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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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February 14, 2017

Hand-Delivered

Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: Fairness in Class Action Litigation Act of 2017 (H.R. 985)

Dear Mr. Chairman:

We are the current chairs of the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Committee") and the Advisory Committee on the Federal Rules of Civil Procedure (the "Advisory Committee"). We understand the Committee on the Judiciary will meet later this week to mark up the legislation known as H.R. 985, the Fairness in Class Action Litigation Act of 2017.

As you know, Rule 23 of the Federal Rules of Civil Procedure has governed the procedures for modern class actions since 1966. The rule has been studied and amended by the Advisory Committee several times since then, with the involvement and concurrence of the Standing Committee, the Judicial Conference of the United States, the Supreme Court, and Congress. In fact, a subcommittee of the Advisory Committee has been studying class action procedures for the last five years. That study has produced proposed amendments to Rule 23 that are now out for public comment under the procedures established by the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. The final public hearing on the proposed amendments will be held on February 16, 2017, after which the subcommittee and Advisory Committee will consider final changes to the proposed amendments before they are forwarded to the Standing Committee for

review this spring, and, if approved, to the Judicial Conference in September. If they are approved by the Judicial Conference, they will be forwarded to the Supreme Court for review and then, if the Court approves them, to Congress. The multi-year study has considered many of the issues addressed in H.R. 985.

The legislation proposed in H.R. 985 would effectively amend Rule 23 in several ways. Although it is not phrased in terms of direct amendments to the rule, it clearly would change class action procedures under the rule. In fact, section 3 of the legislation is titled “Class Action Procedures.”

As you know, Rule 23(a) provides that a district court may certify a class action only if (1) it is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims of the representative parties are typical of the claims of the class, and (4) the representatives will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(1)-(4). The district court must also find that one of the three provisions in Rule 23(b) has been satisfied. Fed. R. Civ. P. 23(b)(1)-(3). The Supreme Court has instructed district courts to certify classes only after a “rigorous analysis” of whether the Rule 23 demands have been satisfied. *WalMart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011).

The proposed legislation would change Rule 23 procedures. Section 1716 would introduce a new requirement for class certification – that the class representatives make an affirmative showing that class members have suffered the same type and scope of injury as the class representatives. This requirement overlaps and modifies the typicality and adequacy requirements of Rule 23(a)(3) and (4). Section 1717 would exclude certain persons from acting as class representatives, a modification to the adequacy requirement of Rule 23(a)(4). Section 1718(a) would add a new requirement of administrative feasibility for class certification. Sections 1718(b) and 1719 would add requirements to the attorneys’ fees provision found in Rule 23(h). Section 1720 would amend Rule 23(c)(4) to add an additional requirement for issue classes, sections 1721 and 1722 would add new procedural provisions regarding discovery and third-party funding, and section 1722 would alter the appeal provisions in Rule 23(f). In short, H.R. 985 would make significant changes to Rule 23 procedures.

The Judicial Conference has long opposed direct amendment of the federal rules by legislation rather than through the deliberative process of the Rules Enabling Act. This has not been a matter of protecting “turf,” but instead has reflected a strong preference on the part of the judiciary for the thorough and inclusive procedures of the Rules Enabling Act. Congress designed the Act in 1934, and reformed it in 1988, to produce the best rules possible through broad public participation and review by the bench, the bar, the academy, and Congress. The Act charges the Judicial Conference with the task of neutral and thorough analysis of the rules and their operation. The rules committees undertake extensive study, including empirical research, so they can propose rules that best serve the American justice system while avoiding unintended consequences. More than 80 years of experience has shown that the process works very well.

We strongly urge Congress not to amend the class action procedures found in Rule 23 outside the Rules Enabling Act process. If Congress wishes the Advisory Committee to consider specific amendments to Rule 23, we will gladly undertake that work. But we respectfully ask that changes be entrusted to the proven and well-established procedures of the Act, rather than direct legislation.

We understand that Administrative Office staff and other committees of the Judicial Conference are also studying H.R. 985. We know there are further concerns with the legislation, including provisions that affect multidistrict litigation and provisions that place time limits on actions by courts. You will receive additional communications from the Administrative Office or the Judicial Conference on these issues.

Thank you for considering the views of the Standing Committee and Advisory Committee. We look forward to continuing to work with you to ensure that our civil justice system fulfills its vital role efficiently and fairly. If you or your staff have any questions, please contact Rebecca Womeldorf, Secretary to the Standing Committee, at 202-502-1820, and we will be happy to respond.

Sincerely,



David G. Campbell
United States District Judge
District of Arizona
Chair, Committee on Rules of
Practice and Procedure



John D. Bates
United States District Judge
District of Columbia
Chair, Advisory Committee
on Civil Rules

Identical letter sent to: Honorable John Conyers, Jr.
Honorable Charles E. Grassley
Honorable Dianne Feinstein