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Proposed Fairness in Class Action Litigation Act of 2017 Seeks to Curb Attorney Abuses of Class Action Device and Expand Class Action Defendant Protections

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On February 9, 2017, Rep. Robert Goodlatte (R-Va.), the Chairman of the House Judiciary Committee, introduced the Fairness in Class Action Litigation Act of 2017 (the "Act" or "H.R. 985"). [1] The Act significantly expands the class action reforms proposed in an earlier version of the bill that stalled after passage in the U.S. House of Representatives [2] and imposes significant new restrictions on class action lawyers and plaintiffs seeking to proceed under Rule 23 of the Federal Rules of Civil Procedure, as well as implementing new rules applicable to cases consolidated through the multidistrict litigation process. The stated purposes of the Act are to: (1) "assure fair and prompt recoveries for class members and multidistrict litigation plaintiffs with legitimate claims;" (2) "diminish abuses in class action and mass tort litigation that are undermining the integrity of the U.S. legal system;" and (3)

"restore the intent of the framers of the United States Constitution by ensuring Federal court consideration of interstate controversies of national importance consistent with diversity jurisdiction principles." [3] In a press release, Rep. Goodlatte announced that the objective of the proposed legislation is to "keep baseless class action suits away from innocent parties, while still keeping the doors to justice open for parties with real and legitimate claims, and maximizing their recoveries." [4]

The Act proposes a number of significant changes to Title 28 of the U.S. Code (the federal judicial code), some of which address issues that have been the subject of recent litigation in federal courts across the country, including the questions of when a class representative has sufficient legal standing to represent putative class members and what constitutes the proper analysis for determining the identification and scope of a class. Generally, the proposed legislation is favorable to class action defendants, as it would provide uniform answers to these highly contested questions and strengthen protections against abusive class action practices by, among other things: requiring that class counsel and putative class representatives disclose conflicts of interest; prohibiting discovery during the pendency of motions to dismiss; adding procedural requirements to Rule 23 to ensure that class actions are manageable; imposing reasonable limits on attorney fee awards; and changing certain rules applicable to cases that become part of multidistrict litigation.

Class Action Procedures

H.R. 985 includes heightened requirements for issuance of an order granting certification of a class. Specifically, in addition to the traditional commonality and typicality requirements of Rule 23, the Act would require that, in class actions seeking monetary relief for personal injury or economic loss, a party seeking certification of a class "affirmatively demonstrate" that each proposed class member "suffered the same type and scope of injury as the named class representative" [5] and that a court may only certify a class under Rule 23(c)(1) if, after a "rigorous analysis of the evidence presented," this requirement has been met. [6] These provisions, if enacted, should help to ensure that similarly aggrieved class members are not short-changed for the benefit of those who should not rightfully be included in a class.

The Act also would establish a nationwide ascertainability requirement for certification of a class, requiring that classes be "defined with reference to objective criteria" and that class counsel "affirmatively demonstrate[] that there is a reliable and administratively feasible mechanism" to identify class members and distribute monetary relief. [7] This change would resolve a recent split among the federal Circuit Courts of Appeal as to whether plaintiffs must prove ascertainability (also known as "administrative feasibility") to have a class certified under Rule 23(b)(3) and would do so in favor of requiring plaintiffs to prove this element for class certification. [8]

And in an effort to prevent "trial lawyers from using incestuous, litigation-factory arrangements to gin up lawsuits," as Rep. Goodlatte put it, [9] H.R. 985 would require putative class action complaints to include numerous disclosures to uncover

and prohibit what the bill deems "conflicts of interest" between class counsel and class representatives. Putative class action complaints would be required to: (1) state whether any named plaintiff is a relative of, present or former employee of, or present or former client of (other than with respect to the current class action) class counsel, or has any contractual relationship with class counsel (other than with respect to the current class action); [10] (2) describe "the circumstances under which each class representative or named plaintiff agreed to be included in the complaint;" [11] and (3) "identify any other class action in which any proposed class representative or named plaintiff has a similar role." The Act would prohibit courts from granting certification in any cases where such "conflicts" exist. [12] Notably, this addition would not only prohibit familial relationships between class representatives and class counsel but would also prohibit prior attorney-client or other contractual relationships between class representatives and class counsel, including serial class representations.

The Act also proposes significant changes to the method and timing of attorneys' fees payments—changes that may make class actions less lucrative for plaintiff's attorneys. The Act would limit an award of attorneys' fees to a "reasonable percentage of any payments directly distributed to and received by class members" and would prohibit fee awards that exceed the total amount of money distributed to class members. [13] The Act would also affect the timing for the determination and payment of attorneys' fees in "a class action seeking monetary relief" such that "no attorneys' fees may be determined or paid … until the distribution of any monetary recovery to class members has been completed." [14] These changes would not only cap the total amount of attorneys' fees but would also link the determination of an award of attorneys' fees to amounts awarded directly to class members—apparently without consideration of any *cy pres* payments or reversionary funds in claims-made settlements. As to class actions seeking "equitable relief," H.R. 985 would limit attorneys' fees to "a reasonable percentage of the value of the equitable relief, including any injunctive relief." [15]

In addition, prior to any payment of attorneys' fees in connection with the settlement of a class action, class counsel would be required to submit an accounting to the Director of the Federal Judicial Center and the Director of the Administrative Office of the U.S. Courts, detailing, among other things, the total amount paid directly to class members, the average amount paid directly to class members, and each amount paid to any other person. [16] The data would be used to prepare an annual report to the Committee on the Judiciary of the Senate and the House of Representatives summarizing "how funds paid by defendants in class actions have been distributed." [17]

Other noteworthy provisions of the proposed legislation, each of which would help to limit undue pretrial expenses and impose tighter restrictions on class certification, include:

- A requirement that discovery is to 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; [18]

- A limitation on the use of Federal Rule of Civil Procedure 23(c)(4), which allows for a class to be certified "with respect to particular issues" to instances where "the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites of Rule 23" [19] (in other words, this provision would limit a court's ability to certify certain elements of a cause of action that may be easier to certify, while leaving other issues to be addressed later);

- A requirement that class counsel disclose third-party litigation funding [20] (similar to a requirement recently adopted by the U.S. District Court for the Northern District of California [21]); and

- A provision requiring courts of appeals to consider appeals from any order granting or denying certification of a class [22] (such appeals currently may be accepted or rejected at the discretion of the circuit court [23]).

Multidistrict Litigation Procedures

The proposed amendments to multidistrict litigation ("MDL") procedures would be more limited under H.R. 985, but significant nonetheless. Specifically, the Act includes:

- A requirement that plaintiffs submit evidence of their injury within 45 days of their case being transferred to the multidistrict proceeding; [24]

- A limitation on MDLs to pretrial proceedings only, prohibiting the use of MDL procedures for any trial "unless all parties to the civil action consent to trial of the specific case sought to be tried"; [25]

- Jurisdiction for appellate courts to consider appeals from orders of a multidistrict proceeding that would "materially advance the ultimate termination of one or more civil actions in the proceeding" [26] and the creation of a permissive right of appeal (i.e., an appeal that the Circuit Court of Appeals "may accept") for any order in an MDL "granting or denying a motion to remand"; [27] and

- A provision requiring that plaintiffs in an MDL proceeding must receive 80 percent of any recovery, whether obtained by settlement, judgment, or otherwise, which would limit attorneys' fees to 20 percent of the total recovery. [28]

Reflecting the inherently divisive nature of any proposed legislation relating to class actions, H.R. 985 has already garnered praise from the defense bar and criticism from the plaintiffs' bar and consumer rights advocates. The legislation has passed the House Judiciary Committee unedited, but may be subject to significant opposition by Democrats as it proceeds through the House and the Senate. Still, the climate seems ripe for legislative reform of class action litigation procedures, as the last round of reforms—enacted in the form of the Class Action Fairness Act of 2005—was passed the last time Republicans controlled both chambers of Congress with a

sitting Republican president.

Notes:

[1] See Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017) https://www.congress.gov/115/bills/hr985/BILLS-115hr985ih.pdf. A summary of the current status of H.R. 985 is available at https://www.congress.gov/bill/115th-congress/house-bill/985.

[2] *See* Fairness in Class Action Litigation and Furthering Asbestos Claims Transparency Act of 2016, H.R. 1927, 114th Cong. (2016), https://www.congress.gov/114/bills/hr1927/BILLS-114hr1927rfs.pdf; *see also* Brian M. Forbes & Jennifer Janeira Nagle, *Step by Step: Stricter Requirements for Class Certification Inch Closer to Legislative Enactment*, K&L Gates Alert, http://www.klgates.com/step-by-step-stricter-requirements-for-class-certification-inch-closer-to-legislative-enactment-01-21-2016/. H.R. 1927 was passed by the U.S. House of Representatives on January 8, 2016, and referred to the Senate, but the Senate did not act on the legislation. It died upon the closure of the 114th session of Congress. *See* https://www.congress.gov/bill/114th-congress/house-bill/1927/all-actions (listing final action on legislation as having been referred to the Senate Committee on the Judiciary).

[3] H.R. 985 at 2.

[4] *See* Press Release: Goodlatte Introduces Major Litigation Reform Bill to Improve Access to Justice for American Consumers (February 10, 2017), http://goodlatte.house.gov/news/documentsingle.aspx?DocumentID=809.

[5] *Id.* at 3.

[6] *Id.*

[7] *Id.* at 4.

[8] *Compare* Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1123 (9th Cir. 2017) (holding that "[a] separate administrative feasibility prerequisite to class certification is not compatible with the language of Rule 23" and citing cases from Sixth, Seventh, and Eighth Circuits purportedly reaching the same holding), *with* Byrd v. Aaron's Inc., 784 F.3d 154, 163 (3d Cir. 2015) ("A plaintiff seeking certification of a Rule 23(b)(3) class must prove by a preponderance of the evidence that the class is ascertainable.").

[9] *See* Press Release: Chairman Goodlatte Statement on H.R. 985, the Fairness in Class Action Litigation Act (February 15, 2017), https://judiciary.house.gov/press-release/chairman-goodlatte-statement-h-r-985-fairness-class-action-litigation-act/.

[10] H.R. 985 at 3. The Act adopts the definition of "relative" set forth in 5 U.S.C. § 3110(a)(3), which includes: "father, mother, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister."

[11] *Id.* at 3–4. Although each of the provisions of the bill will face differing levels of scrutiny, the plaintiffs' bar will most certainly oppose on attorney-client privilege grounds the required disclosure describing the circumstances under which each class representative or named plaintiff agreed to be included in the case.

[12] *Id.* at 4.

[13] *Id.* at 5.

[14] *Id.*

[15] *Id.* at 5–6.

[16] *Id.* at 6 (stating that the accounting shall be submitted to the Directors of the Federal Judicial Center and the Administrative Office of the United States Courts).

[17] *Id.* at 6–7.

[18] *Id.* at 7.

[19] *Id.*

[20] *Id.* at 8.

[21] *See* Standing Order for All Judges of the Northern District of California, Contents of Joint Case Management Statement (Eff. Jan. 17, 2017) ¶ 19, http://cand.uscourts.gov/filelibrary/373/Standing_Order_All_Judges_1.17.2017.pdf.

[22] H.R. 985 at 8 ("A court of appeals shall permit an appeal from an order granting or denying class-action certification under Rule 23 of the Federal Rules of Civil Procedure.").

[23] Fed. R. Civ. P. 23(f).

[24] H.R. 985 at 10.

[25] *Id.* at 11.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 12.