

**REPORT ON LEGISLATION
BY THE FEDERAL COURTS COMMITTEE AND
THE COUNCIL ON JUDICIAL ADMINISTRATION**

H.R. 985

Rep. Goodlatte

AN ACT to amend the procedures used in Federal court class actions and multidistrict litigation proceedings to assure fairer, more efficient outcomes for claimants and defendants, and for other purposes.

**FAIRNESS IN CLASS ACTION LITIGATION AND FURTHERING ASBESTOS
TRANSPARENCY CLAIM ACT OF 2017 (“FICALA”)**

THIS LEGISLATION IS OPPOSED

I. INTRODUCTION

The New York City Bar Association has determined not to support this legislation because of two principal concerns about FICALA. First, the proposed bill makes substantial and sweeping changes to Rule 23 of the Federal Rules of Civil Procedure, circumventing a deliberative process that Congress established through the Rules Enabling Act in 1934, and that continues to function well, including recently with the consideration of proposed changes to Rule 23. Second, although FICALA states that its purpose is to create fairer and more efficient proceedings for complex and multi-party litigation, the result is likely to be the opposite, with an increase in collateral litigation, while also stripping federal judges of the discretion that they need to manage class and mass actions effectively and fairly.

II. FICALA REFLECTS A DEPARTURE FROM A SOUND PROCESS THAT CONGRESS ESTABLISHED FOR CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 23 governs class actions in federal courts. It sets forth prerequisites that a party seeking to certify a class must satisfy, along with provisions for notice to class members, settlement and appeals of class actions, and requests for attorneys’ fees in class cases. FICALA effectively amends several aspects of Rule 23. In addition, FICALA sets forth numerous additional standards and requirements that plaintiffs in multi-district litigation proceedings must meet. For example:

Topic	Current Rule 23	FICALA Proposed Changes
Typicality and adequacy of class representatives	Rule 23(a)(3) and (4) require proposed class representatives to demonstrate that their claims are typical of those of absent class members, and that they will fairly and adequately represent the interests of the class.	Section 1716 prohibits certification of a class seeking monetary relief for personal injury or economic loss unless the plaintiff “affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named representative or representatives.”
Class definition	Rule 23 contains no explicit requirements concerning class definitions or class member identification.	Section 1718(a) includes an “ascertainability” requirement, prohibiting certification of a class “seeking monetary relief unless the class is defined with reference to objective criteria,” and the moving party “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.”
Appeals from class certification orders	Rule 23(f) provides that “[a] court of appeals <i>may</i> permit an appeal from an order granting or denying” certification (emphasis added).	Section 1723 requires that courts of appeal permit interlocutory appeals from orders granting or denying class certification.
Attorneys’ fees	Rule 23(h) sets forth procedures for judicial approval of attorneys’ fees in certified class actions.	Section 1718(b) introduces new and additional procedures for determining the timing of any fee awards, and limits any such fees “to a reasonable percentage of any payments directly distributed to and received by class members,” and, in cases involving equitable relief, “to a reasonable percentage of the value of the equitable relief, including any injunctive relief.”
Issue certification	Rule 23(c)(4) provides that “an action may be brought or maintained as a class action with respect to particular issues.”	Section 1720 prohibits the certification of a class “with respect to particular issues pursuant to Rule 23(c)(4) unless the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites of Rule 23(b)(1), Rule 23(b)(2), or Rule 23(b)(3).”

FICALA’s extensive revisions to the procedures for class actions set forth in Rule 23 constitute a sharp departure from the process for amending the Federal Rules that has been followed for many years. Congress established the framework in 1934 through the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, which delegated much of the responsibility for rules to the U.S. courts, subject to review by Congress. The Rules Enabling Act gave the Supreme Court “the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.” Rules Enabling Act of 1934, Pub. L. No. 73-415, § 1, 48 Stat. 1064, 1064 (1934). Since then, Congress has amended the Act—most notably in 1988—to establish a comprehensive, multi-stage process for amending the Federal Rules of Civil Procedure that encourages all stakeholders to participate and provide input on proposed rules changes.¹

Today, the rulemaking process is primarily carried out by the Judicial Conference—the Committee on Rules of Practice and Procedure (“Standing Committee”) and the advisory committees addressing appellate, bankruptcy, civil, criminal, and evidence rules.² By statute, these committees must “consist of members of the bench and professional bar, and trial and appellate judges,” 28 U.S.C. § 2073(a)(2); in practice, “the Standing Committee and the advisory committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.”³

The process for amending the Federal Rules is a multi-step, deliberative process containing “a minimum of seven stages of formal comment and review.”⁴

1. The advisory committee considers the various suggestions that have been made by interested parties, namely “judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations.”⁵ If the committee believes a change in the Federal Rules is warranted, then a draft amendment is prepared and submitted to the Standing Committee.
2. The Standing Committee must approve the proposal for public comment. Once approved for publication, the proposed amendment is circulated to “more than 10,000 persons and organizations . . . including federal judges and other federal court officers, United States attorneys, other federal government agencies and officials, state chief justices, state attorneys general, legal publications, law schools, bar associations, and interested lawyers, individuals, and organizations requesting

¹ The 1988 amendments to the Rules Enabling Act formalized the efforts that the Judicial Conference had made to “broaden[] participation in the rulemaking process.” See House Rep. (Judiciary Committee) No. 100-889, Aug. 26, 1988, at 5.

² See <http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> (citing 28 U.S.C. § 2073(a)-(b)).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

distribution.”⁶ During this period, the public is encouraged to comment and attend public hearings on the proposed amendments.⁷

3. The public comments are synthesized and submitted to the advisory committee for its review. Once the advisory committee decides on a final version of the amendment, it submits the amendment to the Standing Committee once again, for approval.
4. The Standing Committee reviews the proposed amendment; if it “approves a proposed rule change, it will transmit it to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee’s reports and the Standing Committee’s own report explaining any modifications it made.”⁸
5. The Judicial Conference considers the amendment; if approved, the proposed rule change proceeds to the sixth step: review by the U.S. Supreme Court.
6. The Court transmits the proposed rule change to Congress, at which point it, in the seventh step, can “enact legislation to reject, modify, or defer the rules.”⁹

A. Recent Pre-FICALA Rulemaking Concerning Rule 23

Over the past six years, the Judicial Conference, through a subcommittee of the Advisory Committee on Civil Rules composed of practitioners, academics, and members of the judiciary, has been following the process set forth above in considering changes to Rule 23. Over the course of more than two dozen meetings and bar conferences, including a mini-conference to gather additional input from the public, the subcommittee considered and developed a list of amendments to the rule. The subcommittee published an initial, preliminary draft of proposed amendments in April 2016, and then continued to receive public comment on those rules at additional public meetings and through written submissions. Proposed changes to Rule 23 were then published in August 2016, opening a comment period that then ran for six months, closing in February 2017. That comment process included three public hearings, each of which included more than ten witnesses offering testimony on the proposed rules changes.¹⁰

In February 2017, the Advisory Committee published a proposed amended Rule 23 and accompanying Committee Note “based on its review of the public comment.”¹¹ The proposed amendments then moved to the Standing Committee (the fourth step described above), which approved amendments to Rule 23 on June 12, 2017. If the Judicial Conference, the Supreme

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ See http://www.uscourts.gov/sites/default/files/2017-06-standing-agenda_book_0.pdf, at 66.

¹¹ See http://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf, at 105.

Court, and Congress leave these amendments unchanged, they would go into effect on December 1, 2018.¹²

The proposed changes to Rule 23 produced by this multi-step process are substantial. Among other things, the proposed amendments approved by the Standing Committee provide detailed factors for courts to consider in addressing proposed class settlements; introduce additional procedures relating to objections to proposed settlements; and update the discussion of methods for providing notice to class members.

At the same time, the Rule 23 subcommittee considered, but chose not to address, a “range of issues” in the proposed amendments.¹³ In several cases, where the committee recognized that an issue continued to be actively debated among courts of appeal, it declined to step into that ongoing debate. For example, recognizing a recent split¹⁴ concerning an ascertainability requirement for class definitions, the committee elected not to provide proposed language on that subject.¹⁵ (FICALA’s Section 1718(a) would codify such a requirement.) Similarly, the committee also chose not to address the question of “pick-off,” in which class action defendants attempt to moot a class case by offering individual relief to the proposed class representative prior to class certification, in light of active judicial scrutiny of this issue.¹⁶

Without regard to the substantive merits of any of the proposed amendments, we believe that the deliberative, iterative process that produced the recent proposed changes to Rule 23 works well and is preferable to the blunt instrument of rulemaking by statute. Although Congress has, relatively recently, legislated in the area of class action jurisprudence, it has not prescribed the rules by which judges manage their cases as contemplated by FICALA. The Class Action Fairness Act, for example, which was passed in 2005, (Pub. L. No. 109-2, 119 Stat. 4 (2005)), expanded diversity jurisdiction and attempted to shift more class cases from the state to federal courts. It did not, however, present sweeping changes to Rule 23 or dictate judicial case management functions as FICALA does.

Rules of procedure inevitably involve fact- and case-specific issues that federal judges are well equipped to manage. For these reasons, we believe that these issues are best left to the detailed rulemaking process that has been followed previously, including the opportunity in that process to allow certain issues to percolate further through the judiciary before broad rules amendments are instituted. We urge Congress to maintain its traditional reliance on the rulemaking process under the Rules Enabling Act to address Rule 23 and other issues of procedure and case management. That process allows multiple perspectives, ample opportunity

¹² See <http://www.uscourts.gov/rules-policies/pending-rules-and-forms-amendments>.

¹³ See http://www.uscourts.gov/sites/default/files/2016-08-preliminary_draft_of_rules_forms_published_for_public_comment_0.pdf, at 195 (Excerpt from the May 12, 2016 Report of the Advisory Committee on Civil Rules).

¹⁴ See *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013) (imposing ascertainability requirement for class certification); and *Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015) (holding that ascertainability is not required to satisfy Rule 23).

¹⁵ *Id.*

¹⁶ *Id.* (citing *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016)).

to comment, and also reflects an overall sensitivity to the ongoing work that judges do in continually interpreting Rule 23.

III. THE PROPOSED LEGISLATION INTRODUCES NEEDLESS INEFFICIENCIES

In addition to our concern about bypassing the Judicial Conference’s traditional role in amending the Federal Rules, we are also concerned that FICALA will, contrary to its stated goal, introduce needless inefficiencies into civil litigation through interference in courts’ traditional case management functions. Specifically, two provisions of FICALA, by restricting trial and appellate court discretion, may well result in more protracted, costlier proceedings.

First, Section 1723 requires courts of appeal to hear all appeals of class certification decisions. In the nearly twenty years since Rule 23(f) went into effect, circuit courts have developed sets of factors that govern decisions as to whether to grant appeals of class certification orders.¹⁷ A recent study of Rule 23(f) petitions found that for 2012, 2013, and the first half of 2014, courts of appeal accepted only 23 percent of such petitions.¹⁸ A blanket mandate to hear all class certification decisions will not only substantially increase the workload of federal courts of appeal, it is also likely to produce delays in meritorious cases that would ordinarily proceed promptly to class notice and to resolution, on the merits or through settlement.

In a decision issued last term, the Supreme Court discussed the “careful calibration” that went into the drafting of the current version of Rule 23(f), which allows for immediate review of “improvident certification decisions” while going no further to provide for appeal as a matter of right.¹⁹ Quoting the minutes of a Judicial Conference meeting, the Court noted the drafters’ concerns that a “‘right to appeal would lead to abuse’ on the part of plaintiffs and defendants alike ... ‘increas[ing] delay and expense’ over ‘routine class certification decisions’ unworthy of immediate appeal.”²⁰ Requiring courts of appeal to hear all class certification appeals interferes with the “careful calibration” that the Supreme Court recognized is reflected in Rule 23(f).

Second, Section 1721, which provides for an automatic stay of discovery upon the filing of a motion to dismiss in all class actions, may also lead to inefficiencies notwithstanding the expressed intent of avoiding unnecessary expense. Currently, judges routinely make the fact-specific determination of whether to stay discovery pending resolution of a motion to dismiss. Often, courts impose such a stay to prevent the needless expenditure of resources if the case is dismissed. But there are also situations (such as where a party has produced documents in connection with a parallel government action) where courts determine that a stay will lead to unnecessary delay and is not desirable. Eliminating judicial discretion to make the appropriate determination in any given case is likely to reduce, not improve, efficiency.

¹⁷ See, e.g., *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832 (7th Cir. 1999).

¹⁸ See “Interlocutory Appeal of Class Certification Decisions Under Rule 23(f): An Untapped Resource,” *Class Action Litigation Report*, Mar. 16, 2017. Of course, many certification orders are not appealed at all; this study did not report on the percentage of cases in which no appeal was taken.

¹⁹ *Microsoft v. Baker*, 137 S. Ct. 1702 (2017).

²⁰ *Id.*

IV. CONCLUSION

FICALA is likely to work against its stated purpose to “assure fairer, more efficient outcomes for claimants and defendants.” We oppose this bill, and urge Congress to continue to allow the well-established rulemaking process to function and avoid creating substantial disruption and increased costs to class action litigants.

Federal Courts Committee
Laura Grossfield Birger, Chair

Council on Judicial Administration
Carolyn E. Demarest, Chair

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