

New Political Climate May Lead to Class Action Changes

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The election of a Republican President, along with a Republican U.S. Congress, and the election of a Republican Missouri Governor, combined with a Republican state legislature, are all spurring potential changes on the respective class action landscapes.

Federal Priorities

At the federal level, House Judiciary Committee Chairman Bob Goodlatte (R-Va.) introduced the "Fairness in Class Action Litigation Act of 2017," which is intended to "assure fairer, more efficient outcomes for claimants and defendants, and for other purposes." The bill further recites its purpose to "(1) assure fair and prompt recoveries for class members and multidistrict litigation plaintiffs with legitimate claims; (2) diminish abuses in class action and mass tort litigation that are undermining the integrity of the U.S. legal system; and (3) restore the intent of the framers of the United States Constitution by ensuring Federal court consideration of interstate controversies of national importance consistent with diversity jurisdiction principles."

Rep. Goodlatte was an author of the Class Action Fairness Act enacted in 2005 and led another effort at class action reform in 2015, which did not succeed. The 2017 bill passed the House Judiciary Committee by a vote of 19 to 12. Here is a summary of the bill's main points:

- Class Certification Must be Based on the Same Type and Scope of Injury: The proposed amendment requires uniformity of injury in class actions seeking monetary relief for personal injuries or economic loss. Under the proposed amendment, each proposed class member must have "suffered the same type and scope of injury as the named class representative or representatives." These requirements go beyond the current requirements that the class representative is a "typical" and "adequate" representative, and that common questions "predominate" over individual questions. The bill also requires that any class certification order for injury or loss must include a determination "based on a rigorous analysis of the evidence presented" that the above uniformity requirement was met. This would likely result in discouraging lawsuits where class members have a wide variety of damages, including some with no damages at all. If enacted, the bill's language will also likely lead to judicial interpretation of its breadth.

- Explicit Ascertainability Requirement: The bill makes uniform a requirement that plaintiffs affirmatively demonstrate there is "a reliable and administratively feasible mechanism" for the court to determine if the proposed class members are within the class definition, and how funds can be distributed directly to a substantial majority of the class members. In essence, all class members must be ascertainable. Ascertainability is already a class certification requirement, although its application and the standard courts apply varies by circuit.
- Attorneys' Fees: In what could be a significant change for some class actions, the bill provides that no attorneys' fees will be paid until *after* the distribution of all monetary recovery to class members, and further mandates that any fee must be based upon the *actual* issuance of any payments directly distributed to and received by the class members, and not what *theoretically* could be paid. Further, "[i]n no event shall the attorneys' fee award exceed the total amount of money directly distributed to and received by all class members." This provision could be a significant change in some cases where fees are based on the potential payment to class members, and not the actual payments or claims made. For equitable cases, fees will be limited to "a reasonable percentage in the value of the equitable relief, including any injunctive relief."
- Reporting of Funds Paid: The bill also contains an administrative reporting requirement to the Federal Judicial Center and the Administrative Office of the United States Courts. Class counsel would be required to report the total amount paid to all class members, the actual or estimated total number of class members, the number of class members who received payment, the average amount paid, the largest amount paid to any class member, each amount paid to any other person (including counsel) and the purpose of the payments. Until the reporting is complete, no attorneys' fees can be paid.
- Conflicts of Interest: The bill requires that class counsel state in the complaint whether any class representative or named plaintiff "is a relative of, is a present or former employee of, is a present or former client (other than with respect to the class action), or has any contractual relationship with (other than with respect to the class action) class counsel." The bill also requires recitation in the complaint of the circumstances under which the class representative or named plaintiff agreed to serve in such role, along with any previous similar roles. If enacted, this provision creates an interesting issue for repeat plaintiffs, in that they could not use the same counsel in subsequent lawsuits.
- Discovery Stay: In a significant procedural change, the bill would mandate that all discovery be stayed during the pendency of any motion to transfer, motion to dismiss, motion to strike class allegations, or other motion to dispose of the class allegations, unless the court finds upon motion by any other party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to the party.
- Appeals: The bill would require the Court of Appeals to "permit an appeal from an order granting or denying class action certification under Rule 23 of the Federal Rules of Civil Procedure." Currently, an appeal is permissive.
- Third-Party Funding Disclosure: The bill would require class counsel to disclose in writing to the court and other parties the identity of any person or entity (other than class counsel or class members) who has a contingent right to compensation from the case.

Changes in the Missouri Merchandising Practices Act (MMPA)



Newly elected Missouri Gov. Eric Greitens made it a point in his opening inauguration remarks to say that the MMPA needs to be changed. In making his statement, he was critical of certain cases in Missouri and their pro-plaintiff results. The MMPA is often the basis of class actions and a tort reform target.

Senate Bill 5 has already been proposed in the Missouri legislature by Senate President Pro Tem Ron Richard. It is an aggressive bill, which would substantially change the MMPA, and plaintiffs' ability to bring class actions under the MMPA (along with other tort reform provisions). Among the initial proposed MMPA changes in the bill are exemptions for regulated businesses (most businesses fall within this category), more onerous requirements for class members (not just class representatives), defined elements of recoverable damages, objective proof of damages requirement for *each* class member, uniformity of damages requirement among class members in a class action and significant restrictions on recoverable attorneys' fees. The current version of the bill also makes all changes retroactive and applicable to currently filed cases. If enacted, certain provisions of the bill would certainly be challenged in the courts.

Both bills still have a ways to go before enactment, but their early release indicates they are a priority for the coming year. Look for further updates from Lathrop Gage as they progress through the legislative process.

If you have questions regarding this alert, please contact your Lathrop Gage attorney or the attorneys listed above.