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## Defective Process Cripples Class Action Proposal

Law360, New York (April 7, 2017, 3:50 PM EDT) -- On March 9, 2017, the U.S. House of Representatives passed, without committee hearings, an act radically to change Rule 23 in the Federal Rules of Civil Procedure, which governs the procedure for bringing of class actions. Bypassing the U.S. Supreme Court, the Rules Enabling Act and probably the Constitution, the new Congress placed in the forefront of its work for this session a bill of such thoughtlessness as it would be a fault in the extreme, and a slander, to label it "conservative."



Fred Taylor Isquith

A number of articles have been published on the proposed legislation. Law360 has not been lax. This author, who is a regular contributor to this publication, provides these thoughts about the bill's problematic constitutionality, its deeply flawed proposals, and the true impact on policy and people of what is proposed. While authors here at Law360 have focused on the purpose of the bill and possible change in particular disciplines of the law — employment, civil rights, antitrust, securities, consumer rights — there are serious institutional, even constitutional issues, involved in the passage of the act by the House, as well as within the terms of the proposed legislation, which require some attention.

The Congress seeks to impose on the federal courts a new class action procedural rule. It does not have, or seek any, approval from the Supreme Court. It wholly ignores the process required by the Rules Enabling Act. Both of these failures may be fatal to the bill's enforcement.

Because of the page limitations on these comments, and in respect to the time of my readers and colleagues at the bar, I am presenting my thoughts briefly and in several pieces, which I hope Law360 will be able to publish over the next few weeks.

The bill makes wholesale changes through explicit amendments to Rule 23. The effect (and obvious purpose) as has been explained by others here at Law360, would be to seriously wound or end class actions. The bill passed the House in a most unorthodox way and contrary to the explicit processes adopted by Congress for exactly the purpose of modifying the procedural rules of the federal courts. That process by law requires careful, deliberate and balanced deliberation by the courts through the Judicial Conference, as experience with the Federal Rules teaches the bench, bar and academy. All procedural change must be approved by the Supreme Court. Under the Rules Enabling Act, Congress can disapprove proposed rules — it never has.

The nonconforming pathway taken by the congressional leadership to avoid these learned constituencies of experience risks constitutional issue. Later articles will deal with the impact and flaws within the legislation. Briefly, these proposals are titled the "Fairness in Class Action Litigation Act." The bill proposes to amend the Class Action Fairness Act. While not dealing with the federal rules, CAFA largely expanded the subject-matter jurisdiction of the federal courts by expanding diversity jurisdiction to permit the lodging to the federal system or removal to the district courts of class actions heretofore brought under state law in state courts.

This new bill, however, by its terms seeks directly to amend Rule 23, leaving nothing within it unmodified.

- It includes a conflicts-of-interest provision for class counsel and named plaintiffs, providing a law firm may not represent current (or past) clients.
- It would require that no person may retain same counsel for a class action.
- It would stay discovery pending much motion practice.
- Its provisions have strict typicality requirements.
- It would require an "administratively" feasible way to identify particular class members.
- It would require the courts of appeals to accept appeals of class action rulings.
- It addresses the distribution of fees to class counsel.
- It would limit fees to class counsel.
- It includes changes in a procedure for multidistrict litigation, which will not be discussed here.

The bill was passed along with two other similarly intended bills: dealing with "fraudulent" joinder of parties and reporting of payment to plaintiffs in asbestos cases.

In passing the bill, the House of Representatives seems to have assumed, without examination, its authority to change Rule 23 without approval by the Supreme Court under the current governing statute, The Rules Enabling Act, or the Constitution of the United States. We explore the implications here.

The Federal Rules of Civil Procedure were promulgated in 1937 in response to dissatisfaction with the then-practice of the district court utilizing the procedural rules of each particular state where the district court sat. Congress was given a role, however small, in the adoption of the Federal Rules of Civil Procedure. The Rules Enabling Act in 1934 delegated all authority to initiate any rules or rules change to the U.S. Supreme Court for the development and ongoing supervision of the Federal Rules of Civil Procedures, subject only to the ability of Congress to disagree during a limited period of seven months. To the best of my research, Congress has never disagreed with any proposal by the Supreme Court concerning the Federal Rules of Civil Procedure.

The judicial power of the United States is vested in the Article III courts. Those courts have authority to determine whether their own practices satisfied due process with the ultimate decision on those issues made by the U.S. Supreme Court. There is no other body within the Constitution, or by practice, that has any authority over the courts with respect to its own rulings or procedures.

Article III, Section 1 vests the United States court system, and specifically the U.S. Supreme Court, with that court's authority outlined in Section 2. Nowhere is Congress given authority, other than to authorize courts inferior to the Supreme Court a power described within Article III.

In searching for any basis for congressional authorization to have a hand in internal court procedure, one can only look to Article I's "necessary and proper" clause. It is with the "necessary and proper" clause that the early cases that upheld federal, and not state, processes for collection of judgments rested. *Wayman v. Southard*, 23 U.S. 1 (1825), *Bank of United States v. Halstead*, 23 U.S. 51 (1825), *Beers v. Haughton*, 34 U.S. 329 (1835). Thereafter, congressional influence on court process has been assumed with little analysis.

Without going into further details, congressional authority over the Federal Rules of Civil Procedure would rest on this thinnest of rationales.

Indeed, in 1965, the Supreme Court held that the Federal Rules of Civil Procedure governed all district court proceedings, including diversity cases. *Hanna v. Plumer*, 380 U.S. 460 (1965). The court held that state procedures would be improper to override the federal court's power over their own procedure, emphasizing that such power is plainly paramount. *Burlington NRR Co. v. Woods*, 480 U.S. 1 (1987). Further, because of Supreme Court approval, the rules of practice and procedure promulgated are presumed to be constitutionally valid. *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

The Rules Enabling Act provided to Congress limited authority to only accept or reject rules governing the practice before the federal courts that otherwise arise from the courts themselves, not propose and enact its rules for that separate branch of the federal government. It has been

both the law and the practice for 80 years, or a third of the constitutional life of this country, to follow that statute and respect the delegation of whatever authority Congress has. The act also contains a "supersession clause" stating that existing laws in conflict with new rules shall have no further force or effect.[1]

As the current effort by the House of Representatives eludes the constitutional problems, as well as the Rules Enabling Act, I suggest there will be several lines of expected challenge on the validity of the bill, if passed. One must ask whether the entire edifice of the new law will ultimately collapse upon congressional-authority problems.

The specific procedure required by the Rule Enabling Act is as follows: The Judicial Conference of the United States is coordinated by the Judicial Conference Committee, commonly referred to as the Standing Committee. The Standing Committee has five advisory committees dealing respectively with the appellate, bankruptcy, civil, criminal and evidence rules. The Judicial Conference consists of the chief justice of the Supreme Court, the chief judge of each circuit, the chief judge of the Court of International Trade, and one district judge from each judicial circuit. In theory, the chief justice appoints the subcommittees that report to the Judicial Conference. The committees consists of members of the judiciary, the bar and the academy. The proposals are public, transparent and debated. The committees as well as the Standing Committee receive comments on any proposal. Before going into effect, the proposed rule change is sent by the chief justice to Congress, which has seven months to disagree.

As best as I have been able to find, Congress has never sought to invalidate a rule processed through the process in the Rules Enabling Act.

More significantly, as far as I can tell, Congress has never interfered with that process by amending the Federal Rules of Civil Procedure. Indeed, the constitutional authority of those rules rests on the authority of the Supreme Court of the United States — and not Congress; see *Burlington NRR Co.*, 480 U.S. 1 (1987) and its progeny.

In opposing the class action bill, the American Bar Association wrote on March 6, 2017, "This legislation would circumvent the time-proven process for amending the Federal Rules of Civil Procedure established by Congress in the Rules Enabling Act. ... the Rules Enabling Act, which reflects a healthy respect for the Separation of Powers doctrine and the role of the federal courts in determining their own rules."

"Courts have the inherent authority to control the proceedings in their courtrooms, including the power to regulate attorneys. Federal statutory changes in these areas would have substantial adverse effects on the fairness, efficiency, and timeliness of relief under class action processes, ultimately usurping the traditional regulatory authority of the courts."

This briefly then is an outline of the larger problems that the bill encounters both as a matter of statute and constitutional authority.

It is no accident that the modern class action practice that began in 1965 with the establishment of the modern Rule 23, with minor amendments, has been used by those seeking access to the courts for more than 50 years as a wholesale replacement of the previous 1938 class action regime in federal courts. That 1965 Rule 23 was first and foremost intended to strengthen and give further law enforcement abilities to the civil rights movement and legislation of those years. Rule 23 was intended in the first instance to provide an avenue for African-Americans in particular, to enforce those new federal laws in an aggregate manner through the federal courts. The current proposal would cripple these rights. In addition, because of later developments, it would also cripple the enforcement of the federal antitrust laws, the securities laws, consumer law and others by affecting their economic practicality. Without class actions, the economic reality of litigation would eliminate many substantive rights.

—By Fred Taylor Isquith, Wolf Haldenstein Adler Freeman & Herz LLP

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[1] Granted, this provision of “no force” could be read as applying to past law and practice — but not necessarily.

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