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Reform Bill Aims to Shake Up Class Actions

Proposals include limits on plaintiffs' attorneys' fees and stay on discovery

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A new congressional bill seeks to provide defendants with a new arsenal of weapons to defeat a class certification.

The Fairness in Class Action Act of 2017 would, among other things, tighten class certification standards and remove some incentives for plaintiff's attorneys if passed. What it could mean for companies is that less meritorious class action claims, which would otherwise drag on through discovery, would become more likely to see an early resolution.

Introduced Feb. 9 by House Judiciary Committee Chair Rep. Bob Goodlatte, a Republican from Virginia, the Fairness in Class Action Act proposes a raft of defendant-friendly reforms to class action litigation, affecting everything from attorneys' fees to delays on discovery. With its many provisions taken together, H.R 985 might be a welcome sight for most companies.

"The individual reform provisions can provide some benefit, but the overall package could make a substantial impact on the current burden placed on companies defending class action litigation today," said attorney Paul Williams in an email. Williams is a partner in Shook Hardy & Bacon's Denver and Kansas City offices, and his complex litigation practice includes mass tort.

Williams said that much of the bill looks to weed out the more "non-meritorious, lawyer-driven" complaints asserted by plaintiffs' attorneys, namely by exposing conflicts of interest they might have with named plaintiffs and placing stricter limits on the fees they would reap.

Attorneys' fees of course are not just a backend matter for companies facing a putative class action. As they are attached to the relief the class members seek, attorneys' fees are often leveraged in the negotiations for settlement early on.

One of the bill's provisions would cap plaintiffs' attorneys' fees at "a reasonable percentage" of the equitable relief or the payout that the class ends up receiving (unless a federal statute dictates otherwise). And the payment of attorneys' fees, under the bill, would be delayed until after all of the relief is paid out to the class.

"These changes would ensure that fee awards stay relevant to the actual value obtained for the class, which does not always occur today," said Jessica Fuller in an email. Fuller is a Denver-based partner in Lewis Roca Rothgerber Christie's litigation practice group.

Regarding class certification, the reform bill would require that all putative class members suffer "the same type and scope of injury as the named class representative or representatives" and that the class be defined by "objective criteria" — the latter being commonly referred to as "ascertainability," according to Fuller.

"The requirement that putative class members be ascertainable … is an important one," she said. "Otherwise, the scope of the class would remain a moving target for defendants, and courts would be forced to conduct mini-trials simply to determine who is in the class."

H.R. 985 would also require plaintiffs' counsel to disclose what relationships they have, if any, with the named plaintiff and the "circumstances under which each class representative or named plaintiff agreed to be included in the complaint." It would also prohibit courts from certifying a class where the proposed class representative or named plaintiff "is a relative of, is a present or former employee 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."

Fuller said that barring those relationships "would help combat the subset of class actions that appear to be asserted by class counsel, for the economic benefit of class counsel, without a meaningfully engaged plaintiff, or alternatively, those that are brought by the 'professional plaintiff.'"

From a potential defendant's perspective, perhaps one of the most economically significant pieces of the class action reform bill is its stay on discovery pending motions to transfer, dismiss or strike the complaint. In high-stakes mass tort cases, companies "are often forced to spend hundreds of thousands if not millions of dollars in broad sweeping discovery," and particularly in e-discovery, Williams said.

According to Fuller, "class discovery is time consuming, expensive, and burdensome for defendants — just the threat of that discovery can be used to leverage settlement discussions." She noted that the bill exempts "particularized" discovery from the stay when it's necessary to preserve evidence or prevent undue prejudice. But if any discovery that went forward had to be particularized and truly necessary, "that could significantly change the calculus for defendants in choosing to fight class certification and/or the merits of the class claims," she said.

In a nutshell, the class action reform package would allow courts to determine the case-dispositive issues earlier on in the case, Williams said. That would allow companies to better focus their decision-making on the key issues with the claims and what the claims' economic impact might be, he added.

H.R. 985 has "a very legitimate chance" of passing in this Congress, according to Victor Schwartz, chair of Shook Hardy & Bacon's public policy practice in Washington, D.C.

Among other indicators for passage, the bill got approval from the House Judiciary Committee on Feb. 15 — less than a week from its introduction. "That is extraordinarily early if one looks at the history of civil justice reform proposals," Schwartz said. "That provides more time for the legislation to become law."

If one is to look for recent legislative precedent, there's the Class Action Fairness Act that President George W. Bush signed in 2005 with bipartisan support. The act expanded federal courts' ability to preside over certain class actions with diversity jurisdiction. But the current reform bill is much broader and will affect a wider range of class action and mass tort issues, "some of which are arguably more complex," Schwartz said.

"Right now nothing is certain in Washington, D.C., so there is no certainty with respect to this legislation with respect or its passage or failure to become law," Schwartz said, noting that perhaps the only certainty is that the bill will draw more attention to what he calls "abusive practices" in class action and mass tort litigation. •

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