

Class Action Fairness Act Author Introduces New Bill That Would Drastically Reform Class Action Litigation

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House Judiciary Committee Chairman Bob Goodlatte (R-Va.), the author of the Class Action Fairness Act, introduced the “Fairness in Class Action Litigation Act of 2017” last week that would substantially change class action litigation to “assure fairer, more efficient outcomes for claimants and defendants.” The House Judiciary Committee approved the bill on February 15th by a vote of 19-12.

The bill (H.R. 985 available [here](#)), seeks to “maximize recoveries by deserving victims, and weed out unmeritorious claims that would otherwise siphon resources away from innocent parties.” What does this mean and, if passed, how will it affect class actions moving forward? Here are some of the highlights:

Class certification based on type and scope of injury. The bill would require class members to demonstrate that *each* proposed class member “suffered the same type and scope of injury as the named class representative or representatives.” The practical effect of this requirement would be a decrease in class actions where the plaintiffs have a wide variety of damages (or none at all).

Additionally, an order issued under Rule 23(c)(1) that certifies a class seeking monetary relief for personal injury or economic loss must include a determination, “based upon a rigorous analysis of the evidence presented,” that the requirement

described above was met.

Explicit ascertainability requirement. While many Circuits have held there is an implied requirement of ascertainability, the bill would require plaintiffs to affirmatively demonstrate that there is “a reliable and administratively feasible mechanism” for the court to determine whether putative class members fall within the class definition and for distributing funds to them directly.

Attorneys’ Fees. In a class action seeking monetary relief, “no attorneys’ fees may be determined or paid . . . until the distribution of any monetary recovery to class members has been completed.” Further, the bill mandates that unless otherwise specified under federal statute, if a judgment or proposed settlement provides for a monetary recovery, the portion of attorneys’ fees to class counsel are “limited to a reasonable percentage of any payments directly distributed to and received by class members.” Under no circumstances can the fee award “exceed the total amount of money directly distributed to and received by all class members.”

For class actions that provide equitable relief, the bill requires that any portion of attorneys’ fees be limited to “a reasonable percentage of the value of the equitable relief, including any injunctive relief.”

Mandated reporting regarding funds paid. Attorneys’ fees may not be paid to class counsel until an accounting of the disbursement of all funds paid by the defendant pursuant to the settlement agreement is submitted to the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts. This accounting must include, among other things, the total amount paid to all class members, the actual or estimated total number of class members, the average amount paid, the largest amount paid to any class member, each amount paid to any other person (including class counsel) and the purpose of the payments.

Class action attorneys cannot represent relatives and other conflicts of interest rules. The bill would prohibit federal courts from granting certification of any class action in which “any proposed class representative or named plaintiff is a relative of, is a present or former client of (other than with respect to the class action), or has any contractual relationship with (other than with respect to the class action) class counsel.

Discovery stay. All discovery would be stayed during the pendency of any motion to transfer, motion to dismiss, motion to strike class allegations, or other motion to dispose of the class allegations, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

Appeals of certification orders. Currently, appeals of certification grants or denials are available now only upon discretion of the appeals court. The bill would require that the appeals court “shall permit an appeal from an order granting or denying class-action certification under Rule 23 of the Federal Rules of Civil Procedure.”

Goodlatte stated in his remarks during the House Judiciary Committee’s markup of H.R. 985 that “[f]ederal judges are crying out for Congress to reform the class action

system, which currently allows trial lawyers to fill classes with hundreds and thousands of unmeritorious claims and use those artificially inflated classes to force defendants to settle the case.” A copy of Goodlatte’s full remarks can be found [here](#).

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