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Client Alert Commentary

Latham & Watkins Antitrust & Competition and Product Liability, Mass Torts & Consumer Class Actions Practices

March 15, 2017 | Number 2093

Class Action Defendants Likely to Benefit if House Bill Becomes Law

The Fairness in Class Action Litigation Act, passed by the House of Representatives on March 9, 2017, may significantly change how class action cases proceed under Rule 23.

Key Points:

- The Act addresses a range of issues related to class action litigation, including class certification requirements, appeals, and attorneys' fees in class settlements.
- While most provisions are likely to benefit defendants, a few have the potential to disadvantage both sides, particularly in certain kinds of settlements.

Introduction

On March 9, 2017, the U.S. House of Representatives passed H.R. 985, the Fairness in Class Action Litigation Act of 2017 (the Act), by a vote of 220-201. The Act's stated purposes are to "assure fair and prompt recoveries," to "diminish abuses," and to "restore the intent of the framers" in the context of class action litigation.[1] The Act is the most recent attempt by the House Judiciary Committee to implement class action litigation reform. A similar bill, H.R. 1927, was introduced in 2015 but failed to get through Congress.

In some respects, the Act merely codifies existing law. Nonetheless, if enacted, the legislation could significantly change class action litigation, particularly at and before the certification stage. Although most of the provisions are likely to benefit defendants by making certification requirements more stringent, some may disadvantage both sides by discouraging judicial approval of certain types of settlements.

When the Senate plans to take up the bill remains unclear, but reports indicate that when it does, the Act will face strong opposition. The class action plaintiffs' bar and numerous national organizations also reportedly are working hard to prevent the Act's passage. Nonetheless, given that President Trump is believed to be supportive of the legislation, companies that are involved in or regularly face class litigation should monitor the Act's progression carefully. In that regard, it is important to note that if passed by the Senate in its current form, the Act will apply to *all* civil actions that are pending on the date of its enactment.

This *Client Alert* highlights several of the most important provisions in the Act, and how they would change and/or impact current law.

Major Provisions in the Act

Class Action Injury Allegations

No provision of the Act has garnered more attention than Section 1716, which sets forth the requirements for sufficiently pleading class action injury. Under Federal Rule of Civil Procedure 23 (Rule 23), subsection (a)(2), a class may be certified only if "there are questions of law or fact common to the class." In *Walmart v. Dukes*, the Supreme Court held that this commonality requirement demands that the plaintiff "demonstrate that the class members have 'suffered the same injury,'" but noted that "[t]his does not mean merely that they have all suffered a violation of the same provision of law."[2]

Following *Dukes*, the Third Circuit held that "[m]eeting this requirement is easy," as commonality may be present "even when not all members of the plaintiff class suffered an actual injury, when class members did not have identical claims, and, most dramatically, when some members' claims were arguably not even viable."[3] In the NFL concussion litigation, despite the players' differing injuries, the Third Circuit held that a class of 20,000 NFL players had sufficiently common factual questions, such as "whether the NFL Parties knew and suppressed information about the risks of concussive hits," and sufficiently common legal questions, such as "the nature and extent of any duty owed to retired players by the NFL Parties," were common to all class members.[4] Other circuits have reached similar results.[5] Along the same lines, in antitrust cases, courts typically find the commonality requirement satisfied based on the plaintiffs' allegations of conspiracy — where the evidence regarding the defendants' alleged price fixing or bid rigging is common to all class members.[6] The fact that class members may have suffered different injuries (or been impacted in different ways) by the alleged conduct is relevant to the question of whether common issues predominate over individual ones under Rule 23(b)(3), but it does not defeat commonality under Rule 23(a).

Section 1716 of H.R. 985 requires district courts to conduct a "rigorous analysis" of whether each "proposed class member suffered the same type and scope of injury as the named class representative or representatives" before it can certify a class. While the language of H.R. 985 seems to echo that of *Dukes*, it goes further by appearing to require for class certification an evidentiary showing of common injury for all class members.

Read literally, the bill would seem to prevent certification of classes with members that have suffered different injuries, even if those injuries were caused by the same conduct or events. However, as with *Dukes*, courts may continue to interpret the requirement to allow for certification when class members' injuries stemmed from the same conduct.[7] The real change may come from the requirement that courts conduct a "rigorous analysis" to determine whether each class member has suffered the same injury. This provision suggests that plaintiffs will need to prove that all class members have suffered the same injury at the class certification stage, not simply show that they are capable of proving class-wide injury at some point.

Class Member Benefits and Ascertainability

The Act also aims to resolve a significant split amongst the circuit courts concerning the extent to which class members, consistent with Rule 23, must be ascertainable.

The more rigorous approach, adopted by the Third Circuit, requires that (1) a class "be defined with reference to objective criteria" and (2) there is a "reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition."[8] Under this heightened standard, if class members are not ascertainable through the defendant's records, there must be a reliable, administratively feasible alternative that does not rely on potential class members' "say so."[9] A

class is not ascertainable if class members are "impossible to identify without extensive and individualized fact-finding or 'mini-trials.'"[10] The First, Second, Fourth and Eleventh Circuits also follow this approach.[11]

The Sixth, Seventh, Eighth and Ninth Circuits, by contrast, only require that classes be defined clearly and based on objective criteria. They do not require plaintiffs to prove that all class members can be identified easily.[12]

Section 1718(a) of H.R. 985 codifies the Third Circuit ascertainability standard, declaring that a "[f]ederal court shall not issue an order granting certification of a class action seeking monetary relief unless the class is defined with reference to objective criteria and the party seeking to maintain such a class action affirmatively demonstrates 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."

In addition to adopting the Third Circuit's two-part test, this language requires plaintiffs to show that there is a reliable and administratively feasible mechanism for distributing monetary relief directly. This standard will require plaintiffs to "affirmatively demonstrate" — not simply allege — that there is a reasonable way to sufficiently differentiate class members from non-class members, and to contact class members regarding distributions. If the Third Circuit's previous application of its standard is any indication, satisfying this statutory requirement may be difficult for plaintiffs.[13]

However, the need to provide a mechanism for distributing proceeds "directly to a substantial majority of class members" could disadvantage both plaintiffs and defendants with respect to class settlements. In antitrust cases, for example, most settlements distribute funds to only those class members who submit claims, and the percentage of class members that are claimants is often quite low — far less than a "substantial majority." If H.R. 985 becomes law and courts interpret it to require distributions to a "substantial majority," plaintiffs and defendants may need to re-structure their settlements to secure court approval.

Issues Classes

Another important section of the Act addresses the requirements for certifying "issues classes." Rule 23(c)(4) states that a judge may certify an action to be "brought or maintained as a class action with respect to particular issues" when appropriate. The Rules Advisory Committee's notes suggest that this rule enables plaintiffs to certify a class as to liability only, and then to prove damages on an individual basis, once the defendant's liability to the class has been established. [14]

Courts are divided on the question of whether Rule 23(c)(4) allows certification of a narrower, "issues-based" class action that does not necessarily meet the full requirements of the Rule 23, particularly the predominance requirement, or whether Rule 23(c)(4) is simply a procedural tool for trial purposes that does not alter Rule 23's usual requirements.[15]

Section 1720 of H.R. 985 prohibits the certification of a class under Rule 23(c)(4) unless the district court makes a determination that "the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites of Rule 23(a), Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3)." Thus even an "issues class" seeking certification under Rule 23(c)(4) would need to demonstrate numerosity, commonality, typicality and adequacy (Rule 23(a)), as well as establish the risk of inconsistent adjudications (Rule 23(b)(1)), that defendant's actions apply generally to the class (Rule 23(b)(2)), or that common questions predominate and the controversy is best treated as a class action (Rule 23(b)(3)).

The Act therefore appears to codify the view that Rule 23(c)(4) is procedural, not a substantive rule that broadens the scope of class certification. If courts interpret it in this manner, certification will be more difficult in actions that may have some common issues and some individualized issues, because plaintiffs must ensure that the entire cause of action — not just a single issue within it — satisfies all of the requirements of Rule 23.

Class Action Attorneys' Fees

Rule 23(h) addresses the procedures by which class counsel may seek attorneys' fees, and says nothing regarding the amount of the fees other than that they must be "reasonable." Courts use two methods to ascertain reasonable fees: the "percentage" method, in which the fees are based on the class' recovery, and the "lodestar" method, in which the fees are based on counsel's actual bills. The percentage method can be difficult to apply in cases that involve significant equitable relief, settlements that require class members to make claims and settlements in which unclaimed funds revert to the defendant or to a *cy pres* recipient.[16]

Section 1718(b) of H.R. 985 addresses the calculations to be used in certain of these scenarios. Most importantly, an award of fees based on a class' monetary recovery "shall be limited to a reasonable percentage of any payments directly distributed to and received by class members," and cannot exceed the total amount actually paid to class members. This language indicates a clear preference for fees to be calculated based on actual distributions, not potential distributions (*i.e.*, the amount set aside or total fund), and will likely engender significant opposition from the plaintiffs' bar, which could see fee awards in large claims-made settlements significantly reduced.[17]

Appeals

While Rule 23(f) currently provides that a court of appeals "may permit" an appeal from an order granting or denying class action certification, appeals are permissive and parties must make a specific showing to gain the right to immediately appeal. For example, the Seventh Circuit will grant an interlocutory appeal only when (1) the appellant shows that denial of class certification would be a "death-knell" for the litigation and the appellant demonstrates the district court's ruling on class certification is "questionable" or (2) the interlocutory review would contribute to the development of law.[18]

Under Section 1723 of H.R. 985, 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." This provision removes the court's discretion to grant an appeal of a class certification decision, and instead requires the court to permit the appeal. This change guarantees the party that loses a class certification decision the ability to immediately appeal that decision, removing any uncertainty regarding what may be required or sufficient to justify a grant of an interlocutory appeal on class certification.

Stay of Discovery in Class Actions

With the exception of private securities fraud class actions, in which motions to dismiss or other dispositive motions trigger an automatic stay on any discovery, in most class actions, courts are not obligated to stay discovery before deciding whether the case may proceed past the pleadings stage.[19]

Section 1721 of H.R. 985 applies the private securities fraud discovery exception to all class actions.[20] It stays "all discovery and other proceedings" during any motion that seeks to dispose of the class allegations, including motions to dismiss, transfer or strike. However, the stay is not absolute; a court may grant discovery during the pendency of such a motion, if it finds such "particularized discovery ... necessary to preserve evidence or prevent undue prejudice to that party."

Other Provisions

Additional provisions of H.R. 985 address the following topics:

- Disclosure of relationships in non-securities class actions between class counsel and potential class representatives for purposes of determining conflicts of interest, and a bar on relatives or employees of class counsel serving as class representatives (Section 1717)
- Reporting of class action settlement disbursements to the federal government, and preparation of annual reports to Congress of total disbursements (Section 1719)
- Misjoinder of plaintiffs in personal injury and wrongful death actions (Section 104)
- Multidistrict litigation procedures, including verification of allegations, consent of parties to a civil trial; issues related to appeals and remands; and personal injury plaintiffs' recovery (Section 105)
- The ultimate rulemaking authority of the Supreme Court and Judicial Conference (Section 106)

Conclusion

If passed in its current form, H.R. 985 could create significant changes in class action practice, primarily in the context of making class certification requirements more stringent and potentially creating heightened thresholds for judicial approval of settlements and attorneys' fees. In other areas, however, the Act largely codifies current precedent in many circuits, although to what extent will depend on how broadly or narrowly the courts construe those provisions of the Act.

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The authors wish to thank Alexandra S. Wise for her contributions to this *Client Alert*.

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Endnotes

1 Fairness in Class Action Litigation Act, § 102.

2 *Walmart v. Dukes*, 564 U.S. 338, 350 (2011), quoting *Gen. Telephone Co. of Northwest v. EEOC*, 446 U.S. 318, 330 (1980).

3 *In re NFL Players Concussions Injury Litigation*, 821 F.3d 410, 427 (3d Cir. 2016), *cert. denied* 137 S. Ct. 591 (2016).

4 *Id.*

5 *See*, *e.g.*, *Vaquero v. Ashley Furniture Indus.*, 824 F.3d 1150, 1154 (9th Cir. 2016) (upholding class certification where the common injury was "far less extensive, far less abstract, far less dispersed, and far more objective and focused" than the injury alleged in *Dukes*").

6 *See, e.g.*, *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 308 F.R.D. 606, 617 (N.D. Cal. 2015) ("[W]here an antitrust conspiracy has been alleged, courts have consistently held that the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist.").

7 *See*, *e.g.*, *In re NFL Players Concussions Injury Litigation*, 821 F.3d at 410; *Vaquero*, 824 F.3d at 1150.

8 *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013); *see also Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) ("The ascertainability requirement consists of nothing more than these two inquiries. And it does not mean that a plaintiff must be able to identify all class members at class certification – instead, a plaintiff need only show that 'class members can be identified.'"), quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 n.2 (3d Cir. 2013).

9 *Carrera*, 727 F.3d at 2013.

10 *Marcus v. BMW of North America*, 687 F.3d 583, 593 (3d Cir. 2012).

11 *See In re Nexium Antitrust Litigation*, 777 F.3d 9 (1st Cir. 2015); *Brecher v. Republic of Argentina*, 806 F.3d 22 (2d Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014); *Karhu v. Vital Pharmaceuticals, Inc.*, 621 Fed. Appx. 945 (11th Cir. 2015).

[12] *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 659 (7th Cir. 2015); *see also Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015); *Sandusky Wellness Center, LLC v. Medtox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017).

[13] *See*, *e.g.*, *Karhu*, 621 Fed. Appx. at 949 (sales records identified retailers but not purchasers); *Carrera*, 727 F.3d at 311 (affidavits claiming purchase insufficient); *Marcus*, 687 F.3d at 593-94 ("serious ascertainability issues" raised when defendant's records could not provide sufficient information to meet class definition).

[14] Fed R. Civ. P. 23(c)(4), Advisory Committee's Note (1966).

[15] *See*, *e.g.*, *Castano v. American Tobacco*, 84 F.3d 734, 745 n.21 (5th Cir. 1996) ("A cause of action, as a whole, must satisfy the predominance requirement of [Rule 23] (b)(3) … [Rule 23] (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial."); *In re Nassau County Strip Search Cases*, 461 F.3d 219, 226–27 (2d Cir. 2006) (holding that a class may be certified as to liability under Rule 23(c)(4) "regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement"); *Gunnells v. Healthplan Services*, 348 F.3d 417, 439 (4th Cir. 2003) (observing that a dissent's interpretation that matched the Fifth Circuit's renders Rule 23(c)(4) superfluous).

[16] *See*, *e.g.*, *Pokorny v. Quixtar Inc.*, 2011 WL 2912864, *2 (N.D. Cal. July 20, 2011) (noting skepticism of the valuation of injunctive relief and observing that such relief would only benefit a small portion of the class); *In re TJX Companies Retail Sec. Breach Litigation*, 584 F.Supp.2d 395, 405 (D. Mass. 2008) (noting a "claims-made" defendant "is likely to bear only a fraction of the liability to which it agrees); and *Landsman & Funk v. Skinder-Strauss Assoc.*, 639 Fed. Appx. 880, 884 (3d Cir. 2016) (upholding fee calculation based on entire amount made available for claims even when a significant portion would revert to defendant).

[17] Section 1718 also addresses the timing of the payment of attorneys' fees, previously unaddressed by Rule 23. It mandates that fees cannot be determined or paid until the monetary relief has been completely distributed to the class.

[18] *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 835 (7th Cir. 1999).

[19] 15 U.S.C. §§ 77z-1(b)(3), 78u-4(b)(3)(B).

[20] Section 1721 exempts private securities fraud actions brought as class actions; presumably this is due to its redundancy with existing law on such actions.