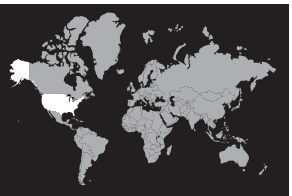
UNITED STATES



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OVERVIEW OF CLASS/COLLECTIVE ACTIONS AND CURRENT TRENDS

1. WHAT IS THE DEFINITION OF CLASS/COLLECTIVE ACTIONS IN YOUR JURISDICTION? ARE THEY POPULAR AND WHAT ARE THE CURRENT TRENDS?

Definition of class/collective actions

In the US, a class action is a form of representative litigation where some parties are absent from court. In a traditional lawsuit, all parties to the suit, meaning all plaintiffs and defendants, are present in court and represent themselves. However, in a class action, at least one of the parties, plaintiff or defendant, is a group of people who are collectively represented by a member of that group. That member, known as the "named" plaintiff or defendant, is present in court and litigates the case on behalf of themselves and the absent members of its class.

Use of class/collective actions

The vast majority of class actions in the US are plaintiff class actions. In a plaintiff class action, one or more named plaintiffs sue one or more defendants on behalf of themselves and the absent plaintiffs.

Defendant class actions are possible but rare. There, plaintiffs sue a named defendant and other unnamed, absent defendants who the plaintiffs allege are similarly situated to the named defendant. If both plaintiffs and defendants are organised into classes, the action is a bilateral class action. Class actions are most common where the plaintiffs allege that a large number of people have been injured by the same defendants in the same way. Instead of each injured person bringing his or her own separate lawsuit, the class action allows a court to resolve in a single proceeding the claims of all class members. Class actions are generally available in all areas of law, as long as the legal and procedural requirements for bringing a class action are met (*see Question 3*).

Current trends

After many years of growth in the use of the class action device in both federal and state courts, the US Congress and US Supreme Court have both acted to attempt to limit class actions, and additional bills are pending before the US Congress that would impose further limitations. In 2005, the US Congress passed the Class Action Fairness Act, 28 U.S.C. § 1332(d) (CAFA). CAFA expands federal jurisdiction over class actions, to reduce

inconsistency among class actions litigated in the individual states, and provides for greater scrutiny of class action settlements and the payment of attorneys' fees.

In addition, recent decisions of the US Supreme Court have addressed the requirements for class certification. For example, in *Wal-Mart Stores, Inc. v Dukes (131 S. Ct. 2541 (2011))*, the Supreme Court overturned a grant of certification to a nationwide class of 1.5 million female Wal-Mart employees because the class failed to show that the suit involved common issues where there was no single discriminatory policy, but rather numerous independent decisions affecting class members in different ways. The Court emphasised that the class could not meet the Rule 23(a)(2) (Federal Rules of Civil Procedure) "commonality" requirement because their allegedly common question, that is, why they were disfavoured relative to other employees, could not produce a common answer across the class, and it urged district courts in other cases to engage in a "rigorous analysis" of the factual record to determine if certification is appropriate. Similarly, in *Comcast Corp. v. Behrend (133 S. Ct. 1426 (2013))*, the Court reversed the certification of a class of cable television customers alleging that their provider monopolised a local market for cable services. The Court ruled that plaintiffs' expert's model could not prove injury or damages on a class wide basis, and therefore there was no "predominance" of common questions over individual issues under Rule 23(b)(3). The Court re-emphasised that district courts and courts of appeal should conduct a rigorous analysis of the factual record to determine whether expert methodologies support a finding of certification, even where doing so involves an inquiry into the merits of the dispute. The Supreme Court has also permitted consumer contracts to include arbitration provisions that include waivers of the right to participate in class or collective actions (*see Question 23*).

REGULATORY FRAMEWORK

2. WHAT ARE THE PRINCIPAL SOURCES OF LAW AND REGULATIONS RELATING TO CLASS/COLLECTIVE ACTIONS? WHAT ARE THE DIFFERENT MECHANISMS FOR BRINGING A CLASS/COLLECTIVE ACTION?

Principal sources of law

Rule 23 of the Federal Rules of Civil Procedure is the principal source of law relating to class actions in the US federal courts. Most states allow parties to bring class actions in state courts, and most of those states have enacted standards analogous to Rule 23 that govern class action proceedings in their respective state courts.

These rules, both at the federal and state level, serve to protect the rights of absent class members and seek to ensure that parties use class actions only where appropriate. The US Constitution guarantees procedural due process to all litigants. In class actions, the due process rights of absent class plaintiffs are potentially at risk, should the named plaintiffs ultimately have divergent interests.

Principal institutions

Most class actions in the US are litigated in court, in either the federal court system or in state courts. The US federal government maintains a tiered national court system, consisting of trial courts in every state, regional appellate, or "Circuit" courts, and the US

Supreme Court. The individual states each maintain analogous state court systems of their own.

Since the passage of the Class Action Fairness Act, 28 U.S.C. § 1332(d) (CAFA), most class actions proceed in the federal courts. Under CAFA, the federal courts have jurisdiction over all class actions where:

- The amount in controversy exceeds US$5 million.
- "Any member of a class of plaintiffs is a citizen of a State different from any defendant" (*28 U.S.C. § 1332(d)(2)*).

That encompasses the vast majority of class actions. However, a federal court can decline jurisdiction if "greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed" (*28 U.S.C. § 1332(d)(3)*).

Class actions can also be resolved by arbitration, including where the parties expressly or implicitly contract to resolve disputes by arbitration. And in certain circumstances businesses can prevent class action litigation by requiring that consumers agree to arbitration of individual claims (*see Question 23*).

Different mechanisms

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

3. ARE CLASS/COLLECTIVE ACTIONS PERMITTED/USED IN ALL AREAS OF LAW, OR ONLY IN SPECIFIC AREAS?

Class actions are generally permitted in all areas of law, including:

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

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

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

Other areas of law/policy

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

LIMITATION

4. WHAT ARE THE KEY LIMITATION PERIODS FOR CLASS/COLLECTIVE ACTIONS?

Limitation periods are relevant in both class actions and traditional litigation, and many of the same rules apply. Calculating the limitation period relevant to a particular class action therefore requires first considering both the substantive nature of the action and the court hearing the action. For example, the different states each have their own limitations periods for tort actions, ranging from about one to six years. In addition, different causes of action have different rules regarding the kind of circumstances that justify "tolling", or suspending, the limitation period, such as fraudulent concealment by the defendant of its alleged conduct.

Other considerations relating to limitation periods are unique to class actions. Principally, the filing of a class action generally suspends the limitation periods that would apply to the individual claims of all of the putative class members. That is the case even if a putative class member is not even aware that the class action is pending. That suspension ends if the court denies certification of the class, and the limitation periods applicable to individual claims begin to run again.

STANDING AND PROCEDURAL FRAMEWORK FOR BRINGING AN ACTION

STANDING

5. WHAT ARE THE RULES FOR BRINGING A CLAIM IN A CLASS/COLLECTIVE ACTION?

Definition of class

To bring a class action, the representative plaintiffs must define the class that they seek to represent. The class definition must be sufficiently precise so that the court can determine who is and is not in the class. To that end, class definitions commonly focus on the defendant's alleged conduct and include geographic, temporal, or other objective parameters that permit the court to ascertain the members of the class (and thereby limit membership of the class).

Until the court concludes that the class satisfies the requirements for a class action, a process that can take several years, the class is referred to as a "putative" or "potential" class and the members of the putative class are referred to as "putative" or "potential" class members.

Potential claimant

To serve as a named plaintiff, a potential claimant must satisfy two fundamental requirements. First, the putative plaintiff must be a member of the class that it seeks to represent. Second, the putative plaintiff must itself have "standing" to assert its claim.

In the US, standing is generally required in all lawsuits, whether class action or individual. The doctrine entails several specific considerations but, in essence, requires determining whether the litigant itself is entitled to have the court decide the merits of the dispute. The answer will often depend on the plaintiff's relationship to the defendant's alleged conduct. For example, a plaintiff will generally have standing where it alleges that it was harmed directly by the defendant.

However, the scope of standing to assert a claim varies depending on the claims at issue and the court hearing the claim. For example, in the anti-trust context, under *Illinois Brick Co. v Illinois, 431 U.S. 720 (1977)*, an indirect purchaser of a good or service generally may not sue the seller for alleged damages in federal court. However, the indirect purchaser may be able to sue the seller in state court, depending on whether and how the court applies the test for anti-trust standing as established in *Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519 (1983)*. That test focuses on the causal connection between the alleged violation and the asserted harm, and on the directness of the harm. Regardless, in class actions, the named plaintiff's theory of harm, and therefore standing, must be generally the same as the class of persons that he or she seeks to represent.

Claimants outside the jurisdiction

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

Professional claimants

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

QUALIFICATION, JOINDER AND TEST CASES

6. WHAT ARE THE KEY PROCEDURAL ELEMENTS FOR MAINTAINING A CASE AS A CLASS ACTION?

Certification/qualification

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

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

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

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

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

Minimum/maximum number of claimants

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

Joining other claimants

In the US, class actions are almost always initiated on an opt-out basis, as opposed to an opt-in basis. This means that all putative class members are assumed to be a part of a certified class unless and until class members opt out, or choose to leave, the class. Class members may opt out where they determine that their individual claims are large enough to justify suing separately, or for a variety of other reasons, but the opt-out rate in most cases is less than 2% of the class.

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

Test cases

In the US, if the court certifies the class and the parties do not then settle, test cases, or "bellwether trials", are sometimes used to move the overall litigation towards a more prompt resolution. In these circumstances, the court selects a representative plaintiff's claim or claims from among the class, and that case proceeds to trial. The outcome, whether for plaintiffs or defendants, will likely inform how the parties proceed as to the remaining cases. Bellwether trials are particularly common in mass tort actions, where thousands of plaintiffs claim the same injury allegedly caused by the same defendant.

TIMETABLING

7. WHAT IS THE USUAL PROCEDURAL TIMETABLE FOR A CASE?

A plaintiff seeking class treatment must assert in its complaint that it seeks to represent a class of persons or entities and must describe why the putative class meets the prerequisites of Rule 23 of the Federal Rules of Civil Procedure. Before any timetable is established, a defendant can seek dismissal of some or all the claims. If a class action survives a motion to dismiss (or if none is filed), a court will usually establish a timetable for discovery, motions and hearings on class certification, a deadline for filing any summary judgment motions, and trial. Rule 23 states that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action".

Because a putative class plaintiff must demonstrate that the class meets each Rule 23 prerequisite through a preponderance of evidence, courts typically allow several months (or years) of discovery before a class certification motion is due. If a class is certified, any ruling at summary judgment or trial will bind all members of that class who have not opted out.

EFFECT OF THE AREA OF LAW ON THE PROCEDURAL SYSTEM

8. DOES THE APPLICABLE PROCEDURAL SYSTEM VARY DEPENDING ON THE RELEVANT AREA OF LAW IN WHICH THE CLASS/COLLECTIVE ACTION IS BROUGHT?

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

Plaintiffs can bring a "collective action" suit under the Fair Labor Standards Act, 29 U.S.C. § 216(b) (FLSA), to recover unpaid minimum wages, overtime compensation, and additional liquidated damages.

Although FLSA collective actions and Rule 23 (of the Federal Rules of Civil Procedure) class actions share many similarities, they have certain key differences (*see ABA Section*

of Labor and Employment Law, Certification—216(b) Collective Actions v. Rule 23 Class Actions & Enterprise Coverage Under the FLSA (2011), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/084.authcheckdam.pdf). In particular, in FLSA cases, an employee must opt in by stating in writing that he or she wishes to participate in a lawsuit, whereas putative class members under Rule 23 must opt out of the class if they choose not to participate in an action. FLSA collective actions involve a two-phase certification process. First, a court can conditionally certify a class of employees if it finds them to be "similarly situated". Second, discovery will commence after conditional certification, after which the court can decide whether to certify the class for trial based on an analysis of whether the employees were subject to a common policy and whether their claims can be resolved through common proof.

Additionally, for certain mass tort suits consolidated into a single action, a court can devise procedures for resolving multiple claims even in the absence of class procedures. For example, in *In re Fosamax (Alendronate Sodium) Products Liability Litigation (2014 WL 1266994 (D.N.J. Mar. 26, 2014))*, the district court granted summary judgment to defendants on a single plaintiff's state law tort claim on the grounds that it was pre-empted by the Food, Drug, and Cosmetic Act, then issued an order to show cause to hundreds of other plaintiffs in the same multi-district litigation as to why their similar claims should not also be found pre-empted, and subsequently granted summary judgment by applying its pre-emption finding against each similarly-situated plaintiff.

FUNDING AND COSTS

FUNDING

9. WHAT ARE THE RULES GOVERNING LAWYERS' FEES IN CLASS/COLLECTIVE ACTIONS?

There are no rules (other than applicable rules of professional conduct) governing fees of defence counsel in class actions, and they are commonly paid by an hourly rate.

Plaintiffs' class action counsel, however, can act on both a standard fee and contingent fee basis. Rule 23(h) of the Federal Rules of Civil Procedure allows a court to "award reasonable attorney's fees and non-taxable costs that are authorized by law or by the parties' agreement", and sets out a process for attorneys to file a motion for fees after a certified class has recovered a settlement or judgment. When an attorney makes a claim for fees, it must serve notice on all parties and class members in a "reasonable manner", and any class member or party from whom payment is sought may object to that motion. A court must make factual findings and legal conclusions with respect to the motion for fees, and it may refer fee-related issues to a special master or magistrate for determination.

Class attorneys may recover different types of fees depending on the nature of the action. When an action arises under a statute containing a fee-shifting provision, a prevailing plaintiff recovers attorneys' fees directly from the defendant. In these cases, a court may determine fees by applying the "lodestar method" in which the court multiplies the number of hours spent by counsel by a reasonable hourly rate and then adjusts the resulting amount upward or downward based on the degree of risk or quality of work

performed. Where a settlement creates a common fund for distribution among class members, courts may also use a "percentage-of-fund" approach, in which it will award fees by determining a reasonable percentage of the total class recovery to be awarded to attorneys, often in the range of 15% to 33%.

10. IS THIRD PARTY FUNDING OF CLASS/COLLECTIVE ACTIONS PERMITTED?

Third party financing is permitted for US class actions, and the use of outside investment has risen significantly in recent years. No federal regulatory framework governs third party financing, but three general categories of state laws apply to contracts between class plaintiffs (or their attorneys) and third party funding entities:

- First, a handful of states have laws directly governing the use of third party litigation financing, with two (Maine and Ohio) requiring funders to register and disclose their fees and interest rates (*Me. Rev. Stat. Ann. tit. 9-A §§ 12-104, 12-106; Ohio Rev. Code Ann. § 1349.55*).
- Second, common law doctrines of maintenance and champerty arguably apply to litigation financing, but little precedent exists for challenging third party funding of class actions under either doctrine.
- Third, rules of professional conduct apply to attorneys who enter into third party financing contracts, typically requiring attorneys to ensure that the third parties will not interfere with the litigation (*see, for example, ABA Model Rules of Prof. Conduct §§ 1.8(f), 5.4(a)*).

No fixed limits on the amount of funding exist, and a court need not approve a contract between a third party financier and an attorney or plaintiff.

As the use of third party litigation funding has grown, the practice has attracted numerous critics who assert that such arrangements increase the number of questionable or speculative claims, and that such arrangements deter settlement because plaintiffs must share a greater percentage of their recovery. The US Chamber of Commerce and other business groups have advocated for federal regulations of third party litigation funding to reduce instances of misconduct.

11. IS FINANCIAL SUPPORT AVAILABLE FROM ANY GOVERNMENT OR OTHER PUBLIC BODY FOR CLASS/COLLECTIVE ACTION LITIGATION?

State and federal government entities do not provide direct financial support for private class action lawsuits in the US. However, state or federal enforcers may bring actions against the same defendants targeted by private class action suits when the defendants' alleged conduct gives rise to both private and public damages claims. When parallel actions are filed, public enforcers and private plaintiffs may enter into a common interest agreement to share their work product (that is, preparation for the case) and divide the burdens and expenses of discovery.

12. ARE OTHER FUNDING OPTIONS AVAILABLE TO CLAIMANTS IN CLASS/COLLECTIVE ACTIONS?

Claimants and third party financiers have considerable flexibility in structuring their funding of class action litigation. In addition to providing funding in exchange for a percentage of the class's eventual recovery, a litigation financier can provide a loan to class action plaintiffs or their attorneys to cover costs and expenses of litigation without

taking any percentage of recovery. Alternatively, a litigation financier can purchase some percentage of the attorneys' fee before that fee is paid.

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

COSTS

13. WHAT ARE THE KEY RULES FOR COSTS/FEES IN CLASS/COLLECTIVE ACTION LITIGATION?

Under the "American Rule" in the absence of a statutory fee-shifting provision each party to a litigation, whether a class action or traditional litigation, generally bears its own fees and costs, whether it loses or wins. Fee-shifting provisions are generally "one way" provisions that do not allow defendants to recover their legal fees from plaintiffs even if they defeat the action, although certain costs may be recoverable.

KEY EFFECTS OF THE COSTS/FUNDING REGIME

14. WHAT ARE THE KEY EFFECTS OF THE CURRENT COSTS/FUNDING REGIME?

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

DISCLOSURE AND PRIVILEGE

15. WHAT IS THE PROCEDURE FOR DISCLOSURE OF DOCUMENTS IN A CLASS/COLLECTIVE ACTION?

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

Before litigation

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

During litigation

During class action litigation, discovery between plaintiffs and defendants is sometimes viewed as two parts:

- Pre-certification, in connection with the court's decision whether to certify the proposed class.
- Merits discovery, as to the parties' underlying claims.

Relatively soon after a class action commences, the court will often enter a discovery plan or schedule, setting out the timing, sequencing of, and rules for discovery. Because many issues often relate to both certification and the merits, courts now less commonly divide discovery of the two. Rather, full discovery will generally proceed. Class certification discovery might end before merits discovery but, in most instances, the court will not be able to determine whether certification is appropriate without extensive discovery, including both factual evidence and expert opinion. Certification discovery will focus on whether the proposed class meets the requirements of Rule 23(a) and Rule 23(b) of the Federal Rules of Civil Procedure.

Discovery during class actions, as in traditional litigation, is governed by the Federal Rules of Civil Procedure, rules of the local court, and the judge's individual rules and practices. Those rules will dictate the scope of discovery. Similarly, the court will commonly enter a protective order, agreed to by the parties, that limits the use and disclosure of materials obtained through discovery.

16. ARE THERE SPECIAL CONSIDERATIONS FOR PRIVILEGE IN RELATION TO CLASS/ COLLECTIVE ACTIONS?

There is a well-established concept of privilege in the US, whereby otherwise relevant information is protected from discovery because it falls within a privilege. Most notable are the attorney-client privilege and attorney "work product" doctrine.

The attorney-client privilege protects from discovery confidential communications between the client and attorney, made for the purpose of seeking or conveying legal advice.

The attorney work product doctrine protects from discovery materials prepared by or for an attorney in anticipation of litigation. Federal Rule of Civil Procedure 26(b)(1) limits discovery to non-privileged matters, and Rule 26(b)(3) codifies the attorney work product doctrine. Similarly, Rule 26(b)(4) limits the extent to which parties may seek discovery of communications between a party's attorney and its expert witnesses.

Although the same core rules regarding privilege apply in class actions, class actions do pose some unique considerations. For example, some courts allow defendants and/ or defence counsel to contact absent putative class members before certification because, until certification, they are not represented by class counsel. Those communications would not be privileged. Also, individual named plaintiffs and individual defendants often have separate counsel. Communications among plaintiffs and their counsel and among defendants and their counsel are likely to remain privileged, particularly if the groups enter "common interest" or "joint defence" agreements.

EVIDENCE

17. WHAT IS THE PROCEDURE FOR FILING FACTUAL AND EXPERT WITNESS EVIDENCE IN CLASS/COLLECTIVE ACTIONS?

The Federal Rules of Evidence govern the admissibility of any evidence submitted in class action lawsuits. At the class certification stage, to certify a class, the plaintiffs must demonstrate by a preponderance of evidence that their case satisfies each applicable requirement of Rule 23. Courts typically require plaintiffs to submit admissible factual evidence such as documents, affidavits, and deposition testimony, and expert reports along with their motion for certification, and defendants can submit their own factual and expert evidence along with their opposition to the class certification motion.

In many instances, courts permit plaintiffs to submit rebuttal evidence and expert reports with their reply to a defendant's opposition. Even though Rule 23 does not require expert evidence at the class certification stage, as a practical matter, parties almost always submit expert reports regarding whether the proposed class meets the prerequisites for certification. Parties often file motions to exclude this expert testimony, and in resolving those motions, many courts apply the same Federal Rules of Evidence standard applicable to expert testimony offered at trial. Until recently, courts faced with conflicting expert reports at the class certification stage would often certify the class and postpone a close inquiry into empirical questions. However, as demonstrated by the Supreme Court's ruling in *Comcast Corp. v Behrend*, courts now rigorously scrutinise expert submissions at the class certification stage, and in some instances exclude or refuse to endorse unreliable expert testimony.

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

DEFENCE

18. CAN ONE DEFENDANT APPLY TO JOIN OTHER POSSIBLE DEFENDANTS IN A CLASS/COLLECTIVE ACTION?

Joining other defendants

The Federal Rules of Civil Procedure liberally permit a joinder of other parties, and the rules for a joinder of defendants typically do not vary in the context of a class action suit. Rule 19 allows a joinder of a party, including additional defendants, where "in that person's absence, the court cannot accord complete relief among existing parties", or if a non-party claims an interest in the litigation and disposing of the action in that non-party's absence would impair their interest or would leave an existing party subject to a

substantial risk of incurring multiple or inconsistent obligations. At the request of any party, a court may order the joinder of such a non-party as a defendant.

Rule 21 more generally provides that "[p]arties may be dropped or added by order of the court on motion of any party . . . at any stage of the action and on such terms as are just". If a defendant has a claim against a non-party who may be liable for all or part of a plaintiff's claim against that defendant, the defendant can serve a complaint on that non-party within 14 days of serving its original answer, or can file a motion for leave to serve the non-party if more than 14 days have passed since serving its original answer (*Fed. R. Civ. P. 14(a)*). The purpose of these rules is to ensure fairness and judicial efficiency in the resolution of all claims arising from the same underlying events or subject matter. As a practical matter, defendants do not join other defendants in certain class actions (such as anti-trust actions) because there is no right to contribution or indemnification among anti-trust defendants in the US.

Rights of multiple defendants

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

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

DAMAGES AND RELIEF

19. WHAT IS THE MEASURE OF DAMAGES UNDER NATIONAL LAW IN THE FIELD OF CLASS/COLLECTIVE ACTIONS?

Damages

A class certified under Rule 23 of the Federal Rules of Civil Procedure can recover compensatory damages on behalf of its members if it demonstrates liability, as well as automatic treble damages for certain violations (such as violations of the anti-trust laws). Similarly, a certified class can obtain punitive damages where permitted by statute

or common law, but courts often reduce the amount of punitive damage awards under equitable doctrines and based on constitutional due process concerns.

Courts typically calculate and apportion damages based on a methodology submitted by plaintiffs' experts, but the calculation itself will often depend on the characteristics of each class member. For example, in a securities class action, even if a court or jury finds a defendant liable for losses incurred from a reduction in a company's stock price, each class member's damages will depend on the amount of stock it purchased, and the circumstances of that purchase and sale. No explicit cap on damages exists under Rule 23, and defendants may be held liable for the actions of their co-defendants under ordinary principles of joint and several liability.

Recovering damages

Under certain statutes for which a plaintiff may recover joint and several damages from a single defendant based on the actions of other defendants, the defendant that pays damages may bring a contribution claim against the remaining defendants. For example, under section 11 of the Securities and Exchange Act, multiple defendants may be held jointly and severally liable and have a right of contribution, but outside directors may only be held liable for proportionate liability as determined by a jury verdict (*15 U.S.C. § 77k(f)*). Other statutes, such as the anti-trust laws, make defendants jointly and severally liable, but prohibit a defendant from bringing a contribution or indemnification claim against another defendant.

Interest on damages

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

DECLARATORY RELIEF AND INTERIM AWARDS

20. WHAT RULES APPLY TO DECLARATORY RELIEF AND INTERIM RELIEF IN CLASS/COLLECTIVE ACTIONS?

Declaratory relief

A class of individuals or entities may seek declaratory relief in a number of circumstances where the class also seeks injunctive relief or monetary damages. For example, a class may seek a ruling that a law is unconstitutional and should be invalidated, that a single tortfeasor acted negligently with respect to many affected parties, or that a provision of an insurance policy should be interpreted to require coverage of a particular claim. Certification of a class seeking declaratory relief is required before a court can make such an award binding class members other than the named plaintiffs. To obtain certification of a class seeking injunctive and declaratory relief, a plaintiff must demonstrate that the class it seeks to represent meets the four prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure (*see Question 6*), and that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive or

corresponding declaratory relief is appropriate respecting the class as a whole" (*Fed. R. Civ. P. 23(b)(2)*). If a class seeks monetary damages in addition to declaratory relief, it must satisfy the additional requirements of Rule 23(b)(3), including predominance and superiority. That is, a class certified for purposes of obtaining declaratory relief under Rule 23(b)(2) alone may not also obtain monetary relief on the grounds that a declaratory ruling necessarily entitles the class to damages.

Interim awards

Interim monetary awards are generally unavailable for class members before they have succeeded on their claims or obtained a settlement, but in limited circumstances, class counsel may apply for and obtain interim awards of costs and fees after they have prevailed or obtained recovery on at least some of the claims of the class. In several states such as Delaware, interim fee awards are not favoured for reasons of judicial economy, but for complex class actions involving multiple defendants, some of whom settle in the early stages of litigation, courts tend to allow such awards.

SETTLEMENT

21. WHAT RULES APPLY TO SETTLEMENT OF CLASS/COLLECTIVE ACTIONS?

Settlement rules

In individual litigation, a court usually does not need to approve a settlement between the parties. In class actions, however, Rule 23(e)(1)(A) of the Federal Rules of Civil Procedure requires that the court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defences of a certified class. That is because settlement of class actions implicates numerous parties, including the class representatives, class counsel, absent class members, defendants, defence counsel, and possibly defendants' insurers. Although the court need not approve a pre-certification settlement of individual claims, the court can still inquire into the circumstances behind such a settlement, including to protect the interests of the absent class members.

To approve the settlement of a certified class, Rule 23(e)(1)(C) requires that the court conduct a hearing and find that the settlement is "fair, reasonable and adequate". Courts commonly consider several factors:

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

- The complexity, length, and expense of continued litigation.
- The stage of the proceedings.

Because strong policy considerations favour settlement, courts often presume that settlements negotiated at arm's length are fair and reasonable.

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

If the court preliminarily approves the settlement, under Rule 23(e)(1)(B), the court will then determine a schedule for notifying all absent class members who would be bound by the class, so that they can decide whether to opt out of the class. In addition to opting out, any class member may object to the terms of the proposed settlement.

Separate settlements

Where there is more than one defendant, individual defendants may, and often do, settle separately and at different points in the litigation with all class members. The effect of such a settlement is that the settling defendant is out of the litigation and the remaining defendants may be jointly and severally liable for the plaintiffs' full damages, including that proportion caused by the settling defendant. Usually, however, any judgment against the remaining defendants will be reduced by the amount of the prior settlements. In cases where treble damages are available, this reduction happens after the court triples the damages award.

Similarly, before certification, one or more defendants can seek to settle with some but not all of the named plaintiffs, sometimes in an attempt to undermine the putative class. The US Supreme Court is expected to decide this year in *Campbell-Ewald Co. v Gomez* whether a pre-certification settlement offer to pay a plaintiff's full claim of damages moots (voids) that plaintiff's case, on the basis that a plaintiff no longer has constitutional standing to pursue its case if it has received an offer to pay its alleged damages in full (*see Petition for Writ of Certiorari, Campbell-Ewald Co. v Gomez, No. 14-857 (filed Jan. 16, 2015 and granted May 18, 2015), http://sblog.s3.amazonews.com/wp-content/uploads/2015/02/2015-01-15-Campbell-Ewald-Cert-Petition-and-Appendix-1.pdf*). If the Court rules that such an offer does moot a plaintiff's case, these offers by defendants will likely become more common.

APPEALS

22. DO PARTIES HAVE A RIGHT TO APPEAL DECISIONS RELATING TO CLASS ACTIONS, SUCH AS A DECISION GRANTING OR DENYING CERTIFICATION OF A CLASS ACTION?

The final judgment rule in federal civil litigation generally prohibits appeals of interim or "interlocutory" decisions before the court enters a final judgment on all of a plaintiff's claims, but Rule 23 of the Federal Rules of Civil Procedure includes an exception to this general rule for class action suits. In particular, under Rule 23(f), "[a] court of appeals may permit an appeal from an order granting or denying class action certification under this

rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered", but such an appeal "does not stay proceedings in the district court unless the district court judge or the court of appeals so orders".

In addition to appeals pursuant to Rule 23(f), parties to class actions can also request that a district court permits an interlocutory appeal of an order involving a "controlling question of law" for which "there is substantial ground for difference of opinion", and "immediate appeal from the order may materially advance the ultimate termination of the litigation" (*28 U.S.C. § 1292(b)*). Such a discretionary appeal can be requested with regard to a court's ruling on a motion to dismiss or for summary judgment. To obtain such an appeal, however, both a district court and the court of appeals must agree to resolve the issue on an interim basis. Moreover, where several cases are consolidated into a single litigation and the court issues a final judgment ending one plaintiff's case, that plaintiff may appeal immediately rather than awaiting a final judgment in all of the consolidated cases (*see Gelboim v. Bank of America Corp., 135 S. Ct. 897 (2015)*).

For class actions brought in a state court, state class action statutes typically provide a mechanism for appealing orders of class certification before the termination of litigation, but they often vary from the Federal Rules. In California, for example, an order denying class certification is immediately appealable based on the doctrine that such a denial is a "death-knell" to the class, but an order granting class certification may only be challenged after final judgment or if a court of appeals grants a discretionary writ of mandate to review that order.

ALTERNATIVE DISPUTE RESOLUTION

23. IS ALTERNATIVE DISPUTE RESOLUTION (ADR) AVAILABLE IN CLASS/COLLECTIVE ACTIONS?

Though not specifically required under Rule 23 of the Federal Rules of Civil Procedure, various methods of alternative dispute resolution are available for class action suits. Rule 16 allows courts to order the parties to any action to appear at a pre-trial conference to discuss options for settlement or mediation, and many courts require that the parties mediate their claims before proceeding to trial. ADR procedures are a common tool for facilitating settlement, but the court in which the action is pending must approve any class-wide settlement agreement reached through ADR procedures (*Fed. R. Civ. P. 23(e)*).

Parties to class actions can also arbitrate their claims before a single arbitrator or a panel of arbitrators. Arbitration can provide benefits to the parties including "lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialised disputes" (*AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011)*). Arbitration involving class procedures is more controversial, however, because an arbitrator must make determinations regarding class certification without the benefit of an appellate review. Commercial parties therefore commonly include waivers of class arbitration in favour of bi-lateral arbitration in their commercial contracts, and the Supreme Court in *American Express Co. v Italian Colors Restaurant 133 S. Ct. 2304 (2013)* held that such waivers are enforceable even where a plaintiff's cost of arbitrating individually would exceed that plaintiff's potential recovery. The same remedies that exist for class actions in federal court are generally available in class arbitration proceedings.

PROPOSALS FOR REFORM

24. ARE THERE ANY PROPOSALS FOR REFORM CONCERNING CLASS/COLLECTIVE ACTIONS?

Since the enactment of the Class Action Fairness Act, 28 U.S.C. § 1332(d) (CAFA) in 2005, there have been no significant legislative reforms to the laws governing class action lawsuits. However, several recent Supreme Court decisions have clarified the requirements for class action plaintiffs to certify their classes and indicated that the Court may be trying to narrow the kinds of cases that can be maintained as class actions. In *Wal-Mart Stores, Inc. v Dukes* and *Comcast Corp. v Behrend* (*see Question 2*), the Supreme Court established a rigorous standard for plaintiffs to demonstrate that their classes should be certified and for assessing whether expert testimony satisfies plaintiffs' burden of proof. In a series of cases (*Stolt-Nielsen S.A. v AnimalFeeds Int'l Corp. (130 S. Ct. 1758 (2010)); AT&T Mobility LLC v. Concepcion (131 S. Ct. 1740 (2011))* and *American Express Co. v Italian Colors Restaurant*) the Supreme Court upheld the enforceability of class action waivers requiring arbitration of individual claims, where the plaintiffs in each suit sought to bring a class action suit. In response to these decisions, some Congressmen and Senators have introduced legislation to overturn these rulings or to provide new routes for similar classes to be certified, but none have advanced significantly or been adopted.

More recently, in April 2015, Congressman Bob Goodlatte introduced the Fairness in Class Action Litigation Act of 2015, which would prohibit a federal court from certifying a proposed class "unless the party seeking to maintain a class action affirmatively demonstrates through admissible evidentiary proof that each proposed class member suffered an injury of the same type and extent as the injury of the named class members or representatives" (*H.R. 1927, 114th Cong., 1st Sess. (2015), http://judiciary.house.gov/_cache/files/cee8dcfc-0c48-43c0-91ea-08d4aac39374/pt-001-xml.pdf*). The bill is intended to curb a perceived trend in certification of classes that include individuals who suffered no injury or cannot demonstrate an injury due to the defendant's alleged actions. The prospect for this proposal is uncertain at this time.

ONLINE RESOURCES

FDSYS

W www.gpo.gov/fdsys/search/advanced/advsearchpage.action

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

US HOUSE OF REPRESENTATIVES

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

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

THE US SUPREME COURT

W www.supremecourt.gov/default.aspx

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

CONGRESS.GOV

W www.congress.gov/

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

LEGAL INFORMATION INSTITUTE (LII)

W www.law.cornell.edu/lii/get_the_law/our_legal_collections

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