Class Action Monitor

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Rule 23 Under Scrutiny: House to Consider Dramatic Changes to Class Action Law

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On February 9, 2017, U.S. Representative and House Judiciary Committee Chair Bob Goodlatte (R-VA) introduced the *Fairness in Class Action Litigation Act of 2017* (H.R. 985) (the "Act"). The purpose of the Act is to "amend the procedures used in federal court class actions and multidistrict litigation proceedings to assure fairer, more efficient outcomes for claimants and defendants." The Act, which is co-sponsored by U.S. Representatives Pete Sessions (R-TX) and Glenn Grothman (R-WI), would affect dramatic and wide-ranging changes to the law governing collective actions under Rule 23 of the Federal Rules of Civil Procedure. On February 15, 2017, the Act was vigorously debated within the U.S. House of Representatives' Committee on the Judiciary and ultimately, on a recorded vote of 19-12, was referred without amendment to the full U.S. House of Representatives.

The Act, if passed in its original form, would implement eight categories of revised procedural rules for class actions in federal court, including:

1. **No class certification without uniform damages**. In any class action seeking monetary relief for personal injury or economic loss, the Act would prohibit a federal court from granting class certification unless the class representatives "demonstrate that each proposed class member suffered the *same type and scope of injury*." In the event that a federal court grants such a motion for class certification, the Act would require the resulting order to explain how the uniform damages requirement is satisfied "based on rigorous analysis of the evidence presented." The new uniform damages requirement would legislatively supersede the Supreme Court's ruling last year in *Tyson Foods, Inc. v. Bouaphakeo*,[1] which permitted class certification even when certain class members likely suffered no injury at all, reserving the treatment of any uninjured class members as a question of damages disbursement. In *Tyson*, the Court observed that certification could be proper even if "important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."[2] The Act would therefore radically reshape the standards for certification, effectively reversing the ruling in *Tyson*.
2. **Heightened standard for issue class certification**. Currently, under Rule 23(c)(4), class certification may be granted "with respect to particular issues" under the liberal standard of "when appropriate." The Act would dramatically heighten this standard, prohibiting a federal court from certifying a class action with respect to particular issues "unless the entirety of the cause of action from which the particular issues arise

satisfies all the class certification prerequisites" of Rules 23(a) and (b). Under Rule 23(a), class action plaintiffs must plead and prove (1) the numerosity of the class, (2) common questions of law or fact, (3) the typicality of class claims and defenses, and (4) the adequacy of the proposed class representative. Rule 23(b) requires that, with the requirements of Rule 23(a), a plaintiff must also demonstrate at least one of three additional criteria: (a) separate adjudications would create a risk of decisions that are inconsistent with or dispositive of other class members' claims, (b) class-wide declaratory or injunctive relief is appropriate based on the defendant's acts, or (c) common questions predominate over any questions affecting only individual members and a class action is superior to other methods of adjudication. The Act would also require any order granting issue class certification to "include a determination, based on a rigorous analysis of the evidence presented," that the action as a whole is properly certifiable under Rules 23(a) and (b). This proposed change would address a recent increase in requests for Rule 23(c)(4) issue certification following the Supreme Court's ruling in *Comcast Corp. v. Behrend*, which held that the predominance test of Rule 23(b)(3) could not be satisfied if individual questions of damages calculations would "inevitably overwhelm questions common to the class."[3] In essence, the Act would eliminate issue class certification as a resource for class action plaintiffs who fail to meet the high bar of Rules 23(a) and (b) for the entirety of their cause of action. The Act therefore appears to be an attempt to curb this recent trend of increased bifurcated or issue class certification orders, and would likely eliminate or significantly reduce the use of Rule 23(c)(4).

3. **No class certification without objective, ascertainable class membership and reliable, feasible means for allocating recovery**. The Act would also prohibit class certification "unless the class is defined with reference to objective criteria," requiring class representatives to "affirmatively demonstrate[] that there is a reliable and administratively feasible mechanism" to identify class members and distribute monetary relief directly to a substantial majority of the class. This proposal would resolve a current Circuit Court split and would adopt the prevailing standard in the Second, Third, and Eleventh Circuits. This heightened standard, the most stringent among courts that have addressed the issue, requires a showing for certification that "the class is currently and readily ascertainable based on objective criteria" and that the "purported method for ascertaining class members is reliable and administratively feasible."[4] The Act would not only extend this heightened class definition standard to plaintiffs in every Circuit, it would broaden its scope, requiring plaintiffs to make a similar showing for the proposed mechanism to distribute recovery to the proposed class.

4. **Automatic stay of discovery in all class actions**. For all federal class actions, the Act would automatically stay all discovery and other proceedings during the pendency of any motion to transfer, dismiss, strike class allegations, or otherwise 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." This provision is reminiscent of the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), which imposes an automatic stay of all discovery on all parties "during the pendency of any motion to dismiss."[5]

5. **Enhanced disclosure requirements for named plaintiffs and class counsel; no certification if there are conflicts**. The Act requires the pleading stage disclosure of any familial, employment, client, or contractual relationship between class counsel and each named plaintiff, outside of the present action. In the event of such a relationship between class counsel and a named plaintiff, the Act prohibits—without exception—a federal court from granting class certification. The Act would also require each named plaintiff to identify any other class action in which the party served a similar role. This rule would extend another PSLRA provision beyond the securities litigation context,

as the PSLRA requires a similar disclosure and prohibits a lead plaintiff from bringing more than five class actions in a three-year period. In addition, the Act would require prompt disclosure of any third-party litigation funding.

6. **Reporting requirements for settlement payments to class members**. The Act would require class counsel to submit to the Federal Judicial Center a full accounting of any settlement, including the total number of class members, the number of class members who received payment, the total amount directly paid to class members, the amount paid to any non-class member, and the smallest, median, average, and largest amounts paid to any class member. From this data, the Federal Judicial Center would be required to prepare an annual report summarizing how settlement funds were distributed in all federal class actions that year.
7. **Limitation on the timing and amount of attorneys' fees paid to class counsel**. The Act would prohibit the payment of attorneys' fees to class counsel until the settlement accounting required under the Act has been submitted to the Federal Judicial Center. In addition, any attorneys' fee award to class counsel as a result of a judgment or a settlement "shall be limited to a reasonable percentage of any payments directly distributed to and received by class members" and "in no event" may exceed the total amount of money distributed to the class.
8. **Automatic right of appeal for class certification orders**. Finally, the Act provides that Circuit Courts "shall permit an appeal from an order granting or denying class-action certification under Rule 23." Currently, under Rule 23(f), appellate review of an order granting or denying class-action certification is discretionary, and such appeals are rarely granted. The Act would therefore likely increase the amount and scope of appellate court practice, and resulting decisions, concerning class certification.

These many and sweeping proposals have already spurred fierce debate, garnering swift support from the U.S. Chamber of Commerce and drawing immediate criticism from the American Association for Justice, formerly the Association of Trial Lawyers of America. Although it remains to be seen whether the Act will become law, and whether it will undergo substantial revision by amendment, the enactment of any one provision within the Act would represent a fundamental shift in the procedures that govern federal class actions. We will continue to monitor the progress of the Act in the 115th Congress, and, if enacted, we will provide prompt analysis of the likely impact of the Act's statutory language on class action defendants and practitioners. In the interim, given the current composition of both houses of Congress and the enduring popularity of tort reform measures, observers should prepare for the strong possibility of a new legal environment under a substantially changed Rule 23 landscape.

1. 136 S. Ct. 1036 (2016).
2. *Id*. at 1045.
3. 133 S. Ct. 1426, 1433 (2013).
4. *Carrera v. Bayer Corp.*, 727 F.3d 300, 306-308 (3d Cir. 2013); see also *Brecher v. Republic of Argentina*, 806 F.3d 22, 25 (2d Cir. 2015); *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015).
5. Pub. L. 104-67, 109 Stat. 737.

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