

So What's In the "Fairness in Class Action Litigation Act of 2017"?

February 21, 2017

On Feb. 9, the Chair of the House Judiciary Committee introduced a bill titled the "Fairness in Class Action Litigation Act of 2017" (FCALA) (H.R. 985). Although the FCALA has a worthy goal and several provisions that build on existing, successful class action reforms, it may have too many "poison pills" to pass the Senate, as did its predecessor bill of the same title introduced in 2015 (H.R. 1927). Before businesses suit up for a fight over those more controversial aspects of the bill, however, they should consider the likelihood of unintended consequences if those provisions become law.

Two provisions of the FCALA would extend to all class actions some of the beneficial changes Congress imposed on securities fraud class actions in the 1995 Private Securities Litigation Reform Act. The bill would require named plaintiffs to provide certifications attesting to their willingness to serve as class representatives and disclosures of any other class action cases they have brought. It also would presumptively stay discovery in all class actions while motions to dismiss are pending. Both of those steps would be helpful to class action defendants and preclude class plaintiffs from exerting undue settlement pressure until the Court has determined the plaintiff has a plausible claim.

The FCALA then would go beyond the securities reforms by also requiring class counsel to disclose any employment, familial, or contractual relationship it has with the named plaintiff and precluding courts from certifying classes represented by people possessing such relationships. The bill seems to preclude a law firm from representing the same client in multiple class actions — a requirement the bar will resist. It also would stay discovery during the pendency of "any motion to transfer" or "motion to strike class allegations." In that respect, the FCALA would become the first federal law or rule explicitly recognizing the propriety of pre-discovery challenges to class claims. The bill does not contain an express exception allowing discovery on class issues while a motion to strike class allegations is pending, which would set up an interesting and perhaps untenable dynamic if the defendant seeks to introduce materials beyond the pleadings while preemptively attacking class claims.

The bill would substantially tighten class certification requirements. Under current law, before certifying classes, courts must find (among other things) that the named plaintiff is a "typical" and "adequate" class representative, and that questions common to the class "predominate" over questions individual to each putative class member. The FCALA would impose a new "super-typicality" requirement that "each proposed class member [must have] suffered the same type and scope of injury" as the named plaintiff. What this would mean in practice is unclear.

Every Court of Appeals to opine on the subject of class definitions has precluded so-called "fail-safe" classes and held that classes must be "defined with reference to objective criteria." The FCALA would codify that requirement.

The FCALA also weighs in on the current Circuit split over “ascertainability” and resolves that split in the Third Circuit’s favor. It would preclude class certification unless “there is a reliable and administratively feasible mechanism” to determine whether someone is a member of the class. The bill is silent, however, as to whether accepting say-so affidavits from class members is such a “feasible mechanism.” If affidavits are not acceptable, the net effect of the FCALA likely would be to preclude class certification in consumer products cases where the defendants do not have contact information for their end-purchasers. That potential effect already has generated major opposition to the bill from consumer advocates.

In fact, the FCALA would go well beyond the Third Circuit’s holding by prohibiting courts from certifying classes unless a means exists to “distribut[e] directly to a substantial majority of class members any monetary relief secured for the class.” Businesses, however, should be at least as wary of that provision as the plaintiffs’ bar is, if not more so. Although one possible outcome, if this aspect of the FCALA becomes law, is that classes rarely will be certified, another is that plaintiffs will push harder to maximize claims rates, including by demanding intrusive third-party discovery from the defendants’ business partners and insisting on ever-more-expensive and burdensome steps to provide notice to class members.

Where defendants find themselves on the wrong end of a class certification ruling, current Federal Rule of Civil Procedure 23(f) already permits interlocutory appeals from those orders. Rule 23(f), though, allows the Courts of Appeals to accept or reject those appeals based on any criteria they may set. The FCALA would require the Courts of Appeals to hear these appeals mandatorily. That change would be a boon to defendants who believe a class was certified wrongly, but it also would mean defendants must bear the costs and risks of defending appeals from disappointed plaintiffs that, under the current procedures, never would have made it past the petition stage.

The most recent round of major class action reform, the Class Action Fairness Act of 2005, came in the last year of unified Republican control of Congress and the Presidency. The return of that unified control stirs hope for further class action reform, which is badly needed. The FCALA is a helpful first shot in that battle, but it could use some additional input from the proverbial front lines of the consumer class action wars.

To learn more about Class Action Litigation, please tune in for our webinar on February 22 at 12 PM ET on "Litigation is Inevitable: Update on Recent Advertising Class Actions." For more information and to register, [please click here](#).