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The new CAFA? The Fairness in Class Action Litigation Act of 2017

The House Judiciary Committee has approved a bill introduced by its Chairman Robert Goodlatte (R-Va.), one of the authors of the Class Action Fairness Act of 2005 ("CAFA"), that would greatly alter class action litigation in the federal courts. The Fairness in Class Action Litigation Act of 2017, H.R. 985, addresses a host of topics including, among others, the similarity of injury among class members required for class certification, the "ascertainability" of putative class members, the amount and timing of payments of fees to class counsel, appeals of class certification decisions, and stays of discovery.

Here are some of the highlights:

"Same Type and Scope of Injury"

The bill limits class certification to actions in which all class members "suffered the same type and scope of injury as the named class representative or representatives." This provision should operate to preclude certification of any class that includes uninjured members. At present, most courts allow certification even where the class may include uninjured members. *See, e.g.*, *Kohen v. Pacific Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009) ("a class will often include persons who have not been injured by the defendant's conduct . . . Such a possibility or indeed inevitability does not preclude class certification."). The bill offers no guidance as to the degree of similarity required to deem injuries of the "same type and scope," one of many issues that will be left to the courts to determine.

"Ascertainability"

Several federal courts (with the recent notable exception of the Ninth Circuit) have implied to varying degrees a requirement that the identity of putative class members be objectively ascertainable. The bill codifies "ascertainability" by precluding class certification unless the class plaintiffs "affirmatively demonstrate that there is a reliable and administratively feasible mechanism (a) for the court to determine whether putative class members fall within the class definition and (b) for distributing directly to a substantial majority of class members any monetary relief secured for the class."

Opponents argue a rigid ascertainability requirement will preclude small-value consumer class actions where, *e.g.*, consumers likely did not retain a receipt or proof of purchase. Another question for the courts will be whether affidavits from putative class members swearing to their purchases would satisfy this requirement.

Attorneys' Fees

Before receiving any attorneys' fees, class counsel would be required to complete distribution of all

damages to class members. In the case of cash settlements, class counsel must also submit to the Director of the Federal Judicial Center and the Director of the Administrative Office of U.S. Courts – prior to collecting fees – an accounting that discloses, among other things, the total amount paid to all class members, the average amount paid, and the largest and smallest payments.

The bill also limits fee awards in damages cases to "a reasonable percentage of any payments directly distributed to and received by class members." Fee awards in equitable relief cases must reflect "a reasonable percentage of the value of the equitable relief, including any injunctive relief."

Appeals

The bill would make all district court class certification rulings directly appealable (thereby eliminating the Court of Appeals' current discretion to deny petitions for interlocutory review of such rulings under current Federal Rule 23(f)). Although this change protects class defendants from the settlement pressure of improper class certifications, it also potentially adds the expense of an appeal in every case where a district court properly denies certification of a class.

Stay of Discovery

Some appellate courts already have directed district courts to stay discovery pending resolution of a motion to dismiss or motion to transfer. The bill would codify these requirements and also require a stay of discovery based on an early motion to strike class allegations. This would represent a significant change in existing law, given that district courts usually do not give meaningful consideration to early motions to strike class allegations.

Conflicts of Interest

The bill also seeks to curtail the use of "professional plaintiffs" by requiring class counsel to disclose, and prohibiting certification based on, any preexisting relationship with the named plaintiffs.

Takeaways

CAFA's passage in 2005 – the last year Republicans controlled the presidency and both houses of Congress – had a seismic impact on class action litigation by, among other things, moving many large class actions based on violations of state law to federal court. The current bill (with the much less elegant acronym FCALA) strikes at the heart of many perceived continuing abuses in class action litigation. Several of the key provisions – most notably the "same type and scope of injury" requirement and the attorneys' fees limitations – could undermine key economics driving much of the current consumer class action docket. And the mandatory discovery stay would avoid the burden of discovery in putative class actions that never get past the pleading stage. We will track this bill as it makes its way through Congress and provide updates in future posts.