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# Class Actions

## **CAFA 2.0? Major Class And Mass Action Reform Bill Advances In Congress**

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**A commentary article  
reprinted from the  
April 21, 2017 issue of  
Mealey's  
Litigation Report:  
Class Actions**





# Commentary

## CAFA 2.0? Major Class And Mass Action Reform Bill Advances In Congress

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More than 10 years ago, Congress passed and President George W. Bush signed the Class Action Fairness Act (CAFA). Among other things, CAFA made it easier for defendants in putative state-court class actions to remove their cases to federal court for adjudication. As a result, fewer class actions are litigated in state courts today.

A much broader civil justice reform bill is now working its way through Congress with the potential to significantly alter class action and mass action practice in the United States. Known as the Fairness in Class Action Litigation Act of 2017 (FICALA), the bill would make major changes to procedure in both federal class actions and multidistrict litigation (MDL).<sup>1</sup> FICALA easily passed the House of Representatives on March 9, 2017, and as of the writing of this article, is in the hands of the Senate Judiciary Committee.

FICALA's purposes and potential effects are the subject of disagreement. The bill's stated purpose is to "diminish abuses in class action and mass tort litigation that are undermining the integrity of the U.S. legal system" while "assur[ing] fair and prompt recoveries for class

members and multidistrict litigation plaintiffs with legitimate claims."<sup>2</sup> Opponents argue the bill will "give the class action mechanism the guillotine" or at least put it in a "straitjacket."<sup>3</sup>

Regardless of one's perspective, the dramatic changes FICALA would effect are worthy of attention. This article provides background on the proposal and an overview of its extensive provisions.

### Background

With CAFA's reforms and other developments in class action law, the MDL proceeding has risen in prominence and as a procedural mechanism for mass litigation. According to statistics concerning MDLs maintained by the Judicial Panel on Multidistrict Litigation, the 10 years that followed CAFA's implementation in 2005 saw nearly a 30 percent rise in newly-created MDLs, compared with the 10 years prior to CAFA's enactment.<sup>4</sup>

Although the procedural nature of the proceeding is different from a class action, most significantly because generally every claimant must file a lawsuit, MDLs share with class actions the ability to consolidate multiple claims into a single coordinated procedural proceeding. FICALA contains provisions to address issues with both class actions and MDLs. Similar legislation has been introduced in the past without success. A 2016 version of the bill, which contained fewer reforms, passed the House but perished in the Senate.

### Class Action Reforms

The modifications FICALA would make to class action practice are extensive. They affect the types of cases that

can be certified as class actions, who may serve as a plaintiff or class representative, how class member recoveries are distributed, how attorney's fees are awarded, and appeals.

#### **“Same Type And Scope” Requirement**

FICALA would add a provision to CAFA to require proposed class plaintiffs suing for personal injury or economic loss to “affirmatively demonstrate[] that each proposed class member suffered the same type and scope of injury as the named class representative or representatives” Before certifying a class, the federal court must perform “a rigorous analysis of the evidence presented” to determine that this requirement is met.<sup>5</sup>

This requirement would make it difficult to maintain a type of so-called “no injury” class actions in which a named plaintiff asserts, for example, a statutory violation however neither they nor their putative class members suffered any cognizable injury or damages.

#### **Conflicts Of Interest**

FICALA would require disclosure in the complaint of whether any named plaintiff or proposed class representative is a relative, employee, or previous client of class counsel. Further, the court is not permitted to certify a class in which “any proposed class representative or named plaintiff is a relative or employee of class counsel.”<sup>6</sup>

This provision is aimed at curbing the practice of class action counsel who wish to bring a class action but who lack any plaintiffs, and who then recruit family or employees to serve as those plaintiffs.

#### **Class Member Benefits And Attorney's Fees**

FICALA would require a class be “defined with reference to objective criteria” and would require an affirmative demonstration that “there is a reliable and administratively feasible mechanism” to determine who falls within the class and to distribute any monetary relief “directly to a substantial majority of class members.”<sup>7</sup>

Additionally, FICALA would limit an award of attorney's fees “to a reasonable percentage of any payments directly distributed to and received by class members.” And money would have to be distributed to class members before any attorney's fees were paid.<sup>8</sup>

#### **Accounting And Reporting**

Before any attorney's fees are paid to class counsel from a settlement, FICALA would require an accounting of all funds paid by a defendant, which must be reported to the Federal Judicial Center (and ultimately to Congress).<sup>9</sup> The reporting would track a number of metrics about the size of the class and recoveries by class members, and presumably enable further academic study about the costs and benefits of class action litigation.

#### **Issues Classes**

FICALA would clarify that “issues classes” under Federal Rule of Civil Procedure 23(c)(4) must still meet the requirements of Rules 23(a), 23(b)(1), 23(b)(2), and 23(b)(3).<sup>10</sup> So even for a class certified with respect to issues under Rule 23(c)(4), questions of law or fact common to the class must still predominate over questions affecting individual class members.

#### **Stay Of Discovery**

FICALA would require a stay discovery while motions to dismiss, transfer, or dispose of class allegations are pending.<sup>11</sup>

#### **Third-Party Litigation Funding Disclosure**

Third-party litigation funding, investment by strangers to litigation (that is, not parties, their counsel, or related third parties like insurers), is a rapid-growth industry in the United States. Because disclosure of these arrangements has been limited, little is known about the industry, the extent of its involvement in the U.S. civil justice system, or its effect on particular cases. FICALA would require the prompt disclosure of any third-party funding arrangements in class actions.<sup>12</sup>

#### **Class Certification Appeals**

FICALA would create mandatory appellate jurisdiction for appeals from class certification decisions.<sup>13</sup> This would replace the practice of discretionary appeals from such decisions under Federal Rule of Civil Procedure 23(f).

#### **Other Mass Action Reforms**

In addition to its class action reforms, FICALA would make substantial changes to other mass actions, particularly personal injury mass torts.

#### **Fraudulent Misjoinder**

FICALA would arrest an increasingly widespread tactic to maintain otherwise removable cases in a preferred

state court venue. This tactic involves the filing of a single lawsuit on behalf of multiple clients whose claims share no nexus other than, for example, use of the same product. The collection of unrelated plaintiffs will include an individual from the home forum, as well as someone from the same state as a defendant's residence to destroy diversity jurisdiction. These lawsuits often include up to 99 plaintiffs—in order to avoid CAFA's removal procedure for actions with 100 or more plaintiffs.

FICALA would require federal courts considering motions to remand such cases to look through this gamesmanship and consider each plaintiff's diversity individually.<sup>14</sup> That way, a single non-diverse plaintiff would not be a basis to remand an entire 99-plaintiff action.

#### **MDL Upfront Evidentiary Submission**

FICALA would codify a growing practice in MDLs that a plaintiff provide early evidence that their claim is not frivolous. If passed, FICALA would require a plaintiff to produce evidence within 45 days to support the "factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury."<sup>15</sup> This often involves medical and prescription records, and many experienced MDL courts have imposed similar requirements as part of the Plaintiff Fact Sheet process.

#### **MDL Trial Consent Requirement**

FICALA would require all parties' consent for the MDL court to conduct a trial of a constituent case.<sup>16</sup> This requirement would in effect expand *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), to require consent for MDL bellwether trials even where the case would otherwise be properly venued in the MDL district.

This provision would allow plaintiffs or defendants to opt out of a bellwether trial process, and require the MDL court to remand cases back to originating districts for trial at the conclusion of pre-trial coordinated proceedings. It also appears that the language in FICALA would prevent MDL judges from remanding home-forum cases to themselves for trial.

#### **MDL Appeals**

FICALA would require Courts of Appeal to accept an interlocutory appeal of an MDL court order "provided

that the order is applicable to one or more civil actions seeking redress for personal injury and that an immediate appeal from the order may materially advance the ultimate termination of one or more civil actions in the proceedings."<sup>17</sup>

Additionally, defendants would be permitted to appeal an order from an MDL court to remand a case to state court, though the language suggests that the appeal is discretionary for the Court of Appeals.<sup>18</sup> Currently, such remand orders are not appealable.

#### **MDL Attorney's Fees**

FICALA would require at least 80 percent of the money from MDL settlements or judgments to go to the plaintiffs. In effect, this provision would cap the contingency fees for MDL plaintiffs' attorneys at 20 percent.

#### **Conclusion**

All interested parties to class action and mass action practice should pay close attention to the progress of FICALA in the Senate, including any amendments. If passed in its same or substantially similar form, it will have immediate and meaningful impact on the filing, administration, appeal, and ultimate resolution of federal class actions and mass actions.

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#### **Endnotes**

1. H.R. 985, 115th Cong. (2017) ("FICALA"). As passed by the House, FICALA is now called the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017. This article does not address the added provisions on asbestos litigation.
2. FICALA, Sec. 102.
3. 163 Cong. Rec. H1975 (daily ed. March 9, 2017) (statement of Rep. Raskin).
4. See United States Judicial Panel on Multidistrict Litigation, 2016 Calendar Year Statistics, pp. 3-4, [http://www.jpml.uscourts.gov/sites/jpml/files/JJPLM\\_Calendar\\_Year\\_Statistics-2016.pdf](http://www.jpml.uscourts.gov/sites/jpml/files/JJPLM_Calendar_Year_Statistics-2016.pdf).
5. FICALA, Sec. 103, at § 1716.
6. FICALA, Sec. 103, at § 1717.

- 7. FICALA, Sec. 103, at § 1718(a).
- 8. FICALA, Sec. 103, at § 1718(b).
- 9. FICALA, Sec. 103, at § 1719.
- 10. FICALA, Sec. 103, at § 1720.
- 11. FICALA, Sec. 103, at § 1721.
- 12. FICALA, Sec. 103, at § 1722.
- 13. FICALA, Sec. 103, at § 1723.
- 14. FICALA, Sec. 104, at § 1447(f).
- 15. FICALA, Sec. 105, at § 1407(i).
- 16. FICALA, Sec. 105, at § 1407(j).
- 17. FICALA, Sec. 105, at § 1407(k)(1).
- 18. FICALA, Sec. 105, at § 1407(k)(2). ■



**MEALEY'S LITIGATION REPORT: CLASS ACTIONS**

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**The Report** is produced twice monthly by



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ISSN 1535-234X