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CLASS AND COLLECTIVE ACTIONS

Class/collective actions in the United States: overview

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OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS

1. What is the definition of class/collective actions in your jurisdiction? Are they popular and what are the current trends?

Definition of class/collective actions

In the US, a class action is a form of representative litigation. A traditional lawsuit typically involves all plaintiffs and defendants in the case representing themselves and their own interests before a state or federal court. In contrast, a class action involves at least one of the parties, typically the plaintiff(s), representing a group of people who are similarly situated but absent from the proceedings to obtain classwide relief for a civil wrong that the defendant(s) purportedly committed. The plaintiffs in a class action, known as the lead, named, or representative plaintiffs, direct the litigation by filing the requisite pleadings, propounding and responding to discovery, sitting for depositions, opposing dispositive motions, moving to certify the class, and ultimately, if successful at the class certification stage, either negotiating a settlement on behalf of the class or participating in a trial on behalf of themselves and the absent class members.

Technically, a case does not become a class action until a state or federal court certifies it as such. This process is generally referred to as "class certification" and typically occurs after the parties have engaged in motion practice to determine whether the proposed class action should be certified. Until the lawsuit is certified as a class action, the absent class members are often referred to as "putative class members".

Use of class/collective actions

As noted above, the vast majority of class actions in the US are plaintiff class actions. However, in extremely rare instances a class action can be asserted against a class of defendants. In these limited circumstances, the defendant class can be certified if it meets the same general requirements as those for a plaintiff class (*see Question 6, Certification/qualification*).

Defendant class actions are extremely rare because:

- They tend to be used to adjudicate less than the whole controversy.
- There are difficulties over individual defences.
- There are concerns over due process, as a defendant representative may not adequately represent the interests of the defendant class.

Class actions are most common where plaintiffs allege that a large number of people have been injured by the same defendant(s) in the same way. Instead of each class member filing his or her own separate lawsuit, the class action allows a court to resolve in a single proceeding the claims of all class members, unless individual class members opt out of the class (*see Question 6, Joining other claimants*). Class actions are generally available for any claims that a plaintiff might allege, so long as the legal and procedural requirements for bringing a class action are met, although certain claims are better suited for class treatment than others (*see Question 3*).

Current trends

After many years of growth in the use of the class action device in both federal and state courts, the US Congress and US Supreme Court have both recently acted to limit class actions. In 2005, the US Congress passed the Class Action Fairness Act, 28 USC § 1332(d) (CAFA). CAFA was intended to expand federal jurisdiction over class actions, reduce inconsistency among class actions litigated in the individual states, and provide for greater scrutiny of class action settlements and the payment of attorneys' fees. Several recent US Supreme Court high-profile decisions have limited the circumstances under which cases are certified as class actions (*see Question 2, Principal sources of law*). In addition, the recent addition of conservative Supreme Court justices is causing some to speculate that class actions, particularly nationwide class actions, may be further limited in the years to come.

Despite attempts by both federal and (some) state courts and legislatures to limit class actions, some industries confront a constant and sometimes rising stream of statewide and nationwide class actions. The industries that most commonly face class actions are consumer-facing industries such as the retail, automotive, insurance, pharmaceutical, and financial services industries.

Retailers have seen a growing number of class actions regarding discount and/or reference pricing practices in their traditional stores, outlet stores, and in their online platforms, although many of these class actions have been dismissed at the pleading stage.

Another trend in class actions involves telemarketing that implicates the Telephone Consumer Protection Act 47 USC § 227, which is federal legislation restricting the circumstances under which certain businesses may lawfully contact potential customers by phone or other electronic means. Cases brought under this legislation include those relating to unsolicited facsimile adverts (*Hawk Valley, Inc v Taylor, 301 FRD 169, 172 (ED Pa 2014)*) and commercial text messages (*Emanuel v Los Angeles Lakers, Inc, No CV 12-9936-GW SHX, 2013 WL 1719035, at *1 (CD Cal Apr 18, 2013)*).

Some states, for example California and Florida, see higher numbers of class actions filed and litigated than other states because, in part, they have expansive consumer protection statutes and active plaintiff bars. As a result, jurisdictions such as California are seen as leaders in class action practice and jurisprudence. In a minority of jurisdictions, class actions are either disallowed or severely limited. In Texas, for example, the Texas Supreme Court has narrowly interpreted the state's class action requirements under Texas Rule of Civil Procedure 42 such that it is extremely difficult to have a class action certified by a Texas state court. That trend does not appear to be reversing anytime soon.

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Companies' implementation of arbitration provisions with class action waivers is another trend that is on the rise (*see Question 2 and Question 23*). This trend will likely continue in light of the US Supreme Court's recent ruling in *Epic Systems Corp, v Lewis, 138 S Ct 1612 (2018)* (*see Question 2*).

Another emerging trend is increased scrutiny of class action settlements and refusal to approve them where, for example, the court determines that the class is receiving insufficient consideration. In addition, a few courts are beginning to express an interest in tracking class action settlements after granting final approval.

REGULATORY FRAMEWORK

2. What are the principal sources of law and regulations relating to class/collective actions? What are the different mechanisms for bringing a class/collective action?

Principal sources of law

Rule 23 of the Federal Rules of Civil Procedure (*Fed R Civ P 23*) is the principal source of law relating to class actions in US federal courts. Most states have enacted standards analogous to Rule 23 that govern class action proceedings in their respective state courts.

These rules, at both the federal and state levels, serve to protect the rights of absent class members and seek to ensure that class actions are certified only where appropriate. The US Constitution guarantees procedural due process to all litigants. The class certification process aims to ensure that absent class members' interests are protected. The specific requirements for most class actions are discussed more fully below (*see Question 6*). In general, a certifiable class must comply with all of the following features:

- Be so numerous that joining all members is impractical.
- Raise common questions of law or fact.
- Have representatives whose claims or defences are typical of the class.
- Have representatives who fairly and adequately protect the interests of the class.

(*Fed R Civ P 23(a).*)

If a putative class action brought under the federal rules seeks monetary damages, the putative class must satisfy the additional requirements of Rule 23(b)(3), including predominance and superiority. The predominance requirement mandates that questions of law or fact common to the class members predominate, or be most prominent, over any questions affecting only individual members (*Fed R Civ P 23(b)(3)*). The superiority requirement compels the putative class to show that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. In some cases, individual absent class members may opt out of the putative class and pursue their cases individually or by other means (*Fed R Civ P 23(c)(2)(B)*). At the time a class is certified the court is required to appoint class counsel, who must fairly and adequately represent the interests of the class (*Fed R Civ P 23(g)*).

The US Supreme Court recently addressed the requirements for class certification in *Wal-Mart Stores, Inc v Dukes, 131 S Ct 2541 (2011)*. In Dukes, the Supreme Court overturned a grant of certification to a nationwide class of 1.5 million female Wal-Mart employees because the lead plaintiff failed to show that the suit involved common issues where there was no single discriminatory policy, but rather numerous independent decisions affecting class members in different ways. The court emphasised that the class could not meet the Rule 23(a)(2) commonality requirement because their alleged common question (that is, why they were disfavoured relative to other employees) could not produce a common answer across the class. The Supreme Court urged district courts in other cases to engage in a rigorous analysis of the factual record to determine whether certification is appropriate.

Similarly, in *Comcast Corp v Behrend, 133 S Ct 1426 (2013)*, the court reversed the certification of a class of cable television customers alleging that their provider monopolised a local market for cable services. The court ruled that the plaintiffs' expert's model could not prove injury or damages on a classwide basis, and therefore there was no predominance of common questions over individual issues under Rule 23(b)(3). The court re-emphasised that district courts and courts of appeal should conduct a rigorous analysis of the factual record to determine whether expert methodologies support certification, even where doing so involves an inquiry into the merits of the dispute. (Typically, merits inquiries do not take place until after a class is certified.)

In the area of labour and employment law, the US Supreme Court recently reaffirmed that employers can prevent employees from banding together in a class action to redress certain employment-related alleged wrongs. The High Court decided in May 2018 that a provision of the National Labor Relations Act, which guarantees to workers the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid, does not reflect a clearly expressed and manifest congressional intention to displace the Federal Arbitration Act and to forbid class and collective action waivers in employment contracts (*Epic Systems Corp v Lewis, 138 S Ct 1612 (2018)*).

The Supreme Court has also permitted consumer contracts to include arbitration provisions that contain waivers of the right to participate in class or collective actions (*see Question 23*).

Principal institutions

Most class actions in the US are litigated in court, either in the federal court system or in state courts. The US federal government maintains a tiered national court system, consisting of trial courts in every state, regional appellate (circuit) courts, and the US Supreme Court. The individual states each maintain similar state court systems of their own, from trial courts to lower appellate courts, and, with limited exceptions, to supreme courts, which are generally the highest courts in the states.

Since the passage of CAFA, 28 USC § 1332(d), an increasing number of class actions proceed in the federal courts. Under CAFA, the federal courts can exercise jurisdiction over all class actions where the following are true:

- There are more than 100 putative class members.
- The amount in controversy exceeds USD5 million.
- Any member of a class of plaintiffs is a citizen of a state different from any defendant.

A federal court may, however, decline jurisdiction if greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed (*28 USC § 1332(d)(3)*).

There are two exceptions to CAFA when a district court must decline jurisdiction:

- The local controversy exception, where the plaintiff class and at least one defendant meet certain characteristics that essentially make the case a local controversy (*28 USC § 1332(d)(4)(A)*).
- The home-state controversy exception where two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants are citizens of the state in which the action was originally filed (*28 USC § 1332(d)(4)(B)*).

These exceptions were discussed in *Serrano v 180 Connect, Inc, 478 F 3d 1018, 1022 (9th Cir. 2007)*.

Class actions can also be resolved by arbitration when the parties expressly contract to do so. And in certain circumstances businesses

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can prevent class action litigation by requiring that consumers agree to arbitration of individual claims (*see Question 23*).

Different mechanisms

In both federal and state courts, the mechanism for bringing a class action lawsuit is simply filing a proposed or putative class action, where the named plaintiffs seek to represent themselves and all other similarly situated persons (*see Question 1*). To proceed, the named plaintiffs must then establish that they satisfy the specific requirements to maintain a class action (*see Question 6, Certification/qualification*).

3. Are class/collective actions permitted/used in all areas of law, or only in specific areas?

Unless specifically prohibited, class actions are permitted in all areas of law, including:

- Product liability.
- Environmental law.
- Anti-trust and competition law.
- Pension disputes.
- Civil rights.
- Securities.

These disputes typically involve alleged actions or activities that harm a large number of individuals or entities through the same underlying means (for example, by designing a defective product, by overcharging customers and consumers through price-fixing, or by making a false statement that affects the price of a security). Cases involving discrete actions that affect different individuals in different ways are generally less suitable for class treatment. But in the absence of an express statutory or contractual prohibition, class actions are available for any private right of action.

Some state and federal statutes and common law doctrines nevertheless limit certain disputes from being litigated on a class basis or restrict the type of individuals or entities that may be members of a class. For example, the Truth in Lending Act caps damages and does not permit class actions for rescission claims. Certain states limit the type of claims that may be brought as class actions, or do not allow class actions at all.

Other areas of law/policy

Where a statutory right of action exists permitting private claims, classes may pursue remedies even if state or federal regulators bring a lawsuit for the same underlying actions. As a result, class action lawsuits often proceed at the same time as civil and criminal enforcement actions, and unless limited by statute, a class may obtain monetary or injunctive relief in addition to any relief obtained by government enforcers. As enforcers may have limited resources, many policymakers view class actions as an additional mechanism to deter wrongdoing.

LIMITATION

4. What are the key limitation periods for class/collective actions?

For claims under state law, the statute of limitations for class actions is generally dependent on the statute of limitations in the state in which the conduct is alleged for the claims asserted. For claims based upon federal statutory rights, such as anti-trust class actions, the limitations period is usually specified in the statute.

Different causes of action and jurisdictions have different rules on whether and when a statute of limitations will be tolled or suspended. These can include a defendant's fraudulent concealment of its alleged conduct, or when there are latent defects in products that consumers cannot readily detect. Statutes of limitation may also be included in the same statutes that provide relief.

The filing of a class action generally tolls or suspends the limitation periods that apply to the individual claims of all of the putative class members even if the putative class member is not aware that the class action is pending. The limitations period is generally tolled until such time that class certification is denied.

STANDING AND PROCEDURAL FRAMEWORK FOR BRINGING AN ACTION

Standing

5. What are the rules for bringing a claim in a class/collective action?

Definition of class

To assert their claims on behalf of a putative class, the representative plaintiffs must define the class that they seek to represent. The class definition must be sufficiently precise so that the court can determine who is and is not in the class.

Class definitions commonly focus on the defendant's alleged conduct and include geographic, temporal, or other objective parameters that permit the court to ascertain the members of the class. Subclasses asserting claims on behalf of a common subissue generally must meet the same definition requirements.

Potential claimant

To serve as a named plaintiff, a potential claimant must satisfy at least two fundamental requirements (*see Question 6*). First, the putative plaintiff must be a member of the class that it seeks to represent. Second, the putative plaintiff must itself have standing to assert its claim.

In the US, standing is generally required in all lawsuits, whether class action or individual action. The doctrine entails several considerations but, in essence, requires the litigant to demonstrate that it is entitled to have the court decide the merits of the dispute. The answer will often depend on the plaintiff's relationship to the defendant's alleged conduct.

Standing to assert a claim varies depending on the claims at issue and the court in which the action is filed. The US Supreme Court recently reaffirmed that named plaintiffs in putative class actions must allege and prove that their purported injury is both "concrete" and "particularised" (*Spokeo, Inc v Robins, 136 S Ct 1540, 1548 (2016)*). Cases decided since *Spokeo* have generally reinforced this standard, although there are some decisions in various jurisdictions that cannot easily be reconciled with one another.

In some circumstances, a named plaintiff may not have standing to assert a claim in federal court but it may have standing to assert a claim in state court. For example, in the anti-trust context an indirect purchaser of a good or service generally cannot sue the remote seller for alleged damages in federal court (*Illinois Brick Co v Illinois, 431 US 720 (1977)*). Some states have addressed this issue by passing "Illinois Brick repealer statutes", which expressly allow indirect purchasers to sue remote sellers under state law.

Claimants outside the jurisdiction

The representative plaintiff can bring claims that arise under federal law on behalf of absent plaintiffs residing in other states, so long as their claims and theories of harm are the same. In addition, the same federal court will typically hear any accompanying state law claims, brought on behalf of plaintiffs living in those specific states, so long as the requirements for federal jurisdiction are met.

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Professional claimants

Entities may have standing to assert claims that they acquire from others (*see Sprint Communications Co. v APCC Services, Inc., 554 U.S. 269 (2008)*). Additionally, although the US Supreme Court has not answered the question, such assignees may also serve as class representatives if the assignor satisfies the Rule 23 (of the Federal Rules of Civil Procedure) prerequisites. If so, the assignees "stand in the shoes of the assignor before [the] court" as "assimilated members of the class" and therefore possess the same interests as other class members and assert a claim for the same injury allegedly suffered by the class (*see Cordes & Co. Fin. Servs., Inc. v A.G. Edwards & Sons, Inc., 502 F.3d 91, 99-103 (2d Cir. 2007); Faris v Longtop Fin. Tech. Ltd., 2011 WL 4597553 (S.D.N.Y. Oct. 4, 2011) and Amalgamated Transit Union Local v Laidlaw Transit Servs., Inc., 2009 WL 249888 (S.D. Cal. Feb. 2, 2009)*).

Use of surrogates is uncommon.

Qualification, joinder and test cases

6. What are the key procedural elements for maintaining a case as a class action?

Certification/qualification

To maintain a class action, the representative plaintiff must first meet each of the four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure:

- The class must be so numerous that a joinder of all members is impracticable.
- There must be questions of law or fact common to the class.
- The claims or defences of the representatives must be typical of the claims or defences of the class.
- The representative parties must fairly and adequately protect the interest of the class.

Next, the representative plaintiff must also satisfy at least one of the following requirements imposed by Rule 23(b) of the Federal Rules of Civil Procedure:

- The prosecution of separate actions could potentially establish inconsistent standards of conduct or substantially impair other class members' ability to protect their interests.
- Final injunctive or declarative relief is appropriate because the party opposing the class acted on grounds generally applicable to the entire class.
- Common issues of law and fact predominate over individual issues and a class action is the superior mechanism for resolving the plaintiffs' claims. In actions for monetary damages, the third issue is the most important factor in the decision regarding whether a class can proceed as a class action.

On the timetable described below (*see Question 7*), the court determines before trial whether named plaintiffs meet the requirements to maintain a class action. If so, the court "certifies" the class for trial, and the class action proceeds. If plaintiffs do not meet the requirements, the court will not certify the class. Then, unless the representative plaintiffs attempt to amend their class claims, plaintiffs will be left to pursue their claims individually.

Minimum/maximum number of claimants

There is no absolute minimum or maximum number of claimants that may comprise a plaintiffs' class. Although the Rule 23(a) requirement of a number of plaintiffs in the class requires case-specific consideration, courts have held that classes of at least 25 plaintiffs are sufficient.

Joining other claimants

In the US, class actions are almost always initiated on an opt-out basis, as opposed to an opt-in basis. This means that all putative class members are assumed to be a part of a certified class unless and until they opt out or leave. Class members may opt out where they determine that their individual claims are large enough to justify suing separately, or for a variety of other reasons, but the opt-out rate in most consumer class actions is less than 2% of the class. In commercial class actions it is not unusual for the power plaintiffs to opt out to maximise the value of their individual claims.

If the court certifies the class, the court will set specific deadlines for the notification of absent plaintiffs, and for absent plaintiffs to decide whether to opt out. The form and method of notice is subject to court approval. Notice is usually either direct (for example, by mail) if that method is reasonably practicable,or by publication in various media. Notice via email is becoming more common.

Test cases

In the US, if the court certifies the class and the parties do not then settle, then test cases are sometimes used to move the overall litigation towards a more prompt resolution. In these circumstances, the court selects a representative plaintiff's claim or claims from among the class, and that case proceeds to trial, or the court may allow plaintiffs and defendants to each pick a small number of plaintiffs whose cases will first be tried.

The outcome, whether favourable to the plaintiffs or the defendants, will likely inform how the parties proceed. Test cases are particularly common in mass tort actions, where thousands of plaintiffs claim the same injury allegedly caused by the same defendant.

Timetabling

7. What is the usual procedural timetable for a case?

A plaintiff seeking class treatment must assert in its complaint that it seeks to represent a class of persons or entities and must describe why the putative class meets the prerequisites of Rule 23 of the Federal Rules of Civil Procedure (*see Question 2, Principal sources of law*). Before any timetable is established, a defendant can seek dismissal of some or all of the claims. If those claims survive a motion to dismiss (or if none is filed), a court will usually establish a schedule for discovery, motions and hearings on class certification, a deadline for filing any summary judgment motions, and trial.

If a person sues or is sued as a class representative, the court must decide at an early practicable time whether to certify an action as a class action (*Rule 23, amended 2003*). This is a change from "as soon as practicable" and is generally viewed as having been a defendant-friendly one.

Courts typically allow several months (or years) of discovery before a class certification motion is due. If a class is certified, any ruling at summary judgment or trial will bind all members of that class who have not opted out.

Effect of the area of law on the procedural system

8. Does the applicable procedural system vary depending on the relevant area of law in which the class/collective action is brought?

The procedural system typically does not vary based on the area of law giving rise to the class or collective action claim (*see Question 3*). However, there are exceptions.

For example, the procedure under the Fair Labor Standards Act, 29 USC § 216(b), requires an employee to opt in to the action, rather than opt out if they do not wish to be part of it.

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For certain mass tort suits consolidated into a single action, a court can devise procedures for resolving multiple claims even in the absence of class procedures. In *In re Fosamax (Alendronate Sodium) Products Liability Litigation, 2014 WL 1266994* (*DNJ Mar 26, 2014*), the district court granted summary judgment to defendants on a single plaintiff's state law tort claim then extended this to hundreds of other similar plaintiffs in the same multi-district litigation.

FUNDING AND COSTS

Funding

9. What are the rules governing lawyers' fees in class/collective actions?

Defence counsel in class actions are commonly paid an hourly rate, and there are generally no restrictions governing their fees other than rules of professional conduct. However, class action plaintiffs' counsel may be paid through hourly rates or on a contingent fee basis, or some combination.

A court can award reasonable attorney's fees authorised by law or by agreement between the parties (*Federal Rules of Civil Procedure*). This reasonableness limitation is the only constraint on the amount of fees awarded. The federal rules also set out a process for attorneys to file a motion for fees after a certified class has recovered a settlement or judgment. An attorney who makes a claim for fees must serve notice on all parties and class members in a reasonable manner, and any class member or party from whom payment is sought may object to that motion. A court must make findings on the motion for fees, and it may refer fee-related issues to a special master or magistrate for determination.

In the order appointing class counsel, the court will often specify the method it will use to calculate any fee award. In most cases, the method will be either:

- A percentage of the amount recovered (often between 15% and 33%).
- An hourly rate, with adjustments for other factors including the complexity of the case and the quality of the work.

These methods have different advantages and disadvantages. For example, the percentage-of-recovery method aligns the incentives of class counsel with those of class members. However, this approach may sometimes result in a windfall to class counsel. The hourly rate method draws criticism for improperly incentivising class attorneys to inflate bills through needless legal work and also for reducing the incentive for class counsel to settle promptly. Lastly, applying the hourly rate method is often time-consuming for courts, which must closely review law firm billing records that can sometimes span multiple years. Judicial economy favours the percentage-of-recovery method.

Increasingly the courts are employing a hybrid approach by applying one approach to "cross-check" the other. Regardless of the method used, courts closely scrutinise (and sometimes reduce excessive) fee awards to class counsel.

10. Is third party funding of class/collective actions permitted?

Third-party funding of class actions is generally permitted in the US. There are no applicable restrictions under federal law, and in most cases, state laws do not significantly restrict the activity.

Use of third-party funding arrangements in class actions is relatively new but their use appears to be increasing.

There is currently no federal regulatory framework governing third-party litigation funding, although some have called for an amendment to the federal rules to require that such funding arrangements be disclosed and, in November 2017, a sub-committee of the Judicial Conference of the United States agreed to review whether such disclosure should be required in federal civil cases. And, in fact, several federal courts have adopted local rules that require disclosure of the identity of the litigation funder and the nature of their interest in the litigation. In one notable federal case, *Gbarabe v Chevron Corp 14-cv-00173, 2016 (ND Cal Aug 5, 2016)*, the court required class counsel to produce its confidential litigation funding agreement to the defendant, although the unusual facts in this case make its precedential value unclear at this point.

Under state laws, there are three general categories of provisions restricting the scope of permissible funding agreements between class plaintiffs (or their attorneys) and third-party funding entities:

- Consumer protection statutes. These are designed to regulate the activities of commercial lenders offering nonrecourse loans to fund litigation. These often impose requirements including:
  - registration or licensing of the lender;
  - enhanced disclosures to the consumer-plaintiff;
  - prohibition on interference by the lender in case settlement decisions;
  - limitation on the duration of the funding agreement;
  - maximum interest rates for these nonrecourse loans.
- Common law doctrine. Historically, the common law doctrines of maintenance and champerty operated to prohibit third-party legal funding. However, these doctrines are now disfavoured or effectively abolished in many states and the clear nationwide trend is toward limiting their use. Accordingly, in a majority of states, little precedent exists for challenging third-party funding of class actions under either doctrine, and maintenance and champerty are generally allowed so long as the supplier of funding does not do any of the following:
  - promote clearly frivolous litigation;
  - intermeddle with the conduct of the litigation;
  - engage in "malice champerty".
- Professional conduct rules. Rules of professional conduct prohibit attorneys from allowing a third-party funder to interfere with a client's litigation, and also require that attorneys use reasonable care to safeguard against waiver of the attorney-client privilege, most importantly by limiting the nature and amount of case/client information shared with the funder.

11. Is financial support available from any government or other public body for class/collective action litigation?

State and federal governments do not provide direct financial support for private class actions in the US. However, where a defendant's purported misconduct gives rise to both public and private actions, government enforcement authorities may bring a public action concurrent with a plaintiff's private suit. In these cases, regulators and private plaintiffs may choose to enter into a common interest agreement to share their work product, and to divide the burdens and expenses of discovery.

12. Are other funding options available to claimants in class/collective actions?

Generally, other funding options are not available. The majority of class actions are financed by class counsel (that is, counsel advances expenses for the case in the hope of eventually earning a fee award), with a growing minority funded instead through third-party litigation funders or other law firms.

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After-the-event insurance policies (that is, insurance policies that claimants can purchase after the dispute has arisen), though not prohibited in the US, have not gained the same level of popularity for use in class actions as they have in the UK and Australia.

Costs

13. What are the key rules for costs/fees in class/collective action litigation?

As a general rule, each party bears its own fees and costs, regardless of whether that party wins or loses. However, there are roughly two hundred federal fee-shifting statutes (generally enacted to encourage private litigation to help implement public policy) that require a defendant to pay a successful plaintiff's legal fees. These fee-shifting provisions are usually one way (enabling a successful plaintiff to recover fees, but not a successful defendant) and are designed to help equalise contests between private individual plaintiffs and corporate or governmental defendants. Fee-shifting provisions appear most frequently in statutes with clear public policy aims. Parties may also contractually agree to prevailing party attorney fee provisions.

Key effects of the costs/funding regime

14. What are the key effects of the current costs/funding regime?

The current regime for costs and fees in the US makes class actions a viable vehicle to address injuries that, individually, would be too small to justify litigation. Yet some argue that class actions are too successful in this respect. Defendants in class actions often face tremendous exposure, given the size of the putative class, the presence of joint and several liability, and, in some areas like anti-trust, the availability of mandatory treble damages. In addition, plaintiffs' counsel are well motivated by the prospect of receiving a portion of any settlement or their fees following a judgment. Therefore, some argue that the US regime unduly encourages class actions.

DISCLOSURE AND PRIVILEGE

15. What is the procedure for disclosure of documents in a class/collective action?

At all stages of a class action, the Federal Rules of Evidence and of Civil Procedure govern the admission of evidence and the litigation process, just as in individual litigation.

Before litigation

As in individual litigation, there is generally no required disclosure of documents or information between prospective parties to a class action before the litigation begins. The parties are free to voluntarily produce their documents or information to their prospective opponent, including in an attempt to influence pre-litigation decisions and/or settlement negotiations.

During litigation

Traditionally, the parties conduct discovery in two stages: pre-certification and post-certification (merits-based) discovery. However, the courts are now less likely to entirely divide discovery into these two stages, because many issues relate to both class certification and the merits (*Wal-Mart Stores, Inc v Dukes, 131 S Ct 2541 Comcast Corp v Behrend, 133 S Ct 1426 (2013), and Halliburton Co v Erica P John Fund, Inc, 134 S Ct 2398 (2014)*).

Class-certification discovery. Class certification requires the courts to do a rigorous analysis of all of the facts to determine if the class meets all of the Rule 23(a) standards (*see Question 6*). Very few courts set a specific evidentiary threshold. This discovery generally ends before merits discovery but, in most instances, the court will not be able to determine whether certification is appropriate without extensive discovery (sometimes delving into certain aspects of the merits of the case), including both factual evidence and expert opinion (*see Question 18*).

Merits discovery. After certification, federal discovery is governed by the Federal Rules or by the state court's rules if the action is pending in state court. Generally, discovery of absentee class members is not permitted (that is, admissions, interrogatories and so on). This is because absentee class members are not considered parties. However, in some cases deficiencies in the proposed class can be established only through discovery of absent class members. In such cases, courts may allow limited discovery of specific absentees.

The heightened standard of review at the certification stage has led litigators to focus on certification discovery. For defendants, this provides an opportunity effectively to end the litigation by foreclosing certification.

Protective orders. Protective orders are essential to the disclosure of confidential information during discovery. These orders should be specifically written to protect confidential and proprietary information, trade secrets, intellectual property and other sensitive business and personnel information. A party is required to demonstrate good cause for a protective order (*Fed R Civ P 26(c)*).

16. Are there special considerations for privilege in relation to class/collective actions?

The established principle of attorney-client privilege applies in class actions litigation, as it does in individual litigation. Confidential communications made for the purpose of seeking or conveying legal advice are privileged and are not subject to discovery (*Fed R Evid 502*). There is also qualified protection from discovery of materials prepared by or for an attorney in anticipation of litigation.

Plaintiffs' attorneys

One special consideration for plaintiffs' attorneys is maintaining privilege with the class members. The general rule is that before class certification, the other potential class members are not clients, and therefore communications with them are not privileged. Plaintiffs' attorneys need to be aware of the law on when the attorney-client relationship begins, when or if solicitation communications are confidential, and if a solicitation form constitutes legal advice.

Defence attorneys

At the initial stages of a class action, defence counsel will likely need to consider the Upjohn warning (that is, the notice that a corporation's attorney represents the corporation not the individual employee) (*Upjohn Co v US, 449 US 383 (1981)*).

Defence counsel must also:

- Issue litigation holds to ensure the protection of key data for discovery, and identify key custodians.
- Assess the communications between attorneys and the corporation to see what falls within the protected privilege/work product category and what is instead "business" related, and therefore, subject to discovery.

Joint defence agreements can assist with cost sharing among defendants. They may also assist attorneys representing different defendants to share work product without waiving privilege.

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EVIDENCE

17. What is the procedure for filing factual and expert witness evidence in class/collective actions?

The Federal Rules of Evidence govern the admissibility of any evidence submitted in class action lawsuits in a federal court. To certify a class, the plaintiffs must demonstrate by a preponderance of evidence that their case satisfies the four requirements of Rule 23 (*see Question 6, Certification/qualification*). Most plaintiffs submit both factual and expert evidence at the certification stage (although Rule 23(a) does not specifically require this). Defendants submit their own factual and expert evidence along with their opposition to the class certification motion.

After certification proceedings, a case will proceed under the ordinary federal rules. Courts permit the parties to file additional factual and expert evidence at the summary judgment and trial stages. At summary judgment, to determine whether disputed issues of material fact exist between the parties, a court may only rely on evidence that would be admissible at trial. Courts therefore commonly allow the parties to file motions to exclude opposing evidence submitted at this stage. Before trial, courts often set a process for exchanging pre-trial evidence and filing motions to exclude.

DEFENCE

18. Can one defendant apply to join other possible defendants in a class/collective action?

Joining other defendants

The Federal Rules of Civil Procedure liberally permit a joinder of other parties, and typically these rules do not vary in a class action suit.

Any party can request the joinder of a non-party as a defendant. Joinder of a party, including an additional defendant, can occur where:

- In that party's absence, the court cannot accord complete relief among existing parties.
- If a non-party claims an interest in the litigation and disposing of the action in that non-party's absence would impair their interest or would leave an existing party subject to a substantial risk of incurring multiple or inconsistent obligations.

(*Fed R Civ P 19.*)

Parties can be dropped or added at any stage (*Fed R Civ P 21*). If a defendant has a claim against a non-party who may be liable for all or part of a plaintiff's claim against that defendant, the defendant can serve a complaint on that non-party within 14 days of serving its original answer, or can file a motion for leave to serve the non-party if more than 14 days have passed since serving its original answer (*Fed R Civ P 14*). The purpose of these rules is to ensure fairness and judicial efficiency in the resolution of all claims arising from the same underlying events or subject matter.

In practice, in certain class actions (such as anti-trust actions) defendants do not join other defendants because there is no right to contribution or indemnification among anti-trust defendants in the US.

Rights of multiple defendants

When there is more than one defendant in a class action and their interests align, they may enter into a joint defence agreement, in which each defendant agrees to share confidential information without waiver of attorney-client privilege. Joint defence agreements typically require defendants not to use any other defendant's confidential information for any purpose separate from the litigation, and they outline the process for a defendant's withdrawal if any conflicts arise among defendants during the litigation. Joint defence agreements often provide that a defendant who settles with the plaintiffs no longer has a community of interest with the remaining defendants and therefore must withdraw from the joint defence agreement.

In most instances, multiple defendants are represented by separate lawyers, although occasionally a law firm will represent more than one defendant where the unavailability of indemnification or contribution claims means that a conflict between defendants is unlikely. In addition, one firm will often represent affiliated defendants, such as parents and subsidiaries both named as defendants. Multiple defendants often agree to retain a single expert to report on behalf of all defendants at the class certification stage and on the merits where an analysis of certain elements of liability do not pose any conflicts among defendants.

DAMAGES AND RELIEF

19. What is the measure of damages under national law in the field of class/collective actions?

Damages

A class certified under Rule 23 can recover compensatory damages on behalf of its members if it demonstrates liability, as well as mandatory treble damages for certain violations (such as violations of the anti-trust laws). Plaintiffs often need to submit expert reports to assert their damages theory and the amount of damages.

A certified class can obtain punitive damages where permitted by statute or common law, but courts often reduce the amount of punitive damage awards under equitable doctrines and based on constitutional due process concerns. Some states do not allow punitive damages in any cases.

Courts typically calculate and apportion damages based on a methodology submitted by the plaintiffs' experts, but the calculation itself will often vary depending on the characteristics of each class member. No explicit cap on damages exists under Rule 23, and defendants may be held liable for the actions of their co-defendants under ordinary principles of joint and several liability.

Recovering damages

Under certain statutes under which a plaintiff may recover joint and several damages from a single defendant based on the actions of other defendants, the defendant that pays damages may bring a contribution claim against the remaining defendants.

Other statutes, such as anti-trust laws, make defendants jointly and severally liable, but prohibit a defendant from bringing a contribution or indemnification claim against another defendant.

Interest on damages

The rules for calculating interest on damages vary based on the underlying state or federal law giving rise to a claim. Rule 23 does not contain any specific rules for calculating interest on damages.

20. What rules apply to declaratory relief and interim awards in class/collective actions?

Declaratory relief

A class of individuals or entities may seek declaratory relief in a number of circumstances where the class also seeks injunctive relief or monetary damages. For example, a class may seek a ruling that a law is unconstitutional and should be invalidated.

Certification of a class seeking injunctive and declaratory relief is required before a court can grant such relief that binds class

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members other than the named plaintiffs. To obtain certification of a class seeking injunctive and declaratory relief, a plaintiff must demonstrate both that:

- The class it seeks to represent meets the four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure (*see Question 6, Certification/qualification*).
- The party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole (*Fed R Civ P 23(b)(2)*).

If a class seeks monetary damages in addition to declaratory relief, it must satisfy the additional requirements of Rule 23(b)(3), including predominance and superiority.

Interim awards

Generally, class members cannot obtain interim monetary awards until they have succeeded on their claims or obtained a settlement. However, in certain circumstances, class counsel can apply for interim awards of costs and fees after they have prevailed or obtained recovery through settlement on at least some of the claims of the class.

In several states interim fee awards are disfavoured for reasons of judicial economy. However, in complex class actions involving multiple defendants, where one or more defendants settle in the early stages of litigation, most courts tend to allow interim awards.

SETTLEMENT

21. What rules apply to settlement of class/collective actions?

Settlement rules

In individual litigation, a court usually does not need to approve a settlement between the parties. However, in class actions the court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defences of a certified class (*Fed R Civ P 23(e)(2)*). That is because settlement of class actions implicates numerous parties, including the class representatives, class counsel, absent class members, defendants, defence counsel, and possibly defendants' insurers.

Although the court need not approve a pre-certification settlement of individual claims, the court can still enquire into the circumstances behind such a settlement, to protect the interests of the absent class members.

To approve the settlement of a certified class, the court must:

- Conduct a hearing to evaluate the terms of the settlement.
- Find the settlement to be fair, reasonable and adequate.
- Determine the extent to which notice must be provided to members of the class.

(*Fed R Civ P 23(e)(2).*)

Courts commonly consider several factors:

- The nature of the claims and possible defences.
- Whether the proposed settlement was fairly and honestly negotiated.
- Whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt.
- Whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation.
- Whether the parties believe that the settlement is fair and reasonable.
- The defendant's financial viability.
- The number and objective merit of any objections received from the class members.
- The risks in establishing damages.
- The complexity, length, and expense of continued litigation.
- The stage of the proceedings.

Provisions of the Class Action Fairness Act of 2005 (*28 U.S.C. §§ 1711-1715*) provide procedures for greater scrutiny of class action settlements, including requiring that notice of the proposed settlement be provided to state and federal agencies depending on the type of case. However, because strong policy considerations favour settlement, courts often presume that settlements negotiated at arm's length are fair and reasonable.

If a defendant seeks to settle with all the putative class members before class certification, the court must still apply the factors set out in Rule 23, and certify a class for settlement purposes. The court must find that the settlement class meets all of the Rule 23 requirements except manageability at trial (*Amchem Products v Windsor, 521 US 591 (1997)*). Determining whether to certify a settlement class is often less onerous than whether to certify a contested class, especially where all defendants favour the settlement.

If the court preliminarily approves the proposed class settlement, under Rule 23(e)(1), the court will then determine a schedule for notifying all absent class members who would be bound by the settlement, so that they can decide whether to:

- Opt out of the class.
- Object to the terms of the proposed settlement.

Separate settlements

Where there is more than one defendant, individual defendants may, and often do, settle separately and at different points in the litigation. The effect is that the settling defendant is out of the litigation and the remaining defendants may be jointly and severally liable for the plaintiffs' full damages, including that proportion caused by the settling defendant. However, usually any judgment against the remaining defendants will be reduced by the amount of the prior settlements.

Similarly, before certification, one or more defendants can seek to settle with some but not all of the named plaintiffs, sometimes in an attempt to undermine the putative class. This raises the question of whether a pre-certification settlement offer to pay a plaintiff's full claim of damages moots (voids) that plaintiff's case, on the basis that a plaintiff no longer has constitutional standing to pursue its case if it has received an offer to pay its alleged damages in full. However, in *Campbell-Ewald Co v Gomez, 136 S Ct 663 (2016)*, the US Supreme Court held that, in accord with Fed R Civ P Rule 68, an unaccepted settlement offer has no force and creates no lasting right or obligation.

APPEALS

22. Do parties have a right to appeal decisions relating to class actions, such as a decision granting or denying certification of a class action?

In federal civil litigation interim appeals before the court enters a final judgment on all of a plaintiff's claims are generally prohibited.

Parties can seek permission to appeal a decision on whether or not to certify a class action (*see Question 6*) order within 14 days of it

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being made, although this does not necessarily stay proceedings (*Rule 23(f)*).

The circuits have unfettered discretion whether to permit a Rule 23(f) appeal, (Advisory Committee Notes to Rule 23(f)). In exercising this discretion, the courts generally require a petitioner to demonstrate either:

- That the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable.
- That the certification order implicates a legal question about which there is a compelling need for immediate resolution.

(*Sumitomo Copper Litigation v Credit Lyonnais Rouse, Ltd, 262 F 3d 134 (2d Cir 2001).*)

Rule 23(f) petitions are occasionally granted, although such determinations are highly case-specific.

Parties to a class action can also request that the district court permit an interlocutory appeal of other interim court decisions where there is a difference of opinion over question of law and an appeal could materially advance the litigation (*section 1292(b), Interlocutory Appeals Act 1958*). Section 1292(b) is tailor-made for handling novel and complex questions of law that would otherwise evade review. Such a discretionary appeal can be requested with regard to a court's ruling on a motion to dismiss or for summary judgment. To obtain such an appeal, however, both a district court and the court of appeals must agree to resolve the issue on an interim basis.

Interlocutory appeal under 28 USC § 1292(b) is allowed infrequently, mainly due to the courts' stated preference for reserving it for exceptional cases and judicial reluctance to review their original decision.

State class action statutes typically provide a mechanism for appealing orders of class certification, but they may be different from the Federal Rules.

ALTERNATIVE DISPUTE RESOLUTION

23. Is alternative dispute resolution (ADR) available in class/collective actions?

Though not specifically required under Rule 23, various methods of ADR are available for class action suits. Courts can order the parties to any action to appear at a pre-trial conference to discuss options for settlement or mediation (*Fed R Civ P 16*), and many courts require that the parties mediate their claims before proceeding to trial.

ADR procedures are a common tool for facilitating settlement, but the court in which the action is pending must approve any classwide settlement agreement reached through ADR procedures (*Fed R Civ P 23(e)*).

Parties to class actions can also arbitrate their claims before a single arbitrator or a panel of arbitrators. Arbitration can provide benefits to the parties including lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialised disputes (*AT&T Mobility LLC v Concepcion, 131 S Ct 1740 (2011)*). However, arbitration of class actions is unusual and controversial because an arbitrator must make determinations regarding class certification without the benefit of an appellate review.

To avoid the risks associated with class arbitrations, commercial parties commonly include waivers of class arbitration in favour of individual arbitration in their commercial contracts. The US Supreme Court in *American Express Co v Italian Colors Restaurant, 133 S Ct 2304 (2013)*, held that such waivers are enforceable even where a plaintiff's cost of arbitrating individually would exceed that plaintiff's potential recovery.

In *DIRECTV, Inc v Imburgia, 136 S Ct 463, 471 (2015)*, the US Supreme Court reaffirmed its holding in Concepcion (see above) that the Federal Arbitration Act (FAA) pre-empts state laws that attempt to ban class arbitration waivers in consumer contracts. Therefore, as things stand, federal law generally favours arbitration and it seems likely that the US Supreme Court will continue to ensure that state laws (and courts) do not contravene or otherwise undermine the supremacy of the FAA and US Supreme Court's decisions on the enforceability of arbitration provisions in consumer contracts.

Generally, the same remedies that exist for class actions in federal court are available in class arbitration proceedings.

PROPOSALS FOR REFORM

24. Are there any proposals for reform concerning class/collective actions?

In April 2015, Congressman Bob Goodlatte introduced the Fairness in Class Action Litigation Act of 2015, which would prohibit a federal court from certifying a proposed class unless it is proved that each proposed class member suffered an injury of the same type and extent as the injury of the named class members or representatives (*HR 1927, 114th Cong, 1st Sess (201)*).

It was approved by the US House of Representatives in January 2016 and died in the Senate. Congressman Bob Goodlatte introduced another bill in February 2017, the Fairness in Class Action Litigation Act of 2017 (*HR 985, (FCALA*)). In addition to requiring potential class members to prove they suffered the same type and scope of injury, the legislation imposes significant new restrictions on class action lawyers, and reforms multi-district litigation proceedings. In March 2017, FCALA was passed by the House of Representatives and remains under review by the Senate. The proposed changes are considered controversial by some, and there is no indication as to when the Senate will move forward on the issue.

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ONLINE RESOURCES

FDSys

W *www.gpo.gov*

Description. FDsys is powered by the Government Printing Office (GPO) and it provides access to many up-to-date government publications and laws including official versions of the Code of Federal Regulations, Congressional Bills, the Congressional Record, Public and Private Laws, the United States Code, and United States Courts Opinions, among many others.

US House of Representatives

W *http://uscode.house.gov/search/criteria.shtml*

Description. The Office of the Law Revision Counsel of the US House of Representatives provides a searchable version of the most recent version of the US Code. This is an official site that provides specific information regarding the section of the US Code being searched; the currency date for each section of the United States Code is displayed above the text of the section. If the section has been affected by any laws enacted after that date, those laws will appear in a list of "Pending Updates" on the site. If there are no pending updates listed, the section is current as shown.

The US Supreme Court

W *www.supremecourt.gov/default.aspx*

Description. The US Supreme Court website includes links to many up-to-date official documents, including case opinions and Orders of the Court. There are current and historical documents available, and the website is kept up to date by Supreme Court staff. It also includes resources for locating briefs in Supreme Court cases.

Congress.gov

W*https://www.congress.gov/*

Description. Congress.gov, which replaced THOMAS.gov, offers access to a wide range of official government sources and documents, including legislation, committee reports, congressional records, and treaty documents. It is maintained by the federal government and offers current (and historical) information that is updated regularly.

Legal Information Institute (LII)

W *https://www.law.cornell.edu/lii/get_the_law/our_legal_collections*

Description. Many primary legal materials can be accessed via Cornell University's Legal Information Institute (LII), which provides access to federal laws, the Constitution, the US Code, Code of Federal Regulations, Supreme Court decisions, the Federal Rules, and many state law resources. These unofficial resources are kept up to date by Cornell University staff.

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