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Curtailing Abusive Litigation: Congress to Consider Important Legal Reform Legislation This Week

If your organization is facing abusive litigation—or is concerned about that possibility—you may be pleased to know that, this week, the U.S. House of Representatives is expected to consider and pass four bills aimed at reducing some of the most common abuses in class action cases and other lawsuits.

According to House Judiciary Committee Chairman Bob Goodlatte, these four bills are part of a larger effort to "to reform the litigation system by seeking to reduce frivolous lawsuits, making it harder for trial lawyers to game the system, and improving protections for consumers and small businesses."

The Fairness in Class Action Litigation Act ("FICALA"), H.R. 985, addresses several common abusive practices in class action cases. FICALA would:

- Provide a mandatory right of appeal of class certification decisions.
- Require disclosure of third-party funding agreements.
- Compel plaintiffs' lawyers to disclose conflicts of interest with any proposed class representative, including whether that person is related to the lawyers, is an employee of the lawyers, or is working with the lawyers in any other case or business matter.
- Require courts to halt discovery until it has resolved all Rule 12 motions (motions to dismiss for failure to state a claim, motions to strike class allegations, and motions to transfer).
- Ensure that class members receive a meaningful share of the judgment or settlement funds by: limiting attorney's fee awards to a reasonable percentage of those funds; prohibiting the lawyers from receiving fees until after the class members are paid; and requiring the lawyers to file a report of how all money paid by the defendants was distributed.
- Require that the named plaintiff have the same type of injury as the rest of the class members. This "typicality" requirement would reduce the number of "no-injury" cases in which the plaintiff who has been harmed by a product (for example) purports to represent thousands of others who may have purchased the product but have not suffered any injury as a result.
- Require plaintiffs' lawyers to demonstrate that the proposed class is "ascertainable," meaning that the class members will be identifiable based on objective criteria and that it will be possible to distribute money to them.
- Prohibit certification of an "issue class" unless the entire claim qualifies for class treatment under Rule 23.

The Innocent Party Protection Act, H.R. 725, aims to prevent "fraudulent joinder," a technique used by some aggressive plaintiffs' lawyers to keep cases in state courts, which are often perceived to be more favorable to plaintiffs, rather than transferred to federal courts, which are seen as fairer to both sides. Under current law, federal courts lack "diversity" jurisdiction if the plaintiffs and defendants reside in the same state. Suing an in-state defendant therefore prevents federal courts from hearing the case. But when that in-state defendant has no real connection to the controversy, and is brought into the case only for jurisdictional purposes, the joiner of that defendant is fraudulent. H.R. 725 would fix this problem by requiring federal courts to deny motions to remove cases to state courts if the plaintiff misrepresents a defendant's state of citizenship, sues a defendant for a claim

that is not possible or plausible under state law, or sues a defendant without a good-faith intention to prosecute its claims against that defendant.

The Lawsuit Abuse Reduction Act ("LARA"), H.R. 720, would put teeth back into Rule 11, the rule that prohibits lawyers from bringing a frivolous case or filing any pleadings for an improper purpose such as harassment or imposing costs on the other side. LARA would require courts that find Rule 11 violations to impose mandatory sanctions, and would remove from Rule 11 the provision that currently allows lawyers to avoid sanctions if they withdraw the offending pleadings after a motion for sanctions is filed. Prior to 1993, Rule 11 included a requirement for mandatory sanctions.

The Furthering Asbestos Claim Transparency Act ("FACT Act"), H.R. 906, would require the bankruptcy trusts that administer asbestos claims to issue public quarterly reports disclosing who has sought compensation from the trust, the nature of their alleged injury, and the amount the trust paid them. This legislation is a response to allegations of rampant fraud in the area of asbestos litigation, which is the longest-running mass tort litigation in the country and has driven approximately 100 companies into bankruptcy.

Next steps. Although the House is expected to pass all four of these bills this week, their fate in the Senate is uncertain. Most Republican senators will support them, but most Democrats will not. With a 52-to-48 split between Republicans and Democrats in the Senate, the focus will be on the "red state" Democrats facing reelection in 2018 in states that Trump won. Meanwhile, it is likely the House Judiciary Committee will hold at least one hearing on these bills—an unusual step after passage—designed to build the case for why the Senate should pass them. The chances for timely action in the Senate will be influenced by the fact that Congress has plenty of other priorities, including the confirmation of Judge Neil Gorsuch for the Supreme Court, approving many dozens more Trump administration nominees, the effort to "repeal and replace" the Affordable Care Act, comprehensive tax reform, and infrastructure, to name a few of the big ones.

Alexander R. Dahl
Shareholder
adahl@bhfs.com
202.747.0508

This document is intended to provide you with general information regarding The Fairness in Class Action Litigation Act, The Innocent Party Protection Act, The Lawsuit Abuse Reduction Act and The Furthering Asbestos Claim Transparency Act. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.