

# CLASS ACTIONS IN THE UNITED STATES OF AMERICA: AN OVERVIEW OF THE PROCESS AND THE EMPIRICAL LITERATURE

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## INTRODUCTION

In this Country Report,<sup>1</sup> we initially discuss how Federal Rule of Civil Procedure 23 has shaped class action litigation in the United States. We then review some of the rule's most important requirements and explain how Rule 23 is applied in some of the most common types of class actions (***How Rule 23 Works***). A brief discussion of some of the ways in which related claims can be aggregated outside of the context of Rule 23 follows (***Alternatives to Rule 23 Class Actions***). To provide context for those who might be unfamiliar with U.S. civil law and procedure, we walk through the process by which a "typical" consumer class action might progress from initial filing to resolution (***A Consumer Class Action***). Finally, we review some of the empirical literature on class action litigation in this country (***Research on Class Action Litigation***). The complete text of Rule 23 and related court rules and legislation (***Key Rules of Court and Statutory Authority***) as well as a summary of the information relevant to this conference (***Responses to Questions Posed to National Reporters***) can be found at the end of the document.

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## **CLASS ACTIONS AND FEDERAL RULE OF CIVIL PROCEDURE 23**

Class actions in the United States are certainly not a recent innovation; group litigation with representative plaintiffs and outcomes that bind absent parties has been possible in this country since the mid-19th century (Hensler et al., 2000, pp. 10-11). But modern class actions were given birth in 1938 with the adoption of Rule 23 of the Federal Rules of Civil Procedure (FRCP) and later matured into the powerful tool available today as a result of amendments to that rule adopted in 1966.

Under the original version of Rule 23, class members were often required to affirmatively "opt in" to the litigation in order to be bound to any settlement, trial verdict, or other resolution of the case, thus placing practical limits on the ultimate sizes of these classes. The 1966 amendments greatly expanded the scope of U.S. class actions by allowing judges to certify certain types of classes in which participation would now be presumed for every potential member *unless* the individual or entity formally excused themselves out of the class. This change facilitated the creation of classes with memberships numbering in the hundreds of thousands or even millions in cases with aggregate monetary damage claims that would reflect the substantial size of these expanded plaintiff classes.

Rule 23's enhanced impact would have been felt across the nation. Although the rule change technically applied only to class actions sought in federal courts, the procedural framework for conducting litigation in many state court systems generally mirrors the federal rules, and most states now have a class action mechanism more or less similar to the post-1996 version of Rule 23.<sup>2</sup> That being said, there can be distinct and important differences

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<sup>2</sup> Only Mississippi lacks a class action process. Virginia allows common law class actions but does not have a specific statutory rule; Iowa and North Dakota follow the Uniform Class Action Rule; Nebraska and Wisconsin follow the Field Code rule on group litigation (California does as well but has judicially adopted the equivalent of FRCP 23); Missouri and North Carolina follow their own versions of the original form of FRCP 23 (this was the case for Georgia and West Virginia as well but in the last few years the two states have adopted the new version); and the remainder have incorporated, at least in modified form, the aspects of the current version of FRCP 23 that

between the federal courts and the courts in each of the 50 individual states in regard to the procedural rules and appellate authority that govern class action litigation. Moreover, the exact application of such rules and controlling case law is popularly thought to reflect considerable variation from courthouse to courthouse and from judge to judge even within the same judicial system. Concerns about a lack of uniformity in class action law and practice and the potential for a single class action filed in one state to affect citizens residing across its border (and in some instances, in 49 other states) were part of the core arguments made by the ultimately successful proponents of the *Class Action Fairness Act of 2005* (CAFA<sup>3</sup>), which in effect “federalizes” many class actions that would otherwise be filed and resolved in state courts. Defendants now have the ability to have such cases transferred to federal district courts for processing if any of the parties (including individual class members) are citizens of different states and if the aggregate amount in controversy exceeds \$5 million. But CAFA is a relatively new part of the class action landscape in the United States and early evidence suggests that defendants are not always exercising their new found power to trigger removal of large value, multistate class actions originally filed in state courts. This, coupled with the generally shared perception that many more class actions are filed in state courts than in the federal system,<sup>4</sup> means that a complete and accurate picture of class action litigation in this country must describe what takes place in 51 different forums. Nevertheless, for the purpose of simplification, the main focus of this Country Report is on how class actions are processed in federal courts.

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allows for opt-out classes. See Conte and Newberg (2002 [2005], §§13.1-13.3, §§13.12-13.13) and Grande (2004).

<sup>3</sup> Public Law 109-2, enacted February 18, 2005.

<sup>4</sup> As discussed elsewhere in this Country Report, reliable estimates of the frequency of class actions are elusive. Only the federal district courts and some individual states attempt to track the number of new filings and even in such jurisdictions, their efforts are not always successful. But at least before the passage of CAFA, evidence pointed to the state courts as where the bulk of class action litigation (measured by the number of case filings) is processed, though the federal courts are where certain types of cases, such as securities and civil rights matters, are most likely to be filed.

It should be kept in mind that just about any civil lawsuit in the United States has the ability to morph from one with a limited number of individual parties to one where entire classes of plaintiffs or defendants are involved. Rule 23 and its equivalents in the various states are procedural rules that are applicable to claims of virtually all kinds, and its use is only restricted in a limited set of circumstances. Depending on the jurisdiction (and there is great variation in this regard), class actions might be prohibited in some administrative proceedings, in certain taxpayer challenges, in particular instances where enhanced types of damages are available, in small claims courts, in domestic relations or probate matters, or cases brought under statutes with specific restrictions, but these exceptions are usually quite narrowly defined. For the most part, as long as there are questions of law or fact that are common to a large group of individuals or entities in a civil case, Rule 23 can be invoked to create a class.

#### **TERMINOLOGY**

Though the section in this Country Report entitled ***A Consumer Class Action*** will describe this process in greater detail, a typical Rule 23 class action might begin with an attorney filing a civil complaint in which a limited number of *representative plaintiffs* are individually named. There would be language in the complaint indicating that the named plaintiffs are seeking to recover losses or force changes in the defendants' behavior on behalf of both themselves and "others similarly situated." A *motion for class certification* would be filed at some point in the litigation, describing with greater specificity the characteristics of the desired class, and requesting that a judge review the proposed class definition and the relief sought and should they meet the various tests of Rule 23, formally certify a plaintiff class. If a class is so certified, one or more of the plaintiffs' attorneys will be named as *class counsel* and any subsequent dispositive resolution such as a settlement or a verdict at trial would apply to the claims of all class members. If a class is not certified, the matter could continue to be litigated but the outcome would affect only the individually named plaintiffs.

In this Country Report, we use the term *class action* to mean any civil case in which parties at some point during the litigation indicated their intent to sue on behalf of themselves as well as others not specifically named in the suit. This definition would obviously include a case in which a class was formally approved by a judge (a *certified* class action) but would also include a *putative* class action, in which a judge denied a motion for certification, in which a motion for certification had been made but a decision was still pending at the time of final resolution, or in which no formal motion had been made but other indications were present suggesting that class treatment was nevertheless a distinct possibility (e.g., a statement in a complaint that the plaintiffs intended to bring the action on behalf of others similarly situated). Thus, for purposes of this Country Report, class actions include both certified and putative cases unless otherwise indicated. Likewise, *class member* refers to individuals or entities in certified classes as well as those in putative classes. References to *class settlements*, however, only describe a negotiated resolution to a case that affects the members of a certified class.

In the general media and even in the specialized legal press, there is often an underlying assumption that a “class action” in the United States is a suit involving a large plaintiff class of individuals against one or a handful of corporate defendants and where the primary relief sought is monetary compensation. While such a characterization might indeed be the most common form of class actions in this country (unfortunately, accurate counts are not available), not all cases fit this description. Rule 23 is more or less “party neutral”<sup>5</sup> and so defendant classes are certainly possible though in actual practice they appear to be quite rare. In this Country Report, the discussion focuses exclusively on plaintiff classes unless otherwise noted. Plaintiff classes made up primarily of individuals are undoubtedly involved in the most widely reported cases involving classes with hundreds of thousands or many millions of members, but many other class

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<sup>5</sup> It should be noted that some federal court authority suggests that defendant classes are not appropriate when the suit primarily seeks equitable relief.

actions are brought on behalf of businesses both large and small, non-profit organizations, and even governmental entities. Mega-classes might dominate the headlines but in fact certified classes of less than 200 members are certainly not unknown. Similarly, the defendants in class actions are not always corporations; government agencies and officials, private individuals, and individually named members of corporate management are also common targets for class litigation. And as described in greater detail below, many class actions involve prayers for injunctions and other equitable relief, sometimes in addition to requests for monetary damages, but often as the exclusive remedy.

## HOW RULE 23 WORKS

### THE PREREQUISITES OF RULE 23

Despite being the underlying foundation for some of the biggest civil suits ever litigated in the United States (in terms of both numbers of interested parties and amounts in controversy), Rule 23 may appear surprisingly terse, lacking in specific directives, and not necessarily well organized to the first time reader. The rule is set forth in its entirety in ***Key Rules of Court and Statutory Authority***. It should be noted our intent throughout this Country Report is to simply provide the reader with a brief and perhaps overly simplified description of the rule's requirements and how it has been applied in practice. Obviously, this document should not be used as a substitute for more authoritative legal sources. In the interest of brevity and readability, citations to controlling statutes, court rules, and case law are generally not provided.

At its core, the rule describes four prerequisites to any class action that are often described as *numerosity*, *commonality*, *typicality*, and *adequacy of representation*. Before a judge can formally certify a class, he or she must initially find that the members of the proposed class are "so numerous that joinder of all members is impracticable," in other words, that naming each individual member of the class as a separate party in the lawsuit would be problematic or logistically inconvenient though not necessarily

impossible. As a practical matter, the numerosity requirement is not a difficult hurdle to clear; on occasion, classes of just a few dozen members have been certified.

Another requirement that is relatively easy to meet (at least relative to other Rule 23 mandates) in cases seeking certified class status is that there be "questions of law or fact common to the class." Courts have held that there need be just a single common question common. Even if the damages claimed by each person varied significantly, for example, a common question in regards to the liability of the defendant might suffice. A class-wide resolution of the case by settlement or verdict would, however, only apply to that common question.

Intermixed with the issue of commonality is the requirement that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Should the matter reach the trial stage (a rare event for civil litigation in the United States as a rule but especially so for certified class actions), it would be the class representative's individual claims that would be decided by the jury or judge and the outcome would essentially be applied to the entire class. As such, the class members' and the representative plaintiffs' common claims need to be based on the same legal theories of liability and arise from the same events or practices.

Alignment of interests is also involved in Rule 23's requirement that the representative plaintiffs "fairly and adequately protect the interests of the class." This test serves two purposes. The first is to ensure that the representative plaintiff's interests would not be in conflict with those of the class members. In many ways this goal is similar to that of the typicality requirement and is satisfied when the representative is a member of the class, is making the same claims based on the same facts and law, and has the same interest in a successful outcome. But the second goal is arguably more important. As a matter of practice, the class representative may have little or nothing to do with the day-to-day decisions of how the case will be managed. That responsibility falls to the legal counsel initially chosen (at least in theory) by the class representative and as such the attorney has to be sufficiently qualified, experienced, unconflicted, and able to vigorously prosecute this type of litigation.

As indicated previously, numerosity, commonality, typicality, and adequacy of representation are simply the basic prerequisites to certification of a class. In addition, Rule 23 holds that a class action can be maintained only if all of the above prerequisites are met and if the proposed class falls into one of four categories listed under Rule 23(b). Because they are often associated with particular types of claims, the Rule 23(b) categories are best described within the context of class actions primarily seeking equitable relief remedies (such as *institutional reform* cases) and those primarily seeking to recover monetary losses (such as *mass torts, securities, or financial injury cases*).

#### **CLASS ACTION TYPES**

As described below, contemporary class action litigation (as well as empirical research on the subject) can be roughly divided by the primary type of relief being sought and further by the nature of the claims being made. Each of these grounds have somewhat different rules for certification, goals for class members, legal theories of liability, and sources for empirical data.

#### **Injunctive and Declaratory Relief Class Actions Under Rule 23(b)(2) and Rule 23(b)(1)(A)**

Civil rights cases and other suits seeking social change or to implement *institutional reform* were, in many ways, the quintessential type of class action envisioned at the time of the 1966 amendments.<sup>6</sup> Compensation for

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<sup>6</sup> "Rule 23, on which the basic committee work was done in 1962 and 1963 and which was promulgated in 1966, must be seen as part of both its professional and its social times. The social setting had a most direct bearing on this rule. Rule 23 was in work [directly] parallel to the Civil Rights Act of 1964 and the race relations echo of that decade was always in the committee room. If there was [a] single, undoubted goal of the committee, the energizing force which motivated the whole rule, it was the firm determination to create a class action system which could deal with civil rights and, explicitly, segregation. The one part of the rule which was never doubted was (b) (2) and without its high utility, in the spirit of the times, we might well have had no rule at all." John Frank, member of the Advisory

monetary losses are not the main goals of these types of cases; rather, plaintiffs primarily seek equitable relief in order to directly change defendants' behavior.<sup>7</sup> Institutional reform (or *social policy reform*) cases are sometimes referred to as "Rule 23(b)(2)" class actions because that subsection of the rule specifically permits class litigation seeking injunctions or declaratory judgments when "the party opposing the class has acted or refused to act on grounds generally applicable to the class."

Examples of institutional reform class actions include claims over discrimination in college admissions, over conditions in state mental hospitals, over industrial runoff polluting nearby rivers, over the deduction of union dues from the wages of non-union workers, and over a mass transit agency' funding balance between fixed rail and bus options. Unlike the precisely defined class in, for example, a consumer class action seeking to recover monetary losses (e.g., "all residents of California who paid additional fees for allegedly late payments made to defendant credit card company from January 2006 to March 2006"), Rule 23(b)(2) class actions often involve a relatively unascertainable or amorphous class such as "all persons residing in the City and its surrounding community who will be at risk of being on the waiting list to receive methadone treatment."

Despite the forging, institutional reform class actions are not always brought under Rule 23(b)(2). Some cases seeking institutional reform or social policy changes are certified under Rule 23(b)(1)(A) which is concerned with avoiding "inconsistent or varying adjudications" that might arise from a large number of individual actions each seeking equitable relief. While their may not be a problem if, for example, a defendant is sued for monetary damages in multiple actions and the outcomes of trials in those cases differed, "[s]eparate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it...might create a risk of

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Committee that revised FRCP 23 in 1966 (U.S. House Of Representatives, 1998, emphasis added).

<sup>7</sup> Monetary damages can be awarded in these cases but they would be incidental to the overarching claims for equitable relief.

inconsistent or varying determinations".<sup>8</sup> At the extreme, a defendant might be placed in the position whereby compliance with one court order requires violating another. Examples provided by the Advisory Committee that helped define the rule of cases where Rule 23(b) (1) (A) would be an appropriate solution include litigation "of the rights and duties of riparian owners" and "of landowners' rights and duties respecting a claimed nuisance." In recent years, for example, Rule 23(b) (1) (A) classes have been employed by deaf person advocacy organizations to prevent a city from removing street alarm boxes and by professional American football players to change the rules of their league. Given that the underlying purpose is to prevent a rash of inconsistent outcomes, in many ways Rule 23(b) (1) (A) classes exist primarily for the defendant's benefit.

One important aspect of cases certified under Rule 23(b) (2) as well as Rule 23(b) (1) (A) is that judges are not required to give class members the option to exclude themselves. This is because the nature of any equitable relief that might be ordered (such as an injunction prohibiting discriminatory admission policies) would, at least in theory, be indivisible and work to the benefit of all who met the class definition. Another characteristic of these cases that distinguish them from those seeking monetary damages is that there is no requirement to provide notice to the absent class members of the fact that they have become a party to ongoing litigation (though judges do have the power to issue such orders if desired). Part of the rationale for not requiring that notice of certification be provided in cases primarily seeking equitable remedies is that there is no obvious benefit to individual members for doing so since they cannot exclude themselves by opting-out. In addition, the significant costs of providing such notice might discourage litigants seeking social change or institutional reform from pursuing potentially meritorious class action lawsuits. Because of the lack of rights to opt-out and to be provided with notice of certification, cases certified under these two provisions are sometimes referred to as "mandatory" class actions. Nevertheless, all Rule

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<sup>8</sup> "Notes of Advisory Committee on Rules to the 1966 Amendment to Federal Rule of Civil Procedure 23," 28 U.S.C.A. Rule 23.

23 class action, no matter what subsection of 23(b) applies, require that "reasonable" notice to the class be given whenever they would be "bound by a proposed settlement, voluntary dismissal, or compromise."

### **Monetary Class Actions Under Rule 23(b)(3) and Rule 23(b)(1)(B)**

#### Generally

Three other important types of class actions (*mass torts, securities & shareholders*, and various other *financial injury* claims) can be thought of as "Rule 23(b)(3)" cases in which monetary compensation is usually the primary goal (as opposed to injunctive or declaratory relief) and in which potential class members are given notice that they can opt out and sue on an individual basis if desired.

To be precise, not all class actions that primarily seek monetary damages involve Rule 23(b)(3) classes. Actions under Rule 23(b)(1)(B) involve certification of a class when individual actions would "be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."<sup>9</sup> An obvious example in which allowing individual suits to proceed might have undesirable effects for future litigants involve claims against a fund with a limited amount of money or a defendant with limited assets. Unless the various claims in a "limited fund" situation are aggregated into a single class, plaintiffs arriving at the courthouse steps first will collect fully while others who are equally entitled might not see any compensation at all. To avoid this outcome, a judge in a Rule 23(b)(1)(B) case could order the defendant's assets to be divided pro rata among all class members. As with Rule 23(b)(1)(A) and Rule 23(b)(2) cases, these are "mandatory classes" in that there is no mechanism for individual members to opt-out of the limited fund class nor is there a requirement that notice of certification be provided. Because of the limited situations

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<sup>9</sup> The potential for rulings in one case to trigger a *stare decisis* effect that would effect the outcomes of subsequent cases involving similar claims is not, in and of itself, enough to justify the application of a Rule 23(b)(1)(B) class.

where Rule 23(b) (1) (B) would be applicable, Rule 23(b) (3) classes are a far more commonly used basis for monetary damage claims.

Rule 23(b) (3) classes have two additional requirements that need to be met before a class can be certified. The judge must find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." As with the prerequisites to Rule 23 described above, these requirements are often referred to in an abbreviated fashion: *predominance* and *superiority*.

Though it might appear that the predominance test is merely a restatement of the commonality prerequisite (i.e., there must be "questions of law or fact common to the class") or the typicality prerequisite (i.e., "the claims or defenses of the representative parties are typical of the claims or defenses of the class"), in fact it presents one of the most serious challenges to plaintiffs seeking a certified class in a monetary damages case. At the core, the class must be sufficiently cohesive to warrant adjudication by representation. Cases involving class members from multiple states, for example, make up one area where the predominance question looms large. An oft-made argument against certification in such cases is that statutory authority and case law from each state needs to be applied individually but differ to such a degree that the predominance test cannot be met. Cases involving fraud claims often have this issue raised as well; those opposing the formation of a class may assert that any showing of reliance upon the defendant's statements or advertising would require individualized –and not class-wide– proof. Toxic tort claims, where issues of fact regarding length of exposure, preexisting conditions, and resulting injuries can be highly individualized, are another contentious area.

Though related to the issue of predominance (and in fact a non-exhaustive list of factors the judge should consider in deciding whether to

certify a Rule 23(b) (3) class apply to both requirements<sup>10</sup>), superiority might be best characterized as a judicial manageability question. Judges need to weigh the merits of a class action against alternative methods of resolving the dispute (which usually, though not always, involve allowing individual suits to go forward independently). In consumer cases, for example, the amounts in controversy for each class member are often small enough to make individual lawsuits impracticable (indeed, the claimed losses can be much less than even the fee the court clerk would charge to file the complaint) and so a class action might be the only practical way to litigate these claims. On the other hand, a complex mass tort might present so many individualized issues that a class trial would essentially deconstruct into a large number of separate hearings; a similar result might occur in a fraud case where individual reliance was a key question of fact. In addition, mass torts might involve individual damage claims so large as to make separate lawsuits economically viable, which may tilt the superiority balance away from a single class action.

Despite the sometimes daunting qualifications required of Rule 23(b) (3) cases seeking monetary damages, classes under this subsection are certified in the United States all the time. The following text discusses some of the most common species of these claims.

#### Mass Tort Class Actions

The first of the major Rule 23(b) (3) sub-types involves mass tort claims of personal injury and property damage. Mass tort class actions have, arguably, gone in and out of legal favor over the years. The drafters of the 1966 amendments suggested that because of the likely differences in the specific nature of the damage claims advanced by individual class members,

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<sup>10</sup> "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

mass torts would not ordinarily be appropriate matters for class treatment.<sup>11</sup> But beginning in the early 1980s, mass torts involving claims arising from Agent Orange, asbestos, breast implants, and other products began to include certified class actions in addition to numerous individual lawsuits. Rule 23 was seen as an efficient way of resolving a body of litigation that threatened to overwhelm court resources, to exponentially increase transaction costs for both plaintiffs and defendants, and to result in imbalances in the level of compensation provided to equally worthy victims. More recently, however, appellate courts have stepped back from blanket approval of Rule 23's application in these cases, in part because of the original concerns over a lack of commonality in claimed injuries but also because of concerns that compensation for more severely injured victims will be given short shrift in trying to forge class-wide resolutions. A series of key rulings in the late 1990s have been characterized by some observers as the "death knell" for attempts to resolve mass tort claims on a class basis.<sup>12</sup>

Mass tort class actions are certainly not an extinct species and the current state of affairs is probably somewhere in-between the "ordinarily not appropriate" view of the drafters of the 1966 amendments and the wide favor Rule 23 enjoyed from the mid 1980s to the mid 1990s. Though the process towards certification will likely be a difficult and highly scrutinized one, the relative intensity of that scrutiny appears to be related to the class of injuries (personal injuries versus property damage), the underlying causes (dispersed versus focused in time and place), and the nature of the plaintiffs (known identity with readily apparent injuries versus future classes of unknown size with claims of unknown characteristics). Proposed

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<sup>11</sup> "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways." *Amendments to Rules of Civil Procedure*, 39 F.R.D. 69 at 103 (1966).

<sup>12</sup> See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (US Sup. Ct. 1999), *Amchem v. Windsor*, 521 U.S. 591 (US Sup. Ct. 1997), *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (USCCA9 2001), *Rhone-Poulenc v. Rorer*, 51 F.3d 1293 (USCCA7 1995), *Castano v. American Tobacco*, 84 F.3d 734 (USCCA5 1996), and *Georgine v. Amchem Prods., Inc.*, 83 F.2d 610 (USCCA3 1996).

classes arising out of single, localized events such as oil spills, airliner crashes, or building collapses might have an easier time of satisfying the predominance requirement these days than a situation involving tens of thousands of plaintiffs spread across all 50 states. Allegations of damage to automobile fuel gauges as a result of misformulated gasoline probably have a better chance under Rule 23 than ones alleging that fumes from that same gasoline caused birth defects in children living near the refinery. A "futures class" consisting of the refinery's neighbors who have at least a possibility of developing cancer from exposure to the gasoline would have the most difficult time of all.

Though Rule 23(b) (1) (B) "limited fund" classes might seem to be an obvious choice for large scale mass torts and other cases where significant individual compensation is sought by plaintiffs and where the defendants are now insolvent or are likely to become so, the bankruptcy courts are usually thought of as the preferred method to protect creditors and fairly distribute limited assets (see ***Alternatives to Rule 23 Class Actions***). Attempts to characterize compensation programs set up by defendants and their insurers to settle actual and potential tort claims as a Rule 23(b) (1) (B) class (thus creating a mandatory class with no right to opt-out or notice) have met considerable resistance. though occasionally they have been successful in the past.

#### Securities & Shareholder Class Actions

Another key Rule 23(b) (3) group is the one that involves class actions related to securities. Typically the class is composed of investors in the company, the defendants are the company's officers and directors, and the action is being brought to recover investment losses resulting from managerial decisions.<sup>13</sup> The claims are based on violations of provisions of

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<sup>13</sup> It may be helpful to distinguish securities class actions from other types of shareholder litigation. *Shareholder derivative actions* involve instances where one or a handful of investors bring a non-class action on behalf of the company against the corporation's officers or directors and in some instances, against third parties. Derivative actions brought in state courts are a very common alternative to federal court class actions. *Direct*

the *Securities Act of 1933*, the *Securities Exchange Act of 1934*, and various state “blue sky” laws. Making misleading statements about future earnings or business opportunities, accounting irregularities, and the backdating of options are common allegations.

Such cases have been the subject of considerable legislative attention and though Rule 23 is still the overarching authority, the provisions of the *Private Securities Litigation Reform Act of 1995* (PSLRA) and the *Securities Litigation Uniform Standards Act of 1998* (SLUSA) play a major role on how these cases are litigated.<sup>14</sup> Though we discuss some of their characteristics below, it should be kept in mind that securities class action litigation is an exceedingly complex arena and even a cursory description of the specific requirements for prosecuting and defending such cases is beyond the scope of this Country Report.

For a variety of reasons, securities class actions are perhaps the most thoroughly studied of all class action types. Prior to the restrictions contained in PSLRA, which may have temporarily made the state courts a more attractive venue, the majority of these claims were litigated in federal court which facilitated identification of cases for researchers and other interested parties. After the passage of SLUSA, securities fraud class actions brought in state courts or under state law have been virtually eliminated, and the bulk of litigation is once again back into the federal forum (the state courts of Delaware are a notable exception because SLUSA still allows state law suits where the defendant is incorporated; about half of the companies listed in the Fortune 500 and New York Stock Exchange are incorporated there). Securities matters also have a relatively high degree of visibility because under the PSLRA, a plaintiff must publish a notice of

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*actions* are brought by one or more investors against the company itself in order to recover losses or change the company’s policies.

<sup>14</sup> See, e.g., *Private Securities Litigation Reform Act of 1995* (Pub. L. No. 104-76, 109 Stat. 737, 1995), the *Securities Litigation Uniform Standards Act of 1998* (Pub. L. No. 105-363, 112 Stat. 327, 1998), and FRCP 23.1. Despite their importance to securities class action procedure, PSLRA and SLUSA are relatively lengthy and as such are not presented in the **Key Rules of Court and Statutory Authority** appendix.

the pendency of the suit, even before certification, in a "widely circulated national business-oriented publication or wire service" within 20 days of the filing of the complaint.<sup>15</sup> Even when a securities-related class action is filed in state court, the litigation receives considerable attention from the business and legal press because of its direct impact on corporate governance and share value. The heightened profile of these cases, as well as the flurry of congressional legislative activity in the mid- and late 1990s intended to reform the procedural and substantive rules for securities class actions, also spurred researchers to focus their efforts in this area. It is perhaps the sole segment of class action litigation in the United States where one can say with relatively certainty how many cases were filed, how many were settled, and what the immediate results might have been.

One important difference between securities cases and other class actions involves the role of the representative plaintiff. In other class actions, the representative plaintiff typically has only a negligible role in the oversight of the case and is usually chosen by the attorney initially filing the lawsuit. Under the PSLRA, the "lead plaintiffs" are the investor-plaintiffs in the class with the greatest financial interest in the litigation, even if not specifically named in the initial complaint. They essentially control how the case will proceed, they manage the actions of class counsel, and they are the ones who will take the lead when negotiating of the terms of any settlement.

#### Financial Injury Class Actions

The final Rule 23(b) (3) category, and perhaps the largest in terms of filings, involves what might be characterized as financial injury class actions. Unlike mass tort class actions which seek compensation for personal injury or property damage, often against a defendant who had no direct

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<sup>15</sup> 15 United States Code § 78u-4. Ironically, the initiation of new class action cases is usually not mentioned in filings with U.S. Securities and Exchange Commission unless they have a materially adverse effect on company operations, cash flows, or financial position or allege certain types of environmental damage or law violations. See 17 Code of Federal Regulations 229.103.

connection with class members before the incident, these claims usually have some sort of basis in an existing contractual or business relationship between the class members and the defendants. The primary goals here are the restitution of any ill-gotten gains the defendants might have realized and the deterrence of similar practices in the future, on the part of the defendant as well as others within the same industry. Particularly notable cases in this group include labor and employment, antitrust, and various consumer matters.

### *Employment Cases*

Employment and labor cases brought on behalf of groups of employees occupy an interesting niche in the overall U.S. civil justice system. In addition to traditional Rule 23 class actions involving classes of individuals filing suit against their employers, statutes also provide for a type of group litigation called a "collective action" that has goals and outcomes similar to Rule 23 cases. In addition, governmental agencies can routinely file "pattern and practice" suits on behalf of groups of workers. Because all of these types of litigation are sometimes characterized as "employment class actions," they are discussed below.

Employment class and collective actions can be roughly grouped into four areas: discrimination class actions, employee benefit class actions under the provisions of the *Employee Retirement Income Security Act of 1974* (ERISA<sup>16</sup>), "wage and hour" collective actions, and discrimination collective actions. Discrimination cases under Rule 23 often involve allegations of violations of Title VII of the *Civil Rights Act of 1964* (prohibiting discrimination in an employment setting on the basis of race, color, religion, sex, or national origin<sup>17</sup>), the *Americans with Disabilities Act of 1990* (discrimination based on disabilities<sup>18</sup>), and "Section 1981" protections evolving out of the *Civil Rights Act of 1886* (discrimination based on race<sup>19</sup>).

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<sup>16</sup> Public Law 93-406.

<sup>17</sup> Public Law 88-352, 42 U.S.C. §2000e et seq.

<sup>18</sup> Public Law 101-336, 42 U.S.C. §12100 et seq.

<sup>19</sup> 42 U.S.C. §1981.

The U.S. Equal Employment Opportunity Commission (EEOC) can also bring a special type of Title VII action on behalf of a class of workers known as a "Section 707 pattern or practice" discrimination case. Unlike the certification process in a Rule 23 matter, Section 707 cases (sometimes referred to as "EEOC class actions") involve what might be characterized as a self-certified class of aggrieved individuals based on the EEOC's essentially unreviewable determination that reasonable cause exists to initiate the group litigation.

ERISA was originally enacted to provide workers with a comprehensive civil enforcement scheme within the federal courts for protecting their job-related benefits such as pension plans or health insurance. For example, employees can bring an ERISA action to recover unpaid disability benefits, require health plan administrators to review their decisions to deny medical treatment, or make a claim that the administrator of a pension plan had breached his or her fiduciary duty by making risky investment decisions. Though the remedies available under ERISA can involve significant restrictions on available damages compared to common law-based litigation, there is no bar against class actions brought on behalf of some or all of a company's employees to enforce their collective ERISA rights.<sup>20</sup> ERISA class actions are often spawned in the wake of corporate bankruptcies and other financial problems when the company's own stock makes up a portion of its employees' investment portfolio; the cases that result can name as defendants the company's directors, managers, and auditors and make allegations of mismanagement or misstatements similar to what might be seen in securities fraud class actions.

Wage and hour cases often include allegations that the company misclassified groups of workers as management staff, thus failing to comply with statutory controls on overtime hours and rates of pay, or failed to pay at least the minimum wage. But such claims, when based on violations of the *Fair Labor Standards Act of 1938* (FLSA<sup>21</sup>), are handled in a different manner

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<sup>20</sup> It should be noted that many ERISA class actions are certified under Rule 23(b)(2).

<sup>21</sup> 29 U.S.C. §201 et seq.

than traditional Rule 23 class actions. Under 29 U.S.C. §216(b), wage and hour actions can be brought “in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.” The prerequisites of Rule 23 do not apply and the “similarly situated” test has been characterized as a “fairly lenient standard” that is easily met on the basis of the plaintiff’s pleadings and perhaps some affidavits from other employees. Certification of a representative class could be granted at this point, perhaps subject to later challenges by the defendant as discovery is completed. In addition to the very different standards used by §216(b) collective actions for class certification, another critical distinction is the fact that unlike in traditional Rule 23(b) (3) classes, putative plaintiffs must affirmatively opt-in into the litigation to be bound by its outcome. This effectively limits the size of collective actions in a manner that echoes the pre-1966 version of Rule 23. On the other hand, the provisions in §216(b) for double damages, awards of attorneys’ fees and costs, and perhaps most importantly, the relatively looser standards for class certification may make collective actions a more attractive option for wage-related cases than Rule 23.<sup>22</sup>

Finally, not all discrimination cases involve Rule 23 classes. Collective actions that employ the enforcement provisions of §216(b) under the FLSA are also used for gender discrimination cases under the *Equal Pay Act of 1963* (EPA<sup>23</sup>) as well as age cases under the *Age Discrimination in Employment Act of 1967* (ADEA<sup>24</sup>). The EEOC can also bring EPA and ADEA actions on behalf of employee classes.

#### *Antitrust Cases*

While the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) have the power to enforce federal antitrust laws, it is

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<sup>22</sup> Though not expressly part of the FLSA, collective actions that essentially parallel §216(b) proceedings are found in cases alleging violations of the *Family and Medical Leave Act of 1993* (FMLA, Public Law 103-3; see 29 CFR 825.400),

<sup>23</sup> Public Law 88-38, 29 U.S.C. §206(d).

<sup>24</sup> Public Law 90-202, 29 U.S.C. 621 et seq.

generally believed that most civil enforcement activities in this area come about in the form of private actions. Federal court civil actions brought by those who allege to have been harmed by restraints of trade or anticompetitive activities are expressly authorized by the *Clayton Antitrust Act of 1914* (Clayton Act<sup>25</sup>) and allow the recovery of treble damages as well as attorneys' fees and costs. Individual states have similar laws. In addition to suits filed by state attorneys general on behalf of their own citizens, Rule 23 class actions brought on behalf of the defendant's customers or competitors are permitted as well, greatly increasing the value of the suit compared to a single plaintiff. Because the evidentiary burden for the plaintiffs in such situations are reduced, many such private class actions often follow successful DOJ prosecutions for criminal violations of antitrust laws. Private civil class actions in both state and federal courts can also be encouraged by successful FTC civil enforcements as well as activity by state attorneys general. Unlike private class actions brought under the Clayton Act, those based upon more expansive state antitrust laws can also include indirect purchaser classes, which in turn has led to instances where parallel class actions are filed against a single company across multiple states.

#### *Consumer Cases*

This catch-all category covers a wide variety of claims made by the purchasers of products and services alleging breaches of contract or some type of unfair, deceptive, or fraudulent business practices on the part of the defendants. Despite the use here of the term "consumer," all types of financial and business relationships are involved such as actions by sellers against purchasers. Common law theories of fraud or breach of contract or warranty, regulations promulgated by government agencies charged with industry oversight, and specialized consumer protection and unfair competition statutes enacted at both the state and federal levels are just some of the underlying legal foundations used for these types of class actions. It is beyond the scope of this Country Report to list all of the

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<sup>25</sup> Public Law 63-212, 15 U.S.C. §12 et seq. See also the *Cellar-Kefauver Act of 1950*, Public Law 81-899.

varieties of consumer class actions that have been filed in U.S. courts but a few examples might help illustrate the broad scope of these cases:

- Policyholders against insurers of their automobiles for obtaining credit reports without proper notification
- Private health insurers against a pharmaceutical company for promoting "off-label" usage of a drug without disclosing possible side effects
- Cardholders against credit card companies for late fees on mailed payments
- Cellular phone customers against their providers for rounding up per-minute charges
- Purchasers against manufacturers of computer monitors for inaccurate descriptions of screen size
- Doctors against health maintenance organizations for reducing reimbursements for medical services
- Account holders against their banks for the way interest rates and other charges were calculated
- Customers against a mail-order DVD rental service for falsely advertising "unlimited" rentals for a monthly flat fee
- Banks against a retailer for allowing credit and debit card numbers to be stolen from its unencrypted computers
- Customers against a television shopping network for selling computers without providing promised post-purchase technical support
- Customers against an internet service provider for supplying software that blocks access to other providers
- Contact lens wearers against the manufacturer for selling the same product at different prices under different labels
- Borrowers against a mortgage lender for excessive document preparation fees
- Tool distributors against a manufacturer for inducing the distributors to sign contracts based on fraudulent projections of return on their investments

Four particularly interesting issues arise in regards to certification of consumer class actions in the United States. First, questions of predominance and commonality are often at the core of the certification process in these cases. While the use of uniform language in contracts provides one of the bases for the plaintiff's assertion that there are uniform questions of law and fact, there nevertheless can be significant differences in the way class members might have entered into such agreements, what might have been represented orally or in advertising, and whether the consumer relied on those representations to his or her detriment.

A still evolving area involves the use of arbitration clauses in contracts where there is an express waiver of the right to initiate or participate in consumer class action litigation. Whether there was an imbalance in the relative bargaining power of the parties to the contract, whether the language was buried deep within the documents (or required multiple "clicks" on a webpage to view), whether the consumer had any meaningful choice to reject the clause or purchase goods or services elsewhere have led a number of courts (though not all) to hold such waivers to be unconscionable and therefore unenforceable. The remainder of the arbitration clause might still be valid though, and while a class action could proceed, the resolution would come about through class-wide arbitration rather than trial.

The scope of the proposed class also looms large in consumer class actions. Class definitions that cross state borders become especially problematic when the underlying basis for liability is state, rather than federal, law. Subclasses for each of the 50 states are certainly possible but often the plaintiffs seek to apply what is felt to be the more favorable law of a single state to all class members no matter where they reside. Choice-of-law questions run rampant here and should it be held that the contracts entered into in each of the class states could not be subject to a uniform interpretation, there is a good chance that a multistate class would not be certified. One type of consumer class action that does stand a better chance of having a multistate class certified are those where the law that the plaintiffs are attempting to have applied universally is that of the defendant's home state (principal place of business or state of incorporation) or the state where the disputed transaction primarily took place or the state where the product was produced. To avoid the issue entirely, some corporations have inserted choice-of-law clauses into their contracts that identify the consumer's home state or the place of purchase as site of the governing law for any dispute.

While single state versus multistate class scope is a fertile area for contentious opposition to motions for class certification, it should be kept in mind that it is often in the defendant's best interest to resolve all possible claims against it regarding a particular course of conduct in one

single sweep. It is certainly not unknown to see a proposed single state class morph into one of national scope with the defendant's acquiescence by the time the motion for settlement review is filed, despite any likelihood that a judge would not have approved such a definition at a contested certification hearing.

And finally, the interrelated questions of administrative regulation, compliance, and preemption arise in many consumer class actions, though they certainly can be of equal importance in mass tort and other types of class litigation. Depending on the applicable law, the nature of the claims being made, and the interest of government agencies have in the pendency of the lawsuit, defendants may have a number of ready-made arguments to defeat, or at least delay, the progress of a consumer class action. The defendant might, for example, assert that its actions were in compliance with a controlling statute or regulation and thus there is no right of action by the class. It might assert that the claim falls into an area that has been delegated to an administrative agency by the legislature for oversight, thus giving the regulator either exclusive jurisdiction over the matter or at least the option of first resolving the case through administrative processes. And it might assert that the state law that the plaintiffs are attempting to apply has been completely preempted by federal statute or regulation.

### **Hybrids**

While this Country Report has, as a matter of convenience and simplicity, divided U.S. class actions into two distinct categories (those seeking equitable relief and those where monetary damages are the primary goal) and further divided those categories into various types of claims (such as mass torts or consumer actions), in fact a single class action can involve multiple bases for certification and multiple theories of liability.

In one famous example, a case involving employment discrimination claims against a national retail chain was certified under Rule 23(b)(2) based on the notion that the primary relief sought was injunctive in nature and no compensatory damages were requested. However, punitive damages are also being sought and it is not unrealistic to assume that such claims in this

particular case might be worth billions of dollars. In approving the certification, an appellate court recently asserted that the test of what type of relief predominates turns on the primary goal of the litigation, not the theoretical or possible size of any damage award.

It should be noted that there is nothing to prevent a judge from applying Rule 23(b) (3)-like protections for notice and right to opt-out to cases certified under Rule 23(b) (1) or (2). While judges are not obligated to provide for those rights, they always have the option of making whatever "appropriate orders" are needed to protect absent class members.

Another hybrid situation involves instances where there are multiple subclasses in a case, each certified under a different section of Rule 23(b). One subclass might be certified as a Rule 23(b) (3) class with rights of notice and opt-out while a second subclass would be a mandatory Rule 23(b) (2) class. Mass tort class actions, for example, might seek injunctive relief ordering long-term medical monitoring of a plaintiff class certified under Rule 23(b) (2) and another plaintiff class under Rule 23(b) (3) where only monetary damages are requested. Multiple subclasses with different legal foundations can even apply to the same type of plaintiff; a consumer class action might have a Rule 23(b) (3) subclass where claims are made against a compensation fund but those very same individuals could be prohibited from making any claim for punitive damages as part of a Rule 23(b) (2) subclass without any right to opt-out.

Ostensibly different theories of liability can also become intermingled in some class actions. For example, both elements of mass tort and consumer issues can be found in recent cases seeking reimbursements for consumer classes on the theory that they would not have purchased a particular pharmaceutical product if the manufacturer had disclosed known risks of physical harm. A similar type of claim alleges that the consumer might have bought the drug anyway even if the disclosures been made but would not have paid the full price the manufacturer was asking. Such an approach avoids some of the difficult issues in personal injury class actions that arise regarding the predominance requirement where proof of exposure, causation, and resultant harm may vary greatly from class member to class member. Couched as a consumer class action, on the other hand, the key question in

the case might be reduced to simply whether the class member bought the product or not.

#### **ALTERNATIVES TO RULE 23 CLASS ACTIONS**

As indicated in the preceding section, there can be significant difficulties in the use of Rule 23 in certain types of claims such as mass personal injury torts or where the laws applicable to determinations of liability or damages are scattered across multiple jurisdictions. Moreover, Rule 23 might not be seen by counsel as the best or most profitable way to advance the interests of large numbers of related claims, even when it appears that all the requirements of Rule 23 could be met. Potential plaintiffs may also have serious concerns about subsuming their interests into aggregated litigation. If the stakes are sufficiently large, hiring counsel on a contingency fee or an hourly fee basis to personally advance their claims may in fact be economically viable, thus providing them greater control over the outcome of their own case. In situations where motions for certification have a low probability of success, where attorneys perceive that filing individual cases would present a more attractive business or litigation strategy, or where large numbers of potential class members are likely to opt-out or have already retained counsel, the underlying demand and the legal foundation necessary for giving birth to a Rule 23 class action may never form.

Though they might not be viable as Rule 23 class actions, there certainly are numerous instances where very large numbers of substantially similar claims can be made against the same individuals or entities. Even when Rule 23 certification is granted, large blocks of opt-outs may continue to pursue claims on an individual basis. When such claims evolve into formal lawsuits, various procedures are still available to process at least some aspects of these cases collectively.

The driving forces for utilizing such procedures can come from different sources. Attorneys who represent individual plaintiffs with related claims may hope to gain a tactical advantage by advancing their clients' interests on an aggregated basis. Defendants may also seek to group related claims in order to increase the chances of a less costly global resolution. And

finally, judges may perceive aggregation as the easiest way of relieving crowded dockets. These mechanisms for collective processing, some initially developed or receiving the greatest attention within the context of asbestos mass tort litigation, are described below.

### **Mass Joinder**

The rules covering "permissive joinder" of parties in the United States give a plaintiff the option of including other claimants in the same lawsuit if there are questions of law or fact common to each and if their rights to relief are related or arise out of the same set of transactions or occurrences. A single lawsuit, for example, can be initiated with a complaint individually naming dozens or even hundreds of plaintiffs. If the case does go to trial, each of the claims would be tried more or less independently, similar to what might take place in a case where the plaintiffs originally initiated separate lawsuits that were later consolidated for trial purposes. Joinder rules similar to Federal Rule of Civil Procedure 20 have been adopted in most jurisdictions (see ***Key Rules of Court and Statutory Authority***).

The ability to cluster large numbers of plaintiffs in this way can be an attractive alternative to Rule 23 class actions, especially in regard to cases where there might be difficulties in meeting all the various tests of the rule<sup>26</sup> and where there are relatively large monetary damages being sought by each plaintiff. Mass torts would certainly fit this description. Unlike the situation under Rule 23(b)(3), the common questions of law or fact need not predominate over those affecting only individual members, sidestepping a particularly high hurdle for many mass tort claims. Joinder also presents an advantage in regards to plaintiffs' attorneys' fees as pre-existing fee arrangements would continue in effect despite the clients being joined in a single case; under a class action, in contrast, the judge would have to approve the fee request, often at a discounted rate compared to individual

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<sup>26</sup> Indeed, the fact that it would be possible to join such plaintiffs into a single suit would, in and of itself, defeat Rule 23's numerosity prerequisite.

representation. Thus joinder might be the preferred option when an attorney has already executed agreements with large numbers of clients. Though the count of plaintiffs would be far fewer than a typical class action, the individual amounts in controversy would likely be much greater, and the ability of an attorney to leverage an entire body of claims during negotiations, especially when there are a mix of injury severities among the plaintiffs, is thought to present a significant strategic advantage over separately filed suits.

Though there are no precise limits to the number of plaintiffs that can be joined, a judge does have the discretion to sever one or more of the parties from the case if the joinder fails to satisfy the requirements noted above or if leaving them in would cause delay, prejudice, or adversely impact trial convenience or judicial economy. The exercise of this discretion has varied greatly between different jurisdictions and between different judges. For example, some courts have held that it would be inappropriate to join plaintiffs in a single pharmaceutical products liability case because of variations in causation and damages and what were felt to be highly individualized facts. Other courts have had no such problem. There has also been a divergence in the way courts have treated the question of whether non-resident plaintiffs (either from outside the state or outside the county where the court is located) can be joined in a case when not all of the acts that gave rise to the claim took place in that jurisdiction.

These distinctions in how the rules of joinder are applied are important ones. The federal courts are believed by some to be relatively conservative regarding joinder with at least a few states (most notably Mississippi prior to recent rule changes and appellate holdings) at the opposite end of the spectrum. The most expansive applications have involved thousands of plaintiffs from across the county in single "super-joinder" cases, drawing criticism from some quarters that such instances create what amounts to a virtual national class action without the need for formal certification or Rule 23-type judicial scrutiny of proposed settlements. The federal response to this question involved the *Class Action Fairness Act of 2005*, which contained provisions for removing state court "mass actions" (defined as cases with joinder of 100 or more plaintiffs) to federal courts when at least

some of the claims arise from events or occurrences or injuries from outside the state where the case was filed and where each of the plaintiffs' claims were asserted to be worth at least \$75,000.

### **Mass Consolidations**

In contrast to permissive joinder, consolidation can be a judicially-initiated aggregation. When separate actions are pending before the court that involve a common question of law or fact, the judge can order the cases consolidated into one for all purposes, consolidated only for the conduct of discovery and motion practice, or consolidated just for trial to resolve one or more issues (consolidation can also occur as a result of a motion from either a plaintiff or a defendant). Consolidation rules similar to Federal Rule of Civil Procedure 42 have been adopted in most jurisdictions (see **Key Rules of Court and Statutory Authority**).

As is true with joinder, only a single question need be common and Rule 23(b) (3) predominance is not needed. Judicial economy is a key concern here, and a court faced with a cluster of similar claims may see consolidation as an efficient way to resolve the disputes on a grand scale. On the other hand, consolidation may bring a risk of undue prejudice to a party in regards to prosecuting its claims or raising its defenses, especially in regards to trials. Courtroom logistics would also be a concern. To address these problems, courts tailor consolidated trials as they see fit, perhaps by dividing up all the plaintiffs into much smaller groups, by holding "bellwether" trials with small numbers of related plaintiffs (such as by type of claimed disease or nature of the exposure) either to determine crosscutting issues such as liability for all similar plaintiffs or to simply help provide benchmarks for subsequent settlements, or by bifurcating the trial into two parts, with a liability phase that involves questions of law and fact common to the defendants and a causation\damages phase (sometimes with a different jury) involving questions common to the plaintiffs (some judges reverse this order with the hopes of encouraging settlement after the relatively brief damage phase).

A key limitation on consolidations at the federal level is the requirement that the cases be ones that have been filed in the same federal

district (the procedures for interdistrict consolidation are discussed in the following section). Some states have similar restrictions, prohibiting consolidation of cases unless they were all filed in essentially the same local courthouse. A few states have procedures in place for statewide coordination of multiple actions before a single judge for the issuance of uniform pretrial orders and oversight of the discovery process, even if they could not be formally consolidated. Other states clearly allow intrastate consolidations.

As was the situation with joinder, courts differ in the way they view the appropriateness of consolidations or coordinations in mass tort situations, especially in regard to trial. An example of one approach was the one taken by the courts of West Virginia in regards to asbestos-related claims. In the late 1990s, six mass trials resolved thousands of consolidated claims and in 2002, a court rule that specifically provided for a process similar to consolidation in mass tort cases was used as the basis of a liability-only trial involving 4,500 claimants. Other courts have found that consolidating even a handful of mass tort claims for trial purposes would result in undue prejudice to the defendants, especially when the tort was an "immature" one with few prior trial verdicts and appellate opinions to use as guide marks and where scientific evidence applicable to the underlying issues was being developed.

A related approach involves the use of case management orders (CMOs) that apply to an entire body of litigation before all the judges in the same court. While formal consolidation does not take place and the actions can proceed simultaneously before different judges, the practical effect is to manage the pretrial process so that discovery, settlement conferences, requirements for filing pleadings and documents electronically, hearings on dispositive motions, and other events take place in a coordinated and uniform manner across a single jurisdiction. Such multi-case CMOs are routinely used in the context of asbestos litigation.

### **Federal Multidistrict Processing**

When cases involving related claims are filed in different federal district court, the Judicial Panel on Multidistrict Litigation (MDL Panel)

reviews such cases to see if they should be transferred to a single location and consolidated for centralized pretrial processing. The cases have to share at least some common questions of fact and the transfer must enhance judicial economy and the collective convenience of parties and witnesses. Unlike the procedures for joinder and non-MDL consolidations, common questions of law alone would not be a sufficient basis for transfer. After transfer by the MDL Panel, related cases are usually handled by one judge as part of a single coordinated body of litigation. An important feature of the MDL process is that the individual cases must return to the transferring courts at the conclusion of their pretrial processing if they have not been resolved first. In actual practice, however, the very low frequency of cases that actual go to trial means that the transferee court is likely to be the final stop; in the nearly 40 years the MDL Panel has been in existence, only about 7 percent of these cases were sent back to their originating court for final processing.<sup>27</sup>

At first glance it may be difficult to see why the MDL process has played such a large role in the history of mass litigation in the United States. Such transfers cannot result in group trials and there have been many MDL cases involving only two separate actions (most have involved less than 100). But because the process can pull in cases from any federal district, the potential exists to aggregate hundreds of cases from across the nation, including class actions that expand the scope of the litigation enormously. With some mass torts, the reach of the MDL Panel is a long one: state court products liability cases involving personal injuries are often eligible for removal to federal court on a diversity of citizenship<sup>28</sup> basis where they can then be subject to an MDL transfer. Extreme examples of the

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<sup>27</sup> Judicial Panel on Multidistrict Litigation, *Annual Statistics of the Judicial Panel on Multidistrict Litigation, January through December 2006*, Washington, D.C. As of September 17, 2007:  
<http://www.jpml.uscourts.gov/Statistics/CalendarYearStats-2006.pdf>

<sup>28</sup> This basis for federal jurisdiction requires the amount in controversy to exceed \$75,000 and all the parties to be citizens of different states, both tests easily met with claims of serious personal injuries brought against a defendant whose headquarters or place of incorporation is located in just a single location.

size of a single MDL docket include 20,000 actions over the use of the drugs fenfluramine and phentermine for anti-obesity purposes, 27,000 cases regarding silicone breast implants, and over 111,000 asbestos-related cases. Even when far fewer numbers are involved, the stakes associated with mass consolidations of high value cases for pretrial purposes can be significant.

It should be noted that no such analog exists for cases filed in different state courts. The process for coordinating the progress of a body of litigation crossing state borders is far more informal, requiring voluntary cooperation (not always given) on the part of the various judges overseeing their respective cases. The same is true in regards to coordinating state court cases with similar actions filed in federal courts.

### **Bankruptcy**

Perhaps the most widely used of the non-Rule 23 aggregation devices (at least in terms of aggregate numbers of claims affected) has been corporate reorganization under Chapter 11 of the United States Bankruptcy Code. A company faced with overwhelming exposure can seek bankruptcy protection from past judgments, current lawsuits, and in some instances, anticipated future claims. The intended end result is that the debtor emerge from bankruptcy process free of any debt related to the underlying mass litigation (and, obviously, other liabilities as well) but still able to operate as a viable business entity.

The nuances of the bankruptcy code are extremely complex and beyond the scope of this Country Report but in the most simplistic terms, there are three primary mechanisms that provide for projection in a mass litigation context. First, the filing of a bankruptcy petition in federal court triggers an "automatic stay" which suspends all collection activities against the debtor and its properties, no matter where they are being pursued. This includes cases that have already resulted a trial verdict or other judgment, even if they had been filed in a state court. The stay also freezes ongoing litigation against the debtor. Claims that arise and are pursued after the petition is filed can continue through the courts though any judgment that results is stayed as well. Though insurance policies that provide benefits to the debtor are included as protected property, liability policies that pay

directly to third parties (the type of coverage most likely to be relevant to a mass tort situation) are not, though the bankruptcy court can issue a discretionary stay for these policies when required.

The second mechanism is the ability of the court to collect existing cases related to the bankruptcy. The scope of that collection is a broad one, including not only cases filed against the debtor but also those in which the debtor is not a party but where the outcome might affect the debtor's estate (such as an action brought against a company that was co-insured with the debtor on the same policy). Cases that are already in a federal court are transferred to the district where the bankruptcy petition was filed. State court cases are removed to the federal system and thereafter transferred to the same district court. While there are a number of subsequent events that might result in the return of a case that was originally in state court back to where it was removed (a judge might find, for example, that the case should be remanded on equitable grounds or that the court must abstain from hearing the case because of statutory requirements), cases involved in the mass torts of interest here are likely to remain in the bankruptcy court's district. If the case does not involve a claim of personal injury, it can be referred to the judges of the district court's bankruptcy unit for all further proceedings, including trial. Personal injury cases, on the other hand, are retained in the associated district court for trial though a bankruptcy judge could first hold a hearing to develop proposed findings of fact and conclusions of law with the district court performing a *de novo* review. No matter where exactly such cases end up, the court has considerable power to manage the body of litigation now on its docket, including the ability to consolidate some or all claims for a mass trial to determine common question of liability or other issues. Controlling the pace at which cases proceed to trial, setting up centralized discovery repositories, mandating participation in alternative dispute resolution programs such as mediation, and requiring claimant registries are other management techniques. To make sure that the resolution of mass claims is centralized within the bankruptcy courts, judges have issued injunctions prohibiting those seeking to sidestep the process from bringing related litigation against the debtor's co-defendants and insurers.

The final mechanism for aggregation is the reorganization plan itself, initially designed by the debtor with input from committees appointed to represent the interests of various classes of creditors: secured creditors, unsecured creditors, personal injury tort claimants, property damage tort claimants, co-defendants seeking reimbursement for payments already made to those with personal injuries, etc. After the plan's features are approved by the judge and receive an affirmative two-thirds vote by various classes of claimants, it can be confirmed (note that some provisions exist for confirmation and enforcement of the plan even when not all classes have approved). The features of these plans vary greatly but one that has been used in a number of instances where the debtor was facing massive numbers of mass tort claims is the creation of a creditor's trust (sometimes known as claim resolution trusts). In the mass tort context, the trust can help to manage the litigation workload, administratively adjudicate the value of claims, as well as hold assets such as liability insurance proceeds or contributions by joint tortfeasors for subsequent distribution. "Channeling" injunctions block future claimants from asserting any related claims except through the trust.

Part of the attraction of bankruptcy as a means of dealing with large numbers of claimants in the asbestos context comes from 1994 amendments to the U.S. bankruptcy code. Under section 524(g), a discharge in bankruptcy will free the debtor from not only current claimants but future ones as well. Obviously unidentified future claimants cannot vote on the bankruptcy reorganization plan but in theory it is possible to identify those who might have been exposed to a toxic substance but who have not yet showed any symptom or disease due to a long latency period. When such individuals file lawsuits against the debtor, they can be treated as current claimants and, through the attorneys that represent their interests, have a significant say in the plan's design and compensation program. The requirements for voting on a proposed plan under section 524(g) are increased from two-thirds to three-quarters, which may increase the influence of large blocks of "asymptomatic" or "unimpaired" plaintiffs on the plan's features compared to the small number with currently serious medical conditions.

Another aspect of the bankruptcy process related to the need to satisfy the interests of various voting classes involves so-called pre-packaged Chapter 11 filings. In such instances, the company contemplating bankruptcy protection will first meet with those representing the interests of the largest blocks of claimants. An acceptable reorganization plan is crafted and only then is the petition filed. While this approach is likely to result in speedier compensation to mass tort claimants, some observers have criticized "pre-packs" because of the potential that the interests of certain claimant groups (such as ordinary commercial creditors or tort claimants who were not represented by the attorneys who negotiated the plan with the company) might not be properly protected.

#### **Other Methods**

A few other common methods of aggregating claims are worthy of note:

- **Attorney Inventories** Plaintiffs' attorneys sometimes amass large "inventories" of clients from across multiple states with similar claims against one or a handful of defendants. When such claims are not formally aggregated through joinder, consolidation, MDL, or Rule 23, a group resolution to the cases can nevertheless be negotiated with the defendants. Approaches in these cases can vary from a flat fee for each claimant regardless of individual severity to the development of complicated matrices that adjust the level of compensation by a variety of factors.
- **Attorney General Actions** States and the federal governments, usually through their attorneys general, can bring actions on behalf of its citizens that seek restitution or injunctions similar to Rule 23 class actions. These actions are often brought under provisions of state unfair business practices acts.
- **"Private Attorney General" Actions** Certain statutes expressly allow private individuals to bring actions similar to those typically initiated by government attorneys general. The relief sought is usually equitable in nature (though restitution is sometimes allowed) and the plaintiffs' attorneys fee can be recovered. Some statutes empower the plaintiff to also seek the imposition of fines from defendants though when awarded, much of the money will go directly to the state.

## **A CONSUMER CLASS ACTION**

### **INTRODUCTION**

As described previously, there can exist considerable differences in the procedural rules and substantive case law that are applicable to different types of class actions in the United States. Because it would be impractical to attempt to describe how all such cases typically move from filing to resolution in actual practice, the discussion below concentrates on financial injury class actions outside of the mass tort, securities, or employment arenas.

### **INITIATION**

In what might be characterized as the paradigm Rule 23(b) (3) class action for monetary damages resulting from consumer or business transactions, an attorney will file a complaint alleging some sort of harm or loss to the plaintiffs specifically named in the pleading. The complaint usually identifies no more than one or a handful of such plaintiffs. In some instances, there is language in the initial complaint (or a subsequently filed amended complaint) that suggests that the named plaintiffs are, in fact, seeking to advance the interests of both themselves as well as others who are "similarly situated" (in other words, those who are claimed to have essentially suffered the same sorts of losses caused by the same behaviors exhibited by the same defendants). In other instances, the substance and language of the complaint speak only to issues related to the specific experiences of the named plaintiffs, but subsequent communications between the parties suggest that the plaintiffs' attorneys intend (or are at least considering) to move forward on a class basis. And in some cases, the first indication to the defendants that class treatment is desired will be the service of a formal motion for class certification. Regardless of how it takes place, once the defendant is aware that the case may have consequences that go far beyond claims advanced by just a few individuals or entities, a class action has essentially begun.

As with any civil litigation, the parties in a nascent class action can initiate discovery of relevant evidence in their opponent's control. The matter also is subject to the usual pretrial process, including the filing and resolution of dispositional motions such as those seeking summary judgment or dismissal for failure to state a legally valid claim. If the case is filed in a state court, the defendants may attempt to move the litigation to a federal district court for processing, usually by asserting that the matter involves questions of federal law or that the named plaintiffs and the defendants are citizens of different states. In some instances, the case will end at this point with an outcome that affects only the named plaintiffs in the complaint, perhaps as a result of a ruling on one of the dispositional motions, as a result of a settlement on an individual basis, or as a result of the plaintiffs voluntarily dismissing the suit. Voluntary dismissals are often accompanied by a request for leave to file again, a move that provides plaintiffs' attorneys with the option of initiating a similar class action in the future.

#### **THE MOTION FOR CERTIFICATION**

Should the plaintiffs' attorneys wish to move the matter forward on a formal class action basis, they must file a motion for certification.<sup>29</sup> In the types of class actions that typically comprise those with a plaintiff class of consumers seeking to recover monetary damages from one or more defendant corporations, the judge is essentially being asked to decide whether it is more efficient for those with claims similar to ones spelled out in the complaint to proceed collectively rather than individually, with the named plaintiffs' experiences acting as representative examples of the relevant questions of law and fact. The judge must agree that the issues common to both the representative plaintiffs and all the absent members of the proposed

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<sup>29</sup> Our primary goal in this particular section is to simply present an easily digestible version of what it would take to satisfy the various provisions in Rule 23. In actual practice, however, the prerequisites and requirements of the rule would be examined both independently and rigorously.

class predominate over any individual differences and that collective litigation is superior to alternative approaches.

The modern relationships between corporations and the consumers of their goods and services foster an environment in which litigation on a class action basis is possible. Company-wide practices that standardize contract language, sales presentations, advertising, employee training, employee incentive programs, billing and collections practices, customer service policies, and claim handling may lead to more efficient and more routinized operations, but, if they are alleged to be wrongful, then there is at least the chance that a judge would find the required level of commonality in the issues of fact and law affecting all class members.

For a class to be certified, the situation must be also one in which it would be impractical to name each member of the proposed class as an identified plaintiff, one in which the representative plaintiffs (as well as the attorneys seeking to act as class counsel) would fairly and adequately protect the interests of the absent class members, and one in which the claims of the representative plaintiffs are typical of all members of the class. Other factors that need to be considered include the difficulties that may arise in this type of mass litigation, the ramifications of concentrating all the claims into a single forum, the presence of similar litigation that may have been commenced elsewhere, and the interests of the proposed class members in pursuing their own claims on an individual basis.

In some ways, the motion itself changes the nature of the litigation. Class certification is no longer only a theoretical possibility; the federal rules urge that the decision on the motion be made at the earliest practicable time and, although a ruling by a judge would not necessarily be imminent, the looming potential of that decision colors how the parties interact. The plaintiffs might conduct additional and perhaps more intensive discovery aimed at issues surrounding certification, perhaps seeking the production of business records that detail transactions between the defendant and all proposed or potential class members, not just the named plaintiffs. The defense might intensify activity related to dispositive motions to resolve the litigation before certification (though if successful, the ruling would apply only to the named plaintiffs and not other members of the

proposed class). And the parties may enter into more focused discussions over the possibility of settlement, either to resolve only the claims of the named plaintiffs or to consider an agreement on a class-wide basis.

#### **THE CERTIFICATION DECISION**

If the matter has not been resolved prior to the point at which the judge finally addresses the question of certification, there may be a hearing on the motion with live testimony from witnesses or it may be decided solely on the basis of briefs, affidavits, and oral arguments. In cases in which the motion is contested, the defendants may, for example, assert that the circumstances surrounding the claims of the individual members of the proposed class are too varied to be reflected by the specific experiences of the representative plaintiffs, that the class definition is vague and overbroad, or that the representative plaintiffs do not even meet the proposed class definition. In theory, the merits of the litigation—in other words, the validity of the plaintiffs' factual and legal claims—are not before the judge when making the decision, but often the arguments made in support of and in opposition to the motion repeatedly address these issues anyway.

If certification is denied, the case is not dismissed. The claims of the named plaintiffs can continue on an individual basis and are subject to the same pretrial process as in routine civil litigation, including dispositive motion practice. And class treatment is not ruled out; there is usually nothing to prevent the filing of a new motion for certification, presumably after curing whatever defects led to the adverse ruling. At any stage of the litigation, voluntary dismissal can provide plaintiffs' attorneys with the opportunity to return to court at a later date with modified allegations, a different set of proposed representative plaintiffs, or a redefined class.

#### **CERTIFIED CASES**

If certification is granted, members of the class (however defined in the order) must be provided with notice that litigation on their behalf is under way. The notice usually explains that, should they wish to do so, members can opt out of the class by making a timely request for exclusion

from any outcome of the case and that, if they fail to make such a request, they will be bound by such resolution. A class member who does opt out then has the option of independently advancing his or her interests on an individual basis, assuming that the value of the claim is large enough to justify the costs of hiring counsel and initiating an individual lawsuit. The notice is supposed to be made to each class member individually if possible but, in many instances, it comes only in the form of publication in newspapers and other mass media. The attorneys who were appointed class counsel at the time of certification (usually, but not always, the attorneys who filed the original complaint on behalf of the named plaintiffs) bear the costs of such initial notice, though, if the class is able to reach a settlement or is successful at trial, such expenses can be recovered from the defendants.

Certified cases move toward trial in a manner similar to that seen in individual litigation with the exception that any verdict rendered at such a trial would now involve the aggregated claims of plaintiffs possibly numbering in the thousands or even millions. The stakes are thus raised to another level entirely, along with equally increased incentives for the defendants to pursue a negotiated settlement that would avoid the burden of discovery of the defendant's records on a class-wide basis and, most important, the unpredictable results of a trial. The end result is that, as is the situation for civil litigation generally, trials on a class basis are an extremely rare event. The defendant may continue to make dispositive motions or seek to decertify the class (perhaps through an interlocutory appeal of the certification decision to an appellate court if local rules so allow) but the pressure to settle may override all other considerations.

#### **SETTLED CASES**

The settlement agreement typically describes a finalized definition of the class, the total amount of money that the defendants are offering to resolve all claims of all class members and to cover all associated costs of the litigation (sometimes referred to as the *common fund*), the benefits available to individual class members, the mechanisms by which such compensation will be distributed, the terms of any prohibitions against the

defendant from continuing certain practices and policies in the future, the various responsibilities of class counsel and the defendants for paying for the costs of notice and other expenses, and, in some instances, the amount of attorneys' fees and expenses that class counsel will be seeking. In many common fund cases, class counsel fees and expenses as well as the costs of notice and settlement administration are deducted from the fund before distributing the remainder to class members. In other class action settlements, there is not a common fund per se but rather a promise on the part of the defendants to pay all successful claims plus any court-ordered expenses; such promises are often accompanied by a cap on total expenditures.

Unlike a typical civil case settlement, the judge must review and approve any agreement reached between the parties in a class action. This settlement review process is a critical one for the absent class members, as they have no practical way to supervise or control the decisions of class counsel or the representative plaintiffs who are legally responsible for safeguarding the interests of the class following certification. Another round of notice is sometimes initiated (though now with the defendants shouldering the costs), this time announcing that a proposed settlement has been reached and that the judge will consider approving the agreement at a hearing on a future date. Class members would also be given the option of objecting to the provisional terms of the agreement and sometimes, though not always, are also given a final opportunity to opt out at this late stage of the litigation. Objections can come in the form of written submissions filed with the court prior to the hearing or in the form of testimony at the hearing itself. In some instances, others who were not parties to the litigation, such as state attorneys general or public interest groups, may be allowed to intervene in the case and make their views known about various aspects of the agreement.

Fairness, reasonableness, and adequacy are the standards that judges use in deciding whether to approve the proposed agreement but without the input of objectors and intervenors, the judge is likely to hear only those arguments that are jointly advanced by class counsel and the defendants' attorneys in favor of approval. If the judge declines to approve (or informally indicates his or her reservations), there may be additional rounds

of negotiation, agreement, notice, and hearing to address the judge's concerns.

Class counsels' fees and expense reimbursements are subject to judicial approval as well, sometimes considered as a matter separate from review of the settlement agreement. In many settlements, fee awards and expense reimbursements will come out of the common fund and thus reduce the aggregate amounts available to individual class members; in others, defendants will pay fees and expenses on top of whatever they will be required to pay to the class.

While class counsel and the defendants may enter into a "clear sailing agreement" in which the defendant agrees not to contest class counsel's fee and expense request (or at least those requests below a certain maximum amount), ultimately it is up to the judge to decide the size of the fee award and the amount of expenses to be reimbursed. The calculus for making the fee award differs among jurisdictions, judges, and case types, but a typical approach involves awarding a percentage of the common fund. In instances in which injunctions are part of the settlement provisions, the fee percent might be applied to the sum of the common fund plus the estimated value of any projected benefit to class members derived from prohibitions on the defendant's practices in the future. Less common are situations in which the fees are determined by the "lodestar" method, in which class counsel is paid on the basis of hours worked at what the judge determines to be a reasonable hourly fee, adjusted by a multiplier intended to reflect the complexity of the case and the value of the services provided to the class. Lodestar calculations are the choice in class actions brought under so-called "fee-shifting" statutes (such as those related to antitrust or civil rights actions) that allow a court to order the payment of attorneys' fees to the prevailing party. Reimbursable expenses can include the costs of providing notice to the class of certification and opt-out procedures, as well as covering the same sorts of expenses often incurred in non-class litigation such as expert witness fees and travel.

## **SETTLEMENT DISTRIBUTION**

After approval, the distribution of the settlement benefits begins. Myriad approaches are commonly employed in settled class actions to deliver monetary compensation to the class. When the identities of class members are known, when their right to a share of the common fund and the appropriate level of such benefits can be determined in advance, and when there is an ongoing financial arrangement between the defendant and class members, the compensation is often automatically credited to existing accounts. In such instances, essentially all of the common fund, less class counsel fees and other expenses, will be distributed. In contrast, the circumstances of the litigation and the characteristics of the class may first require providing notice through mass media publication or direct mailing with the goals of informing the class of the fact of resolution and providing details about the claiming process. This process may require the submission of completed claim forms along with supporting documentation. Full distribution of the common fund is far less likely under these conditions. In some instances, compensation comes not in the form of credits to accounts or negotiable instruments but in the authority to have repairs performed at the defendants' expense or in coupons that can be redeemed for discounts against future purchases of the defendants' goods and services.

Class action settlements can also differ as to what happens when not all of the net common fund is distributed, perhaps as a result of some class members who were identified at the time of settlement approval failing to make successful claims or as a result of an inability to identify and contact all potential class members. In many instances, unclaimed funds revert back to the defendants while, in others, the defendants are required to pay the unclaimed funds to a third party such as a charitable organization (such alternative payment plans are usually referred to as *cy pres* or fluid recovery distributions). But there are no hard and fast rules here, and ultimately it is up to the judge to decide whether the size of the benefits available to individual class members as well as the notice, claiming, and distribution programs agreed to by class counsel and the defendants are in the best interests of the class.

## **OTHER COMMON SCENARIOS**

Because the explicit rules controlling class action procedures are sometimes tersely written and speak only in generalities, and because the circumstances of this type of litigation can differ greatly from case to case, there are countless variations on what might be thought of as the "standard" class process as described in this section.

Perhaps the most notable example of such a situation involves the certification of so-called *settlement classes* in which the judge conditionally approves a class solely for the purposes of negotiating or finalizing an agreement with the defendants. The defendants may stipulate that the prerequisites and requirements of Rule 23 have been satisfied but only for the limited purposes of submitting a proposed settlement agreement to the judge for review. Legal authority and commentators differ as to whether such provisional classes are appropriate in instances in which the same judge would not have granted certification had the request been one seeking full class treatment at trial, perhaps because of considerable diversity of legal and factual questions among class members. Such requests for provisional settlement classes are a common feature of cases where both the initial motion for certification and the motion for settlement approval are filed simultaneously. From the defendant's point of view, seeking only approval of a conditionally stipulated settlement class provides an opportunity to aggressively defend a subsequent motion for full certification should the proposed settlement fall through as a result of protests from objectors or other roadblocks.

Another common departure from our simplistic description occurs in situations where the attorneys for defendants and plaintiffs have successfully concluded settlement negotiations on a class basis even before the first motion for certification is made and, in some instances, before the original complaint is even filed. In such instances, the motion might be filed simultaneously along with a motion for approval of the proposed settlement agreement and there will be but a single opportunity for class members to opt out or object to either certification or the settlement. In some cases in which extensive pre-filing discussions have taken place (often coming on the heels of similar litigation in the same jurisdiction or other

states), the complaint, the motion for certification, and the motion for settlement approval might all be filed at the same time.

In other class action settlements, the claiming process might precede final settlement review. An unopposed or joint motion for preliminary class certification and preliminary settlement approval is filed and is quickly granted. Notice of preliminary certification is provided to the class along with information about an upcoming fairness hearing and the respective processes for opting out, objecting, and claiming (in many instances, the cut-off date for all three options is the same). Conceivably the judge could use information about the numbers of objectors, opt-outs, and claimants in the calculus of whether or not to formally certify the class and give final approval to the settlement. If the settlement is indeed approved following the hearing, then the distribution of funds to successful claimants can begin. If no approval is forthcoming, the submitted claim forms are essentially null and void though a more likely scenario is that whatever defects the judge felt to exist in the settlement will eventually be remediated, thus triggering benefit distribution.

## RESEARCH ON CLASS ACTION LITIGATION

Given the four decade period in which civil cases have had the ability to turn into mega-sized class actions with enormous consequences for plaintiffs and defendants, it may be surprising to learn that we do not know much about their numbers, their size, their outcomes, or changes in these measures over time. In this section, we begin by describing the main challenges to conducting research on this type of litigation, then summarize the empirical literature on class action in terms of research area and type of study.

### DATA LIMITATIONS

Researchers attempting to study class action litigation in the United States are continually confronted with the initial question of how to identify cases with class issues. Part of the problem is the fact that a class action is not a type of case based on a specific theory of liability such as medical malpractice or antitrust law that a court clerk can easily take note of at the time of filing. Rather, it describes a procedural concept that may or may not be officially applied to the case at some point in its life. The term certainly applies to those cases in which a judge has certified a class but it also applies, in a broader sense, to matters in which it is clear (from the filing of a motion for certification or even language used in the original complaint) that plaintiffs intend or reserve the right to seek formal class treatment.

Both orders for certification and the filing of the motion are procedural events that usually take place after case initiation, and many court information systems in this country are not equipped to routinely identify and keep track of this type of post-filing activity.<sup>30</sup> Conceivably, a

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<sup>30</sup> Courts have traditionally kept track of significant events in a case's life, such as the filing of a pleading (such as a motion for certification) or the entry of a judicial order (such as a decision to certify a class) in

clerk might be tasked with reading each new complaint for any indication of class allegations, but few courts can afford to allocate scarce administrative resources for this purpose. Moreover, class actions rarely reach the trial stage and many resolve quietly as voluntary dismissals, through dispositive pretrial judgments, or as a result of settlements on a non-class basis. Even though the process of approving class action settlements under Rule 23 and its state court equivalents are matters of public record, many, perhaps even most, escape the attention of the general media and even specialized legal publications.

Even when courts are able to identify which particular cases might have involved class allegations or were certified at some point, their own records and files do not provide much usable information. The most notable shortcoming involves the ultimate outcomes of the litigation, especially regarding the distribution of any settlement funds to class members. In far too many instances, judges may fail to require the parties to publicly report how many class members came forward to make claims against the fund, how many of those claims the settlement administrator approved, how much money was actually paid out, and what happened to the undistributed portion of the fund. In addition, some judges approve confidentiality orders that prohibit the class counsel and the defendant from publicly discussing any aspect of the case, including the final distribution to the class. This situation essentially prohibits outside researchers and even class members from learning how well the litigation process ultimately performed.<sup>31</sup>

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hard-copy ledgers known as *dockets*. Without eyes-on review of each of these dockets, cases that become class actions cannot be separated from those that do not. However, an increasing number of courts have adopted computerized case management systems that record all case events electronically; this practice should ultimately provide court administrators and researchers with a better means of identifying class actions in jurisdictions across the country.

<sup>31</sup> Equally problematic in terms of learning about the outcomes in class actions are those that are never certified. Here, privately negotiated settlements are common and, like all such resolutions in the U.S. civil justice system (with the exception of certified class actions, cases involving minors and incompetents, and a few specialized areas such as workers' compensation), the details of the agreements between the parties are

These sorts of methodological issues are not unique to class action research; problems in data collection exist in all civil justice scholarship. But they may explain why there has been comparatively little empirical work in this area compared, for example, with the large number of studies of medical malpractice litigation, jury behavior, punitive damage awards, auto claiming frequency and severity, and other key topics in the U.S. civil courts.

#### **EMPIRICAL STUDIES OF CLASS ACTIONS**

The following discussion presents selected class action research findings that have made major contributions to what little we do know about this type of litigation. It should be noted that the discussion does not include studies published prior to 1995, studies primarily based on data collected from appellate decisions (except those involving interlocutory appeals), studies focusing on mass actions in which the procedural vehicle for aggregating the litigation are large-scale consolidations or joinder of individual cases rather than Rule 23-type classes, or studies that are based on information collected in traditional types of individual party cases even if the results might be relevant to class actions as well.

#### **Types of Class Actions and Their Frequency**

As suggested earlier, there are no reliable numbers for total class action activity in this country. However, some studies have attempted to describe the relative proportion of filings in state and federal courts and to provide a sense of the types of claims that are being brought. Using searches of electronic databases containing general media reports, specialized business press reports, and reported judicial decisions from federal and state appellate cases as well as from selected federal trial court matters, a RAND Institute for Civil Justice study of class action litigation led by Deborah Hensler (Hensler et al., 2000) suggested that social policy reform cases, despite their importance in the development of

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completely beneath the radar of the court's, and therefore the public's, scrutiny.

the 1966 amendments to Rule 23, comprise only a minority of all class actions. Mass tort cases, though the subject of considerable attention by academics and legal scholars in recent years, also appear to take a back seat to the frequency with which securities and financial injury matters appeared in the sources reviewed by Hensler et al. The study also attempted to better understand the degree to which state courts handle class actions as compared with the federal courts. Hensler et al. suggested that there were about three reported judicial decisions regarding class actions in state courts for every two in federal courts, suggesting that state court class actions comprise a significant proportion of the total class action workload; however, the authors did not estimate the actual ratio of state to federal cases. Using a variety of data sources, they asserted that consumer cases, citizens' rights cases, and tort cases accounted for a larger fraction of state court class action cases than federal court class action cases, while the opposite was true for securities, employment, and civil rights cases.<sup>32</sup>

State courts also seemed to be the favored forum for at least one type of consumer class action claim. The RAND Institute for Civil Justice conducted a survey of insurance companies in the United States, seeking detailed information about the insurers' class action experiences as defendants over the period of 1992 through 2002 (Pace et al., 2007). The survey data showed that 89 percent of reported insurance class actions were originally filed in state courts.

One issue that has been a hallmark of the debate over class actions has been whether their numbers have grown over time. Hensler et al. (2000) also conducted interviews at 15 major corporations and 12 plaintiffs' law firms with national class action practices for perspective on the issue of growth. In these interviews, corporate representatives generally asserted that the number of attempted class actions had risen significantly in recent years with the largest number of suits reported by the financial services industry

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<sup>32</sup> This finding is consistent with Willging, Hooper, and Niemic (1996), who found that securities cases appeared to constitute the bulk of Rule 23(b) (3) certifications in federal courts, while civil rights and ERISA matters dominated Rule 23(b) (2) certifications.

(e.g., banks and insurers). Plaintiffs' attorneys also reported their caseloads growing.

Pace et al. (2007) also looked at filing trends. Twelve very large insurers reported that they could identify every certified or putative class action filed against them over the period of 1993 to 2002. The 431 reported cases reflected a 23.5 percent compound annual growth rate, with over six times as many cases filed in 2002 as in 1993.<sup>33</sup> But the growth in insurance class action litigation appeared to have slowed considerably in later years, a finding supported using additional data. A far more modest 5.3 compound annual growth rate in filings over a five year period was seen in the 382 cases reported by 24 very large insurers who could identify all class actions filed against them between 1998 and 2002.<sup>34</sup>

The most rigorous attempt at examining the numbers of class actions filed in federal courts was conducted by Thomas E. Willging and Emery G. Lee III (2007) of the Federal Judicial Center (FJC). Excluding class actions brought by pro se litigants, those involving prison conditions or habeas corpus claims, or where the United States government was a plaintiff, they estimated that an average of 5,300 class actions per year were filed in federal courts from July 2001 through June 2006 (these include both original filings and removals from state courts). They asserted that there were 46 percent more class actions filed in the last six months of their study period than in the first six months.

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<sup>33</sup> By way of comparison, using data from 17 states, the National Center for State Courts estimates that the total number of contract case filings in general and unified jurisdiction state courts increased by 21 percent from 1993 to 2002, for about a 2-percent compound annual growth rate (tort cases, in contrast, decreased by 5 percent over the same period) (National Court Statistics Project et al., 2003, pp. 23-28).

<sup>34</sup> Another attempt to ascertain the growth of class actions involved a Federalist Society survey of selected Fortune 500 companies with corporate or general counsel membership in tort reform advocacy organizations as well as large employers in Texas ("Analysis," 1999a; "Analysis," 1999b). The 32 companies responding to the survey reported that there were 14 times as many putative class actions pending against them in state courts during 1998 compared to 1988; in the federal courts, there was a four fold increase.

### **Choice of Forum and Movement Between Systems**

Forum choice is another topic that has received considerable attention in recent years. Hensler et al. (2000) looked at reports in the general media, business press, and judicial decisions and found that the cases mentioned in these sources were most often from the most populous states but that, when rated on the basis of cases per 100,000 residents, jurisdictions such as Alabama, Alaska, Colorado, Delaware, District of Columbia, Illinois, Louisiana, and Massachusetts could be considered hot states for class action activity.

Exploring the question of whether Louisiana and Texas courts attracted class action filings, Geoffrey Miller (2000) compared the experiences in those states with those in California and New York. Searching the published written opinions of trial court judges as the source for the cases in the study, Miller asserted that Texas' rate of class action litigation (when controlled for population) was below the national average, while Louisiana's was far above it and that both states had seen increased frequency of new cases.

John H. Beisner and Jessica Davidson Miller (2001) reviewed dockets and the court's computerized databases in Madison County, Illinois; Jefferson County, Texas; and Palm Beach County, Florida, to identify putative and certified class actions. The researchers concluded that the three counties chosen for the review experienced disproportionately high volumes of these cases when measured against the counties' populations and the size of each courts' overall workload. Because of the lack of data for statewide and national filing patterns, the researchers extrapolated the per capita figures for each county to national levels and concluded that the results for Madison County (42,349) and Jefferson County (22,331) had to be larger than the total number of state court cases across the country, which they thought "probably does not approach 20,000." They also identified what they believed to be rapid rises in the number of new class actions filed in these jurisdictions over the course of the study period, especially for nationwide classes. For example, one county had just two cases reported in one year and 39 two years

later.<sup>35</sup> Beisner and Miller felt that other measures helped to confirm that the courts had become magnets for multistate and nationwide class actions: Depending on the county, anywhere from none to half of the defendants sued were located outside the county, not all of the named plaintiffs were residents of the county of filing, most of the few law firms that brought the bulk of cases were located elsewhere, there was a large proportion of duplicate cases even within the same court, and a high percentage of cases sought national classes. However, it should be noted that the three courts chosen for the study have achieved not inconsiderable notoriety in the public debate over so-called "magnet courts" and it is not likely that the experiences seen on their dockets are typical of the nation's state courts generally.

Looking not at raw numbers of cases in particular jurisdictions but instead at the types of cases being filed, Pace et al. (2007) reported that some individual counties had a much higher percentage of state court insurance class actions seeking multistate classes than both the overall average for all cases in their data (17 percent of all state court filings sought a class involving citizens or residents of more than one state) and also exceeded the average reported for other counties in the same state. In Broward County, Florida, for example, 46 percent of the insurance class actions filed in state courts there were seeking multistate classes versus 11 percent for the state as a whole. Madison County, Illinois, had an even higher percentage (68 percent) of such cases, more than any other county with eight or more cases reported. The authors suggested that attorneys may be choosing these jurisdictions for multistate class litigation over other counties and states that would have been equally acceptable from a strictly procedural point of view.

In a follow-on work that used data from published trial court decisions involving class actions in six states as well as from class actions identified through an eyes-on review of files in a single county, Beisner and

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<sup>35</sup> An update of the figures for Madison County, Illinois, can be found in Beisner and Miller (2002).

Miller (2004) estimated the effects of then proposed federal legislation (similar to the subsequently enacted *Class Action Fairness Act of 2005*) that would have expanded federal diversity jurisdiction to include class actions involving citizens of different states and \$5 million or more in aggregate claims. According to the authors, "More than half of the class actions for which decisions were available on-line would not be removable under the bill." However, the researchers were unable to assess the dollar value of the aggregate claims in the remaining cases; thus they could not say with certainty how many of the potentially removable matters met the \$5 million threshold.<sup>36</sup>

In contrast, Pace et al. (2007) suggested that the potential impact of the *Class Action Fairness Act of 2005* (CAFA) on removals from state to federal court could be dramatic, at least insofar as insurance class actions were concerned. Using survey data from insurers regarding class actions in which they had been defendants, the RAND study team found that 89 percent of the reported cases that had been filed in state courts involved either a multistate class of plaintiffs or an out-of-state corporate defendant, either of which would satisfy the first of CAFA's two liberalized tests for diversity of citizenship removal. While the study team was unable to determine whether or not the underlying amounts in controversy in each of these cases exceeded \$5 million (CAFA's second test), 37% of the settlements of certified insurance class actions involved common funds of at least that size. However, the value of such settlements are typically less than what the parties might have originally claimed the case to be worth in terms of potential losses to class members, suggesting that a much greater fraction of the state court cases reflecting interstate citizenship might be eligible for removal under CAFA.

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<sup>36</sup> It should be noted that the Hensler et al. (2000) study, the Miller (2000) study of Gulf State class action activity, and the Beisner and Miller (2004) study of the effects of Senate bill 2062 all used published trial court opinions (and sometimes media reports) for their identification of class action activity levels, a technique that would inevitably result in a shortfall of the actual count of these cases.

Willging and Lee (2007) saw evidence of such movement from state to federal courts following the enactment of CAFA in February of 2005. Filings and removals based on diversity of citizenship jurisdiction in the federal courts averaged 27 cases per month in the last calendar year before the act's passage. From July of 2005 through June of 2006, that rate had increased to 53.4 cases per month.<sup>37</sup>

A Federalist Society survey of attorneys indicating in the Martindale-Hubbell lawyer directory that class actions formed at least a part of their practice received responses from 464 plaintiffs' attorneys and 61 defense attorneys ("Federalist Society Surveys Class Action Lawyers," 1999; "Summary of Survey," 2001). About 58 percent of the plaintiffs' attorneys and 73 percent of the defense attorneys agreed with the assertion that greater incentives to file class actions in state courts were available because of tighter requirements for certification mandated by the federal appellate courts. But the attorneys' perception of an easier path to certification in state courts generally may not reflect the actual situation, as suggested by a study by Thomas E. Willging and Shannon R. Wheatman (2005) of the Federal Judicial Center (FJC). Willging and Wheatman surveyed attorneys from a sample of class actions litigated at least at some point in the federal courts (many of which were originally filed in state courts but subsequently removed by one of the parties). The attorney's choice of federal versus state court appeared to be related to his or her perceived attitude of judges about the issues of class certification and level of scrutiny for any proposed settlements (to a lesser degree, the applicable law within the jurisdiction, the residence of the potential class members, and the location of the incident in question also played a role in their opinions). Nevertheless, the information collected during the survey suggested that both forums were equally unlikely to certify cases as class actions. State court settlement

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<sup>37</sup> Interestingly, much of the increase was due to a jump in original filings rather than removals from state courts. It is possible that plaintiffs' attorneys are either taking advantage of what they feel to be a new opportunity to litigate their class actions in a federal forum or are proactively filing in federal court to avoid any delay that would be triggered by an anticipated removal effort by the defendants.

funds were generally larger than those in federal courts but the numbers of class members were typically larger as well, ultimately leading to smaller individual awards.

In addition to changes in the rules regarding federal diversity jurisdiction, other factors can affect movement between state and federal systems as well. Robert J. Niemic and Thomas E. Willging (2002) of the FJC looked at the number of federal court filings following the Supreme Court's decision in *Amchem Products v. Windsor* (1997) and *Ortiz v. Fibreboard Corp.* (1999) that were thought to make it more difficult for federal judges to certify settlement classes in mass tort cases, especially when the settlement included future claimants. The study was designed to explore the possibilities that plaintiffs would be filing fewer cases in federal courts as a result, that defendants would be more likely to seek removal, and that there would be fewer class actions resulting in settlements. Although the researchers did find statistically significant changes in filing patterns following the delivery of the Supreme Court's decisions, they were unable to distinguish the effects of the opinions from other factors that might have also affected filings. Subsequently, Willging and Wheatman (2002) used a set of cases similar to the ones employed in their study of attorney decisionmaking regarding choice of forum to conduct further exploration into *Amchem* and *Ortiz's* impact. Surveys of attorneys involved in class actions terminated in federal court (regardless of origin) suggested that neither opinion directly affected the plaintiff's choice of filing forum or the defendant's decision to remove the case from state court in most instances.

### **Origins**

To try to understand the origins and outcomes of class actions, Hensler et al. (2000) performed intensive case studies of 10 selected financial injury and mass tort class actions. In even such a limited number of cases, the authors found a wide range in the roles of the class action attorneys in initiating the lawsuits (ranging from discovering the alleged unlawful practice independently to responding to specific complaints from clients to simply "jumping onto a litigation bandwagon" that other attorneys had already begun), in the responses of defendants (ranging from aggressive defense of

the allegations to almost immediately joining with the plaintiffs' attorney to seek approval of a settlement), and in the choice of forums (ranging from a local court over a matter of limited geographical scope to remote rural counties far removed from the majority of class members). The range of values seen in the case studies was not asserted to reflect the minimums and maximums present in contemporary U.S. class actions; rather, the intent was to explore the notion that "all class actions are alike" and to suggest that proposals for reform need to take into account the wide variety of claims and outcomes to target cases that need addressing and to avoid a chilling effect on class actions in which the public interests were being served adequately.

### **Duplicative Actions**

An FJC study led by Thomas E. Willging (Willging, Hooper, and Niemic, 1996) that is considered to be the most comprehensive and thorough description of class action litigation available found that 20 percent to 39 percent of the class actions in four federal district courts studied appeared to be related to other cases as reflected by intradistrict or multidistrict litigation consolidations or were duplicative or overlapping in terms of the issues in the cases, perhaps lending credence to a claim that class actions are often marked by a race to the courthouse in order for the filing attorney to be named as lead counsel. But only a fraction of these related cases were not already subject to consolidation with similar litigation pending in state or federal court. The authors felt that, although the non-consolidated duplicative cases exhibited procedural problems, the problems were not insurmountable. It should be noted that the Willging, Hooper, and Niemic study would have had only cases in the four districts to use for determining whether there were non-consolidated overlapping cases elsewhere; thus, the true count might have been much higher.

Another FJC study by Willging and Lee III (2007) asserted that 37 percent of 26,000 class actions filed in federal courts from July 2001 through June 2006 involved either intradistrict or multidistrict consolidations.

The Federalist Society took another approach to the question of duplicative cases with a survey of Fortune 500 companies with corporate or

general counsel membership in tort reform advocacy organizations ("Analysis," 2002). The 24 companies that responded indicated that, between 1990 and 2000, they had been involved in 465 clusters of multiple cases concerning essentially the same facts and the same type of plaintiffs (one responding company, however, accounted for about half of the total). About a third of the clusters involved similar cases only in state courts, four out of ten were in federal courts only, and the remainder had cases in both systems. About one out of four clusters were reported to have the same plaintiffs' attorney involved in at least two of the cases within the cluster. The largest of the clusters reportedly involved more than 100 separate cases.

#### **Amounts in Controversy and the Scope of the Proposed Class**

Willging, Hooper, and Niemic (1996) thought that the amounts generally sought by class members in federal cases appeared unlikely to support individual lawsuits. The largest median per-member award (not reduced for attorneys fees) in the four districts studies was \$528 and the maximum award was \$5,331, a level that was not believed to be able to induce private attorneys to represent on a contingency fee basis or worth the cost for individuals to retain counsel, regardless of whether the case involved securities.

Pace et al. (2007) reported that in the vast majority of reported insurance class actions (82 percent), the class consisted of residents of a single state. National classes were sought in 15 percent of the cases, and the remainder involved residents of two or more specifically identified states. Multistate classes (which include both national classes and classes involving members from two or more states) were sought in about 17 percent of state court filings.

The Federalist Society's survey that used responses from 32 companies (either Fortune 500 companies with corporate or general counsel membership in tort reform advocacy organizations or large employers in Texas) indicated that 27 percent of the class actions pending in state courts against the respondents were seeking plaintiff classes with members from two or more states ("Analysis," 1999b). A follow-up survey of companies with representation on boards of defense-oriented associations (not including

those on the first survey) indicated that 73 percent of the state court actions involving the 31 responding companies had proposed or actual multistate classes ("Analysis," 1999b). The difference in the figures reported in the two surveys was thought to be related to the larger proportion of toxic tort and property damage cases (and the correspondingly smaller proportion of consumer fee and fraud cases) in the first set of respondents. The initial survey reported that 86 percent of the cases pending in 1988 involved classes of fewer than 10,000 members and none was over a million; cases pending in 1998 had a greater proportion of larger classes, with 53 percent having 10,000 or fewer members and 15 percent with over a million ("Additional Findings," 1999).

### **The Certification Decision**

Willging, Hooper, and Niemic (1996) reported median times from the filing of a motion for certification to the decision of 2.8 to 8.5 months in four federal district courts. The decisions generally took place after rulings on motions to dismiss or for summary judgment. Over half of the cases had some sort of opposition raised against certification. In the end, certification occurred in 37 percent of the cases (with the defendants stipulating to certification or failing to oppose the motion in about half of these cases).<sup>38</sup> Of the certified cases, 39 percent contained classes certified for the purposes of settlement only and, of these, 40 percent had the proposed settlement submitted at about the same time as the motion for certification. In 86 percent of such cases with simultaneous motions for certification and approval, the judge approved the settlement without any changes.

Using data from Alabama state courts, Stateside Associates (1998 [2000]) examined court records in six selected counties over a two-year period to identify putative and certified class actions. The researchers found 91 such

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<sup>38</sup> In actuality, not all classes sought involved plaintiffs, but defendant classes were at issue in only four out of the 407 cases in the study. For purposes of simplification, the discussion herein speaks only of plaintiff classes against individual defendants.

cases, of which 43 were ultimately certified (many of the uncertified cases were still open at the time that data collection ended). In 38 of the 43 certified cases, the class was certified *ex parte* (i.e., prior to the point at which the defendants have been served or filed an answer) and often on the date the complaint was filed. However, it is not clear why the researchers chose the six specific counties over others in the state of Alabama.

Pace et al. (2007) examined a set of cases seeking class action status where insurers were defendants in order to calculate the rate of certification. Only 14 percent of the cases in the data set wound up with certified classes. The judges denied certification in 11 percent of the cases, and the remainder—about 75 percent of the total—never had a decision either way. The median and mean times from the filing of the motion to the decision were 212 and 274 days respectively, but in 10 percent of the cases it was less than 46 days or less, a period that might not provide an opportunity for thoughtful review as contemplated in the federal rules.

Brian Anderson and Patrick McLain (2004) assessed the use of the more liberal rules for interlocutory (i.e., prior to final judgment) appellate review of certification decisions in federal court (Anderson and McLain, 2004). After the courts of appeals were given the discretion to hear appeals of orders to approve or deny certification,<sup>39</sup> the number of interlocutory reviews increased from 1.8 per year to 4.4. Of 53 requests for review, 44 were granted with some circuits granting every petition. Defendants filed four times as many petitions and, when petitions were granted, defendants won 70 percent of the appeals.

### **The Pretrial Process and Case Resolution**

The Willging, Hooper, and Niemic (1996) study found that about two out of three cases in four federal districts had a ruling on some sort of dispositive issue such as a motion to dismiss or a motion for a summary

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<sup>39</sup> Prior to the federal rule change in 1998, interlocutory review was only possible if the court making the initial certification decision certified an order for immediate review or if the court of appeals issued a writ of mandamus.

judgment. Overall, about three out of ten cases were terminated as a result. Based on data collected about the decisions made prior to and after certification, the authors felt that it would be wrong to assume that there are no judicial examinations of the merits of the claims in federal class actions. There were mixed results as to whether judges performed such merit decisions before or after certification depending on the specific rules and opinions applicable to the individual district. Motions to dismiss were filed and ruled upon more frequently than in traditional civil cases.

In their study of insurance class actions, Pace et al. (2007) found striking differences in final outcomes depending on the status of the motion for certification. For all attempted class actions (including those where formal class status was sought but not ordered), a negotiated settlement that bound a certified class took place in only 12 percent of all closed cases. Settlements involving only the small number of plaintiffs specifically named in the original filings, and not a class, occurred in 20 percent of the cases. The judge ruled in favor of the defendant on some sort of dispositive pretrial motion in 37 percent of the cases. In 27 percent of the cases, plaintiffs dismissed their complaints voluntarily, presumably without prejudice, which would have allowed them to refile the same case later. For class actions in which the plaintiffs made a motion for certification, however, the distribution of outcomes changed considerably. Class settlement in those cases was much more likely, with 34 percent of all cases resulting in a settlement for a certified class. The frequency with which plaintiffs voluntarily dropped their cases was reduced to 15 percent, as were pretrial dispositive rulings for the defense (27 percent). Individual settlements occurred in 20 percent of cases with a motion for certification. When a class was in fact certified, the end result in 90 percent of such cases was a class settlement while just 4 percent involving a subsequent dispositive ruling for the defense.

#### **Notice to the Class and Hearing**

Willging, Hooper, and Niemic (1996) study found a small number of cases in its sample drawn from four federal districts in which no notice to the class regarding settlement was given and in which no hearings on settlement

approval were held. Even when notice was provided, a substantial number of cases had such notice delayed until time of resolution, presumably to shift such costs directly to defendants. Most notice processes included individual notice to class members along with publication and the median cost of notice exceeded \$36,000. About a quarter of the certified cases in which notice was made included some sort of litigation activity over the nature of that notice. In the authors' view, typical settlement notices reviewed failed to provide the net amount of the settlements, the estimated sizes of the class, any estimates of the size of the individual recoveries, the amounts of attorneys' fees, or the costs of administration and other expenses (however, claiming procedures and the processes for opting out or objecting were usually explained). It should be noted that the Willging, Hooper, and Niemic study came at a time when less-than-adequate attention might sometimes have been paid to the important question of providing realistic and informative notice to the class. In subsequent years, practices may well have improved as a result of revisions to the federal rules.<sup>40</sup>

#### **Opt-Outs, Objectors, and Intervenors**

Willging, Hooper, and Niemic (1996) found that, although opt-outs do occur in a substantial number of cases, the total number of potential class members requesting exclusion is usually quite small: 75 percent of the cases with any opt-outs at all had rates of 1.2 percent or less (none of the cases studied involved opt-in procedures for the purpose of being included in the certified class). About half of the cases with settlement hearings involved objectors, either by in-person appearance or by written objection, but, in the end, the courts approved 90 percent or more of the proposed settlements without changes. Outside intervention was infrequent.

Theodore Eisenberg and Geoffrey P. Miller (2004b) reviewed published trial court opinions and concluded that opt-out and objector rates in class

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<sup>40</sup> In 2003, FRCP 23(c)(2)(B) was revised to require that notice be written "concisely and clearly" and in "plain, easily understood language." Moreover, new examples have been developed by the FJC to guide federal judges in approving proposed notice (see Federal Judicial Center, undated).

actions are usually tiny percentages of total class size. The level of dissent (using opt-outs and objectors as the measure) appeared to be inversely related to class size and directly related to per-member class recovery (proposed, not actual); dissent was also found to be more common in mass torts and civil rights cases, with the data suggesting a decrease in frequency over time. No relationship was found between opt-out or objector rates and the amount of fees awarded, regardless of whether the rates are compared to absolute size of fees or the percentage that the fee comprises of the total fund. Settlements that were not approved by the judge in the form originally presented had higher objection rates than those that were approved; interestingly, the percentage of the class opting out was much larger in approved settlements.

### **Features of Settled Class Actions**

#### Generally

Hensler et al. (2000) saw large variation in just ten case studies in the size and scope of the claims both individually (ranging from less than a \$5 loss per class member to allegations of death) and in the aggregate (total compensation ranging from less than \$1 million to more than \$800 million), in changes in defendant practices (ranging from direct or indirect to no meaningful change), in attorneys' fees as a percent of negotiated settlement value (ranging from 5 percent to 50 percent, with most of the case studies reflecting percents of one-third or less), and in such important areas such as the process for certification, the types of notice provided to the class, the manner in which claims could be made, intervenors' roles, and the oversight of fee award requests.

Focusing on five selected federal court cases involving mass torts that resulted in proposed settlement classes, Jay Tidmarsh (1998a, 1998b) found marked variation in the procedures and standards used to certify the class and rule on the fairness of the settlement, the manner in which notice was provided, and the basic terms of the resolution of the cases. Tidmarsh believed that variations observed and concerns over inadequacy of the representation afforded to the plaintiffs' class suggested that guidelines were needed for handling future mass tort settlement case actions.

### Settlement Size

Willging, Hooper, and Niemic (1996) found that the median recoveries for individual class members (based on the potential value at the time of settlement) in four selected federal district courts ranged from \$315 to \$528 with maximum awards of approximately \$5,300. Only a few cases resulted in per-member awards of less than \$100, suggesting that such cases are outliers compared with all class action recoveries in federal courts. Trial rates for non-prisoner federal class actions were generally the same for all types of claims. But federal class actions took considerably longer to resolve than non-class cases and consumed five times as much in terms of judicial resources, whether or not certified. Most certified cases (excluding those certified only for the purposes of settlement) resulted in class settlements; depending on the district, the rate ranged from 62 percent to 100 percent (for those not certified, 20 percent to 30 percent resulted in individual settlements with the rest mostly being disposed of by motion). Four percent of class actions resulted in a trial.

Eisenberg and Miller (2004a) collected information about settlement size in cases from 1993 through 2002 using two different sources. In the 370 cases they found by searching published legal opinions, the mean recovery in 2002 dollars was \$100 million and the median \$11.6 million. In the 630 cases contained in data from *Class Action Reports* for the same period, the comparable numbers were \$35.4 million and \$7.6 million, a difference attributable to the much higher percentage of securities class actions in that publication. Addressing the issue of changes over time using both data sets, the researchers could "find no robust evidence that either recoveries for plaintiffs or fees of their attorneys as a percentage of the class recovery increased during the time period studied."

### Fees

The Eisenberg and Miller (2004a) study also compared fee decisions with settlement size. The cases found in the data sources the researchers used suggested that the percentage that the fees represented of the overall recovery decreased as the recovery increased, regardless of whether the matter involved fee-shifting statutes employing the lodestar method. The study

found that “high risks” inherent in the litigation (the researchers used the wording employed by the judge as an indicator of the level of risk) and federal court jurisdiction were associated with higher fees. But other potential determinants (such as the presence of objectors, the use of settlement classes, or the inclusion of injunctive relief or coupon redemption schemes into the settlement) did not seem to have statistically significant effects on fee size. Overall, the mean fee award in non-fee-shifting cases was 21.9 percent and the median was 23.2 percent.

One of the sources of data for the Eisenberg and Miller fee study (2004a) was a report by Stuart J. Logan, Jack Moshman, and Beverly C. Moore (2003). Using 1,120 cases collected by Class Action Reports, the authors estimated that the average contingency fee rate was 18.4 percent across all type of claims, though cases in which the fund size was under \$10 million had average contingency fees just over 30 percent.

The Eisenberg and Miller fee study (2004a) received wide publicity because of the subsidiary assertion of relatively flat recoveries and fee percentages over the 10-year period (see, e.g., Glater, 2004). One critical review by George L. Priest (2005) that reexamined the tables in the Eisenberg and Miller fee study claimed that the true average common fund size (recovery for the class plus attorneys’ fees plus reimbursed ancillary costs and expenses) was closer to \$140 million in 2002 dollars (compared to \$100 million reported by Eisenberg and Miller) and that the average for the top 10 percent of cases exceeded \$1 billion. It was also asserted that securities class actions were overrepresented and that important case types such as civil rights, employment, ERISA benefits, and mass torts were underrepresented in the data (as were reported decisions that did not discuss fees), resulting in misleading findings regarding outcomes. Priest’s recalculation of average aggregate settlements and judgments per year of about \$5 billion was accompanied by a claim that such a number would have to be multiplied by “five, ten, or twenty times” or perhaps “twenty to forty times” to approach the real magnitude of all class action outcomes. Moreover, Priest suggested that, because of the potential impact that class actions can have on a company or an industry, the mean and median figures for outcomes were far less important than what might be thought of as outliers, the cases

that cast the longest shadow over defendants' decisions to litigate a certified case to an unknown conclusion or to choose the certainty of settlement, even at a premium price. Priest also criticized the study for failing to take non-certified putative class actions into account when calculating the overall financial impact of class action litigation.

In the Willging, Hooper, and Niemic (1996) study, both mean and median fee rates (when they could be calculated from the monetary award to the class) ranged from about 24 percent to 30 percent depending on the district. When the fees exceeded 40 percent, the cases usually involved non-quantifiable benefits (such as injunctions) or relatively small fund sizes. Percentage of the recovery calculations (rather than the lodestar) were used most often when a distribution fund was created.

In some instances, competing attorneys submit bids to the judge supervising the class action containing amounts requested for handling the case; the court then selects the lead class counsel primarily based on that basis, though other qualitative factors (such as prior experience in handling similar litigation) is often taken into account as well. In theory, the auction replicates to some degree the private marketplace that is generally absent in class action litigation as a result of the attorney choosing the clients and not the other way around. Laural L. Hooper and Marie Leary (2001) examined the procedures and outcomes in 14 federal class actions in which fee auctions were employed, 12 of which involved securities litigation (Hooper and Leary, 2001). Judges chose the lowest bidder in all of the cases for which the information for making that assessment was available to the researchers. Perhaps as a result, the majority of the fee awards in these cases were 9 percent or less of the common fund (with the highest at 22.5 percent), markedly smaller than what had been reported by Willging, Hooper, and Niemic (1996) for federal court class actions generally.

#### Rates of Claiming

There is often a significant difference between what was asserted to be available to class members in the form of a compensation fund created at the time of settlement and what was actually distributed after class members successfully meet the requirements for making claims against that fund. A

lack of knowledge that a class action had been initiated, a lack of knowledge that a settlement had been reached, a lack of knowledge of how to make a claim, and a lack of interest in expending the time and effort needed can result in significant portions of the fund going unclaimed and, in many instances, reverting back to the defendants. In the Hensler et al. (2000) study, the percent of the settlement funds that was actually paid to class members in 10 illustrative class actions ranged from 100 percent to about 30 percent, with some subclasses receiving less than 1 percent. Viewing settlement outcomes from the perspective of actual distribution rather than the hypothetical available value may lead to different conclusions about the adequacy of the settlement and the value of the litigation. In the case studies, attorneys' fees as a percentage of actual settlement value when disbursements to class members are taken into account were as high as 50 percent, with half of the case studies reflecting percentages of one-third or more. In one of the case studies, transaction costs (excluding defense costs) as a percentage of actual settlement value was 75 percent.

The rates of claiming observed by Hensler et al. (2000) appeared to be influenced by the mechanisms incorporated in the settlement agreement for providing notice to class members of the case's resolution and the process for making claims, the use of automatic distribution schemes versus the need for class members' affirmative action to participate (such as clipping a claim form out of a newspaper announcement and mailing it in), and individual claim size. Despite the clear need for judges to have access to reliable data on how different approaches result in better or worse claiming rates when assessing a settlement's adequacy, it does not appear that any comprehensive empirical study has directly assessed this question for monetary damage class action settlements generally. This gap in knowledge appears to be primarily due to the judges' own failure to routinely require parties to publicly report on the final distribution of the settlement fund. Reflecting this problem, Willging, Hooper, and Niemic (1996) remarked that "Unfortunately, the parties generally did not report the number of claims received; thus, our data on claims received are too incomplete to present."

A survey of insurance class actions conducted by Pace et al. (2007) found that the number of actual beneficiaries of a compensation fund was

often much smaller than the class size estimated by the parties at the time of settlement review. In 10 of the 29 cases in which both the potential class size and the number of claims paid were reported, 100 percent of the projected number of class members received some amount of direct compensation. In one case, however, less than 1 percent of the estimated total was paid. The average case paid benefits to 45 percent of the estimated number of class members at the time of settlement, while the typical case had a much smaller claiming rate, with a median percentage of just 15 percent. The effectiveness of the settlement distribution plans proposed by the parties and approved by the judges did not improve much when viewed from the standpoint of dollars paid out rather than number of successful claimants. In some instances, the total payout represented a just fraction of the net compensation fund (which is the total common fund less class attorneys' fees and expenses) theoretically available to the class at the time of settlement. In seven of the 23 cases with complete information, fund distribution rates were at or near 100 percent (the median was 79 percent). But another quarter of the cases reflected a fund distribution rate of 13 percent or less and, in three instances, only 4 percent of the original net compensation fund was paid out.

Because of the low rates of distribution reflected by some of the cases in their data, Pace et al. (2007) suggested that the effectiveness of class counsel at putting compensation into the pockets of class members might be measured by using the size of the actual monetary distribution to the class as the benchmark for calculating attorneys' fee and expense awards, rather than the size of the proposed benefit argued at the time of settlement review. "Effective" fee and expense percentages—in other words, ones based on the fee and cost awards divided by the sum of the distributed benefits, attorneys' fees, and other costs—increase to a median average of 47 percent (based on 36 cases in which this information was available), compared to a median of 30 percent when the common fund size is used as the denominator as is traditionally done. In a quarter of these cases, the effective fee and cost percentages were 75 percent or higher and, in 14 percent (five cases), the effective percentages were over 90 percent.

**Court Resources**

Using data from a federal court time study of judicial involvement in various types of cases, Willging, Hooper, and Niemic (1996) compared the time required to process 51 class actions with that required to process 8,269 other civil cases and found that class actions required 4.71 times more effort than the average civil case. Certified cases required about 5.5 times more effort than uncertified class actions.

## KEY RULES OF COURT AND STATUTORY AUTHORITY

### FEDERAL RULES OF CIVIL PROCEDURE RULE 20

#### Rule 20. Permissive Joinder of Parties

##### (a) Permissive Joinder.

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

##### (b) Separate Trials.

The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or make other orders to prevent delay or prejudice.

### FEDERAL RULES OF CIVIL PROCEDURE RULE 23

#### Rule 23. Class Actions

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

**(b) Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

**(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.**

(1)(A) When a person sues or is sued as a representative of a class, the court must--at an early practicable time--determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c) (1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b) (1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b) (3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,

- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c) (3).

**(3)** The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

**(4)** When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**(d) Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**(e) Settlement, Voluntary Dismissal, or Compromise.**

**(1)(A)** The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

**(B)** The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

**(C)** The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

**(2)** The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e) (1) must file a statement identifying any

agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

**(3)** In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

**(4)(A)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

**(B)** An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

**(f) Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

**(g) Class Counsel.**

**(1) Appointing Class Counsel.**

**(A)** Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

**(B)** An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

**(C)** In appointing class counsel, the court

**(i)** must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

**(ii)** may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

**(iii)** may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

**(iv)** may make further orders in connection with the appointment.

**(2) Appointment Procedure.**

**(A)** The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g) (1) (B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

**(h) Attorney Fees Award.** In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

**(1) Motion for Award of Attorney Fees.** A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d) (2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

**(2) Objections to Motion.** A class member, or a party from whom payment is sought, may object to the motion.

**(3) Hearing and Findings.** The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

**(4) Reference to Special Master or Magistrate Judge.** The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d) (2) (D).

## **FEDERAL RULES OF CIVIL PROCEDURE RULE 23.1**

### **Rule 23.1. Derivative Actions by Shareholders**

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or

compromise shall be given to shareholders or members in such manner as the court directs.

#### **FEDERAL RULES OF CIVIL PROCEDURE RULE 23.2**

##### **Rule 23.2. Actions Relating to Unincorporated Associations**

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

#### **FEDERAL RULES OF CIVIL PROCEDURE RULE 42**

##### **Rule 42. Consolidation; Separate Trials**

###### **(a) Consolidation.**

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

###### **(b) Separate Trials.**

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

#### **THE CLASS ACTION FAIRNESS ACT OF 2005**

**SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.**

(a) SHORT TITLE- This Act may be cited as the 'Class Action Fairness Act of 2005'.

(b) REFERENCE- Whenever in this Act reference is made to an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of title 28, United States Code.

(c) TABLE OF CONTENTS- The table of contents for this Act is as follows:

Sec. 1. Short title; reference; table of contents.

Sec. 2. Findings and purposes.

Sec. 3. Consumer class action bill of rights and improved procedures for interstate class actions.

Sec. 4. Federal district court jurisdiction for interstate class actions.

Sec. 5. Removal of interstate class actions to Federal district court.

Sec. 6. Report on class action settlements.

Sec. 7. Enactment of Judicial Conference recommendations.

Sec. 8. Rulemaking authority of Supreme Court and Judicial Conference.

Sec. 9. Effective date.

**SEC. 2. FINDINGS AND PURPOSES.**

(a) FINDINGS- Congress finds the following:

(1) Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.

(2) Over the past decade, there have been abuses of the class action device that have--

(A) harmed class members with legitimate claims and defendants that have acted responsibly;

(B) adversely affected interstate commerce; and

(C) undermined public respect for our judicial system.

(3) Class members often receive little or no benefit from class actions, and are sometimes harmed, such as where--

(A) counsel are awarded large fees, while leaving class members with coupons or other awards of little or no value;

(B) unjustified awards are made to certain plaintiffs at the expense of other class members; and

(C) confusing notices are published that prevent class members from being able to fully understand and effectively exercise their rights.

(4) Abuses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution, in that State and local courts are--

(A) keeping cases of national importance out of Federal court;

(B) sometimes acting in ways that demonstrate bias against out-of-State defendants; and

(C) making judgments that impose their view of the law on other States and bind the rights of the residents of those States.

(b) PURPOSES- The purposes of this Act are to--

(1) assure fair and prompt recoveries for class members with legitimate claims;

(2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and

(3) benefit society by encouraging innovation and lowering consumer prices.

**SEC. 3. CONSUMER CLASS ACTION BILL OF RIGHTS AND IMPROVED PROCEDURES FOR INTERSTATE CLASS ACTIONS.**

(a) IN GENERAL- Part V is amended by inserting after chapter 113 the following:

**CHAPTER 114--CLASS ACTIONS**

Sec.

1711. Definitions.

1712. Coupon settlements.

1713. Protection against loss by class members.

1714. Protection against discrimination based on geographic location.

1715. Notifications to appropriate Federal and State officials.

Sec. 1711. Definitions

In this chapter:

(1) CLASS- The term 'class' means all of the class members in a class action.

(2) CLASS ACTION- The term 'class action' means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was

originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

(3) CLASS COUNSEL- The term 'class counsel' means the persons who serve as the attorneys for the class members in a proposed or certified class action.

(4) CLASS MEMBERS- The term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(5) PLAINTIFF CLASS ACTION- The term 'plaintiff class action' means a class action in which class members are plaintiffs.

(6) PROPOSED SETTLEMENT- The term 'proposed settlement' means an agreement regarding a class action that is subject to court approval and that, if approved, would be binding on some or all class members.

#### Sec. 1712. Coupon settlements

(a) CONTINGENT FEES IN COUPON SETTLEMENTS- If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney's fee award to class counsel that is attributable to the award of the coupons shall be based on the value to class members of the coupons that are redeemed.

(b) OTHER ATTORNEY'S FEE AWARDS IN COUPON SETTLEMENTS-

(1) IN GENERAL- If a proposed settlement in a class action provides for a recovery of coupons to class members, and a portion of the recovery of the coupons is not used to determine the attorney's fee to be paid to class counsel, any attorney's fee award shall be based upon the amount of time class counsel reasonably expended working on the action.

(2) COURT APPROVAL- Any attorney's fee under this subsection shall be subject to approval by the court and shall include an appropriate attorney's fee, if any, for obtaining equitable relief, including an injunction, if applicable. Nothing in this subsection shall be construed to prohibit application of a lodestar with a multiplier method of determining attorney's fees.

(c) ATTORNEY'S FEE AWARDS CALCULATED ON A MIXED BASIS IN COUPON SETTLEMENTS- If a proposed settlement in a class action provides for an award of coupons to class members and also provides for equitable relief, including injunctive relief--

(1) that portion of the attorney's fee to be paid to class counsel that is based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (a); and

(2) that portion of the attorney's fee to be paid to class counsel that is not based upon a portion of the recovery of the coupons shall be calculated in accordance with subsection (b).

(d) SETTLEMENT VALUATION EXPERTISE- In a class action involving the awarding of coupons, the court may, in its discretion upon the

motion of a party, receive expert testimony from a witness qualified to provide information on the actual value to the class members of the coupons that are redeemed.

(e) JUDICIAL SCRUTINY OF COUPON SETTLEMENTS- In a proposed settlement under which class members would be awarded coupons, the court may approve the proposed settlement only after a hearing to determine whether, and making a written finding that, the settlement is fair, reasonable, and adequate for class members. The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties. The distribution and redemption of any proceeds under this subsection shall not be used to calculate attorneys' fees under this section.

Sec. 1713. Protection against loss by class members

The court may approve a proposed settlement under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member only if the court makes a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss.

Sec. 1714. Protection against discrimination based on geographic location

The court may not approve a proposed settlement that provides for the payment of greater sums to some class members than to others solely on the basis that the class members to whom the greater sums are to be paid are located in closer geographic proximity to the court.

Sec. 1715. Notifications to appropriate Federal and State officials

(a) DEFINITIONS-

(1) APPROPRIATE FEDERAL OFFICIAL- In this section, the term 'appropriate Federal official' means--

(A) the Attorney General of the United States; or

(B) in any case in which the defendant is a Federal depository institution, a State depository institution, a depository institution holding company, a foreign bank, or a nondepository institution subsidiary of the foregoing (as such terms are defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

(2) APPROPRIATE STATE OFFICIAL- In this section, the term 'appropriate State official' means the person in the State who has the primary regulatory or supervisory responsibility with respect to the defendant, or who licenses or otherwise authorizes the defendant to conduct business in the State, if some or all of the matters alleged in the class action are subject to regulation by that person. If there is no primary regulator, supervisor, or licensing authority, or the matters alleged in the class action

are not subject to regulation or supervision by that person, then the appropriate State official shall be the State attorney general.

(b) IN GENERAL- Not later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate State official of each State in which a class member resides and the appropriate Federal official, a notice of the proposed settlement consisting of--

(1) a copy of the complaint and any materials filed with the complaint and any amended complaints (except such materials shall not be required to be served if such materials are made electronically available through the Internet and such service includes notice of how to electronically access such material);

(2) notice of any scheduled judicial hearing in the class action;

(3) any proposed or final notification to class members of--

(A) (i) the members' rights to request exclusion from the class action; or

(ii) if no right to request exclusion exists, a statement that no such right exists; and

(B) a proposed settlement of a class action;

(4) any proposed or final class action settlement;

(5) any settlement or other agreement contemporaneously made between class counsel and counsel for the defendants;

(6) any final judgment or notice of dismissal;

(7) (A) if feasible, the names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official; or

(B) if the provision of information under subparagraph (A) is not feasible, a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement; and

(8) any written judicial opinion relating to the materials described under subparagraphs (3) through (6).

(c) DEPOSITORY INSTITUTIONS NOTIFICATION-

(1) FEDERAL AND OTHER DEPOSITORY INSTITUTIONS- In any case in which the defendant is a Federal depository institution, a depository institution holding company, a foreign bank, or a non-depository institution subsidiary of the foregoing, the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the person who has the primary Federal regulatory or supervisory responsibility with respect to the defendant, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person.

(2) STATE DEPOSITORY INSTITUTIONS- In any case in which the defendant is a State depository institution (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)), the notice requirements of this section are satisfied by serving the notice required under subsection (b) upon the State bank supervisor (as that term is defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813)) of the State in which the defendant is incorporated or chartered, if some or all of the matters alleged in the class action are subject to regulation or supervision by that person, and upon the appropriate Federal official.

(d) FINAL APPROVAL- An order giving final approval of a proposed settlement may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice required under subsection (b).

(e) NONCOMPLIANCE IF NOTICE NOT PROVIDED-

(1) IN GENERAL- A class member may refuse to comply with and may choose not to be bound by a settlement agreement or consent decree in a class action if the class member demonstrates that the notice required under subsection (b) has not been provided.

(2) LIMITATION- A class member may not refuse to comply with or to be bound by a settlement agreement or consent decree under paragraph (1) if the notice required under subsection (b) was directed to the appropriate Federal official and to either the State attorney general or the person that has primary regulatory, supervisory, or licensing authority over the defendant.

(3) APPLICATION OF RIGHTS- The rights created by this subsection shall apply only to class members or any person acting on a class member's behalf, and shall not be construed to limit any other rights affecting a class member's participation in the settlement.

(f) RULE OF CONSTRUCTION- Nothing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.

(b) TECHNICAL AND CONFORMING AMENDMENT- The table of chapters for part V is amended by inserting after the item relating to chapter 113 the following:

1711.

**SEC. 4. FEDERAL DISTRICT COURT JURISDICTION FOR INTERSTATE CLASS ACTIONS.**

(a) APPLICATION OF FEDERAL DIVERSITY JURISDICTION- Section 1332 is amended--

(1) by redesignating subsection (d) as subsection (e); and

(2) by inserting after subsection (c) the following:

(d) (1) In this subsection--

(A) the term 'class' means all of the class members in a class action;

(B) the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term 'class certification order' means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term 'class members' means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which--

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which 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 based on consideration of--

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the

same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2)--

(A) (i) over a class action in which--

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant--

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) 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.

(5) Paragraphs (2) through (4) shall not apply to any class action in which--

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim--

(A) concerning a covered security as defined under 16(f) (3) of the Securities Act of 1933 (15 U.S.C. 78p(f) (3)) and section 28(f) (5) (E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f) (5) (E));

(B) that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a) (1) of the Securities Act of 1933 (15 U.S.C. 77b(a) (1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11) (A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B) (i) As used in subparagraph (A), the term 'mass action' means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term 'mass action' shall not include any civil action in which--

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C) (i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply--

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(b) CONFORMING AMENDMENTS--

(1) Section 1335(a) (1) is amended by inserting 'subsection (a) or (d) of' before 'section 1332'.

(2) Section 1603(b) (3) is amended by striking '(d)' and inserting '(e)'.

#### **SEC. 5. REMOVAL OF INTERSTATE CLASS ACTIONS TO FEDERAL DISTRICT COURT.**

(a) IN GENERAL- Chapter 89 is amended by adding after section 1452 the following:

##### Sec. 1453. Removal of class actions

(a) DEFINITIONS- In this section, the terms 'class', 'class action', 'class certification order', and 'class member' shall have the meanings given such terms under section 1332(d) (1).

(b) IN GENERAL- A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) REVIEW OF REMAND ORDERS--

(1) IN GENERAL- Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

(2) TIME PERIOD FOR JUDGMENT- If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) EXTENSION OF TIME PERIOD- The court of appeals may grant an extension of the 60-day period described in paragraph (2) if--

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) DENIAL OF APPEAL- If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) EXCEPTION- This section shall not apply to any class action that solely involves--

(1) a claim concerning a covered security as defined under section 16(f) (3) of the Securities Act of 1933 (15 U.S.C. 78p(f) (3)) and section 28(f) (5) (E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f) (5) (E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a) (1) of the Securities Act of 1933 (15 U.S.C. 77b(a) (1)) and the regulations issued thereunder).

(b) TECHNICAL AND CONFORMING AMENDMENTS- The table of sections for chapter 89 is amended by adding after the item relating to section 1452 the following:

1453. Removal of class actions.

## **SEC. 6. REPORT ON CLASS ACTION SETTLEMENTS.**

(a) IN GENERAL- Not later than 12 months after the date of enactment of this Act, the Judicial Conference of the United States, with the assistance of the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall prepare and transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report on class action settlements.

(b) CONTENT- The report under subsection (a) shall contain--

(1) recommendations on the best practices that courts can use to ensure that proposed class action settlements are fair to the class members that the settlements are supposed to benefit;

(2) recommendations on the best practices that courts can use to ensure that--

(A) the fees and expenses awarded to counsel in connection with a class action settlement appropriately reflect the extent to which counsel succeeded in obtaining

full redress for the injuries alleged and the time, expense, and risk that counsel devoted to the litigation; and

(B) the class members on whose behalf the settlement is proposed are the primary beneficiaries of the settlement; and

(3) the actions that the Judicial Conference of the United States has taken and intends to take toward having the Federal judiciary implement any or all of the recommendations contained in the report.

(c) AUTHORITY OF FEDERAL COURTS- Nothing in this section shall be construed to alter the authority of the Federal courts to supervise attorneys' fees.

**SEC. 7. ENACTMENT OF JUDICIAL CONFERENCE RECOMMENDATIONS.**

Notwithstanding any other provision of law, the amendments to rule 23 of the Federal Rules of Civil Procedure, which are set forth in the order entered by the Supreme Court of the United States on March 27, 2003, shall take effect on the date of enactment of this Act or on December 1, 2003 (as specified in that order), whichever occurs first.

**SEC. 8. RULEMAKING AUTHORITY OF SUPREME COURT AND JUDICIAL CONFERENCE.**

Nothing in this Act shall restrict in any way the authority of the Judicial Conference and the Supreme Court to propose and prescribe general rules of practice and procedure under chapter 131 of title 28, United States Code.

**SEC. 9. EFFECTIVE DATE.**

The amendments made by this Act shall apply to any civil action commenced on or after the date of enactment of this Act.

## RESPONSES TO QUESTIONS POSED TO NATIONAL REPORTERS

1. As background for consideration of the context within which your country's group litigation operates, please briefly describe your civil litigation system (e.g. common law, civil law)?

The United States is a common law country, though legislatively-enacted statutes, regulations promulgated by administrative agencies, and the provisions of state and federal Constitutions play equally important roles in the development of both substantive and procedural law.

2. What formal rules for representative or non-representative group litigation have been adopted in your country? Please include both statutory rules and rules adopted by the judiciary, and include both private law and public law mechanisms (e.g. *partie civile*). Describe briefly the policy debate and political context for the consideration and adoption of different forms of group litigation, including if relevant the decision to adopt a non-representative form of group litigation and/or a limited form of representative litigation, as alternative(s) to a broadly available representative litigation procedures, along the US model. For each litigation mechanism, please describe what types of claims the mechanism pertains to (for example, all multi-party claims or only some specific type of claims, such as antitrust, consumer protection, investor/shareholder protection, environmental, etc.) and when the rules were adopted. If there have been important amendments to the governing statutes or rules since their adoption, please identify these, describe them briefly and if possible describe why amendments were adopted. Please attach copies of the statutory provisions and/or rules, and an English translation, if possible.

The primary mechanism for representative group litigation in the United States is the *class action*. Federal Rule of Civil Procedure 23 (see **Key Rules of Court and Statutory Authority**) provides the authority for using this device in the context of federal litigation and a similar rule is used in many individual states. However, state-to-state differences in the wording of the procedural rule, its interpretation by appellate courts, and its application in local courthouses can be significant.

The closest analogues in the United States to the types of non-representative group litigation used in some other countries would be in the form of joinder or consolidation of distinct but related claims into the same case. Federal Rules of Civil Procedure 20 and 42 apply at the federal level and though there are similar rules in the various states, interstate differences are not trivial. Corporate reorganizations under the United States Bankruptcy Code have also provided for group resolution of extremely large numbers of claims.

3. For each litigation mechanism identified above, please provide a general description of the process contemplated by the formal rules. *In most legal systems, there are significant differences between "the law on the books" and "the law in practice." For this item, we are interested in "the law on the books"; later we will ask about actual practice, and about specific issues, such as standing, appointment of legal counsel, and who is bound by outcomes of the litigation.*

See discussion in *How Rule 23 Works* and *A Consumer Class Action*.

4. In representative litigation, who may come forward to represent groups of claimants, in what circumstances? Must class members all come forward individually ("opt in") to join the litigation, in some or all circumstances? *What interests and organizations have availed themselves of the procedure? What roles have public justice officials and private lawyers played in prosecuting cases? What are the barriers to individuals and groups using the representative mechanism (e.g. funding problems, difficulty communicating with potential class/group members, lack of independence of officially-appointed representatives, judicial attitudes)? Are there features of your country's civil litigation system that either facilitate or deter representative litigation?*

See discussion in *How Rule 23 Works* and *A Consumer Class Action*.

5. In non-representative group litigation, who may initiate group litigation, and in what circumstances? *In what types of cases have parties/lawyers attempted to use the group litigation process? What role have judges*

*played in conferring group litigation status on cases? What are the barriers to parties/lawyers using the group litigation mechanism (e.g. funding problems, difficulty determining whether group litigation would be efficient & effective, judicial attitudes)? Are there features of your country's civil litigation system that either facilitate or deter group litigation (presence or absence of contingency/speculative fee system, limits on lawyer advertising, etc.)?*

See discussion in *Alternatives to Rule 23 Class Actions*.

6. *How many lawsuits have proceeded in each litigation form over the past 5 years? If representative or group litigation requires judicial approval, please indicate the number of representative or group actions that have been attempted and the number in which approval was granted. Please indicate the source of any numbers you provide. If no "hard" numbers are available, please provide estimates.*

No reliable estimates exist for class action filings, certifications, or settlements in the nation's courts, outside of its use in some narrow types of litigation (such as securities fraud). The same is true for the use of joinder, consolidation, and bankruptcy in the context of mass litigation.

7. *In representative litigation, must possible class members be informed of the initiation of the litigation and, if so, how? Do courts have oversight authority for the notification process? Please provide any information you have about the types of notification used, their scale, and costs. If parties are required to opt-in, what has been the experience with regard to that? What are the barriers to participation in representative suits? How are class members kept informed of developments, and to what extent can they exercise control over decisions, or take part in the process if they wish?*

See discussion in *How Rule 23 Works* and *A Consumer Class Action*.

8. *In non-representative group litigation, must the named parties be informed that the litigation is proceeding in group form? Can parties/lawyers whose cases are similar to others that are proceeding in group litigation form*

**exclude themselves from the group litigation and proceed independently, and if so how? Are group members kept informed of developments, and to what extent can they exercise control over decisions?**

In joinder, consolidation, and bankruptcy actions, the interests of the claimants are represented by their individually-hired attorneys and as such, they are presumed to have been informed about the progress of their cases. The difficulties presented by self-exclusion differ for the three mechanisms. Plaintiffs whose claims were subject to permissive joinder could obtain new counsel and proceed independently with relative ease. Self-exclusion would be more problematic in instances where similar claims were consolidated primarily for reasons of judicial efficiency because a subsequent but similar filing may well be consolidated again. Proceeding independently of the bankruptcy process is not a realistic option.

- 9. In group litigation, are there special case management procedures (e.g. case pleadings, scheduling, development of evidence, motion practice, test cases, preliminary issues)? Are there features of your country's civil litigation system that either facilitate or hinder the development of cases that proceed in representative or non-representative group form?**

See discussion in *How Rule 23 Works* and *A Consumer Class Action*.

- 10. In group litigation, what proportion of cases is resolved through party/attorney negotiation and settlement, and what proportion is resolved through judicial or jury decision? If cases are settled, who participates in negotiating settlements? Does the court or do other public officials have responsibility for assuring fairness of any negotiated outcomes, and if so what procedures exist to address the fairness issue? What has the experience of oversight been? Have there been controversies over the fairness or reasonableness of settlements? If cases are tried, how is evidence presented on behalf of the class or grouped claimants?**

Precise counts are not available for outcomes but they are likely to vary greatly by the type of class action. What is clear is that only a tiny fraction of class actions (defined here as any case seeking class treatment

regardless of whether it is eventually certified) actually reach the trial stage. Evidence suggests that the rate of trial may be lower than what might be seen in non-class litigation involving similar claims and defenses. Evidence also suggests that outcomes other than trial or settlement are involved in a larger fraction of class actions than in non-class litigation. In only those cases with certified class actions, class settlements are by far the most common result.

The answers to other aspects of this question can be found in ***How Rule 23 Works*** and ***A Consumer Class Action***.

11. ***What remedies are available in representative and non-representative group litigation? When group litigation is resolved with the payment of monetary damages, how are damages allocated among claimants? Do judges exercise oversight of fairness or process of allocation? Please provide data on outcomes of representative and non-representative group litigation over the past five years. Please indicate the source of any outcome data you provide. If no "hard" data are available, please describe the diversity or range of outcomes to the best of your ability.***

Though it certainly depends on the legal basis for the class action, generally compensatory damages (including both out-of pocket losses as well as "pain and suffering"), punitive damages, injunctions, declaratory relief, attorneys' fees, and recovery of the costs of litigation are available to classes as part of trial judgments and settlements. The same would be true for non-representative litigation. The mechanism for distributing monetary damages following a class settlement is designed and negotiated by class counsel and the defendants and must be approved by a judge. An approval process must also take place in regards to setting up compensation programs within the bankruptcy process. Resolution of cases subject to mass joinder or mass consolidation are generally not subject to judicial oversight.

As indicated previously, no "hard" data exists for class action outcomes nor is any available for cases using mass joinder or mass consolidation.

12. *Who funds group litigation: the state, legal services organizations, NGOs, private lawyers, or the claimants themselves? Is funding perceived to be a problem, and if so, is the problem perceived as too much funding or too little? What problems have those who wish to proceed in representative or non-representative group litigation encountered in obtaining funding?*

In both class actions and in non-representative group litigation, private attorneys almost always fund the litigation initially. If a class action is successful, attorneys fees and other costs can be recovered from the defendants, though in many instances, the payment of fees reduce the aggregate compensation available to class members. Fee shifting can take place in non-representative litigation but only in cases where the statutory basis for the claims expressly included such authority. In most other cases, fees would be deducted from the amounts recovered from the defendants as provided for in representation contracts between the attorney and the client. Some cases would involve direct payment of fees by the client on an hourly or salaried basis.

As with some other aspects of the U.S. civil justice system, class actions have been criticized both for insufficient funding (i.e., otherwise legitimate claims are ignored because attorneys do not perceive them to be economically viable) and for misaligned incentives (i.e., the lure of large fee awards encourages the filing of meritless cases). The same would be true for non-representative group litigation.

13. *Costs and benefits. How are attorneys in group litigation paid? Please indicate whether there are special rules for paying attorneys in representative and non-representative group litigation that do not pertain in ordinary civil litigation. Do courts have responsibility for determining or approving fees in these cases? How do the private costs of group litigation compare to the costs of ordinary civil litigation, or any other available methods for resolving such situations? Do attorneys make more, the same, or less, in proportion to their time, effort and risk, by comparison to ordinary civil litigation? How do costs compare with the outcomes achieved? Please provide any quantitative data available on litigation costs over the past five years, and any available data comparing costs to outcomes Please indicate the source of any cost and outcome data you provide. If no "hard" data are available, please describe the range of costs to the best of your ability, and share your perceptions of the relationship between costs and outcomes.*

In class action litigation, attorneys' fees are determined and awarded by a judge. See discussion in ***How Rule 23 Works*** and ***A Consumer Class Action***. In non-representative litigation, fees are a privately contracted matter between an attorney and his or her clients.

On a percentage basis, cases that result in class settlements appear to result in attorney fee awards of between 20 and 25 percent of the total value of what the defendant is offering to resolve the litigation. Larger value settlements are associated with lower fee awards (sometime under 10 percent) while 50 percent or more is not unknown in small value settlements and where much of the relief obtained was in the form of equitable relief.

When handled on a contingency fee basis, non-class litigation often results in a somewhat larger percentage, with one-third commonly used as the "typical" benchmark.

14. **Is the burden that group litigation places on the court more, the same, or less, than in comparable non-representative, non-group litigation? What is the average time to dispose of a group case, and how does this compare to comparable non-representative non-group litigation? Please provide any quantitative data available on court costs and time to disposition over the past five years. Please indicate the source of any data you provide. If no "hard" data are available, please describe the range of outcomes to the best of your ability.**

Research suggests that the average federal class action consumes about five time as much in the way of court resources compared to non-class litigation. This figure would likely be quite different if the focus was only on certified class actions that were vigorously opposed through the certification process. It is difficult, however, to identify sets of "ordinary" cases that would be roughly comparable to class actions, mass joinders, or mass consolidations in terms of complexity for a more precise comparison. Moreover, it generally believed that though more judicial time may be spent per class action or per mass consolidation, there is a net benefit to the court in processing related claims on a group basis compared to what would be required if each claim were prosecuted as a separate

lawsuit. On the other hand, the claims of members in many class actions would evaporate outside of a class action process because of the low monetary stakes.

15. What are the current debates in your jurisdiction over the application of collective litigation rules and their consequences? *How intense are the debates, how pressing is any need for reform? Have there been important evolutionary steps or trends? What major developments might follow?*

See discussion in ***How Rule 23 Works***.

16. Overall, how would you evaluate the mechanism(s) success in achieving major changes in behavior, activities or policy, relative to the costs incurred by public and private actors?

This is an extraordinarily difficult question to answer. There are numerous instances where class actions have been efficient mechanisms for instituting important social changes, for remedying serious wrongs, and for discouraging harmful behavior in the future. There are also instances where the outcomes of such cases have done little except to enrich self-serving attorneys or insulate corporations from liability for their actions. Attempts to empirically determine where the bulk of class action litigation lies between these two extremes has been hampered by a chronic lack of reliable, detailed, and system-wide information. Evaluation is made even more difficult by the highly politicized nature of the policy debate over these types of cases.

There are, however, two points to consider in answering this question. First is the fact that the basic provisions of Rule 23 have remained more or less unchanged for four decades. Only a single state lacks some type of class action process while the vast majority of the remaining jurisdictions have fully embraced Rule 23 in practice if not word-for-word. Despite the

ability of popularly elected legislative bodies to completely eliminate the availability of the class action device, they have never chosen to do so.

The second point to consider is the continuing effort on the part of judges, academics, public interest groups, and others to thoughtfully address what are seen to be shortcomings in the way the rule works in actual practice. These efforts have taken on a variety of forms, such as intervening in cases to remedy perceived problems with proposed compensation plans or fee awards, appellate opinions that attempt to reduce uncertainty or abuse in the rule's application without destroying its effectiveness, and books and journal articles that describe areas in need of improvement and suggest reasoned changes. While there certainly is no shortage of loudly voiced commentary coming from those who seemingly see all class actions only in terms of "shining knights" or "Frankenstein monsters," others have closely examined the rule with more a nuanced, and ultimately more helpful, perspective.

Taken together, these two points suggest that overall, Rule 23 class actions have indeed achieved many of the goals intended by its drafters and that they continue to be perceived as a vital and important part of the civil justice system in this country. They also suggest, however, that there is a clear need to monitor how the rule is used to aggregate large numbers of claims, the methods by which courts manage such cases, and the outcomes in this type of litigation. To answer Question 16 succinctly, a report card evaluation might read "generally successful but with substantial room for improvement."

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