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Senate to Debate Fairness in Class Action Litigation Act

A piece of federal legislation reflects a significant effort by Congress to curb perceived abuses of the federal class action procedure.¹

The legislation is the Fairness in Class Action Litigation Act of 2017 – on March 9 the House of Representatives passed the proposal as H.R. 985 and sent the Bill to the Senate for further consideration.

The Bill proposes substantial changes to the Class Action Fairness Act passed in 2005. Among other things, it would make certifying classes more difficult by requiring:

- similarity of injury,
- ensuring ascertainment of potential class members,
- changing the timing and amount of attorneys' fees,
- instituting stays of discovery while dispositive motions are pending,
- permitting appeals of certification decisions as of right,
- and addressing conflicts of interest before granting certification.

Additional Class Certification Requirements

1. The Bill requires that, prior to certifying a class, the court must find that putative class members suffered the same type and scope of injury as the proposed named class representatives.

The Bill increases and mandates the scrutiny courts must apply to the requirements for class certification under Rule 23. The legislation requires an affirmative demonstration that all class members suffered the same type and scope of injury as the named class representative or representatives. The determination of similarity and scope would be left to the individual courts to decide, but uniformly requires the courts to undertake a rigorous analysis of this additional requirement. If enacted, the law presumably would

¹ The House also passed and sent to the Senate two other reform measures: H.R. 725 (targeting fraudulent joinder of parties) and H.R. 720 (changing Rule 11 by eliminating the “safe harbor” provision and requiring judges to impose sanctions for meritless civil claims filed in federal court).



exclude uninjured persons from being a part of a certified class, a situation that may currently be allowed in some jurisdictions.

2. The Bill establishes an ascertainability requirement for class certification.

Courts are split over the issue of whether a proposed class representative must show an objectively feasible way to ascertain the identity of prospective members in a class action. If enacted, the Bill would establish a uniform ascertainability requirement, precluding certification of a class unless it can be “defined with reference to objective criteria” and can be demonstrated that “there is a reliable and administratively feasible mechanism” to identify class members and distribute monetary relief.”

3. Certification of issue-specific classes would be prohibited under the Act.

The Bill prohibits courts from certifying an issue-only class pursuant to Rule 23(c)(4) unless the entire cause of action from which the issues arise satisfies all class certification prerequisites.

Restrictions on Fees and Disbursements

1. The Bill places substantial limitations on attorneys’ fees in certain cases.

The proposed legislation includes specifications regarding both the timing and amount of fee payments, which could make class actions less attractive for plaintiffs’ attorneys. Attorneys’ fees would be limited to a reasonable percentage of any payments directly distributed to and received by class members, never to exceed the total amount of money directly distributed to and received by all class members. And personal injury plaintiffs with cases in multi-district litigation (MDL) proceedings will be required to receive at least 80 percent of any monetary recovery in their case (which would have the effect of capping contingency fees at 20 percent).

An important aspect of this provision is that “claims made”

settlements may become more difficult. Because fees would be tied to a reasonable percentage of payments directly distributed, those settlement structures that require class members to “claim in”—which statistically often show reduced percentages when a class member must submit a claim form to recover—are less likely to be agreed. The effect of the Bill to require distributions to people who otherwise do not care enough to submit a claim could increase the financial burden on defendants. A possible incidental consequence may be to decrease a defendant’s willingness to settle because the multiplier (number of claimants/class members to receive distribution) may increase. Moreover, plaintiffs and their attorneys may be less willing to settle a certified class for any discount.

Additionally, the Bill prohibits collection of any attorney fees until the distribution to any monetary recovery to class members has been completed. It also limits the portion of attorneys’ fees awarded to the equitable relief to a reasonable percentage of the value of the equitable relief.

2. The Bill imposes settlement accountings and distribution reports.

Before receiving fee payments, class counsel would also be required to submit to the Director of the Federal Judicial Center and the Director of the Administrative Office of U.S. Courts an accounting that details the total amount paid to class members, the largest amount paid to any class member, and the average amount paid directly to class members. The data would be used in the preparation of an annual report to the Judiciary Committee summarizing the distribution of funds paid in class actions.

Automatic Stays of Discovery

While some courts may restrict discovery in class actions cases pending resolution of certain motions or will permit discovery in stages, the Bill would codify such restrictions, requiring that “[i]n any class action, all discovery and other proceedings shall be stayed during the pendency of any motion to transfer, motion to dismiss, motion to strike class allegations, or other motion to dispose of class allegations,”





unless discovery is deemed necessary “to preserve evidence or prevent prejudice.” This could significantly change the limited consideration some district courts give to early motions to strike class allegations so that meritless class claims can be eliminated before expensive discovery begins.

Appeals as of Right

The Bill provides for immediate appeal of any order granting or denying class certification, eliminating the current discretion of the appeals courts to accept or deny such appeals. This requirement would protect class action defendants from the pressure to settle improper class certification decisions. However, appeals could potentially prolong virtually any class action case by a year or more.

Requiring Disclosure of Relationships that Would Defeat Certification Due to Conflicts of Interest

Another provision of the Bill would prohibit class certification in any case where conflicts of interest exist in regard to class counsel and class representatives. Plaintiff’s counsel would be required to make extensive disclosures identifying whether a proposed class representative or plaintiff is “a relative of, is a former or present employee of, is a present or former client of . . . or has any contractual relationship with . . . class counsel.” Courts would be prohibited from granting certification of class actions that violate this rule. This proposed requirement would circumvent serial and familial class representations.

Although the Bill has passed through the House, it has provoked significant and, expectedly, differing reactions. Some believe class action changes, if any, should come through amendments to Rule 23, though prior attempts at changes such as these in the Rule have failed. Defense attorneys and members of business organizations have welcomed the proposed legislation to curb expensive class action suits and their in terrorem effects that often make such cases more convenient to settle than to fight, regardless of merit. Plaintiffs’ attorneys and consumer advocate groups see a Bill that is over-reactive, shields corporations,

disincentivizes injured persons (and lawyers) from holding businesses accountable for harm caused, and interferes with attorney-client relationships.

Last, at the risk of stating the obvious, it is important to note that the Bill only addresses changes in the federal system. Although the Class Action Fairness Act of 2005 opened more doors to class actions in federal court, for those cases bound to the state courts, those state rules and procedures will continue to apply. The added certification and other requirements offered in the Bill, as well as uniformity and predictability, would not be available to the state court litigants.

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