

Bundle Up, Defense Counsel: Winter's Coming



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A German automaker lies about its cars' emissions, swindling billions. Too bad. An energy company cooks the books, stealing millions of people's retirement savings. So sad. An oil company recklessly releases millions of barrels of oil into the ocean, destroying thousands of fishermen's catches. Pound sand.

If Congress passes H.R. 985 — the Fairness in Class Action Litigation Act — these horrifying scenarios will be just the beginning. If the bill reads like a Chamber of Commerce wish list, that's because it is.

The bill will kill all class actions and will extinguish the necessary and commendable work that plaintiffs class action attorneys have performed for decades. It will gut human rights cases, eviscerate employment-abuse lawsuits, and kill defective drug and product complaints. Its carnage is too expansive to list here. But the bill will leave an unpoliced wasteland, where unaccountable corporations will exploit the new world order, knowing that no one exists to stop them.

If this all sounds too horrible to be real, this time it's very real. Despite all the socks to the gut that the class action bar has endured, this congressional blow not only will destroy victims' access to justice, and tip the competitive business

balance toward corporate cheaters at respectable and decent companies' expense, but also it will decimate both plaintiffs and defense firms overnight. If you think I'm kidding, read the bill.

So how did we get here? It's simple. Bad plaintiffs lawyers brought too many bad cases. The Chamber had enough, and H.R. 985 was born. But these sewer lawyers neither resemble nor represent most of the plaintiffs bar — lawyers who risk comfort, safety and security every day by committing to a contingent-fee model where the upside of bygone days no longer even exists.

Extortionist lawyers are a cancer — one that needs to be cut out. I'm no less committed to seeing that happen than the Chamber is. If anything, I'm more committed. Because for the Chamber, bad cases are a rallying cry. For me, bad cases are a target that spells doom for my plaintiffs' practice.

Good plaintiffs lawyers do their work because they believe their work is important. They care. They want to make a difference. Sure, these motivations might seem silly or unimaginable to lawyers who have never done plaintiffs work, who have never risked their practice, who favor getting paid per hour to getting paid perhaps. That's why plaintiffs work isn't for everybody.

Most plaintiffs lawyers chose this road because they care differently. They care when they see corporations stealing from seniors, companies selling mobile deathtraps to young families, and power plants giving kids cancer. To most plaintiffs lawyers, their profession offers a risk worth taking and a cause worth claiming.

Or it least it did.

If Congress passes H.R.985, these motivations and stories will be a eulogy. Class action law firms — whether plaintiffs or defense — will disintegrate. Just like that. Make no mistake about it, if H.R. 985 passes, defense lawyers and their firms will be poured down the same hole as plaintiffs lawyers and ground into the same unrecognizable refuse.

I've long known what plaintiffs-side fear smells like. And because I now also defend class actions, I know how defense lawyers react to this fear. Defense lawyers' responses tend to fall somewhere between "I'm just as concerned as plaintiffs lawyers" and "I haven't read the bill." The former position is sensible; the latter position, inexcusable.

Plaintiffs lawyers are empowered, mobilized and committed to saving their — and defense lawyers' — professional lives by defeating H.R. 985. Countless consumer groups are similarly determined. For the reasons I explained in [my March 20, 2017, Law360 column](#), responsible companies are on board too.

By tipping the competitive balance toward cheaters, the bill hurts honest companies badly. Victims will no longer be able to file class actions, meaning ethical companies will lose market share, revenue and profits to unpoliced liars who exploit the new anti-litigation landscape.

So who does all this activism leave out? Who's the final piece of the puzzle? Who's not weighed in?

The defense bar.

Defense lawyers aren't acting to save themselves because either they don't think they can or they don't know how to, one defense-lawyer friend even claiming that to save his practice was a "professional conflict." My friend is not alone.

Many defense lawyers believe they're helpless to save themselves. This debilitating perspective is one that bright, assertive and resolute defense lawyers would never embrace in any other setting. Still, many believe that they're relegated to sitting this one out, hoping that the plaintiffs bar, with its commitment, passion and vigor, will do something to help them, like the plaintiffs bar did for its defense colleagues after the Private Securities Litigation Reform Act and Class Action Fairness Act.

But defense lawyers needn't react this way. Never mind which side we're on, class action lawyers are a community. We respect each other. We work together to solve shared problems so that both sides — and, more important, both sides' clients — can emerge in a decent and acceptable place. I have as many dear friends at defense firms as I do plaintiffs firms. I know this dynamic is true.

So if the defense bar doesn't believe it can overtly lobby against H.R. 985 (since despite all the reasons for their clients to oppose it, some defense lawyers still feel institutionally constrained), what can the defense bar do?

The answer is simple. Indeed, it goes back to high school civics. The most crucial thing anyone can do — as I have done on behalf of my plaintiffs and defense clients — is to ask their senators to vote “No” on H.R. 985. Afterward, defense lawyers can ask their fair-minded clients — clients who want to protect themselves from the cheaters and crooks who will exploit the bill — to do the same thing.

Together as class action lawyers, we're in a jam of alarming proportions. But H.R. 985 is so surreal, unjust and downright Kafkaesque that it needn't pass. The problem is that merely supposing it won't pass, wishing it won't pass, will not make that so.

We're in this spot not because of good, necessary and responsible cases that respect both sides, like [Volkswagen](#) diesel emissions, Enron and Exxon Valdez. We're here because of rotten, worthless and profit-driven cases like Subway Footlong, [Starbucks Iced Coffee](#) and most slack-fill cases.

When considering the good work that good plaintiffs class action lawyers achieve — in collaboration with their thoughtful defense colleagues — even less reason exists to kill the body for the sake of “curing” the disease.

Now is the time for us, as a class action community, to come together and do something to save our professional lives so that we can continue to serve our

clients. But not everyone involved in this process has weighed in. It's time for the defense bar to do its part.

I hope this column inspires even one defense lawyer to write a Law360 op-ed challenging H.R. 985 as bad for business. Because if defense lawyers do nothing, when winter comes and class actions are dead, they can blame themselves for having to tell their children that they could have done something to save them but didn't.

So everyone, do your part now. And help our profession thrive — not die.

—By Daniel R. Karon, Karon LLC

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