

January 2016

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Step by Step: Stricter Requirements for Class Certification Inch Closer to Legislative Enactment

By **Brian M. Forbes and Jennifer J. Nagle**

Just over 10 years after the passage of the federal Class Action Fairness Act (“CAFA”), Congress is again considering further legislative reform to class action litigation. Among other reforms, CAFA opened additional avenues for defendants to remove class action litigation to federal court (often viewed by the defense bar as a more favorable venue than state court) and placed additional limitations on class-wide settlements. Now, legislative attention is being paid to class actions that are certified absent a showing of common injury among all class members. On January 8, 2016, the U.S. House of Representatives passed the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016 (“the Act” or “H.R. 1927”).¹ If enacted into law, H.R. 1927 would represent a significant change to the standard that a class action plaintiff must satisfy for a court to certify his or her proposed class.

The “Fairness in Class Action Litigation” portion of H.R. 1927² would amend Title 28 of the United States Code (the federal judicial code) to prohibit federal courts from certifying “any proposed class seeking monetary relief for personal injury or economic loss unless the party seeking to maintain such a class action affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative or representatives.”³ The Act would further mandate that “[a]n order issued under Rule 23(c)(1) of the Federal Rules of Civil Procedure that certifies a class seeking monetary relief for personal injury or economic loss shall include a determination, based on a rigorous analysis of the evidence presented, that the requirement in [the previously cited language] is satisfied.”⁴

Supporters and opponents of the bill, respectively, feel strongly about the need for, or the threat posed by, the Act. Supporters argue, among other things, that passage of tighter requirements for class certification will ensure that similarly aggrieved class members are not short-changed for the benefit of those who should not rightfully be included in a class. Opponents, of course, disagree, arguing that the proposed changes will present additional hurdles for class representatives who are already at a disadvantage in seeking a class-wide remedy.⁵ In the House, the supporters prevailed.

If the Act passes in the Senate, it may face its toughest challenge when it reaches the President’s desk. The White House released a Statement of Administrative Policy on

¹ See <https://www.congress.gov/bill/114th-congress/house-bill/1927>.

² While H.R. 1927 also addresses asbestos litigation reform, the class action provisions of the Act are broad and would apply to all class action litigation in federal court.

³ See H.R. 1927; House of Representatives Report 114–328. Both available at <https://www.congress.gov/bill/114th-congress/house-bill/1927>.

⁴ *Id.*

⁵ See House of Representatives Report 114–328, available at <https://www.congress.gov/bill/114th-congress/house-bill/1927>.

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January 6, 2016, stating that “[t]he Administration strongly opposes House passage of H.R. 1927 because it would impair the enforcement of important Federal laws, [and] constrain access to the courts.”⁶ The statement goes so far as to say that “[i]f the President were presented with H.R. 1927, his senior advisors would recommend that he veto the bill.”⁷

In addition to the current legislative action, changes to class action litigation could come as the result of an appeal, *Spokeo, Inc. v. Robins*, currently pending before the U.S. Supreme Court. It is anticipated that the Court in *Spokeo* will address the constitutional requirements of standing when a private plaintiff is suing for a statutory violation without allegations of actual injury.⁸ While the issue before the Supreme Court is not limited to or specific to class actions, the answer to the “standing” question may limit opportunities for plaintiffs to pursue statutory-based class actions.

Passage of the Fairness in Class Action Litigation Act is by no means certain, but the class action litigation bar will be keeping a close eye on its progress. Enactment of the proposed changes could signal a major shift in the class action landscape and arm defendants with new and powerful arguments for defeating class certification.

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⁶ <https://www.whitehouse.gov/omb/legislative-affairs>.

⁷ *Id.*

⁸ [Spokeo, Inc. v. Robins: U.S. Supreme Court to Consider Whether Plaintiffs Have Standing to Assert a Statutory Violation without Alleging Any Actual Harm](#), April 29, 2015. Oral argument in the *Spokeo* matter took place on November 2, 2015. A decision is expected by June 2016, when the Court finishes its term.