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IN THIS ISSUE

This article is an overview of the history of class actions in American and its unique features, as well as a discussion of recent trends and cases.

Class Actions – A History of Class Actions and Recent Legislative Amendments and Proposals

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I. Introduction

There are differences between litigation in the United States of America and other countries and jurisdictions, but one key difference, is the ability in America of Plaintiffs to bring legal action on behalf of a group of individuals or entities, commonly called a "class action". The federal rules of civil procedure and most states rules of civil procedure permit such actions.

This paper touches on the history of class actions in the United States, including the Class Action Fairness Act, and pertinent proposed legislative changes.

This paper demonstrates the general principles of class actions but is not an exhaustive discussion of the principles or case law.

II. History of Rule 23 of the Federal Rules of Civil Procedure

The Federal Rules of Civil Procedure were first promulgated in 1938 with the desired purpose of "efficiently enforcing the substantive law." Robert G. Bone, Walking the Class Action Maze: Toward a More Functional Rule 23, 46 U. Mich. J. L. Reform 1097, 1100 (2013). In furtherance of this purpose, the original Federal Rules of Civil Procedure were established in order to organize "procedural law into a coherent set of statements which would govern the conduct of all civil litigation in the federal courts." John G. Harkins, Jr., Federal Rule 23—The Early Years, 39 Ariz. L. Rev. 705, 705 (1997). Thus, the Federal Rules of Civil Procedure were "designed as pragmatic and functional rules." Bone, Walking the Class Action Maze: Toward a More Functional Rule 23, 46 U. Mich. J. L. Reform at 1100.

Included within the initial Federal Rules of Civil Procedure was the original version of Rule 23. Id. Prior to the implementation of this rule, the class action device was utilized solely in the context of actions for equity. Harkins, Jr., Federal Rule 23—The Early Years, 39 Ariz. L. Rev. at 706. However, the Federal Rules of Civil Procedure effectively abolished any distinction between actions in law and actions in equity from a procedural standpoint. Id. Accordingly, the original version of Rule 23 applied to actions seeking either monetary or equitable relief. The original version of Rule 23 provided in part as follows:

a. Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that an owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; or

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

Id. (citing FED. R. CIV. P. 23 (1940)).

In effect, therefore, the original Rule 23 divided class actions into the following three groups: 1. The "true class actions" represented in subsection (a)(1); 2. The "hybrid class actions" represented in subsection (a)(2); and 3. The "spurious class actions" represented in subsection (a)(3). Bone, Walking the Class Action Maze: Toward a More Functional Rule 23, 46 U. Mich. J. L. Reform at 1100. These groups were effectively "rights-based," meaning they were categorized by the type of relief sought to be enforced. Id. at 1101-02. Specifically, the "true class actions" were classes in which "the rights sought to be enforced were shared rights--the 'jural relationship'--and joinder of all members of the class would be required to adjudicate those rights." Harkins, Jr., Federal Rule 23—The Early Years, 39 Ariz. L. Rev. at 707. In comparison, the "hybrid class actions" related to "some specific property, often a fund, over which the court would assume what would be (or at least would be akin to) in rem jurisdiction." Id. In this class action group, "[t]he jural relationship would arise from the fact that the members of the class had 'several' (rather than joint) interests involving some distinct property and the interests of all of them with respect to that property might be affected by the outcome of the litigation." Id. Lastly, "spurious class actions" encompassed individuals that had "several rights" that "would depend at least in part on resolution of a common question of law or fact." Id. However, outside of these common questions of law and fact, the members of a "spurious class action" had no relationship. Id. Thus, the "jural relationship" of these class members "was a fiction created to justify bringing together those who had no prior relationship whatsoever." Id.

Rule 23 was subsequently amended in 1966 to, at least in part, "eliminate[] the rights-based formalisms of the 1938 Rule." Bone, Walking the Class Action Maze: Toward a More Functional Rule 23, 46 U. Mich. J. L. Reform at 1100. More specifically, Rule 23 was amended to "rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties." Benjamin Kaplan, A Preparatory Note, 10 B.C.L. Rev. 497, 497 (1969). Thus, the amended Rule 23 removed the "spurious class action" provided under the original rule, and articulated the "permissible types of class actions which appear in subdivision (b) of the revised Rule." Id. While minor subsequent revisions have occurred, the 1966 amendment is considered the modern version of Rule 23. Noah Smith-Drelich, Curing The Mass Tort Settlement Malaise, 48 Loy. L.A. L. Rev. 1, 17 (2014).

III. The Class Action Fairness Act

The Class Action Fairness Act ("CAFA") was passed by Congress in 2005 with the intended purpose of curbing the amount of class action litigation arising in state courts. Jeffrey L. Roether, Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings, 75 Fordham L. Rev. 2745, 2752 (2007). At the time, the Senate Judiciary Committee believed a limitation on state court class actions was necessary because "some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class actions." Judiciary Committee Report on Class Action Fairness Act, S. Rep. No. 109-14, at 14. More to the point, the Senate Judicial Committee believed that some state court judges were certifying class actions "not because they believe a class trial would be more efficient than an individual trial, but because they believe class certification will simply induce the defendant to settle the case without trial." Id. at 21. Thus, CAFA was put in place to "sweep[ ] more class actions into federal courts." Roether, Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings, 75 Fordham L. Rev. at 2754. To that end, CAFA effectively expanded the amount of class actions filed in federal court under Rule 23 by "broadening federal jurisdiction over class actions." Id. at 2752.

The key provision in CAFA for expanding class action litigation in federal court is 28 U.S.C. § 1332(d), which lessens the burden of "diversity" jurisdiction for certain types of class actions. In general, diversity jurisdiction is a basis of jurisdiction which allows an action to proceed in federal court when two conditions are met: 1. Each plaintiff is a citizen of a different state of each defendant (i.e. the plaintiffs are "diverse" from the defendants); and 2. The amount in controversy (i.e. the amount of asserted damages) is greater than $75,000.00. 28 U.S.C. § 1332(a)(1). Prior to CAFA, a class action was only able to obtain diversity jurisdiction if every named plaintiff was diverse from the defendant(s) and each class member (not just the named class members) was entitled to damages of over $75,000.00. Roether, Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings, 75 Fordham L. Rev. at 2748. Under 28 U.S.C. § 1332(d), however, federal jurisdiction now generally exists over class actions when: 1. The class has over 100 members; 2. Any member of the class is diverse from the defendant; and 3. The collective damages of all class members exceeds $5,000,000.00. 28 U.S.C. § 1332(d)(2)(A), (d)(5)(B).

In effect, therefore, CAFA "changed two long-standing rules that previously limited federal jurisdiction over class actions." Roether, Interpreting Congressional Silence: CAFA's Jurisdictional Burden of Proof in Post-Removal Remand Proceedings, 75 Fordham L. Rev. at 2759. First, CAFA departs from the *complete* diversity standard to allow for "'minimal' diversity—that is, just one party with citizenship different from all others" in

class actions that meet the requirements specified in 28 U.S.C. § 1332(d). Hart v. FedEx Ground Package Sys. Inc., 457 F.3d 675, 676 (7th Cir. 2006). Second, CAFA abrogated the rule that the amount in controversy necessary to establish diversity jurisdiction must always be satisfied by each individual member of a class. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 571-72 (2005). As a result of these changes, "the number of class actions in federal courts has risen dramatically--as intended and predicted." Georgene Vairo, What Goes Around, Comes Around: From the Rector of Barkway to Knowles, 32 Rev. Litig. 721, 774 (2013).

IV. Proposed Amendments to Rule 23

On February 9, 2017, the Chairman of the House Judiciary Committee, Re. Robert Goodlatte (R-Va), proposed several changes to Rule 23 by introducing the Fairness in Class Action Litigation Act of 2017 (the "Act"). Brian M. Forbes, et al., Proposed Fairness in Class Action Litigation Act of 2017 Seeks to Curb Attorney Abuses of Class Action Device and Expand Class Action Defendant Protections, The National Law Review, http://www.natlawreview.com/article/proposed-fairness-class-action-litigation-act-2017-seeks-to-curb-attorney-abuses. The three stated purposes of the Act are: 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." Id. In essence, the proposed changes to Rule 23 articulated in the Act seek to benefit U.S. companies by curtailing the amount of class actions that include an "artificially inflated" number of individuals for the sole purpose of forcing defendants to enter unjustified settlement agreements. Press Release: Chairman Goodlatte Statement on H.R. 985, the Fairness in Class Action Litigation Act (February 15, 2017), https://judiciary.house.gov/press-release/chairman-goodlatte-statement-h-r-985-fairness-class-action-litigation-act.

The Act contains several provisions in furtherance of the goal of protecting companies by limiting the amount of class action litigation in federal courts. Most notably, the Act seeks to make class certification of Damages classes more onerous by requiring "the party seeking to maintain such a class action affirmatively demonstrate[ ] that each proposed class member suffered the same type and scope of injury as the named class representative or representatives." Fairness in Class Action Litigation Act of 2017, H.R. 985 at 3, 115th Cong. (2017), https://www.congress.gov/115/bills/hr985/BILLS-115hr985ih.pdf. Moreover, the Act seeks to limit Damages class certification by requiring the party seeking to establish such a class to "affirmatively demonstrate" there

is a reliable and administratively feasible mechanism for determining all "putative class members fall within the class definition" and "for distributing directly to a substantial majority of class members any monetary relief secured by the class." Id. at 4. The Act also seeks to impose additional limitations on recoverable attorney's fees, thereby making "class actions less lucrative for plaintiff's attorneys." Forbes, et al., Proposed Fairness in Class Action Litigation Act of 2017 Seeks to Curb Attorney Abuses of Class Action Device and Expand Class Action Defendant Protections, The National Law Review, http://www.natlawreview.com/article/proposed-fairness-class-action-litigation-act-2017-seeks-to-curb-attorney-abuses.

The Act was passed by the House with a 220-201 vote on March 9, 2017. Pamela Wolf, Federal Legislation—House Approves Three Bills Aimed At Curbing Litigation Abuses, Wolters Kluwer Employment Law Daily, http://www.employmentlawdaily.com/index.php/news/house-approves-three-bills-aimed-at-curbing-litigation-abuses. As a result, the Act "will now move to the Senate and be referred to the Committee on the Judiciary." Kymberly Kochis & Veronica M. Wayner, Expansion of Jurisprudence Under New Class Action Bill, https://www.law360.com/appellate/articles/901917/expansion-of-jurisprudence-under-new-class-action-bill. However, because a "more modest" version of the Act's proposed amendments to Rule 232 stalled in the Senate in 2016, the ultimate future on the Act and its proposed impact on Rule 23 "is uncertain." Id.

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