

January 6, 2016

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, DC 20515

Re: Opposition to Section 3 of H.R. 1927, the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2015

Dear Speaker Ryan and Leader Pelosi:

The undersigned groups strongly oppose Section 3 of H.R. 1927, the “Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2015,” formerly H.R. 526, the “Furthering Asbestos Claim Transparency Act” (FACT Act). This bill will interfere with state legal systems without justification, severely invade the privacy of asbestos victims and their families, and delay and deny justice to people suffering from lethal asbestos-related diseases. While it may seem like an opportune time to legislate in the area of asbestos litigation, this bill is extremely misguided. It will do little more than harm dying victims (including many former Navy shipyard workers), while advantaging the big corporations responsible for compensating them.

For decades, secrecy and deceit have been a way of business for the asbestos industry, and this bill does absolutely nothing to change that. This wholly unnecessary and one-sided legislation is an affront to states’ rights and unfair to victims.

Section 3 of H.R. 1927 has two primary provisions:

- 1) It requires asbestos trusts to disclose on public websites the private, confidential information about every asbestos claimant and their families, including past, current and future claimants. The legislation does nothing to stop asbestos defendants from continuing to demand secrecy when they settle cases (as they routinely do), or force companies to disclose any information to help a claimant with his or her case. To this day, these companies refuse to make public information about where asbestos is present, where it was used, and where it is imported. This bill is an unfair and unwarranted imposition on people who are likely to die because the asbestos industry covered up the dangers of asbestos for over 50 years and still insists on confidentiality today. Moreover, the information that will go on these public sites includes victims’ names, addresses, medical information, how much they received in compensation, and the last four digits of their social security numbers. This extreme invasion of privacy will make victims and their families vulnerable to predators, con artists, and unscrupulous businesses who will scour these sites for information.

2) It gives any defendant in any asbestos lawsuit the right to demand any information about any asbestos victim from any asbestos trust at any time for any reason. The trusts themselves have already told the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law that such a provision would place substantial burdens on them, requiring them to spend tens of thousands of additional hours per year trying to comply with this requirement.¹ And because the provision is unlimited, the costs of compliance for trusts would be very high as well. Trusts are already underfunded. A RAND study found that the median payment from asbestos trusts to victims is 25 percent of the value of the claim, and some payments are as low as 1.1 percent of the claim's value.

In addition to cost burdens, severe delays will result. As explained by Caplin & Drysdale attorney Elihu Inselbuch in his "Responses to Questions for the Record" following his 2013 subcommittee testimony: because trusts will be buried in otherwise unnecessary paperwork seeking claimant information, "The bill would slow down or stop the process by which the trusts review and pay claims, such that many victims would die before receiving compensation, since victims of mesothelioma typically only live for 4 to 18 months after their diagnosis." In many cases, "the delays in trust payment will force dying plaintiffs, who are in desperate need of funds, to settle for lower amounts with solvent defendants.... Delay is a weapon for asbestos defendants."

Finally, Mr. Inselbuch explained that, because this bill does not require that the information demanded by defendants be relevant to, or admissible in, any lawsuit, it is an unwarranted and "heavy-handed piece of federal interference with the states' legal systems."

Far from being even-handed, this bill allows defendants — and only defendants — to do an end-run around state rules of discovery that place limits on information-gathering. The bill would tip the scales of justice in favor of asbestos defendants by giving defendants access to information about victims' settlements with asbestos trusts while allowing defendants to continue hiding information about their settlements with other victims. To level the playing field, victims should be entitled to information from defendants regarding previous settlement amounts and true transparency about where the defendants' asbestos was used, manufactured, and stored.

As to the claim that this bill will "prevent fraud," this bill places new, burdensome requirements on regularly-audited trusts. No one can find evidence of significant fraud in the trust process. The U.S. Government Accountability Office (GAO) studied the problem and did not identify one fraudulent claim.² As Mr. Inselbuch noted, "[b]ecause the injured victim was typically exposed to multiple asbestos products at multiple job sites over a period of many years, he or she must file different claims, with different trusts, with different forms that request different information. The fact that the exposure information submitted to one trust *differs* from the exposure information submitted to another does not mean it is 'inconsistent' — and certainly not specious or fraudulent." Similarly, with regard to charges that victims "double-dip," he explains, "when an asbestos victim recovers from each defendant whose product contributed to their disease, that

¹ See Letter from Douglas A. Campbell, Campbell & Levine, LLC, to Rep. Bob Goodlatte, Chairman, H. Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, et al. (Mar. 20, 2013).

² UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO THE CHAIRMAN, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 23 (2011).

victim is in no way ‘double-dipping’; rather they are recovering a portion of their damages from each of the corporations who harmed them. In fact, each trust is responsible for and pays for only its own share of the damages.” And as noted above, each trust usually can pay only pennies on the dollar.

Since at least the 1930s, asbestos companies and their insurers have been denying responsibility for the millions of deaths and illnesses caused by this deadly product. The Centers for Disease Control and Prevention report that roughly 3,000 people continue to die from mesothelioma and asbestosis every year. Other experts estimate the death toll is as high as 15,000 people per year when other types of asbestos-linked diseases and cancers are included.³ The companies hid the dangers posed by asbestos exposure, lied about what they knew, fought against liability for the harms caused, tried to change the laws that held them responsible and, to this day, fight against banning asbestos in the U.S. The asbestos industry is not interested in transparency. This legislation is nothing but another industry attempt to avoid responsibility for the grave harms they have caused. We are asking you to stand with veterans and other cancer victims of the asbestos industry’s wrongdoing and oppose H.R. 1927.

Thank you for your consideration of our views.

Sincerely,

Alliance for Justice
Asbestos Disease Awareness Organization
Center for Effective Government
Center for Justice & Democracy
Connecticut Center for Patient Safety
Constitutional Alliance
Consumer Action
Consumer Watchdog
EWG Action Fund
National Employment Lawyers Association
National Association of Consumer Advocates
National Consumers League
OpenTheGovernment.org
Protect All Children’s Environment
Public Citizen
US PIRG

³ Sonya Lunder, *Asbestos Kills 12,000-15,000 People Per Year in the U.S.*, ASBESTOS NATION, EWG ACTION FUND (last visited July 1, 2015), <http://bit.ly/1F51Pjf>.

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Dear Speaker Ryan and Leader Pelosi:

The House may soon consider H.R. 1927, the "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2015." Section 2 of this bill would effectively eviscerate consumer, antitrust, employment and civil rights class actions. The undersigned groups write in strong opposition to Sec. 2 of this bill.

While a few modifications have been made to the bill since it was first introduced, what has not changed is the requirement that every person in a class have "an injury of the same type and scope" before the case can proceed. (The word "scope" replaced the word "extent" found in the bill's earlier version, but this is a distinction without a difference.) Class members must already meet common requirements spelled out in F.R.C.P. 23, which requires that the class as a whole have the same type of injury stemming from the same unlawful conduct. However, a new requirement that every individual in a class have an injury of the same "scope," proof of which must be established before the case can even proceed as a class, will sound the death knell for most class actions.

Classes inherently include a range of affected individuals, and virtually never does every member of the class suffer the same "scope" of injury from the same wrongdoing. Certainly, many civil rights, discrimination and employment class actions, including cases involving refusals by companies to properly pay workers, would not satisfy these criteria. It is notable that during the bill's June 24 House Judiciary Committee mark-up, Rep. John Conyers offered an amendment to exempt civil rights cases from the bill's reach. In a party-line vote, the committee refused.

There are far too many other examples to list here of recent, important class actions that would fail to meet this bill's "scope of injury" requirement and that never would have gone forward under H.R. 1927. However, it is worth mentioning a few examples. They include recent successful class actions brought over bank and credit card abuses, where the same corporate policy resulted in customers being cheated out of various amounts of money; home and mortgage loan abuses; antitrust violations, where class actions have recovered millions for small businesses in varying amounts from illegal price-fixing cartels; illegal for-profit colleges practices; refusals by companies to properly pay workers; many types of product defects; and denial of insurance benefits. Business owners financially injured by the BP oil spill all had different losses but all were financially injured by the same corporate misconduct. Many more examples could be cited.

It is for these reasons that federal courts have rejected such a "commonality in damages" requirement for class certification. As Judge Posner explained, a "commonality in damages" requirement:

[W]ould drive a stake through the heart of the class action device. . . [T]he fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits.

In addition, by considering this bill now, Congress is circumventing the process that Congress itself established for promulgation of federal court rules under the Rules Enabling Act, bypassing both the Judicial Conference of the United States and the U.S. Supreme Court. In fact, the Judicial Conference already has an Advisory Committee on Civil Rules, which is currently meeting to discuss possible changes to Rule 23. Interference with the proper federal court rules process is reckless and irresponsible, particularly when this proposal is so damaging to victims.

Class action lawsuits are among the most important tools to enable harmed, cheated and violated individuals and small businesses to hold large corporations and institutions accountable and deter future misconduct. Under H.R. 1927, federal courts will be forced to deny class certification to important, worthy classes of aggrieved consumers, employees and small businesses. We urge you to oppose H.R. 1927, the the "Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2015."

Sincerely,

Alliance for Justice
 American Antitrust Institute
 American Association for Justice
 American Federation of State, County and Municipal Employees
 Asbestos Disease Awareness Organization
 Asian Americans Advancing Justice | AAJC
 Autistic Self Advocacy Network
 Caney Fork Headwaters Association
 Center for Effective Government
 Center for Justice & Democracy
 Center For Responsible Lending
 Center for Science in the Public Interest
 Center for Study of Responsive Law
 Committee to Support the Antitrust Laws
 Consortium for Citizens with Disabilities Rights TF
 Consumer Action
 Consumer Federation of America
 Consumers for Auto Reliability and Safety
 Consumers Union
 Consumer Watchdog
 Cornucopia Network/NJ/TN Chapter
 Cumberland Countians for Ecojustice
 D.C. Consumer Rights Coalition
 Demand Progress
 Disability Rights Education & Defense Fund
 Earthjustice

Economic Policy Institute
Essential Information
EWG Action Fund
Food & Water Watch
Home Owners for Better Building
Homeowners Against Deficient Dwellings
Kentucky Equal Justice Center
Law Foundation of Silicon Valley
Leadership Conference on Civil and Human Rights
Madison Area Bus Advocates
Main Street Alliance
MFY Legal Services, Inc.
NAACP
National Association of Consumer Advocates
National Consumer Law Center (on behalf of its low income clients)
National Consumers League
National Consumer Voice for Quality Long-Term Care
National Council on Independent Living
National Disability Rights Network
National Down Syndrome Congress
National Employment Law Project
National Employment Lawyers Association
National Fair Housing Alliance
National Immigration Law Center
Network for Environmental & Economic Responsibility Of United Church of Christ
New Solutions: A Journal of Environmental and Occupational Health Policy
9to5, National Association of Working Women
Pleasant Hill Community Church/UCC
Protect All Children's Environment
Public Citizen
Reinvestment Partners
SC Appleseed Legal Justice Center
Science and Environmental Health Network
Sciencecorps
Southern Poverty Law Center
Texas Watch
The Arc of the United States
U.S. PIRG
Woodstock Institute
Workplace Fairness