June 23, 2015

The Honorable Bob Goodlatte
Chairman
House Judiciary Committee
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte:

On behalf of the American Bar Association and its almost 400,000 members, I write to offer our views as the Committee considers class action reform. I understand that your Committee intends to mark up H.R. 1927, the “Fairness in Class Action Litigation Act of 2015” tomorrow. The ABA has long recognized that we must continue to improve our judicial system; however, we cannot support legislation such as H.R. 1927, 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 would place added burdens on an already overloaded court system.

This proposed 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 of the Federal Rules of Civil Procedure 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, and we recommend allowing this process to continue. In addition, the Supreme Court is poised to rule on cases where there are questions surrounding class certification. For example, the Court agreed to hear Tyson Foods v. Bouaphakeo, where they will determine whether a class can be certified when it contains some members who have not been injured. We respectfully urge you to allow these processes for examining and reshaping procedural and evidentiary rules to work as Congress intended.

Currently, to proceed with a class action case, plaintiffs must meet rigorous threshold standards. A 2008 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 current process set forth by Congress in the Rules Enabling Act.

In addition to circumventing the rulemaking process, the proposed legislation would severely limit the ability of victims who have suffered a legitimate harm to collectively seek justice in a class action lawsuit. The proposed legislation mandates that in order to be certified as a class each individual member must prove he or she suffered an injury of the same type and scope to the proposed named class representative(s), and requires plaintiffs to show they suffered bodily injury or property damage.
We were pleased to learn that a manager’s amendment is expected to be offered during tomorrow’s markup that removes the requirement that the alleged harm to the plaintiff involved bodily injury or property damage. This improves the bill, but the remaining requirement leaves a severe burden for people who have suffered harm at the hands of large institutions with vast resources, effectively barring them from forming class actions. For example, in a recent class action case 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. Making it harder to utilize class actions will add to the burden of 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 recommendations 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, at 202-662-1766 or david.eppstein@americanbar.org.

Sincerely,

[Signature]

Thomas M. Susman