 2017, professors Elizabeth Chamblee Burch and Myriam Gilles say. The measure, which has passed the House, would ''stifle judges' discretion and override appellate court consensus,'' the authors say.

BY ELIZABETH CHAMBLEE BURCH AND MYRIAM GILLES

Some may argue that House Bill 985, the ''Fairness'' in Class Action Litigation Act of 2017, will weed out frivolous lawsuits and help make America great again.

Don't be fooled. We know that class litigation isn't perfect—after all, our academic work focuses on chronicling abuses within class action litigation and outing the cozy relationships that have evolved between plaintiff and defense lawyers. But this bill doesn't fix what's ailing the system. Instead, it seeks to eliminate group litigation altogether. If it becomes law, the bill could prevent consumers from litigating together the next time a company like Volkswagen masks its emissions and thwart General Motors' victims from joining forces to recover if their car ignition turns off while they're driving. It would deprive consumers of the right to sue when businesses rip them off little by little, and derail litigation by small businesses hurt by anticompetitive practices.

Elizabeth Chamblee Burch is the Charles H. Kirbo Chair of Law at the University of Georgia School of Law.

Myriam Gilles is a Vice Dean and Paul R. Verkuil Research Professor of Law at Benjamin N. Cardozo School of Law.

This certainly isn't the first time a Republican-led House has pursued legislation to ''reform'' complex litigation. But it is the first time that this pernicious, heavy-handed legislation has had a chance of enactment. While the bill's prospects are aided by Republican control of both Houses of Congress and the presidency, the real momentum behind HR 985 (which is being fast-tracked—in and out of committee in less than a week—by Rep. Bob Goodlatte (R-VA)) is congressional distrust of courts. And this distrust has a new-found respectability; it can now be openly aired because the President himself has repeatedly disparaged the legitimacy and authority of judges who have the temerity to rule against him.

HR 985 would stifle judges' discretion and override appellate court consensus. For instance, courts have long struggled with cases where there is no good way to determine money damages on a class-wide basis. But over the past 20 years, the federal courts have come to a hard-won consensus that permits ''issue classes''—where a defendant's liability gets tried on a class basis, followed by individual damages proceedings. This bill would trash that bipartisan consensus. In fact, one could argue the only class actions it would permit are those where every class member suffered the *exact same* damages.

The bill rejects not only the wisdom of the courts but also that of the bipartisan federal rules committee. After working to revise the class action rule for several years (and holding countless town hall meetings so that all affected stakeholders could get in their two cents), the committee announced last summer that it was best to leave issue class actions alone—to watch how the doctrine evolves in courts confronted with real cases involving real people.

Other parts of the bill try (ineptly) to simply tell judges how and when to do their jobs. For instance, the bill requires plaintiffs to submit proof like medical re-

 ISSN 0092-7732

cords shortly after they sue, and judges must decide whether that proof is sufficient within 30 days of receiving it. This would require the impossible. For example, over *40,000 plaintiffs* sued Merck before it withdrew its painkiller, Vioxx, from the market. No judge in the country has enough clerks (or clones) to fulfill the bill's mandate under circumstances like that. It is also simply unnecessary: the Federal Rules of Civil Procedure already provide a tried-and-true path for handling just this sort of procedural and administrative tangle.

Interbranch distrust is hardwired into our constitutional structure; as James Madison famously put it, ''ambition must be made to counteract ambition.'' And it generally serves a positive function, stimulating each of the three branches to check the authoritarian, antimajoritarian, and expansive impulses of the others. But in this new era when distrust leads to disrespect—when ''so-called judges'' are threatened and bullied, called out and castigated—HR 985 serves as alarming example of upended norms and constitutional dysfunction. Given this new reality, now, perhaps more than ever before in our history, we need the federal courts to remain independent sources of authority.

Editor's Note: The authors have submitted detailed comments on the bill to the U.S. House of Representatives Subcommittee on the Constitution and Civil Justice.

  PSLR ISSN 0092-7732