Class Actions

Contributing editors
Jonathan Polkes and David Lender

2019

GETTING THE DEAL THROUGH

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Weil, Gotshal & Manges LLP

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CONTENTS

Preface

Class Actions 2019

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Class Actions*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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GETTING THE DEAL THROUGH

London
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United States

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Weil, Gotshal & Manges LLP

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

The judicial system in the United States is divided into federal courts and state courts. The federal court system has three levels: the trial courts, known as the US District Courts; the intermediate appellate courts, known as the US Courts of Appeals; and the High Court, known as the US Supreme Court. The composition of the state court systems varies by state, but most states mirror the three-level federal system.

The district courts are divided across 94 geographic districts. There is at least one district court in each of the 50 states and in the District of Columbia. Four territories of the United States also have district courts: Puerto Rico, the Virgin Islands, Guam and the Northern Mariana Islands. There are 13 courts of appeals and 12 of these are organised into regional circuits and hear cases appealed from the district courts within that circuit. The thirteenth court, the Court of Appeals for the federal circuit, has nationwide jurisdiction to hear appeals involving certain specialised issues, including patent cases. The Supreme Court is the highest court in the US system and has jurisdiction over all cases brought in federal court, as well as any case brought in state court but involving federal law. Supreme Court appellate review is discretionary.

Class actions can be litigated in either federal or state courts. However, in 2005, the United States Congress passed the Class Action Fairness Act (CAFA) that expanded the federal courts' jurisdiction over class actions and mass actions (cases that are not class actions but that involve 100 or more individual plaintiffs and common questions of law or fact) in several ways. Since CAFA's enactment, there has been an overall increase in the number of class actions originally filed in or removed to federal courts.

As explained in question 6, in certain circumstances, separate class actions filed in different district courts may be consolidated before a single federal judge. This occurs, most often, where the class actions involve similar issues and parties and consolidation will promote efficiencies in the litigation and prevent inconsistent decisions.

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

Class actions are quite common in the United States. It is estimated that more than 10,000 new class actions are filed each year in the federal and state courts.

Lawmakers and the judiciary generally recognise the benefits of the class action procedural device. Class actions are appreciated for the efficiencies they create through the consolidation of multiple suits and the aggregation of individual claims, as well as for providing a mechanism for plaintiffs to pursue – and potentially recover – on claims that would otherwise be too small to justify the expenses of litigation. However, class actions are sometimes criticised by lawmakers and judges for being 'lawyer-driven litigation' and for placing inordinate pressure on defendants to settle even weak claims so as to avoid the costs and potentially massive liability associated with class actions.

As explained in question 9, most class actions in the United States use an 'opt-out' process, which deems all members of a court-certified class automatically part of the class (as that class has been defined) unless specific members affirmatively 'opt-out'. As a result, class actions are often large and accordingly, pose significant potential damages for defendants. If not dismissed, most class actions settle. Very few class actions are tried to a judge or jury.

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

By statute, federal courts have jurisdiction over class actions: arising under the Constitution, laws, or treaties of the United States, see United States Code (USC) Chapter 28, section 1331; or in which the matter in controversy exceeds the sum or value of US$5 million and any member of the class is a citizen of a state different from any defendant, any member of the class is a foreign state or a citizen subject of a foreign state and any defendant is a citizen of one of the United States, or any member of the class is a citizen of one of the United States and any defendant is a foreign state or a citizen or subject of a foreign state, see USC Chapter 28, section 1332(d). Class actions conducted in federal court are governed by Rule 23 of the Federal Rules of Civil Procedure (Rule 23).

The legal basis for class actions in state courts varies by state, but most states have an analogue to Rule 23 or have, by common law, adopted similar standards.

4 What types of claims may be filed as class actions?

Generally, any type of claim can conceivably be brought as a class action, provided the requisite class-action procedural requirements are met. Consumer claims, securities claims, antitrust claims, mass tort and product liability claims, and civil rights claims are commonly brought as class actions.

5 What relief may be sought in class proceedings?

Class actions are a procedural device and are generally not supposed to abridge or expand any individual class member's substantive rights. As a result, in the federal system, there are generally no limitations on the type of relief available in a class action; a class member may be entitled to whatever relief would be available to them in an individual action. This can include monetary damages (including punitive damages), restitution, or injunctive or declaratory relief.

Certain state laws do limit the types of recoveries that can be achieved through a class action. For example, New York's Civil Practice Law and Rules (CPLR) provides that 'an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action' unless authorised by the statute creating the penalty (New York's CPLR, section 901(b)).

6 Is there a process for consolidating multiple class action filings?

Yes. If multiple class actions involving the same issues or parties are filed in the same trial court, the cases can be consolidated through a notice of related cases or a formal motion for consolidation. If multiple class actions involving the same issues or parties are filed in different district courts, the cases may be consolidated for pretrial proceedings by the Judicial Panel on Multidistrict Litigation (JPML) under USC Chapter 28, section 1407 if the JPML concludes that the various class actions involve 'one or more common questions of fact' and that consolidation 'will promote the just and efficient conduct of such actions'. Consolidation under section 1407 can be initiated by the JPML on its own initiative or by a party to a class action through motion practice. If the JPML orders

consolidation, the related class actions will be transferred to a single district court and organised into one multi-district litigation. The state courts have similar procedures available for the consolidation of related class actions.

Class action plaintiffs can identify related class actions by searching court dockets, many of which are easily accessible online.

7 How is a class action initiated?

Class actions are initiated through the filing of a complaint. A putative class action takes no more than a single named plaintiff and a filing fee typically of several hundred US dollars. Like any lawsuit, a class action complaint must not be frivolous. Also, to survive immediate dismissal, class action complaints must allege, among other things, the requisite procedural requirements under either Rule 23 (if filed in federal court) or state law (if filed in state court).

Under federal law, class action plaintiffs are not required to provide defendants with notice and an opportunity to cure prior to filing a complaint. However, some state substantive laws require that notice and an opportunity be given prior to the filing of a complaint. Accordingly, when asserting state law causes of action, plaintiffs should consult applicable state law on this issue regardless of where the complaint will be filed.

8 What are the standing requirements for a class action?

To have constitutional standing to have a claim heard by a federal court, class action plaintiffs must have suffered an 'injury in fact', that is, a concrete, particularised harm that is actual or imminent, not conjectural or hypothetical. The alleged injury must be traceable to an action taken by the defendant(s) and redressible by a favourable decision on the merits. In the class action context, named plaintiffs must be able to assert the same claims as the proposed class and have suffered the same alleged injury as the proposed class.

Third-party standing is generally prohibited in US courts but can occur if: the litigant has suffered his or her own injury-in-fact; the litigant has a close relationship to the third party whose rights the litigant is seeking to assert or enforce; and the third party's ability to protect his or her own interests is hindered. In some cases, public officials, can bring actions similar to class actions – parens patriae actions – on behalf of citizens of their state. Parens patriae actions are not class actions and are subject to their own unique procedural and substantive requirements.

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

Under Rule 23 (and most state class action rules), where a court certifies a class seeking monetary relief, class members are automatically part of the class unless they affirmatively 'opt out'. Rule 23 class actions that seek to prevent inconsistent adjudications that establish incompatible standards of conduct for defendants or distribute a limited fund or which request injunctive or declaratory relief do not have 'opt in' or 'opt out' procedures because the Court's ruling will necessarily impact all class members.

When a class action is initially filed, class members are not notified that an action has been commenced on their behalf. Class members, however, are required to be notified when a class action brought under Rule 23 seeking monetary relief has been 'certified' (ie, that a court has found that it meets the requirements in question 10 to be filed as a class action). The notice must be the 'best notice that is practicable', and often involves a combination of information sent directly to known class members, as well as descriptions of the class action in newspapers or other periodicals. For Rule 23 class actions that do not seek monetary relief, the court may require that notice be given when a class is certified, but it is not required.

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

For a case to be asserted as a class action in federal court, a plaintiff must allege, and then show by a preponderance of the evidence, that all four of the requirements of Rule 23(a) are met, and that the action meets the requirements of at least one of the three types of class actions identified in Rule 23(b). Many courts also impose an 'ascertainabililty' requirement, which means that members of the class must be identifiable by objective criteria and, in some jurisdictions, a reliable and feasible of way of determining who meets the criteria.

The four requirements of Rule 23(a) are:

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

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

- inconsistent adjudication or limited fund actions – these can be brought as class actions where separate actions would create a risk of: inconsistent or varying adjudications that would establish incompatible standards of conduct for defendants; or substantially impairing or impeding class members ability to protect their interests because an adjudication of individual class members rights would, as a practical matter, be dispositive of the interests of other class members;
- injunctive or declaratory relief actions – these can be brought as class actions where defendants have acted or refused to act on grounds that apply generally to a class, so that injunctive or declaratory relief concerning the class as a whole is appropriate; and
- monetary actions – these are the most common type of class actions and can be brought as class actions where questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

The state law requirements are generally similar because most states have a rule that mirrors Rule 23.

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

Typically, a plaintiff will file a motion to certify an action as a class action. Rule 23(c) provides that at 'an early practicable time' the court must determine whether to certify an action as a class action. But, in practice, it often takes more than a year for a plaintiff to file a motion for class certification, typically after discovery is completed because a plaintiff has the burden to show, by a preponderance of the evidence (mere allegations will not suffice), that all four of the requirements of Rule 23(a) are met, that the action meets the requirements of at least one of the three types of class actions identified in Rule 23(b), and that the class is 'ascertainable'. This inquiry cannot focus solely on whether the plaintiffs' claims satisfy the Rule 23 requirements, but whether the defendants' defences satisfy them, too. Defendants will typically oppose a plaintiff's motion for class certification, and the court will usually, but is not required to, hold a hearing on the issue of class certification and issue a written decision.

12 How does discovery work in class actions?

The discovery allowed in class actions is, like discovery in US civil litigation generally, quite broad. Parties may obtain discovery through mechanisms such as document requests, interrogatories, requests for admission and depositions. Because of the overlap between the issues of class certification and the actual merits of a case, most courts permit discovery on the merits to proceed on the same track as discovery concerning the class certification issue.

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

Rule 23 requires court approval of all class action settlements. A court must find that a settlement is 'fair, reasonable, and adequate' to approve it, and is required to hold a hearing to determine if that standard has been met. Approval typically occurs in two steps. First, the parties will inform the court that they have entered into a settlement and propose a form of notice of the settlement to be provided to class members. The notice must be the best notice practicable under the circumstances to

Update and trends

On 9 March 2017, the US House of Representatives passed the Fairness in Class Action Litigation Act (FICALA). If passed by the US Senate, and signed into law by the president, the FICALA in its current form would lead to some significant changes in class action litigation. Notable proposed changes include:

- class members must have the same 'type and scope' of injury in order for the class to be certified (section 1716);
- FICALA codifies a 'heightened' ascertainability requirement (section 1718(a));
- attorney fee awards are tied to the class recovery and payment of any such awards should be deferred until class members are paid (section 1718(b));
- 'issue' classes can no longer be certified under Rule 23(c)(4) if plaintiffs cannot otherwise satisfy all the Rule 23 requirements (section 1720); and all discovery is stayed pending initial motion practice except as necessary to preserve evidence (section 1721).

Despite being reported to the Senate on 13 March 2017, FICALA has not advanced to a vote in the Senate Judiciary Committee.

In contrast to FICALA, several modest amendments to Rule 23 have been proposed via a rulemaking process. Among other changes that could go into effect:

- Rule 23(c) would authorise notice of a proposed settlement class action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice; and
- Rule 23(e) sets forth the criteria (established by the courts already) for approval of a class action settlement and establishes procedures for dealing with objectors.

On 26 February 2018, the Supreme Court granted certiorari in the case of *New Prime Inc v Oliveira* (No. 17-340) to address the scope of the Federal Arbitration Act (FAA). Specifically, the Supreme Court will determine whether the district court must decide whether the FAA applies to the lawsuit when the contract, under which the lawsuit was brought, has delegated the arbitrability of the dispute to the arbitrator.

On 30 April 2018, the Supreme Court granted certiorari in the case of *Frank v Gaos* (No. 17-961) to address the practice of district courts distributing damages owed to injured class members to non-party charitable institutions – otherwise known as cy-pres. The theory behind cy-pres is that, when getting damage awards to class members is difficult, giving that money to a relevant charity is the next-best result. The Supreme Court has never considered whether cy-pres is legitimate or how it is supposed to work.

Also on 30 April 2018, the Supreme Court also granted certiorari in the case of *Lamps Plus, Inc. v. Varela* (No. 17-988) to address the level of specificity an arbitration agreement must contain in order to demonstrate the parties' consent to submit a dispute to class arbitration. This case aims to resolve a question left open by the case of *Stolt-Nielsen SA v AnimalFeeds International Corp*, 559 US 662 (2010) in which the Supreme Court held that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.

satisfy constitutional due process and will describe the class action and the proposed settlement, state when and where the hearing to approve the settlement will occur, and explain how class members can object to the settlement, if they want to. In Rule 23 monetary class actions the notice will also explain how class members can opt out of the settlement and how they can submit claims for monetary relief. Then the court will hold the settlement hearing, consider any objections by class members to the settlement, and determine whether to approve settlement.

14 May class members object to a settlement? How?

Yes, the notice class members receive will provide them with specific instructions concerning how they can object to the settlement. Class members can typically (on their own behalf or through counsel) file a written objection to the settlement with the court or appear at the settlement hearing and object in person. The court will adjudicate the objection in the context of approving (or not) the proposed class action settlement.

Additionally, in an 'opt-out' class action, class members may choose to opt out of the settlement and pursue their claims individually although the opt-out rate in most cases is generally low.

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

A final judgment in a class action that has been certified binds all class members and precludes class members from asserting any claims that were actually asserted in the action and any claims that arise out of the same nucleus of operative facts as the claims asserted in the action unless the class member has affirmatively opted out of the settlement. A final judgment in a purported class action that was not actually certified by the court as a class action binds only the named plaintiff or plaintiffs.

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

A final judgment in a class action is reviewable as of right, just like any other final decision in civil litigation. Under Rule 23(f), a trial court decision granting or denying class certification can also be reviewed on an interlocutory basis in certain limited circumstances, including where the decision: is a 'death knell' because the claim is too small for plaintiff to pursue individually or too large for defendant to defend such that plaintiff or defendant will be forced to resolve the case based on non-merits based considerations; raises a legal issue that is important to that specific case, and which can be broadly applied to other cases; or is manifestly erroneous.

17 What role do regulators play in connection with class actions?

Generally, regulators have some impact on class actions, particularly in the settlement context. Under CAFA, defendants in a class action are required to notify state and federal regulators of any proposed class action settlement, and to provide the regulators with at least 90 days to review the proposed settlement before a federal judge can grant final approval. If the appropriate regulators are not notified, class members may choose not to be bound by the settlement even if the class member already received a settlement notice and failed to opt out. CAFA's notification requirement is designed to ensure that the responsible state or federal regulator receives information about the proposed class action so that they may evaluate the settlement for fairness and to determine whether the settlement is consistent with applicable regulatory policies.

Likewise, private class action plaintiffs may pursue claims even where state or federal regulators have litigated or are litigating the same underlying conduct. Thus, class actions may proceed at the same time as civil and criminal enforcement actions and a class generally may obtain relief in addition to any relief obtained by regulators.

18 What role does arbitration play in class actions? Can arbitration clauses lawfully contain class-action waivers?

Arbitrations play an increasingly important role in the resolution of class actions and, in particular, consumer and employment class actions. In recent years, the US Supreme Court has repeatedly upheld the use of class action waivers in arbitration provisions in all types of class actions, and has ruled that state laws prohibiting such waivers are pre-empted by the Federal Arbitration Act. More recently, the Supreme Court rejected the proposition that the savings clause of the Federal Arbitration Act precludes the enforcement of class waivers because another federal statute – the National Labour Relations Act – protected the right of employees to act collectively in bringing a class action. In so holding, the Supreme Court relied on the Federal Arbitration Act's instruction to federal courts to enforce arbitration agreements according to their terms, including terms providing for individualised proceedings.

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

In the United States, plaintiffs' lawyers may enter into contingency fee agreements with their clients in class actions. In fact, plaintiffs' lawyers bring most class actions in the United States under such agreements. If the plaintiffs' recover monetary damages in the class action – whether through settlement or by court judgment – the court must approve

any award of fees to the plaintiffs' lawyers based on a percentage of the settlement fund method or the 'lodestar' of counsel based on the number of hours worked multiplied by a reasonable hourly rate. Courts can approve a class action settlement and reject or reduce a requested attorney fee award.

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

Generally, the losing party does not pay the prevailing party's attorneys' fees unless expressly provided for by statute or contract. For example, the Clayton Act provides for fee shifting to the prevailing plaintiff in a federal antitrust claim. If the plaintiff prevails and its lawyers' have brought the case under a contingency fee agreement, then the losing party may indirectly pay the prevailing party's attorneys' fees because those fees typically come from the final settlement or award. A losing party may be responsible for paying certain of the prevailing party's litigation costs under the federal rules. These costs include, among others, witness expenses, travel expenses, filing fees, copying costs and deposition transcripts.

21 Is third-party funding of class actions permitted?

Third-party funding of class actions are permitted in the United States and at least one federal court in the United States has required the automatic disclosure of third-party funding agreements for proposed class action lawsuits. Some courts have found that information provided by attorneys to third-party funders is privileged and protected by the work-product doctrine.

22 Can plaintiffs sell their claim to another party?

Class action plaintiffs may sell or assign their claims to other entities or individuals. In the United States, there are litigation investment companies that acquire claims to file suit and recover any award or settlement. Some of these investment companies also sell shares in the lawsuits to raise money to finance the litigation. Standing issues can be raised to challenge whether the sale renders the plaintiff not the 'real party in interest'.

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

Generally, if a class action is resolved pursuant to a settlement, the settlement agreement will govern the distribution of any unclaimed funds. Settlement agreements typically provide that any unclaimed funds be distributed among class members who have submitted a proper claim or be distributed to a charitable organisation under the doctrine of cy-pres. It is increasingly uncommon for any unclaimed funds to revert to the defendant. Typically, court approval is required prior to the distribution of any unclaimed funds.

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

Plaintiffs' attorneys often file class actions as a result of prior or pending regulatory action. Typically, a federal or state regulator announces an investigation of a particular company or industry based on certain conduct. Class action plaintiffs' attorneys, in turn, identify individuals harmed by the alleged conduct and file class actions with such individuals as named plaintiffs and class representatives. This is most common in antitrust, employment and securities class actions. Plaintiffs' attorneys are incentivised to bring follow-on actions, especially in the antitrust context, where evidence of a guilty plea for antitrust violations is prima facie evidence of liability in a civil action.

The Antitrust Criminal Penalty Enhancement and Reform Act (ACEPRA) provides additional incentives for those who self-report illegal cartel conduct. Under the ACEPRA, the first applicant to review the illegal cartel activity to the Department of Justice is granted leniency in a criminal prosecution. Because a successful applicant may still face follow-on civil litigation, ACEPRA eliminated treble damages and joint and several liability for those who provide 'satisfactory cooperation to civil claimants. In 2010, Congress reauthorised ACPERA's provision eliminating treble damages for another 10 years, up to 2020.

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Renewable Energy
Restructuring & Insolvency
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