

**SYMPOSIUM**

**CIVIL LITIGATION REFORM IN THE  
TRUMP ERA: THREATS AND OPPORTUNITIES**

**SEARCHING FOR  
SALVAGEABLE IDEAS IN FICALA**

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INTRODUCTION

The Fairness in Class Action Litigation Act of 2017 (FICALA) was introduced in Congress less than three weeks after Donald Trump took office as President.<sup>1</sup> Supported by the U.S. Chamber of Commerce<sup>2</sup> and opposed by consumer advocates and civil rights groups,<sup>3</sup> the bill passed the House of Representatives one month after its introduction on a party-line vote of 220

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\* Professor of Law, Fordham University School of Law. Thanks to Serhiy Moshak for his research assistance and to all the participants in the *Fordham Law Review* Symposium, *Civil Litigation Reform in the Trump Era: Threats and Opportunities*, held at Fordham University School of Law on February 23, 2018, for their productive discussion of these issues.

1. Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. (2017). The bill was introduced on February 9, 2017, by Representative Bob Goodlatte, Republican of Virginia. After its introduction, FICALA was merged with H.R. 906, the Furthering Asbestos Claim Transparency (FACT) Act of 2017.

2. See Letter from U.S. Chamber of Commerce to Members of the U.S. House of Representatives (Mar. 8, 2017), [https://www.uschamber.com/sites/default/files/170308\\_kv\\_hr985\\_fairnessinclassactionlitigationandfurtheringasbestosclaimtransparencyact\\_house.pdf](https://www.uschamber.com/sites/default/files/170308_kv_hr985_fairnessinclassactionlitigationandfurtheringasbestosclaimtransparencyact_house.pdf) [<https://perma.cc/A8C9-SYX3>]; see also Letter from Lisa A. Rickard, President, U.S. Chamber Inst. for Legal Reform, to Representative Bob Goodlatte and Representative John Conyers (Feb. 14, 2017), <https://www.uschamber.com/letter/hr-985-the-fairness-class-action-litigation-act-2017> [<https://perma.cc/MQ5U-Z2UX>].

3. See, e.g., Letter from Jocelyn D. Larkin, Exec. Dir., Impact Fund, to Representative Paul Ryan and Representative Nancy Pelosi (Mar. 7, 2017), <https://static1.squarespace.com/static/559b2478e4b05d22b1e75b2d/t/58bf37c73e00be8bb74c3dd8/1488926663702/HR985+Ryan+Pelosi.pdf> [<https://perma.cc/ZF5V-24VY>] (writing on behalf of 123 civil rights organizations); Letter from Jocelyn D. Larkin, Exec. Dir., Impact Fund, to Representative Bob Goodlatte and Representative John Conyers, Jr. (Feb. 15, 2017), <https://static1.squarespace.com/static/559b2478e4b05d22b1e75b2d/t/58a5e62debbd1a8a000fbcee/1487267374907/Civil+Rights+Opposition+to+HR+985+for+Sign+Ons+-+2.15.17.pdf> [<https://perma.cc/4MJB-22HB>] (writing on behalf of 121 civil rights organizations); Maxwell S. Kennerly, *H.R. 985: A Sneak Attack on Veterans, Consumers, and Patients*, LITIG. & TRIAL BLOG (Feb. 16, 2017), <https://www.litigationandtrial.com/2017/02/articles/litigation/hr-985-fairness/> [<https://perma.cc/68LC-5KXU>].

to 201, with 220 Republicans and zero Democrats voting in favor.<sup>4</sup> FICALA stalled in the Senate and, as of this writing, does not appear to be moving toward passage in its current form.<sup>5</sup> But reform ideas have a way of reappearing, particularly when driven by a constituency with much at stake and plenty of resources to push an agenda. Corporations that face mass litigation are a powerful voice for change, and class actions and multidistrict litigation are prime targets. Moreover, the quick vote in the House shows that there is at least some political appetite for the proposed reforms. In anticipation of the reincarnation of the bill in some form, it is worth exploring whether it contains any good ideas.

FICALA is not an easy place to look for good ideas. The bill represents the most aggressive attempt in recent memory to dismantle the apparatus of mass litigation through procedural reform.<sup>6</sup> When the package is viewed as a whole, it is difficult to see it as anything other than a defendant-driven effort to reduce liability exposure by making it difficult for plaintiffs to aggregate claims, difficult for plaintiffs' lawyers to make money, expensive for plaintiffs to pursue claims to adjudication, and difficult for plaintiffs' lawyers to choose the forum. As a package, FICALA is one-sided and most of its provisions are ill-conceived. Hidden among FICALA's bad ideas, however, are a few good ones, and they represent promising opportunities for improving the litigation process. Thus, rather than simply bash the bill,<sup>7</sup> this Article breaks down a number of the proposals and considers each idea on its own terms.

While most of the proposals in FICALA are bad ideas, they are bad ideas in three rather different ways. Some are bad ideas because they purport to solve things that are not really problems. Others are bad ideas because, although they address real problems, they do so in a careless or

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4. See 163 CONG. REC. H1999–2000 (daily ed. Mar. 9, 2017). In addition to the 220 who voted “Yes,” fourteen Republicans voted “No.” *Id.* On March 13, 2017, the bill was received in the Senate and transferred to the Senate Judiciary Committee. See H.R. 985 (as passed by House and referred to S. Comm. on the Judiciary).

5. See Bruce Kaufman, *Business-Friendly Litigation Overhaul Stalls in Senate*, BNA (July 27, 2017), <https://www.bna.com/businessfriendly-litigation-overhaul-n73014462386/> [<https://perma.cc/MN3G-MMRG>].

6. An earlier version of FICALA was introduced in 2016 and met a similar fate: after passage in the House, it died quietly in the Senate. See Fairness in Class Action Litigation and Furthering Asbestos Claims Transparency Act of 2016, H.R. 1927, 114th Cong. (2016) (as introduced on Apr. 22, 2015, passed House on Jan. 8, 2016, and referred to Senate). The prior version, however, did not go nearly as far as the 2017 version. The bill's proponents presumably were emboldened by Republican control of both houses and the election of a business-oriented Republican president. FICALA can be seen as part of a longer retrenchment phenomenon of legislative and judicial efforts to curtail litigation. See Stephen B. Burbank & Sean Farhang, *Rights and Retrenchment in the Trump Era*, 87 FORDHAM L. REV. 37 (2018).

7. My views on the bill are no secret; I was an early and outspoken opponent. See Howard M. Erichson, *New Republican Bill Would Gut Class Actions, Not Improve Them*, HILL (Feb. 20, 2017, 1:40 PM), <http://thehill.com/blogs/pundits-blog/lawmaker-news/320360-new-republican-bill-would-gut-class-actions-not-improve-them> [<https://perma.cc/MK99-Z5SV>]; see also Letter from Howard M. Erichson to Representatives Paul Ryan, Nancy Pelosi, Bob Goodlatte, and John Conyers, Jr. (Feb. 18, 2017), <http://lawprofessors.typepad.com/files/erichson-hr985-letter-1.pdf> [<https://perma.cc/VD69-LCM7>].

counterproductive way. And some are bad ideas because, as a matter of institutional competency, Congress ought not intervene. Thus, to search for reforms worthy of salvaging, one must ask about each proposed reform whether it addresses a problem worth solving, whether the proposed solution is a sensible way to address the identified problem, and whether Congress is well situated to address the problem.

This Article begins with the three ways in which various proposals in FICALA are bad ideas, before turning to the several promising ones. Part I of this Article notes aspects of FICALA that purport to solve things that are not real problems. Part II comments on FICALA provisions that address real problems but offer ill-conceived solutions. Part III points out issues addressed in FICALA that Congress should leave to the courts or to the judicial rulemaking process. Finally, Part IV highlights aspects of FICALA that address real problems, propose sensible solutions (or could be tweaked into sensible solutions), and for which Congress is reasonably well situated to act. In particular, it points to provisions that align class counsel fees with value for class members, provisions that improve data collection concerning class action settlements, and a provision to work around the complete diversity requirement for federal jurisdiction.<sup>8</sup> By highlighting promising provisions in FICALA and distinguishing them from unwise provisions, the Article aims to facilitate productive reform that recognizes both the problems in mass litigation and the value of a justice system that enables plaintiffs to pursue aggregate litigation of related claims.

## I. PROPOSALS THAT ADDRESS NONPROBLEMS

Several of the ideas in FICALA make no sense except as corporate wish-list items. One can see why corporate defendants would desire these reforms, just as a manufacturer might desire a rule that eliminates products liability, or an employer might desire a rule that eliminates liability for wage theft. Defendants naturally prefer not to be sued. And if they are sued, they prefer not to be held liable. And if they are held liable, they prefer it to happen later rather than sooner. The FICALA proposals itemized in this Part serve these goals of corporate defendants, but as a matter of litigation policy, the proposals solve nonproblems.

### A. “*Same Type and Scope of Injury*” Requirement for Class Certification

In one of its signature provisions, FICALA would prohibit certification of any class action seeking monetary relief, unless the plaintiff “affirmatively demonstrates that each proposed class member suffered the same type and scope of injury as the named class representative.”<sup>9</sup> Although it would make it more difficult for plaintiffs to obtain class certification, the provision does not add anything useful to existing requirements for class certification.

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8. See *infra* text accompanying notes 54–71.

9. H.R. 985 § 103(a).

The class certification requirements of Rule 23 already necessitate cohesiveness among class members. Rule 23(a) requires that class claims share common questions,<sup>10</sup> that class representatives' claims be typical of those of class members,<sup>11</sup> and that class representatives adequately represent the interests of class members.<sup>12</sup> In addition, for class actions seeking money damages, Rule 23(b)(3) requires a showing that common questions predominate over individual questions and that a class action be the superior means of resolving the dispute.<sup>13</sup>

The question, then, is what is added by the “same type and scope of injury” requirement? To the extent “same scope” means that class members' claims cannot vary in the extent of damages suffered, this is an unreasonable requirement that would wipe out many appropriate class actions for no good reason. To the extent “same type” does any work beyond the current typicality requirement of Rule 23(a)(3) and other class certification requirements, it would make it impossible for plaintiffs to pursue class actions on behalf of groups of consumers, employees, or others who are similarly, but not identically, situated. But if a class action satisfies the requirements of Rule 23(a) and Rule 23(b)(3)—that is, if the class representative has a claim that is typical of the class members, if common questions predominate, and if a class action is the superior method for resolving the controversy—then there is no justification for disabling the class action on grounds of nonidentical types of harm. The bill's proponents hope that this provision would eliminate class actions on behalf of consumers who have not suffered concrete harm.<sup>14</sup> The “no injury” question, however, is better addressed under the law of standing or under the substantive law that applies to the claims, rather than by an independent constraint on class certification.

### B. Ascertainability Requirement for Class Certification

The statute would prohibit certification of a class action seeking monetary relief unless the plaintiff “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.”<sup>15</sup> This provision is unnecessary because courts

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10. FED. R. CIV. P. 23(a)(2); *see also* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 352 (2011) (emphasizing that there must be “some glue” holding the class members' claims together).

11. FED. R. CIV. P. 23(a)(3).

12. *Id.* r. 23(a)(4).

13. *Id.* r. 23(b)(3).

14. *See The FICALA Fix for Litigation Abuse*, U.S. CHAMBER INST. FOR LEGAL REFORM (Mar. 3, 2017), <https://www.instituteforlegalreform.com/resource/the-ficala-fix-for-litigation-abuse> [https://perma.cc/7VJE-A36K] (arguing that the “FICALA Fix” for “No Injury” Class Actions” is to require the “same type and scope” of injury).

15. H.R. 985, 115th Cong. § 103(a) (2017).

already require that a class be adequately defined for class certification.<sup>16</sup> Problems of identifying individual class members can be addressed at the remedy stage. If remedial difficulties loom so large that a class action is not a superior means of resolving the dispute, then a court should deny class certification under Rule 23(b)(3)'s superiority requirement. But if a class action remains the best way to resolve a dispute, notwithstanding the challenges of identifying class members, then the class should be certified.<sup>17</sup>

### C. *Interlocutory Appeals from Class Certification Decisions*

The statute would require appellate courts to permit appeals from orders granting or denying class certification.<sup>18</sup> This provision is unnecessary because Rule 23(f) already permits interlocutory appeals from class certification decisions at the discretion of the appellate court.<sup>19</sup> It makes sense to permit such interlocutory appeals because a denial of class certification may be a death knell for the litigation and a grant of class certification may create significant settlement pressure. But some class certification denials and grants are straightforward. There is no sense in taking the time for interlocutory appeals in cases where the denial or grant is sufficiently clear such that the appellate court is uninterested in hearing the appeal. Removing the discretion to decline to hear appeals of obviously correct decisions would merely slow the litigation process.

### D. *Automatic Discovery Stay upon Defendant Motions*

FICALA provides that, in any class action, “all discovery and other proceedings shall be stayed during the pendency of any motion to transfer, motion to dismiss, motion to strike class allegations, or other motion to dispose of the class allegations” unless the court finds that particular discovery is needed to preserve evidence or prevent undue prejudice.<sup>20</sup> The burden of discovery is real, and in some cases, defendants ought to be protected from this burden where pretrial motions may dispose of the case or significantly narrow the issues. District court judges already have the power to stay discovery pending such motions.<sup>21</sup> They exercise discretion by considering both the discovery burden on the defendant and the plaintiffs’ interest in moving forward expeditiously.<sup>22</sup> FICALA would remove most of

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16. See, e.g., *In re Petrobras Sec.*, 862 F.3d 250, 264–65 (2d Cir. 2017).

17. See *id.* at 267–69; see also *Briseno v. Conagra Foods, Inc.*, 844 F.3d 1121, 1123 (9th Cir. 2017).

18. H.R. 985 § 103(a).

19. FED. R. CIV. P. 23(f).

20. H.R. 985 § 103(a).

21. See Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss Is Pending*, 47 WAKE FOREST L. REV. 71, 76–77 (2012).

22. In *Thornton v. DaVita Healthcare Partners, Inc.*, the court stayed discovery in a putative class action pending resolution of the defendant’s motion to dismiss, and explained the factors as follows:

When exercising its discretion in evaluating a request for a stay of discovery, the Court considers the following factors: (1) the interest of the plaintiff in proceeding

the district judge's discretion by making the stay mandatory absent a finding of undue prejudice.<sup>23</sup> The bill's approach, which in some cases would accomplish nothing other than delay, imposes a one-size-fits-all rule in an area better left to judicial discretion.

#### *E. MDL Trial Prohibition*

The multidistrict litigation (MDL) statute permits transfer of related cases to a single federal district judge for pretrial handling.<sup>24</sup> Although MDL judges lack the power to try cases that have been transferred under the MDL statute,<sup>25</sup> they may try cases that have been filed in their own district or transferred to them pursuant to the general federal venue transfer statute.<sup>26</sup> FICALA would remove this power of MDL judges to try cases. In the absence of consent by all parties, a transferee judge overseeing an MDL would be barred from conducting a trial "in a civil action transferred to or directly filed in the proceedings."<sup>27</sup>

Trials are not the problem. The problem, if anything, is the opposite: litigation can get bogged down in MDL-coordinated proceedings in a way that makes it difficult and time-consuming for claims to reach adjudication on the merits. MDL judges lack the power to try most of the cases before them, but their ability to try a few bellwether cases has proved useful for generating information that can lead to global settlements.<sup>28</sup> The fact that MDL judges occasionally try cases is not a problem to be solved with a statutory prohibition, but rather a sensible approach to managing certain types of mass litigation.

#### *F. Interlocutory Appeals from MDL Orders in Personal Injury Actions*

FICALA would expand opportunities for interlocutory appeals, thereby slowing the litigation process. It provides that an appellate court must permit an appeal from any order in an MDL personal injury action if "an immediate appeal from the order may materially advance the ultimate termination of one or more civil actions in the proceedings."<sup>29</sup> This provision is unnecessary because the current exceptions to the final judgment rule—particularly the

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expeditiously with discovery and the potential prejudice to the plaintiff of a delay; (2) the burden on the defendants of proceeding with discovery; (3) the convenience to the Court of staying discovery; (4) the interests of nonparties in either staying or proceeding with discovery; and (5) the public interest in either staying or proceeding with discovery.

No. 13-cv-00573-RBJ-KMT, 2013 U.S. Dist. LEXIS 145458, at \*6 (D. Colo. Oct. 8, 2013).

23. See H.R. 985 § 103(a).

24. 28 U.S.C. § 1407(a) (2012).

25. See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998).

26. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.132 (2004).

27. H.R. 985 § 105.

28. See generally Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008).

29. H.R. 985 § 105.

availability of certified interlocutory appeals under 28 U.S.C. § 1292(b)—provide adequate opportunities for appeals to address potentially dispositive issues.<sup>30</sup> The main differences between the FICALA provision and the existing general provision for certified interlocutory appeals are that the FICALA provision does not require district judge certification and does not give the appellate court discretion to decline the appeal. There is no good reason to impose a broader right of interlocutory appeals in MDL.

## II. PROPOSALS THAT ADDRESS REAL PROBLEMS BUT OFFER POOR SOLUTIONS

A number of the proposals in FICALA address issues that are genuine problems in the litigation system and are worthy of serious thought to formulate useful reforms. Of these, a few of the FICALA proposals point the way to sensible solutions; these are discussed in Part IV of this Article. Most of the proposals, however, offer solutions that would do more harm than good. FICALA's proponents latched onto real problems as a ploy to achieve liability-avoidance reforms.

### *A. Prohibition on Class Counsel Fees Until Completion of Class Member Payments*

One of FICALA's class action provisions—innocuously labeled “Fee Distribution Timing”—states: “In a class action seeking monetary relief, no attorneys' fees may be determined or paid pursuant to Rule 23(h) of the Federal Rules of Civil Procedure or otherwise until the distribution of any monetary recovery to class members has been completed.”<sup>31</sup> As drafted, this provision would either make it difficult for class action lawyers to get paid or discourage class action lawyers from negotiating settlements with long-term monetary remedies, even in cases where such remedies are appropriate, such as those involving diseases with long latency periods.

Underlying the proposal, however, is an important insight. The value of a remedy to class members may not be measurable up front but instead may require time to see how the remedy plays out. Particularly if a class settlement or adjudication provides monetary relief on a claims-made basis, one cannot know in advance the extent to which class members will actually receive compensation. The FICALA fee-delay proposal, viewed in its best light, represents a clumsy effort to defer the determination of class counsel fees until after the value of the remedy is known. One can envision revising the proposal into a sensible system of periodic class counsel payments based on periodic accounting of amounts received by class members. This idea is discussed in Part IV.<sup>32</sup> But the FICALA approach—a flat prohibition on payments to class counsel until after the last distribution to class members—

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30. See MANUAL OF COMPLEX LITIGATION (FOURTH) § 15.11.

31. H.R. 985 § 103(a) (proposing a new section to be codified at 28 U.S.C. § 1718(b)(1)).

32. See *infra* note 63 and accompanying text.

would have the problematic effect of discouraging lawyers from negotiating settlements that involve long claims processes even where appropriate.

*B. Limits on Who Can Serve as Class Counsel  
and Class Representative*

FICALA would require disclosure of certain relationships between proposed class representatives and class counsel: family relationships, employment relationships, present or former client-lawyer relationships, and contractual relationships. In addition, it would require a description of “the circumstances under which each class representative or named plaintiff agreed to be included in the complaint” and disclosure of any other class action in which the proposed class representative has a similar role.<sup>33</sup> If the provision merely required these disclosures, it would be unobjectionable. But FICALA goes further, prohibiting certification of a class action “in which any proposed class representative or named plaintiff is a relative or employee of class counsel.”<sup>34</sup> The original version of this provision was much more problematic. It included client-lawyer relationships in the prohibition, and it applied to all types of class actions.<sup>35</sup> Wisely, the bill’s proponents amended the provision so that it does not stop institutional investors from serving as lead plaintiffs in securities class actions pursuant to the empowered-lead-plaintiff model of the Private Securities Litigation Reform Act of 1995.<sup>36</sup> Even so, the provision goes too far, as a prohibition on relationships between class representatives and class counsel would accomplish little. Concerns about class counsel conflicts of interest are real, but this proposal adds an unnecessary constraint on who can serve as class counsel and class representative.

*C. MDL Personal Injury Plaintiff Fact Submission*

FICALA includes a provision that would require an “allegations verification” of all MDL personal injury plaintiffs. Specifically, plaintiffs’ counsel would be required to “make a submission sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff’s complaint regarding the alleged

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33. H.R. 985 § 103(a).

34. *Id.*

35. H.R. 985, 115th Cong. § 103(a) (as introduced in the House, Feb. 9, 2017) (proposing a new section to be codified at 28 U.S.C. § 1717(b)). The provision of the bill as originally proposed read: “A Federal court shall not issue an order granting certification of any class action in which any proposed class representative or named plaintiff is a relative of, is a present or former employee of, is a present or former client of (other than with respect to the class action), or has any contractual relationship with (other than with respect to the class action) class counsel.” *Id.*

36. *See* 15 U.S.C. § 78u-4 (2012). As revised, FICALA specifies that the section on class representative conflicts of interest “shall not apply to a private action brought as a class action that is subject to section 27(a) of the Securities Act of 1933 . . . or section 21D(a) of the Securities Exchange Act of 1934.” H.R. 985 § 103(a).



injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury.”<sup>37</sup>

Mass litigation may include a mix of meritorious and nonmeritorious claims. Therefore, in some cases, it makes sense for judges to use plaintiff fact sheets, *Lone Pine* orders,<sup>38</sup> or phased discovery with first-phase individual plaintiff interrogatories to identify claimants who lack basic supporting information for their claims. But a one-size-fits-all approach would create unnecessary burdens in cases that do not require such an approach.

#### *D. Cap on MDL Personal Injury Plaintiff Lawyer Fees and Costs*

Under the misleadingly optimistic heading “Ensuring Proper Recovery for Plaintiffs,” FICALA would cap MDL personal injury plaintiff lawyers’ fees and costs at 20 percent. The bill approaches the fee cap from the back: “A plaintiff who asserts personal injury claims in [MDL proceedings] shall receive not less than 80 percent of any monetary recovery obtained for those claims by settlement, judgment, or otherwise, subject to the satisfaction of any liens for medical services . . . .”<sup>39</sup> Excessive lawyers’ fees in mass litigation are a legitimate concern. In mass collective representation, lawyers enjoy economies of scale that bear on the reasonableness of contingent fee amounts. But capping MDL fees and costs at a draconian 20 percent would have substantial negative effects on access to high-quality lawyers.<sup>40</sup>

Imposing an automatic fee cap in MDL proceedings, but not in other cases, could have a detrimental effect on the decision-making process at the Judicial Panel on Multidistrict Litigation. The Panel decides whether to order MDL transfers based on its analysis of whether coordinated pretrial proceedings would further the efficient resolution of a set of cases.<sup>41</sup> Defendants and plaintiffs often agree that MDL transfers make sense, and their arguments before the Panel often focus on the question of in which district, rather than whether, MDL proceedings should be convened. If the Panel’s decision to transfer meant that plaintiffs’ lawyers’ fees and costs would automatically be capped at 20 percent, it would alter the proceedings in two ways. First, it would make plaintiffs’ lawyers more likely to argue against MDL transfer, even in cases that warrant coordinated proceedings for efficient judicial handling. It would make defendants correspondingly more inclined to favor

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37. *Id.* § 105 (proposing a new subsection to be codified at 28 U.S.C. § 1407(i)).

38. *See generally* *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986) (requiring plaintiffs to provide certain supporting information at the outset of litigation on pain of dismissal).

39. H.R. 985 § 105 (proposing new subsection to be codified at 28 U.S.C. § 1407(l)).

40. On the irony of corporations’ pressing for price regulation, see J. Maria Glover, “*Encroachments and Oppressions*”: *The Corporatization of Procedure and the Decline of Rule of Law*, 86 *FORDHAM L. REV.* 2113, 2123 (2018) (“How quickly the champions of the free market embrace ‘big government’ paternalism when it reduces their exposure to liability!”).

41. *See* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 *TUL. L. REV.* 2225, 2228–29, 2236–37 (2008).

MDL, if only because the fee cap would discourage high-quality plaintiffs' lawyers from participating and discourage plaintiffs' lawyers from investing in the litigation. Second, it would put the Panel in the uncomfortable position of knowing that, by ordering transfer, it would be imposing a draconian cap on attorneys' fees and costs. This would make it more difficult for the Panel simply to decide, on the merits, whether pretrial coordinated proceedings are warranted.

### III. ISSUES THAT CONGRESS SHOULD LEAVE TO THE COURTS

Legislation is one way to reform procedure, but it is not the only way. In terms of institutional competence, there are three main contenders for addressing procedural problems in federal civil litigation. Some problems in civil litigation ought to be resolved by courts in the context of live disputes or permitted to percolate in the appellate courts. Other problems ought to be resolved through the rulemaking process prescribed by the Rules Enabling Act. Finally, some problems should be addressed by Congress. In thinking about the FICALA package of proposals, it is helpful to distinguish between those where Congress is sensibly taking action—even if the current proposal is not the best way to solve the problem—and those where Congress ought to leave the solution to the courts or to the process of amending the Federal Rules of Civil Procedure.

Congress is well suited to address subject matter jurisdiction because only Congress may grant jurisdictional power to the federal courts.<sup>42</sup> Any changes to diversity jurisdiction or other aspects of federal subject matter jurisdiction must come from Congress.<sup>43</sup> The Class Action Fairness Act of 2005<sup>44</sup> offers a good example of Congress's role in altering the class action landscape through reform of the subject matter jurisdiction of federal district courts. Whatever one thinks of FICALA's proposal regarding diversity jurisdiction upon removal from state court,<sup>45</sup> one cannot object to Congress's institutional role in considering the issue.

In addition, Congress is well suited to enact procedural reforms linked to particular federal substantive statutes.<sup>46</sup> In the Private Securities Litigation Reform Act of 1995, for example, Congress altered class action procedures<sup>47</sup> and pleading requirements<sup>48</sup> for federal securities fraud cases. None of the proposals in FICALA, however, fit this category. Much of FICALA would reform procedure transsubstantively. Several of FICALA's provisions are non-transsubstantive, but not in a way that makes them suitable for congressional intervention in procedure. The plaintiff fact submission, interlocutory appeal, and fee cap apply only to personal injury plaintiffs.

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42. See *Finley v. United States*, 490 U.S. 545, 547–48 (1989).

43. *Id.*

44. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.).

45. See H.R. 985, 115th Cong. § 104 (2017) (proposing new subsection to be codified at 28 U.S.C. § 1447(f)).

46. See Glover, *supra* note 40, at 2127–28.

47. See 15 U.S.C. § 78u-4(a) (2012).

48. See *id.* § 78u-4(b)(2).

Personal injury claims, however, are not matters of federal substantive law. When federal courts hear such claims in the exercise of diversity jurisdiction, they must apply state substantive law.<sup>49</sup>

For the most part, procedural reform that does not concern subject matter jurisdiction and that is not linked to particular federal substantive statutes is better left to the courts and to the judicial rulemaking process. Thus, the “same type and scope of injury” requirement for class certification, like other aspects of class certification under Rule 23(a) and Rule 23(b), would be better left to the Rules Enabling Act process for amending the Federal Rules of Civil Procedure.<sup>50</sup> Likewise, the requirements for who may serve as class counsel under Rule 23(g) are better left to the Rules Enabling Act amendment process or entrusted to the careful attention of the district judge looking at the relationships and potential conflicts of interest in a particular case. A FICALA provision addressing the certification of issue class actions under Rule 23(c)(4)<sup>51</sup> similarly would be better addressed through the careful process of amending Rule 23.

The ascertainability issue is one that has been considered in some detail by courts and rulemakers. In its recent work drafting revisions to Rule 23, the Advisory Committee on Civil Rules heeded the advice of its subcommittee on class actions that the ascertainability issue is percolating in the appellate courts, has resulted in a circuit split, and is likely to make its way to the U.S. Supreme Court.<sup>52</sup> It is an issue already implicit in the manageability aspect of the superiority requirement under Rule 23(b)(3).<sup>53</sup> Both the courts and the rules committees are better situated than Congress to consider whether this additional independent constraint on class certification would be useful.

Certain procedural issues are better left to judicial discretion. These are procedures whose application ought to vary from case to case, where legislative intervention may impose an unduly uniform approach. In FICALA, the discovery stay in class actions and the plaintiff fact submission in MDL fit this description. The wisdom of a discovery stay varies from case to case and from motion to motion. The usefulness of plaintiff fact sheets depends on the nature and size of the dispute, particularly whether it is the type of dispute in which meritorious and nonmeritorious claims need to be distinguished before proceeding with common discovery. Both should be left to the discretion of the district judge, not imposed as a general rule.

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49. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

50. See 28 U.S.C. § 2072 (2012).

51. H.R. 985, 115th Cong. § 103(a) (2017) (proposing new section to be codified at 28 U.S.C. § 1720).

52. See Civil Rules Advisory Comm., *Minutes* (Nov. 5, 2015), [http://www.uscourts.gov/sites/default/files/2015-11-05-minutes\\_civil\\_rules\\_meeting\\_final\\_0.pdf](http://www.uscourts.gov/sites/default/files/2015-11-05-minutes_civil_rules_meeting_final_0.pdf) [<https://perma.cc/MM33-DV73>].

53. See *Briseno v. Conagra Foods, Inc.*, 844 F.3d 1121, 1125–26 (9th Cir. 2017).

## IV. SALVAGEABLE IDEAS

Having catalogued numerous aspects of FICALA that should be discarded, the question remains: Does the bill contain any ideas worth keeping? Opponents of FICALA were so outraged by the one-sidedness of the bill that they paid scant attention to the pieces of it that might make sound procedural reforms. I suggest that the bill contains several proposals that deserve serious consideration as improvements to the litigation process. These reforms fall into three categories: class counsel fees, reporting requirements for class settlements, and subject matter jurisdiction. In each of these areas, the bill addresses genuine problems and offers solutions that, if not perfect, at least point in the right direction.

*A. Reforms to Class Counsel Fees*

FICALA includes three potentially useful provisions regarding class counsel fees. Although the current language of two of the proposals goes too far, they point in the right direction and could be tweaked into proposals worthy of support.

First, FICALA would link class counsel fees to money actually received by the class:

if a judgment or proposed settlement in a class action provides for a monetary recovery, the portion of any attorneys' fee award to class counsel that is attributed to the monetary recovery shall be limited to a reasonable percentage of any payments directly distributed to and received by class members.<sup>54</sup>

The section raises plenty of questions: What counts as a "monetary recovery"? What does it mean for a portion of a fee award to be "attributed to the monetary recovery"? What constitutes a "reasonable percentage"? What counts as "directly distributed to and received by"? If interpreted too narrowly, the provision would unduly constrain remedial options in class actions. The basic idea, however, is both sound and important. As I have written elsewhere, some class action settlements include remedies with face values that differ from their actual value to class members, and class counsel have an incentive to maximize the apparent size of a settlement even if the actual value to class members is small.<sup>55</sup> Claims processes may be unnecessarily burdensome, or entirely unnecessary.<sup>56</sup> Coupons or credits may not be transferrable or stackable.<sup>57</sup> The best way to incentivize class counsel to negotiate remedies of real value to class members is to link fees to what class members get. Suppose a class action settlement provides a monetary remedy on a claims-made basis and has a face value of \$100 million; that is, \$100 million is the maximum amount that might theoretically

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54. H.R. 985 § 103.

55. See Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859, 862–64 (2016).

56. See *id.* at 889–92.

57. See *id.* at 878–82.

be paid if every class member were to submit a claim and receive a full payment. And suppose that only a small number of class members successfully submit claims, so the amount actually paid is \$5 million. To the extent that the court awards attorneys' fees on a percent-of-fund basis, the relevant number should be \$5 million, not \$100 million. By making fees depend on the amount that class members actually receive, the reform would encourage counsel to negotiate settlement terms with automatic payments rather than a claims-made process whenever possible, or with simple claims processes that maximize actual compensation to class members.

As currently offered, the FICALA provision may unduly constrain cy pres remedies. Abusive cy pres settlements are a problem I have discussed elsewhere.<sup>58</sup> An appropriate cy pres remedy provides actual value to those harmed by the defendant's conduct, even if the remedy is not a direct payout of money to class members, and class counsel fees should correspond to the value a cy pres settlement provides as a remedy for class members. The FICALA proposal might be interpreted not to apply to cy pres remedies by reading "monetary recovery" narrowly. If it were interpreted this way, the provision would do nothing to improve class counsel incentives regarding cy pres settlement remedies, but neither would it diminish the opportunity to craft appropriate cy pres remedies. At the other extreme, the FICALA proposal might be interpreted to treat cy pres remedies as "monetary recoveries" that are not "directly distributed to and received by class members,"<sup>59</sup> in which case the provision would instruct courts to award zero attorneys' fees for cy pres remedies. The context suggests that this is the interpretation the bill's proponents have in mind. If so, the provision would have the unfortunate effect of eliminating cy pres remedies even in cases where such remedies are appropriate. The Supreme Court recently granted certiorari to consider the issue of cy pres remedies in class action settlements,<sup>60</sup> so this issue may be in flux regardless of FICALA.

Second, just as FICALA would link class counsel fees to the actual value of monetary remedies, it also would link class counsel fees to the actual value of equitable relief: "if a judgment or proposed settlement in a class action provides for equitable relief, the portion of any attorneys' fee award to class counsel that is attributed to the equitable relief shall be limited to a reasonable percentage of the value of the equitable relief, including any injunctive relief."<sup>61</sup> Class settlements too often include spurious injunctive relief, a problem that could be reduced if courts were to pay greater attention to the actual value of injunctive remedies in class settlements.<sup>62</sup>

Third, FICALA addresses the timing of class action fee awards. It would defer the determination and payment of class counsel fees until after the

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58. *See id.* at 882–89.

59. H.R. 985 § 103 (proposing new subsection to be codified at 28 U.S.C. § 1718(b)(2)).

60. *Gaos v. Holyoak*, 869 F.3d 737 (9th Cir. 2017), *cert. granted sub nom. Frank v. Gaos*, 138 S. Ct. 1697 (Apr. 30, 2018) (No. 17-961).

61. H.R. 985 § 103(a) (proposing new subsection to be codified at 28 U.S.C. § 1718(b)(3)).

62. *See* Erichson, *supra* note 55, at 874–78.

completion of any monetary distributions to the class.<sup>63</sup> As discussed above,<sup>64</sup> this proposal goes too far. Some remedies—particularly those that address harms with future contingencies, such as diseases with long latency periods—may appropriately take decades to run their course. The FICALA proposal seems aimed at making it difficult and slow for class action lawyers to get paid for their work, and it comes across as a crass attempt to discourage lawyers from filing class actions. The current proposal, if enacted, likely would have the perverse effect of constraining the range of remedies that lawyers would negotiate. Even in cases that warrant long-term remedies, class action lawyers would be loath to craft settlements that would make their fees uncollectible for years or decades.

But there is a sound idea underlying the fee-delay proposal. Often it is difficult to assess the value of a class remedy before the remedy is distributed to class members. In many cases, the remedy requires a claims process in which the total number of claimants is unknown in advance, and claim rates tend to be low. In some cases, the amount of individual monetary payouts depends upon a claims process to determine the nature and extent of each class member's claim. When a remedy includes coupons or credits, it may be unknown in advance how many class members will claim and redeem them. When seeking approval of a settlement and an award of fees, class action lawyers have an incentive to make the settlement appear as large as possible. If fees were determined after remedy distribution, then the fees would better reflect the value of the remedy.

Additionally, if fees were determined on this timeline, lawyers would have an incentive to negotiate better settlements in the following ways: Where possible, they would create settlements in which monetary remedies are paid or credited automatically and directly to class members, rather than on a claims-made basis. If a claims-made basis is necessary, then they would prefer simple, clear, and nonthreatening processes to maximize the claims rate. When including coupon or credit remedies, they would prefer to make them transferrable and stackable to maximize the actual value to class members. In other words, a fee-delay provision would mesh nicely with the FICALA proposals to link class counsel fees to the actual value of monetary and injunctive remedies to class members.

It is not hard to imagine a nondraconian version of the fee-delay proposal. Rather than prohibiting payment of fees until after all remedies have been distributed, it would provide for a periodic accounting of the remedy distribution with periodic payment of class counsel fees corresponding to the remedy. Periodic fee payments would achieve all of the benefits of the FICALA proposal but without the undesirable effect of making long-term remedies unviable.

All three of these reforms to class counsel fees would be better accomplished by amending Rule 23(h) pursuant to the rulemaking process

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63. H.R. 985 § 103(a).

64. *See supra* notes 31–32 and accompanying text.

under the Rules Enabling Act.<sup>65</sup> One might worry that the rulemaking process's receptivity to lawyer input would make it difficult to achieve these reforms. The interests of plaintiffs' lawyers and defendants' lawyers largely align on topics related to the expediency of achieving class settlements. Both groups stand to gain from settlements that provide lucrative fees to class action lawyers in exchange for remedies of questionable value to class members. The losers are the class members, but their interests are least likely to be represented in rulemaking deliberations. Thus, one might worry that the rulemaking process would fail to accomplish reforms that advance justice at the expense of lawyers on both sides. But Congress may be no better. The bottom line is that these reforms of class counsel fees have much to commend them, whether enacted by legislation or by amendment to Rule 23(h).

### *B. Class Settlement Reporting*

FICALA would impose reporting requirements regarding class settlement distributions.<sup>66</sup> It is too easy for inadequate claims processes to remain hidden. To the extent class members are not seeing the benefits of class action settlements, sunlight could be a powerful disinfectant. The bill also would require a Federal Judicial Center report on class settlement distributions.<sup>67</sup> In this important area of civil justice, it would be useful for lawyers, judges, scholars, and policymakers to have a clearer picture of settlement outcomes. Opponents of FICALA worry that the proposal is driven by a political desire of defense-oriented reformers to prove to Congress and others that class members receive little compared to the amount that class counsel receive. But that is not a sufficient reason to oppose the collection and dissemination of this information. Whatever the data show, it is important to make policy in light of the reality.

### *C. Subject Matter Jurisdiction*

FICALA includes a section labeled "Misjoinder of Plaintiffs in Personal Injury and Wrongful Death Actions."<sup>68</sup> The provision has nothing to do with "misjoinder" in the sense of the assertion of claims whose joinder is impermissible. Rather, the provision would expand federal court jurisdiction by permitting removal to federal court of actions that do not satisfy the complete diversity requirement of 28 U.S.C. § 1332(a).<sup>69</sup> Specifically, the FICALA provision states that, after removal of a state court action to federal court, when deciding a remand motion, "the court shall apply the jurisdictional requirements of section 1332(a) to the claims of each plaintiff

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65. *See supra* notes 42–52 and accompanying text.

66. H.R. 985 § 103(a) (proposing new subsection to be codified at 28 U.S.C. § 1719(a)).

67. *Id.* § 103(a) (proposing new subsection to be codified at 28 U.S.C. § 1719(b)).

68. *Id.* § 104 (proposing new subsection to be codified at 28 U.S.C. § 1447(f)).

69. *See* 28 U.S.C. § 1332(a) (2012) (permitting federal district courts to exercise original jurisdiction over cases between citizens of different states); *see also* *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267–68 (1806) (interpreting the diversity jurisdiction statute to require complete diversity of citizenship).

individually, as though that plaintiff were the sole plaintiff in the action.”<sup>70</sup> By requiring this analysis of diversity jurisdiction in multiplaintiff personal injury actions at this stage, the provision would effectively repeal the complete diversity requirement in such cases.

Underlying this proposal is a sound idea, the same basic idea that underlies the Class Action Fairness Act of 2005: federal courts should be available to resolve disputes of nationwide scope. Plaintiffs in mass tort litigation sometimes file their claims in so-called “magnet” jurisdictions where they hope to find plaintiff-friendly judges and juries, and they make their claims nonremovable by tactically joining nondiverse plaintiffs. To the extent a mass tort dispute reflects a national-market problem, and to the extent a plaintiff and defendant are both from states other than the forum state, it sometimes would be preferable, from an overall justice perspective, for a case to be heard by a federal court rather than by the plaintiff’s selected state court. But under current law, the defendant may be stuck in the state court because the action lacks complete diversity of citizenship so there is no basis for federal subject matter jurisdiction. The Supreme Court’s 2017 decision in *Bristol-Myers Squibb v. Superior Court of California*<sup>71</sup> significantly reduced this problem by tightening personal jurisdiction in multiplaintiff, multistate cases, but the problem could persist in some cases. The FICALA reform aims to solve this problem by treating each plaintiff as meeting the diversity requirement individually, without regard for other plaintiffs.

The problem is that the FICALA proposal goes much too far. This proposal would be sensible if it were refined to address the particular problems of mass tort litigation. As drafted, the provision applies even in a simple two-plaintiff lawsuit and even in cases better handled by state judges. The provision would create a substantial and unwarranted expansion of federal court diversity jurisdiction.<sup>72</sup> If the proposal were refined to address the narrower problem of tactical joinder in magnet jurisdictions in mass tort litigation, however, it might offer a prudent expansion of federal jurisdiction.

#### CONCLUSION

FICALA states that its purpose is to “assure fair and prompt recoveries for class members and multidistrict litigation plaintiffs with legitimate claims” and to “diminish abuses in class action and mass tort litigation that are undermining the integrity of the U.S. legal system.”<sup>73</sup> Most of its provisions give the lie to this statement of purpose, or at least the part about assuring fair and prompt recoveries for plaintiffs with legitimate claims. Overbearing class certification constraints would make it difficult for plaintiffs to level the field even in cases suitable for class treatment. Automatic discovery stays,

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70. H.R. 985 § 104 (proposing new subsection to be codified at 28 U.S.C. § 1447(f)(2)).

71. 137 S. Ct. 1773 (2017).

72. On the efforts of corporate defendants to expand diversity jurisdiction in recent decades because of the strategic advantage defendants find in federal courts, see Scott Dodson, *Jurisdiction in the Trump Era*, 87 FORDHAM L. REV. 73 (2018).

73. H.R. 985 § 102(1)–(2).



trial prohibition, and interlocutory appeals would grind the litigation process to a crawl even in cases where such delays are unwarranted. A draconian MDL fee cap would hinder access to legal services. These provisions, in the aggregate, suggest that FICALA was driven not by a desire to assure fair and prompt recoveries, but rather by a desire to make recoveries difficult for all plaintiffs in class actions and MDL.

Nonetheless, several of the ideas in FICALA are true to its stated purpose. These proposals, with a bit of tweaking, offer some hope of “assur[ing] fair and prompt recoveries” while “diminish[ing] abuses in class action and mass tort litigation.”<sup>74</sup> Provisions that link class counsel fees to value for class members could improve the quality of class action settlements, and the provision on timing of fees—if tweaked to provide for periodic payments—could further this result. Provisions on class settlement reporting could improve understanding about mass dispute resolution, which in turn could create incentives for better settlements as well as provide a sounder basis for future procedural reform. And the provision on diversity jurisdiction—if tweaked to target the problem of magnet jurisdictions in national-market mass litigation—could improve the allocation of adjudicatory authority and thereby improve the quality of justice in mass disputes.

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74. *Id.*