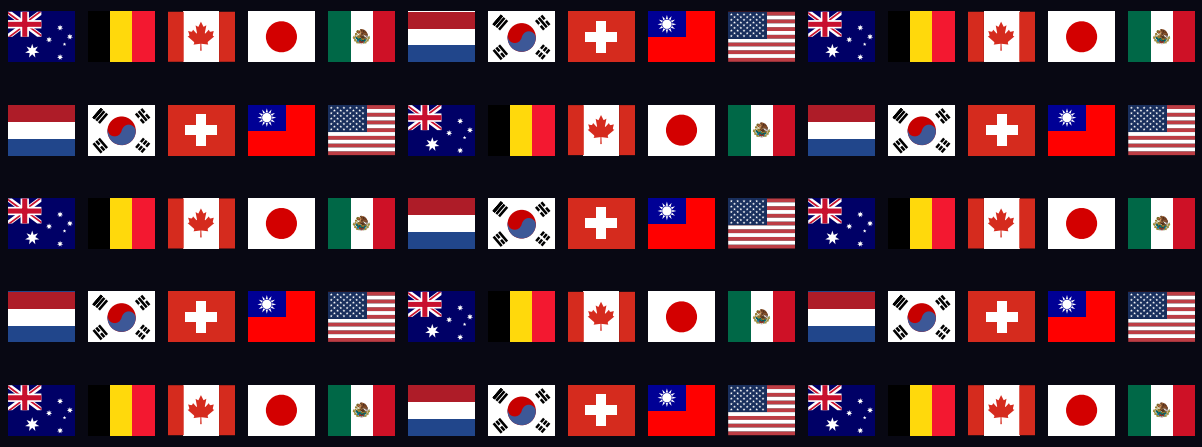
CLASS ACTIONS

USA



LEXOLOGY
Getting The Deal Through

Consulting editor

Cleary Gottlieb Steen & Hamilton LLP

Class Actions

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including an overview of the court system, frequency of class actions, legal basis, types of claim and relief; class formation; procedure; defence; settlement; judgment and appeal; regulatory action; alternative dispute resolution; fees, costs and funding, including potential selling of claims; and recent trends

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OVERVIEW

Court system

Outline the organisation of your court system as it relates to collective or representative actions (class actions). In which courts may class actions be brought?

The American judicial system is divided into two structures: the federal court system, and the state court systems. The federal court system is subdivided into three levels: (1) the trial courts, called the 'US District Courts', which are located across the United States; (2) the 13 intermediate appellate courts, called the 'US Courts of Appeals'; and (3) the highest court, called the 'US Supreme Court'. The Supreme Court has jurisdiction to hear all cases brought in federal court, and any cases brought in state courts that involve federal law. Generally, the state court systems mirror the federal three-level system, although they may label the three levels in different ways (and in some states, such as Delaware, have just two levels).

Class actions may be brought in any of the federal district courts of the United States, or in the trial-level state courts, depending on whether the appropriate jurisdictional requirements are met (including personal jurisdiction) and what body of law is to apply.

A class action may be brought in federal court if there is federal subject matter jurisdiction over the case, which may arise if either (1) the case asserts claims arising under federal law in accordance with United States Code (USC) Chapter 28, section 1331, or (2) there is diversity jurisdiction under USC Chapter 28, section 1332. Diversity jurisdiction arises where the parties are citizens of different states and where the matter in controversy exceeds US$75,000. In 2005, the United States Congress passed the Class Action Fairness Act (CAFA), which expanded the jurisdictional reach of federal courts over class actions and mass actions (cases involving 100 or more individual plaintiffs and common questions of law or fact, but not classified as class actions), in certain instances where the traditional requirements for federal subject matter jurisdiction are not met. State courts are generally perceived to be more favourable to plaintiffs in class actions, so CAFA's enactment is believed to have favoured defendants. And since CAFA's enactment, more class actions have been filed in or removed to federal courts.

If federal courts are unavailable, a class action may be brought in any state court with jurisdiction to hear the case under the relevant state laws.

Law stated - 26 September 2021

Frequency of class actions

How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

Class actions are common in the United States, and it is estimated that more than 10,000 new class action cases are filed each year. However, they are often settled before they reach ultimate adjudication on the merits. For example, according to Cornerstone Research's 2020 Securities Class Action Filings report , between 1997 and 2020, only 0.4 per cent of class actions brought under the federal securities laws reached trial, and only 0.2 per cent reached a verdict. Of the cases filed in that time period, 46 per cent were settled, 42 per cent were dismissed, less than 1 per cent were remanded, and 11 per cent were ongoing as of the report's issuance.

Class actions are generally favoured by US lawmakers and the judiciary as a mechanism for handling complex cases and are seen as promoting judicial efficiency, given that they consolidate numerous individual suits that would consider the same issues based on the same evidence and involve the same (or similar) parties. Another recognised benefit is that class actions allow plaintiffs to join together to pursue damages claims that would otherwise be too small to

justify the expenses of litigation when disaggregated. On the other hand, class action suits have been criticised for placing undue pressure on defendants to settle even weak claims, given the significant expense associated with complying with broad US discovery and the extremely high potential liability that a defendant may face from aggregated class action damages claims. For some time, lawmakers have also raised concerns about a tendency towards lawyer-driven litigation in class action cases, given the high potential attorneys' fees that counsel for the plaintiff class often seeks. There have been some efforts in recent years, particularly from the judiciary, to rein in the availability of class action suits, particularly at the class certification stage, but in practice these efforts have had only a limited impact.

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Legal basis

What is the legal basis for class actions? Is it derived from statute or case law?

Under federal law, class actions are authorised by statute. Rule 23 of the Federal Rules of Civil Procedure governs the adjudication of class actions in the federal courts. The legal basis for class actions under state laws vary by state. Most states, however, have an analogue to federal Rule 23 in either case law or statute.

Law stated - 26 September 2021

Types of claims

What types of claims may be filed as class actions?

Unless expressly limited by statute or in common law, as long as the requirements of Rule 23 are met, any claim may be brought as a class action. Common categories of class action suits in the United States include securities claims, antitrust claims, mass tort and product liability claims, civil rights claims, environmental law claims and pension disputes.

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Relief

What relief may be sought in class proceedings?

Under federal law, a class action claimant is generally entitled to the same relief that would be available in an individual action. Class actions are not meant to abridge or expand any individual claimant's substantive rights. Accordingly, there is generally no limitation on the type of relief available in a class action. Such relief can include monetary damages (including punitive damages), restitution, or injunctive or declaratory relief.

Under state law, there may be limitations on the recovery available in class actions. For example, in New York, an action to recovery a penalty may not be brought as a class action, unless expressly authorised by the statute creating the penalty (New York's Civil Practice Law and Rules , section 901(b)).

Law stated - 26 September 2021

Initiating a class action and timing

How is a class action initiated? What is the limitation period for bringing a class action? Can the time limit for bringing a class action be paused? How long do class actions typically take from filing to a final decision?

Class actions are initiated by filing a complaint, just as any other individual action is initiated. A putative class action complaint may be brought by a single named plaintiff, submitted with a filing fee (typically, several hundred US dollars). But a class has to be certified (usually later in the case upon a motion for certification filed by the named plaintiff) before the case can proceed on a class-wide basis. There is no requirement to provide defendants with notice or an opportunity to cure prior to filing a complaint under federal law, but some state substantive laws do impose such a requirement.

The limitation period for bringing a class action, and any concomitant tolling rules, depend on the underlying substantive claim. On top of those underlying rules, the limitation period for a purported class member to file an individual claim is tolled once a purported class action complaint is filed. If a class is not certified in that case, then the limitation period begins to run again once the court issues an order not certifying the class, and parties who would have been members of the putative class may assert their individual claims before the limitation period expires. Certain substantive statutes, including certain federal securities laws, also include statutes of repose. Statutes of repose, which are distinct from statutes of limitations, cannot be equitably tolled and thus impose an absolute bar against asserting a claim once the repose period has run.

The time to adjudicate a class action will depend on the types of claims involved and the court in which the claim is brought. Many class actions do not reach final adjudication on the merits and so may be concluded within a few years. To reach a final adjudication on the merits can take much longer, including because there may be appeals at multiple stages before a trial or other final adjudication takes place.

Law stated - 26 September 2021

CLASS FORMATION

Standing

What are the standing requirements for a class action?

Under federal law, the standing requirements for a class action plaintiff mirror the constitutional requirements for standing under article III. A plaintiff must have: (1) suffered an 'injury in fact', or a concrete, particularised harm that is actual or imminent, not conjectural or hypothetical, which (2) is traceable to an action by the defendant, and which (3) can be redressed by a favourable decision from the court. Particularly in a class action, the named plaintiff must have suffered the same alleged injury as the rest of the purported class, and accordingly must be able to assert the same claims as the class. To bring a claim for injunctive relief, the named plaintiff must also be at risk of future harm, and not just allege past harms.

The standing requirement applies not only to the named plaintiff, but also to absent class members. The Supreme Court recently confirmed that, in order to recover damages in a class action, every class member must satisfy the standing requirement of article III.

Law stated - 26 September 2021

Participation

Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

Under Rule 23 of the Federal Rules of Civil Procedure and the rules of most states, class actions mostly proceed on an opt-out basis. Further, whether a class member may 'opt out' of a class action depends on the relief sought. In an action for monetary relief, once a class is certified, class members are automatically part of the class and must affirmatively opt out, or they will be bound by what happens to the class. In actions for injunctive or declaratory relief, or that seek to prevent inconsistent adjudications with the same defendants or distribute limited funds, there are no 'opt in' or 'opt out' procedures, because the court's ruling necessarily will impact all class members.

Class members do not receive notification that an action has been filed on their behalf when a complaint is first filed. In actions seeking monetary relief, class members must be notified once the class has been certified. In actions seeking other forms of relief, a court may order that there be notice upon class certification, but such notice is not required. The required notice must be the 'best notice that is practicable', which usually involves providing information directly to known class members and publicising notice in newspapers or other periodicals.

Law stated - 26 September 2021

Certification requirements

What are the requirements for a case to be filed as a class action?

To file a complaint as a putative class action, there are no particular pleading requirements beyond those imposed for filing any complaint based on the alleged claims generally. However, to proceed as a class action, the class must first be certified at a stage following the filing of the complaint. Nothing in the rules provides for precisely when certification is to be considered by the court, but unlike in some countries, in the US a court typically will first considers motions to dismiss addressed to the adequacy of the pleadings and legal adequacy of plaintiff's theory of recovery.

To be certified, under Rule 23 of the Federal Rules of Civil Procedure and the rules of most states (which often mirror Rule 23), a plaintiff must show by a preponderance of the evidence that all four requirements of Rule 23(a) are met, and that the action meets the requirements of at least one of the three types of classes identified in Rule 23(b). Many jurisdictions also impose a requirement that the class be 'ascertainable', meaning that the members of the class may be identified by an objective criteria and, in some jurisdictions, that there is a reliable and feasible way of determining who fits the criteria.

The four requirements of Rule 23(a) are:

- numerosity: that the class is so numerous that joinder of all members is impracticable (whether a class is sufficiently 'numerous' will depend on the specific facts or circumstances of the case, but generally a class of 40 or more individuals is sufficient);
- commonality: that there are questions of law or fact common to the class;
- typicality: that the claims or defences of the representative parties are typical of the claims or defences of the class; and
- adequacy: that the named plaintiff and his, her or its counsel will fairly and adequately protect the interests of the class.

The three types of class actions under Rule 23(b) are:

- inconsistent adjudication or limited fund actions: class actions brought where separate, individual actions would create a risk of either (1) inconsistent or varying adjudications that would establish incompatible standards of conduct for defendants or (2) substantially impairing or impeding class members' ability to protect their interests because an adjudication of individual class members' rights would, as a practical matter, be dispositive of the interests of other class members;
- injunctive or declaratory relief actions: class actions where defendants have acted or refused to act on grounds that apply generally to the class, such that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; and
- monetary actions: class actions seeking monetary relief, where the court finds that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

Law stated - 26 September 2021

How does a court determine whether the case qualifies for a class action?

Generally, a court will determine whether a putative class action meets the certification requirements of Rule 23 upon filing of a motion for class certification by the plaintiff. Under Rule 23(c), a court should determine whether to certify the class '[a]t an early practicable time after a person sues or is sued', but, because a court will generally first consider other dismissal motions, in practice it may take more than a year for the plaintiff to file the requisite motion, and then longer to complete briefing and for the court to render its decision. A motion for class certification may also be filed after a certain amount of discovery has taken place to allow the plaintiff an opportunity to marshal the evidence required to show the requirements Rule 23(a) and 23(b) by a preponderance of the evidence, and similarly for defendants to prepare their opposition. A court will usually, but is not required to, hold a hearing on class certification, in which the court may hear evidence (including testimony from the parties' experts) and then issue a written decision.

Sometimes, multiple putative class action complaints will be filed by different plaintiffs (represented by different counsel) within a short period of time. When that happens, in addition to deciding whether or not to certify a class, the court must also decide which of the competing plaintiffs will be the lead plaintiff (and, consequently, which law firm will take the lead in the litigation and receive a larger share of any fee award). It is possible for several plaintiffs to co-lead a case, with several law firms sharing a lead counsel role.

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Consolidation

Is there a process for consolidating multiple class action filings?

Under both state and federal law, there are procedures for consolidating multiple class action filings. Under federal law, multiple class actions involving the same issues or parties that are filed in the same trial court may be consolidated through a notice of related cases, or a formal motion for consolidation. If multiple class actions are filed in different district courts, the cases may be consolidated by the Judicial Panel on Multidistrict Litigation (JPML), in accordance with United States Code Chapter 28, section 1407, either on the panel's own initiative or by motion filed by a party to the class action. After a determination by the JPML that the various actions involve 'one or more common questions of fact' and that consolidation 'will promote the just and efficient conduct of such actions', the cases can be consolidated for pre-trial proceedings. Upon an order from the panel for consolidation, the related actions will all be transferred to a single district court. The JPML maintains a list of pending multi-district litigations on its website, which is regularly

updated (available at https://www.jpml.uscourts.gov/pending-mdls-0).

It can be more difficult (and in some cases impossible) to consolidate putative class actions filed in both state and federal court asserting the same claims. Some statutes allow for removal of the state court claims to federal court, which facilitates the consolidation of claims, but that process is not always available.

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PROCEDURE

Discovery

How does discovery work in class actions?

Discovery in class actions functions as discovery normally does in civil litigation in the United States. Permissible discovery is quite broad, and allows for use of a wide range of mechanisms including document requests, interrogatories, requests for admissions, and depositions. Discovery specifically for class certification, which is limited to issues related to the class certification requirements under rule R3 of the Federal Rules of Civil Procedure (Federal Rules), may be bifurcated from merits discovery, but such bifurcation is not required. Most courts will permit discovery on the merits to proceed at the same time as class certification discovery.

There are limitations on what discovery defendants in class actions can seek from absent class members, but the full scope of third-party discovery otherwise remains available to defendants.

Law stated - 26 September 2021

Privilege and confidentiality

What rules and standards govern non-disclosure of documents on the grounds of professional privilege, litigation privilege or other confidentiality considerations?

The privilege and confidentiality rules that would normally apply in a civil action apply equally in a class action. These rules vary depending on where the action is pending, the underlying substantive claims, and where the asserted privileged communications took place. Generally, privilege rules will protect confidential communications between attorneys and their clients for the purpose of providing legal advice, and confidential work product materials prepared in connection with or anticipation of litigation.

Law stated - 26 September 2021

Testimony

What rules apply to submission of factual and expert witness testimony? In what circumstances will the court order witness-examination?

The standard civil practice rules that apply to the disclosure and submission of fact and expert witness testimony apply equally in class actions. Parties will accordingly follow the Federal Rules of Civil Procedure or applicable state laws on the disclosure and submission of fact and expert witnesses. For federal courts, Rule 26 of the Federal Rules governs when and what information must be disclosed. Regarding the substance of fact or expert testimony, the standard civil rules of evidence similarly apply.

At the class certification stage, fact and expert testimony is regularly submitted in order to support or rebut certification of the putative class in accordance with the requirements of Rule 23. Mere allegations of class-wide

liability, or unsupported assertions that the impact of the alleged liability and related damages are class-wide are insufficient at the class certification stage to support certification, and so testimony is often submitted in support of these factors. At the certification stage, testimony is usually submitted in the form of a declaration or affidavit, both of which require that the declarant or affiant declare under penalty of perjury that the statements set forth in the submitted documents are accurate and truthful. But as noted above, courts may hold an evidentiary hearing in connection with the class certification motion and order the presentation of witness testimony at the hearing, but the court has wide discretion to do so or not.

Expert testimony is normally subject to an admissibility screening process before it may be used in support of a party's position on the merits. Courts are presently divided as to whether expert testimony must be deemed admissible before it can be used to support class certification, although the plurality of appellate courts agrees that it should first be admissible.

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DEFENCE

Defence strategy

What mechanisms and strategies are available to class-action defendants?

There are a number of mechanisms and strategies available to class action defendants. The appropriate strategy will depend on the stage of the proceedings. There are three key stages for defendants: (1) the motion to dismiss phase, (2) the class certification phase, and (3) the summary judgment phase. At each stage, defendants will want to consider opportunities for settlement alongside their analysis of the merits issues.

The motion to dismiss phase is generally a defendant's first opportunity to dismiss the case or at least significantly narrow the plaintiff's claims for liability. At this stage, before class certification, defendants can settle the case with named plaintiffs (but not with the putative class) without approval from the court. Given that plaintiffs would not have yet expended significant resources in litigation, plaintiffs are sometimes amenable to reaching a favourable settlement at this stage, particularly in the face of a strong motion to dismiss by defendants.

The class certification stage is the next significant opportunity to dismiss or settle a class action. If defendants are successful in challenging class certification and the plaintiff's motion is denied, the class action is effectively over (unless appealed). The named plaintiff's damages in the action will be limited to their individual damages, which are often not very significant, and are usually not enough to warrant the legal costs of further litigation. Thus, plaintiffs are more likely to settle or even voluntarily dismiss a case following a failed class certification bid. If plaintiffs are successful in certifying the class, however, absent an opportunity for a successful appeal, defendants should strongly consider settlement given the significant class-wide exposure that can result from a loss at trial. Rule 23(f) of the Federal Rules of Civil Procedure (Federal Rules) allows defendants to file an interlocutory appeal of the class certification decision, but it is relatively rare for the court of appeals to take such appeals, which depend on the strength of defendants' class certification claims and the novelty of the issues raised by certification. Given these considerations, many class action cases are resolved after the resolution of class certification motions.

Finally, the summary judgment stage is a third key opportunity to settle or conclude a case before trial. However, given plaintiffs' investment in the case by this stage (which follows the expensive fact and expert discovery phases), plaintiffs are likely to demand a higher amount for settlement than they would have at an earlier stage, even on an individual-claim basis.

Defendants may prefer to settle on a class-wide basis, since settling with just an individual named plaintiff will not guarantee 'global peace' with respect to all claims of putative class members. With respect to this issue, settlement with the class as a whole can occur even before a court certifies a class, but is subject to court approval and the

procedures provided in Rule 23(e) of the Federal Rules. The court will evaluate any potential settlement to ensure that settlement negotiations were conducted at 'arm's length' and that the settlement is 'fair, reasonable and adequate' to all class members. Note that all class members are given an opportunity to object to proposed class-wide settlements.

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Joint defence agreements

What rules and standards govern joint defence agreements? Are they discoverable? What are the advantages and disadvantages of these agreements?

The standard civil rules under federal and state laws governing joint defence agreements apply in class actions. These rules vary by jurisdiction, and so parties should check the particular laws relevant in each case. For example, while courts in some jurisdictions have held that joint defence agreements are discoverable, others have not.

The primary advantage of a joint defence agreement is that it memorialises the parties' agreement that their interests are sufficiently aligned to allow them to share privileged information with each other, without waiving privilege as to that information. Sharing privileged information allows the parties and their counsel to better coordinate litigation strategy and pool their knowledge and resources. Entry into a joint defence agreement is not by itself, however, sufficient to avoid waiver of privilege, although it is helpful evidence that the parties' interests are aligned. A court will independently determine whether the parties' interests are sufficiently aligned to allow the sharing of privileged information, and in making its determination will take into consideration the existence of such an agreement.

Coordination may have disadvantages, however, as it may make it more difficult to reach a settlement that does not involve all of the joint parties. Further, if a dispute later arises among joint defendant parties, one party may attempt to use privileged information against another, which can result in a waiver of that privilege.

Law stated - 26 September 2021

SETTLEMENT

Approval of settlements

Describe the process and requirements for approval of a class-action settlement.

All proposed class-wide settlements must be approved by the court under Rule 23(e) of the Federal Rules of Civil Procedure. To approve a proposed class settlement, a court must find that it was (1) the product of an 'arm's length' negotiation and (2) that it is 'fair, reasonable and adequate'. The court is also required to hold a hearing to determine whether the standard has been met.

Settlement approval is typically a two-step process, with the court first preliminarily approving the settlement for purposes of informing the members of the class of the settlement terms, and then second, following notice and a fairness hearing, with court giving final approval. In the first stage, the parties will inform the court that they have entered into a settlement, and submit a form of notice of the settlement to be distributed to class members, which the court will review and will need to approve. The notice must be the best notice practicable under the circumstances to satisfy constitutional due process. The notice must describe (1) the class action, (2) the proposed settlement, (3) when and where the hearing to approve the settlement will occur, (4) the process for objecting to settlement and (5) in class actions for monetary damages, the process for opting out and submitting one's own claim for monetary relief.

The court will then hold the settlement hearing, consider objections submitted by class members, and determine whether or not to give final approval over the settlement. If a class has not already been certified, the court will certify the class for the purposes of the settlement.

All class members are given an opportunity to object to proposed class-wide settlements, and such objections are common. Some such objections are resolved through individual settlements with the objecting absent class member, which gives rise to the concern that the objections are in reality attempts to extract additional compensation by holding the overall settlement hostage. Where a class member raises an objection that results in an improvement to the settlement agreement, that member may seek reimbursement of their fees litigating the objection.

Law stated - 26 September 2021

Objections to settlement

May class members object to a settlement? How?

Class members may object to a settlement. Class members may typically file a written objection to the settlement with the court or may appear at the settlement approval hearing and object in person. Class members may or may not be represented by counsel. Objections will be adjudicated as part of the court's consideration of whether to approve the proposed settlement.

In 'opt-out' class actions, class members can also simply opt out of a settlement and pursue individual claims against the defendant.

Law stated - 26 September 2021

Separate settlements

How are separate class action settlements handled?

Before a class is certified, a named plaintiff's individual claims can be settled without approval from the court. In class actions for monetary relief, individual class members may also opt out of a class settlement and pursue their claims individually with a defendant, and then separately reach a settlement on their claims. This again does not require court approval.

Plaintiffs pursuing individual claims will have more independence and flexibility to develop a case strategy suited to their individual case, but individual plaintiffs often do not have sufficiently significant damages to warrant individual litigation. Individual plaintiffs who opt out of a settlement also may not be able to leverage the work already done by class counsel in the prior class action.

Law stated - 26 September 2021

JUDGMENT AND APPEAL

Preclusive effect

What is the preclusive effect of a final judgment in a class action?

Final judgments in actions in which a class has been certified bind all class members and preclude those class members from asserting any claims that were asserted in the action, as well as any claims that arise out of the same nucleus of operative facts as those claims asserted and resolved in the action. There is an exception for class members that have affirmatively opted out of a settlement agreement. A final judgment in a putative class action that was not certified only has preclusive effect as to the named plaintiff.

Law stated - 26 September 2021

Appeals

What type of appellate review is available with respect to class-action decisions?

A trial court's class certification decision may be appealed under Rule 23(f) of the Federal Rules of Civil Procedure and any state law equivalents on an interlocutory basis. However, a petitioner must first request permission from the appellate court to appeal a class certification decision. A petition for permission to appeal the decision must be filed within 14 days of entry of the class certification decision. Whether the appellate court will allow the appeal will depend on several factors, including whether the decision was a 'death knell' for the case (meaning that the petitioner will be unable to continue onto a merits-based resolution of the case), whether it raises an important legal issue or whether the decision was manifestly erroneous.

A final judgment in a class action is reviewable as of right and follows the procedure of any other final decision in civil litigation.

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REGULATORY ACTION

Regulators

What role do regulators play in connection with class actions?

Regulators play a limited role in relation to class actions in the United States. Under the Class Action Fairness Act (CAFA), defendants in class actions must notify state and federal regulators of any proposed class actions settlements to allow them an opportunity to review the proposed settlement before a federal judge grants final approval. Without proper notification, class members may choose not to be bound by the settlement, even if they already received the settlement notice and did not opt out. CAFA notice gives regulators an opportunity to evaluate proposed settlements for fairness, and to determine whether or not the settlements are consistent with applicable regulations.

Private litigants may initiate and pursue class action suits at the same time that state or federal regulators are investigating or litigating the same underlying conduct. Because class actions and civil or criminal enforcement actions may proceed simultaneously, discovery or admissions from one may affect the progress of the other. That said, in some instances, regulators may ask the court to stay the civil class action pending the regulatory investigation or action, so that the civil plaintiffs do not interfere with or get ahead of the regulators' work. Such requests are not always granted. In pursuing civil claims, class action claimants may obtain relief in addition to any relief obtained by regulators. Whether a class action settlement will bar subsequent regulatory actions may depend on the terms of the settlement, and the case law precedent in the jurisdiction of the suit. Under some circumstances, a regulator will agree to credit to a settlement with the regulator some or all of a settlement paid to private plaintiffs in a civil class action related to the same underlying conduct.

Law stated - 26 September 2021

Private enforcement

Describe any incentives the civil or criminal systems provide to facilitate follow-on actions.

The statutes that provide the substantive rights underlying class action claims may include provisions that incentivise plaintiffs to bring class action suits. Certain consumer protection statutes such as the Telephone Consumer Protection Act and the Fair Debt Collection Practices Act, for example, include provisions requiring that defendants pay a minimum amount in statutory damages if they are found to be in violation of those statutes. These statutory damages

substantially increase the amount of damages that a plaintiff may receive, which may incentivise lawsuits. Similarly, the Sherman Antitrust Act provides for automatic trebled damages if a defendant is found to have violated the statute.

Antitrust laws also provide other, more particular incentives for follow-on civil actions. If a company or person is found to be criminally liable by the federal government for antitrust violations, the judgment may be used as prima facie evidence of an antitrust violation in a subsequent civil suit. This allows plaintiffs to prove, without further evidence, that the defendant committed the same antitrust violation pursued by the federal government. The judgment cannot be used to prove that the defendant committed broader or other antitrust violations, however.

Law stated - 26 September 2021

ALTERNATIVE DISPUTE RESOLUTION

Arbitration and ADR

What role do arbitration and other forms of alternative dispute resolution play in class actions? Can arbitration clauses lawfully contain class-action waivers?

In the United States, there is a general judicial preference for arbitration and alternative dispute resolution. Arbitrations accordingly play an important role in the class actions, and particularly in consumer protection and employment class actions. Class-action waivers in arbitration provisions are considered lawful, and have repeatedly been upheld in a range of class action contexts. The US Supreme Court has even found that state laws prohibiting such waivers are pre-empted by federal law under the Federal Arbitration Act, and has rejected an attempt to use another federal statute – the National Labour Relations Act – to preclude the enforcement of a class waiver

Law stated - 26 September 2021

Court-ordered mediation

Do courts order pretrial mediation in class actions? Does the appointment of a mediator make it more likely that the court will approve a settlement?

Courts will often order pre-trial mediation in class actions and may even order several mediations at various stages of the action. These may occur, for example, after the denial of a motion dismiss, after completion of fact discovery, after summary judgment motions have been submitted, or shortly before trial.

A mediator's support for a settlement will typically be viewed positively by a court, and will support a finding that the settlement was reached at 'arm's length' and that it is fair and reasonable. However, a mediator's recommendation is not sufficient to approve a settlement – the court is still required to make an independent determination that the settlement meets the requirements of Rule 23 of the Federal Rules of Civil Procedure, including that it was 'fair, reasonable and adequate'.

Law stated - 26 September 2021

FEES, COSTS AND FUNDING

Contingency fees

What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?

Plaintiff's attorneys may, and almost always do, enter into contingency fee agreements with plaintiffs in class actions. If plaintiffs recover monetary damages from a class action, either through settlement or judgment, the plaintiffs'

attorneys may recover fees in accordance with Rule 23(h) of the Federal Rules of Civil Procedure (Federal Rules). Upon a motion for an award of reasonable attorney's fees and costs, the court may approve the proposed award. Fees are calculated either as a percentage of the total settlement fund, or by using the 'lodestar method', which multiplies the number of hours worked by a reasonable hourly rate. Class members may object to the attorney's motion. The court may also approve a class action settlement, but opt to reduce or reject the requested attorney's fee award.

Law stated - 26 September 2021

Cost burden

What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?

Under the 'American Rule', losing parties generally do not pay the winner's attorneys' fees, unless expressly required under statute or contract. The Clayton Act, for example, expressly includes a fee shifting provision for plaintiffs that prevail on federal antitrust claims. Where a plaintiff's attorney is operating under a contingency fee arrangement, a losing defendant could be said to indirectly pay the plaintiff's attorneys' fees, given that the fees will be pulled from the final settlement fund or judgment award.

However, under the Federal Rules, a losing party may be responsible for paying certain of the victor's litigation costs, including witness expenses, travel expenses, filing fees, copying costs, and deposition transcripts.

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Calculation

How are costs calculated? What costs are typically recovered? Does cost calculation differ in the litigation and settlement contexts?

Under Rule 54(d)(1) of the Federal Rules, prevailing parties in civil litigation may recover costs. These costs may include fees of the clerk and marshal, fees for printed or electronically recorded transcripts obtained for use in the case, fees and disbursements for printing and witnesses, fees for making copies of any materials or for exemplification, and docket fees. Some courts may also award costs for electronic discovery.

Costs are generally not available in settled cases, unless otherwise provided for in the settlement agreement.

Law stated - 26 September 2021

Third-party funding

Is third-party funding of class actions permitted?

Third party funding of class actions is permitted in the United States. Third party litigation funding (TPLF) is a well-established practice in the United States, although not yet highly regulated. In 2020, the American Bar Association issued a best practices report for TPLF, providing guidance for attorneys on how to navigate TPLF arrangements.

At least one federal district court has required the automatic disclosure of any third-party funding agreements for proposed class action lawsuits, and the state of Wisconsin requires the disclosure of any third-party funding agreements as part of discovery. Some courts have found that information provided by attorneys to third-party funders is privileged and protected as attorney work product. The ABA report advises that attorneys should assume TPLF agreements will eventually be reviewed by courts or opposing parties.

Law stated - 26 September 2021

Public funding

Is legal aid or other public funding available for class actions?

The Legal Service Corporation is the single largest funder of civil legal aid for low-income Americans. However, federal law prohibits the Legal Services Corporation from funding class action litigations. Many state laws have similar organisations but have adopted similar restrictions on funding class actions

Law stated - 26 September 2021

Insurance

Are adverse costs, adverse litigation judgment or after-the-event insurance available?

Adverse litigation judgment insurance is available in the United States. The type of insurance available and the particulars of coverage will depend on the types of claims underlying a class action. However, given that class actions may give rise to very high damages, insurance may not always cover the entirety of an adverse judgment.

Under Rule 26(a)(1)(iv) of the Federal Rules, the parties are required to disclose to the other side as part of their initial disclosures any insurance agreements that might make an insurer liable for all or part of a judgment in the action, or that will indemnify or reimburse payments made to satisfy a judgment

Law stated - 26 September 2021

Transfer of claims

Can plaintiffs sell their claim to another party?

Class action plaintiffs can sell or assign their claims to other parties. However, parties that acquire claims through sale may suffer standing issues in litigation, on the basis that they are not the 'real party in interest'. In the United States, litigation investment companies acquire claims in order to file suits or recover from awards or settlements of those claims, and some sell their shares in lawsuits to raise money to finance litigation

Law stated - 26 September 2021

Distributing compensation

If distribution of compensation to class members is problematic, what happens to the award?

If resolved through settlement, distribution of the class action settlement fund will be governed by the settlement agreement between the parties. Under these agreements, any undistributed amounts are typically distributed among those class members that submitted proper claims or donated to a charitable organisation (typically one agreed upon by the parties), and rarely revert to the defendant. Court approval is usually required before distribution of unclaimed funds.

Law stated - 26 September 2021

UPDATE AND TRENDS

Legal and regulatory developments

What legislative, regulatory or judicial developments related to class actions are on the horizon?

Class action litigation reform remains a highly political issue in the United States, with Republicans generally proposing reforms friendly to defendants, and Democrats in favour of reforms friendly to plaintiffs. In September 2019, the US House of Representatives passed the Forced Arbitration Injustice Repeal Act (FAIR Act), which would have banned pre-dispute arbitration agreements in employment, consumer, antitrust and civil rights disputes. While the bill did not pass the Senate in 2019, it was reintroduced to the Democratic-controlled Senate in February 2021. In July 2021, Democratic congressmen also re-introduced the Restoring Justice for Workers Act, which similarly seeks to end pre-dispute arbitration clauses in the employment context, and also would eliminate class and collective action waivers, reversing the Supreme Court's 2018 decision upholding such waivers.

In 2021, a number of high-profile decisions have impacted some key issues in the class action space, setting up the district courts to wrestle with the proper application of those decisions.

On the hotly disputed issue of standing, the Supreme Court issued a decision in June 2021 in TransUnion LLC v Ramirez that clarified what constitutes a real 'injury' in a class action brought for statutory violations. The Court held that plaintiffs that do not suffer a real harm lack standing to assert damages claims, and that this requirement applied to all class members. The Court further confirmed that a mere statutory violation is not sufficient for a 'concrete injury' under article III. This case will have a meaningful impact on class actions moving forward, as it creates new limitations against previously viable 'no injury' class actions, and particularly on consumer class actions, many of which are based on statutes like the Fair Credit Reporting Act and the Telephone Communications Protection Act that create penalties for statutory violations.

In the securities fraud class action space, also in June 2021, the Supreme Court issued a decision in Goldman Sachs Group, Inc v Arkansas Teachers Retirement System concerning the price impact showing required from a defendant to rebut the Basic presumption of reliance. The Court held that the district court must consider all evidence relevant to price impact when evaluating defendants' price impact arguments, whether or not it overlaps with materiality or other issues reserved for the merits phase of the action. The Court also affirmed that defendants bear the burden of persuasion, and not just the burden of production, to rebut the Basic presumption of reliance by a preponderance of the evidence. While providing new guidance on the proper evaluation of price impact arguments, the Court also expressed that its opinion was 'unlikely to make much difference on the ground'. It remains to be seen how district courts apply the Goldman decision and for the courts of appeals to weigh in on insuring some uniformity.

Finally, decisions from the Fifth and Sixth Circuits further deepened the circuit divide on the question of whether expert evidence must be evaluated for admissibility before it can be admitted in support of class certification arguments. In Prantil v Arkema Inc , the Fifth Circuit joined the Third, Seventh and Eleventh Circuits in holding that expert opinions submitted at the class certification stage must be first evaluated for admissibility under Federal Rule of Evidence 702 and the Supreme Court's Daubert standard. By contrast, the Sixth Circuit issued a decision in Lyngaas v Curaden Ag finding that evidence at class certification need not be admissible, seemingly joining the Eighth and Ninth Circuits (although the opinion did not expressly address expert testimony). The deepening divide on this issue, which can have a meaningful impact on a class's odds of certification, makes it more likely that the Supreme Court may weigh in at some point in the future.

Law stated - 26 September 2021

Jurisdictions

Australia	Clayton Utz
Belgium	White & Case LLP
Canada	Lavery Lawyers
Japan	Nagashima Ohno & Tsunematsu
Mexico	SEPLAW Sepúlveda y Díaz Noriega SC
Netherlands	Freshfields Bruckhaus Deringer
South Korea	Hannuri Law Firm
Switzerland	CMS Switzerland
Taiwan	Lee and Li Attorneys at Law
USA	Cleary Gottlieb Steen & Hamilton LLP