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# United States: Class Actions

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The United States has a robust class action regime for antitrust litigation as part of the dual system of public and private antitrust enforcement. Antitrust class actions are typically brought by direct purchasers and/or indirect purchasers of companies in industries accused of widespread anticompetitive behaviour. These cases often, but do not always, follow investigations or enforcement actions by the US Department of Justice or Federal Trade Commission. Through a multi-district litigation procedure it is commonplace for these cases to be consolidated in one federal court so that a single judge can preside over them for pretrial purposes, including class certification.[1]

The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'[2] 'In order to justify a departure from that rule, 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'[3] More specifically, 'a party seeking to maintain a class action must be prepared to show that [Federal] Rule [of Civil Procedure] 23(a)'s numerosity, commonality, typicality, and adequacy-of-representation requirements have been met and must satisfy through evidentiary proof at least one of Rule 23(b)'s provisions.'[4] The Supreme Court has made clear that the class certification inquiry is not 'a mere pleading standard'[5] and 'certification is proper only if "the trial court is satisfied, after a rigorous analysis, that [Rule 23's] prerequisites […] have been satisfied."'[6] Such an analysis will frequently entail 'overlap with the merits of the plaintiff's underlying claim. That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'[7]

## Implications of class actions unique to antitrust cases

Several factors unique to the US private antitrust laws raise the stakes of a court's class certification decision. Actual damages within a four year statute of limitations, often tolled in conspiracy cases alleging fraudulent concealment or continuing violations, are automatically trebled. In addition, co-conspirators are jointly and severally liable for total damage awards,[8] with no right of contribution.[9] Thus, any plaintiff can seek to recover the entirety of treble damages (minus any settlement amounts actually received) from any single conspirator. This dynamic creates considerable pressure on defendants to settle class actions regardless of the merits of the case.[10]

## Satisfying the prerequisites of Rule 23(a)

A class representative must initially meet all requirements of Rule 23(a), which are designed to ensure 'that the named plaintiffs are appropriate representatives of the class whose claims they wish to litigate.'[11]

### Numerosity

The Rule 23(a)(1) numerosity requirement frequently goes uncontested.[12] While courts have rejected classes where the number of class members is based solely on speculation, an exact count of class members is not required and approximations generally suffice. Rule 23(a) further requires that the class be 'so numerous that joinder of all members is impracticable.' The Third Circuit set out a 'non-exhaustive list' of factors for courts to consider in determining impracticability, including 'judicial economy, the claimants' ability and motivation to litigate as joined plaintiffs, the financial resources of class members, the geographic dispersion of class members, the ability to identify future claimants, and whether the claims are for injunctive relief or for damages.'[13]

### Commonality and typicality

Rule 23(a)(2) requires that there are questions of law or fact common to the class. Not every question of law or fact must be common[14] or dispositive.[15] However, plaintiffs' claims 'must depend upon a common contention […] that] must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.'[16]

Rule 23(a)(3) requires that 'the claims or defenses of the representative parties are typical of the claims or defenses of the class.'[17] The typicality requirement does not require that named representatives have identical legal claims or theories as all absent class members. It does, however, generally preclude certification where the claims of the named representative or the defences they are subject to are unique.

### Adequate representation

Finally, Rule 23(a)(4) requires that the representative party (and their counsel) will adequately represent the interests of the class. The genesis of this requirement is the fact that, absent opting out of a class pursuant to Rule 23(c)(2), absent class members are bound by the final judgment achieved by the class representatives. One of the more common articulations of the standard under Rule 23(a)(4) requires that 'the party's attorney be qualified, experienced and generally able to conduct the proposed litigation'[18] and that 'it is necessary to eliminate so far as possible the likelihood that the litigants are involved in a collusive suit or that plaintiff has interests antagonistic to those of the remainder of the class.'[19]

## Predominance under Rule 23(b)

In addition to the requirements of Rule 23(a), at least one of the three requirements listed in Rule 23(b) must be met. Antitrust class actions most often seek damages and are brought under Rule 23(b)(3),[20] which requires that (i) questions of law or fact common to the class predominate over questions affecting only individual members, and (ii) a class action is superior to other available methods for adjudicating the controversy.[21] As recently described by the Supreme Court, the predominance inquiry:

> *calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is*

> *one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof. The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.*[22]

But the predominance requirement does not require 'commonality as to all questions.'[23] 'When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members […]'.[24]

In antitrust cases, the predominance requirement often turns on the analysis of complex data by expert economists and whether or not there is common proof of harm to class members. For example, the Supreme Court rejected class certification where a damages model did not measure only those damages attributable to the allegedly anticompetitive conduct and thus 'cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).'[25]

### Ascertainability of class

In addition to the explicit requirements of Rule 23(a) and (b), most courts have concluded that there is 'an implicit requirement under Rule 23 that a class must be defined clearly and that membership be defined by objective criteria rather than by, for example, a class member's state of mind.'[26] What constitutes ascertainability has been extensively litigated, resulting in a circuit split currently unresolved by the Supreme Court.[27] Many courts require that a plaintiff establish at the time of certification that 'there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.'[28] The ascertainability issue has arisen most commonly in consumer class actions seeking damages on low-priced consumer products for which class members have no objective proof of purchase. Beginning in the Third Circuit, the sole reliance on affidavits from customers, which are not subject to cross-examination by defendants, to prove class membership has been deemed insufficient.[29] The Second, Sixth, Seventh, Eighth and Ninth Circuits, however, have rejected this 'heightened' standard for ascertainability and have held that a class plaintiff is not required to demonstrate the 'administrative feasibility' of ascertaining a class at the time of certification.[30]

### Class action settlements

Rule 23 requires court approval for any settlement of a certified class, preceded by notice to class members so they can object to particular settlement terms or opt out and preserve their claims and litigate separately if they choose to do so.[31] Trial courts are required to 'independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished.'[32]

While federal courts clearly are required to conduct a Rule 23 analysis prior to certifying any class, in practice the relevant considerations contemplated in this analysis differ depending upon whether the class sought to be certified is a settlement class or a litigation class. While the requirements of Rules 23(a) and (b) generally must be satisfied to certify a settlement class, the Supreme Court has confirmed that when '[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems [under Rule 23(b)(3)(D)], for the proposal is that there be no trial.'[33] However, the Supreme Court also admonished that 'other specifications of the Rule – those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand undiluted, even heightened, attention in the settlement context.'[34] A seemingly incongruous result is that classes can be certified for settlement purposes even where they are found not to satisfy Rule 23's requirements for certification of a litigation class.[35]

### Appealing class certification orders under Rule 23(f)

There is no automatic right to immediately appeal a class certification ruling.[36] Given the significant impact of a class certification or denial, however, Rule 23(f) allows parties to request an immediate appeal, but defers to the appellate courts as to whether to grant this request or require that the parties await a final judgment and appeal as of right under 28 USC section 1291.[37]

Under Rule 23(f), an appeal may be allowed 'on the basis of any consideration that the court of appeals finds persuasive.' 'Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.'[38] Most circuits also contemplate immediate judicial review in 'death-knell' situations for plaintiffs (where continuing as individuals is too costly) or defendants (where settlement pressure is insurmountable). In these death-knell situations, courts often require an additional showing that the district court's class ruling is 'questionable.'[39]

### Possible class action reforms

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 reform 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 certification to address the issue of whether classes can include both injured and injured persons (section 1716);
- the 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).

In contrast to the FICALA, several modest amendments to Rule 23 have been proposed.[40] 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.

## Notes

1 28 U.S.C. § 1407. State attorneys general also can bring parens patriae actions on behalf of their residents for monetary recovery, which can continue in state court and avoid consolidation in federal court pursuant to the multidistrict litigation procedure. See *Mississippi ex rel. Hood v AU Optronics Corp.*, 134 S.Ct. 736 (2014).

2 *Comcast Corp. v Behrend*, 133 S. Ct. 1426, 1432 (2013) (citation omitted).

3 *Wal-Mart Stores, Inc. v Dukes*, 564 U.S. 338, 348-49 (2011) (citation omitted).

4 *Comcast*, 133 S. Ct. at 1428 (2013) (citation omitted). The plaintiff has the burden of proving that the requirements of Rule 23 are met. See, eg, *Comcast*, 133 S. Ct. at 1432 (stating that a party must 'affirmatively demonstrate his compliance' with Rule 23); *Marcus v BMW of N. Am., LLC*, 687 F.3d 583, 591 (3d Cir. 2012) ('The party seeking certification bears the burden of establishing each element of Rule 23 by a preponderance of the evidence.' ); *Stirman v Exxon Corporation*, 280 F.3d 554, 562 (5th Cir. 2002).

5 *Wal-Mart*, 564 U.S. at 350, 131 S. Ct. at 2551.

6 *Comcast*, 133 S. Ct. at 1429.

7 *Comcast*, 133 S. Ct. at 1429.

8 *Perma Life Mufflers, Inc. v Int'l Parts Corp.*, 392 U.S. 134, 144 (1968) (White, J, concurring) ('[D]amages normally may be had from either or both defendants without regard to their relative responsibility for originating the combination or their different roles in effectuating its ends.').

9 *Tex. Indus., Inc. v Radcliff Materials, Inc.*, 451 U.S. 630 (1981).

10 *Hydrogen Peroxide*, 552 F.3d 305, 310 (3d Cir. 2008) (citation omitted); see also *In re Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013) (a defendant does not need to be in risk of destitution for review of class certification; rather, class certification only needs to exert 'unwarranted pressure to settle nonmeritorious or marginal claims.') (citation omitted); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 7 (1st Cir. 2008) (interlocutory appeals of class certification appropriate where 'doubtful class certification results in financial exposure to defendants so great as to provide substantial incentives for defendants to settle non-meritorious cases in an effort to avoid both risk of liability and litigation expense.') (citation omitted).

11 *Wal-Mart*, 564 U.S. at 349 (citation omitted).

12 The number of class members required to satisfy the numerosity requirement, however, can be as low as a few dozen if the court deems joinder impracticable and considers as paramount the concepts of efficiency and judicial economy underlying Rule 23 – rather than requiring proof that joinder actually is impossible. See, eg, *In re Nat 'l Football League Players Concussion Injury Litig.*, No. 15-2206, 2016 WL 1552205, at *7 (3d Cir. Apr. 18, 2016), as amended (May 2, 2016) (class of forty class members sufficient); *In re Marine Hose Antitrust Litig.*, 2009 U.S. Dist. LEXIS 71020, at *23-24 (S.D. Fla. 2009) (numerosity requirement satisfied by class between 50 and 66 geographically diverse members); *In re Beer Distrib. Antitrust Litig.*, 188 F.R.D. 557, 562 (N.D. Cal. 1999) (numerosity requirement satisfied by over 25 class members spread out among 50 states).

13 *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 253 (3d Cir. 2016).

14 *Weiss v York Hosp.*, 745 F.2d 786, 808-09 (3d Cir. 1984) (although some questions raised might not be raised in respect to all class members, common questions of law and fact predominate to satisfy the commonality requirement).

15 *Davis v Northside Realty Assoc.*, 95 F.R.D. 39, 43 (N.D. Ga. 1982) (Rule 23(a)(2) is satisfied '[i]f there is a common issue, irrespective of whether it is dispositive of the case').

16 *Wal-Mart*, 564 U.S. at 350.

17 Fed. R. Civ. P. 23(a)(3).

18 See, eg, *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.*, 827 F.3d 223 (2d Cir. 2016) (reversing approval of a proposed class action settlement on the grounds that class counsel could not adequately represent a unified class of merchants with both damages and injunctive relief claims).

19 *Eisen v Carlisle and Jacquelin*, 391 F.2d 555, 562, 11 Fed. R. Serv. 2d 604 (2d Cir. 1968).

20 Rule 23(b)(2) allows for certification where 'the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.' Fed. R. Civ. P. 23(b)(2). Antitrust class actions under Rule 23(b)(2) are not uncommon when only injunctive relief is sought, but certification under (b)(2) will be denied when the primary relief sought is monetary damages or those damages are not 'incidental to the injunctive or declaratory relief.' *Wal-Mart*, 564 U.S. at 360.

21 Fed. R. Civ. P. 23(b)(3). The superiority requirement often is not the focus of the Rule 23(b)(3) inquiry, but it can be in some cases, particularly where businesses are absent class members who otherwise may have individually pursued claims or can pursue individual claims.

22 *Tyson Foods, Inc. v Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (internal quotations omitted).

23 *Comcast*, 133 S. Ct. at 1436. See also *Kleen Products, LLC v Int'l Paper Co.*, 831 F.3d 919 (7th Cir. 2016) (affirming grant of class certification in alleged containerboard price-fixing case where defendants did not challenge the admissibility of the direct purchasers' economic experts and concluding that plaintiffs do not need to show injury to every class member at the class certification stage: 'the fact that class certification decisions must be supported by evidence does not mean that certification is possible only for a party who can demonstrate that it will win on the merits').

24 *Tyson Foods*, 136 S. Ct. at 1045.

25 *Comcast*, 133 S. Ct. at 1433.

26 *Mullins v Direct Digital, LLC*, 795 F.3d 654, 657 (7th Cir. 2015).

27 The Supreme Court has twice declined certiorari to cases seeking resolution of this split in recent years. See, eg, *Mullins v Direct Digital*, LLC, 799 F. 3d 497 (7th Cir. 2015); *Rikos v Procter & Gamble Co.*, 799 F. 3d 497 (6th Cir. 2016).

28 *Hayes v Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013) (citation omitted).

29 See, eg, *Byrd v Aaron's Inc.*, 784 F.3d 154, 168 (3d Cir. 2015); *Karhu v Vital Pharmaceuticals, Inc.*, 621 F.App'x. 945, 946 (11th Cir. 2015); *EQT Production Co. v Adair*, 764 F.3d 347, 358 (4th Cir. 2014); *Carrera v Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013).

30 See, eg, *In re Petrobras Secs.*, 862 F.3d 250, 264–69 (2d Cir. 2017) ('The ascertainability requirement … asks district courts to consider whether a proposed class is defined using objective criteria that establish a membership with definite boundaries. This modest requirement will only preclude certification if a proposed class definition is indeterminate in some fundamental way.'); *Rikos*, 799 F. 3d 497 (6th Cir. 2016); *Mullins*, 799 F. 3d 497 (7th Cir. 2015); *Sandusky Wellness Ctr., LLC v Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016) (refusing to apply a heightened standard of ascertainability and reversing the denial of class certification of individuals who received an ad from the defendant on the ground that subscribing to the fax was an objective criterion); *Briseno v ConAgra Foods, Inc.*, 844 F.3d 1121, 1123-25 (9th Cir. 2017) (rejecting a heightened ascertainability standard and affirming class certification where the question of whether class members purchased allegedly mislabeled Wesson-brand cooking oils was a sufficiently objective criterion).

31 The Class Action Fairness Act of 2005 also requires that specific regulators or government officials be notified of proposed class action settlements and related collateral consequences for non-compliance. 28 U.S.C. § 1715.

32 Id.

33 *Amchem Prods., Inc. v Windsor*, 521 U.S. 591, 620 (1997).

34 Id.

35 See, eg, *In re Am. Intern. Group, Inc. Securities Litig.*, 689 F.3d 229, 241-43 (2d Cir. 2012) (holding settlement class alleging securities law violations not required to prove fraud-on-the-market presumption as required for class certification); *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 306 (3d Cir. 2005) (explaining the court need not examine manageability issues for settlement-only class as it would be required to do for litigation class); *Thomas v Albright*, 139 F.3d 227, 234-35 (D.C. Cir. 1998) (noting that settlement-only class does not to fulfil all requirements under Rule 23(b)(3)(d); *In re Processed Egg Products Antitrust Litig.*, No. 08-md-2002, 2016 U.S. Dist. LEXIS 85853, at *19-20 (E.D. Pa. June 30, 2016) (granting certification of more expansive class for settlement purposes that the class certified for litigation purposes); *In re Dynamic Random Access Memory Antitrust Litig.*, No. 02-1486, 2013 U.S. Dist. LEXIS 188116, at *254 (N.D. Cal. Jan. 7, 2013) (holding that nothing in the court's prior ruling denying class certification as to a proposed litigation class prevented the court from subsequently granting certification for settlement purposes) (citing *Sullivan v DB Investments, Inc.*, 667 F.3d 273, 306 (3d Cir. 2011)).

36 *Coopers & Lybrand v Livesay*, 437 U.S. 463, 470 (1978) (class certification rulings are 'inherently interlocutory').

37 See *Microsoft v Baker*, No. 15-457, 2017 WL 2507341, at *4 (S. Ct. June 12, 2017) ('We hold that the voluntary dismissal essayed by respondents does not qualify as a 'final decision' within the compass of § 1291. The tactic would undermine § 1291's firm finality principle, designed to guard against piecemeal appeals, and subvert the balanced solution Rule 23(f) put in place for immediate review of class-action orders.')

38 Id.

39 *Blair v Equifax Check Servs., Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999). See also *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 99 (D.C. Cir. 2002) (interlocutory review appropriate 'when there is a death knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification.'); *In re Sumitomo Copper Litig.*, 262 F.3d 134, 139 (2d Cir. 2001) ('In line with our sister circuits, we hold that petitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate […] that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable […]') .

40 See Comm. on Rules of Prac. and Proc. of the Judicial Confer. of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, 211–218 (Aug. 2016). If approved, the proposed amendments will become effective 1 December 2018.

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Weil's antitrust practice is one of the most diversified and well-respected competition practices in the world, with our partners being consistently recognised as leaders in the field for their significant knowledge and experience in handling high-profile matters. Many of our partners are former high-level government antitrust officials.

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