

Class Actions 2021

Contributing editors
Jonathan D Polkes and David J Lender



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

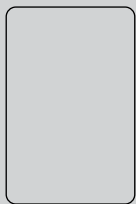
Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between October and November 2020. Be advised that this is a developing area.

© Law Business Research Ltd 2020
No photocopying without a CLA licence.
First published 2015
Sixth edition
ISBN 978-1-83862-311-1

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Class Actions 2021

Contributing editors**Jonathan D Polkes and David J Lender****Weil Gotshal & Manges LLP**

Lexology Getting The Deal Through is delighted to publish the sixth edition of *Class Actions*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on India and the Netherlands.

Lexology 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.lexology.com/gtdt.

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.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Jonathan D Polkes and David J Lender of Weil Gotshal & Manges LLP, for their continued assistance with this volume.



London
November 2020

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2020
For further information please contact editorial@gettingthedealthrough.com

Contents

Introduction	3	Netherlands	54
Jonathan D Polkes and David J Lender Weil Gotshal & Manges LLP		Jeroen van Hezewijk and Sandra Coelen Freshfields Bruckhaus Deringer	
Australia	4	South Korea	60
Andrew Morrison and Colin Loveday Clayton Utz		Joo-young Kim and Hyun-ju Ku Hannuri Law	
Canada	10	Switzerland	66
Jeremy Martin Cassels Brock & Blackwell LLP Myriam Brixi Lavery de Billy LLP		Philipp J Dickenmann CMS von Erlach Poncet AG	
France	20	Taiwan	74
Céline Lustin-Le Core EBA Endrös-Baum Associés		Alan TL Lin and Chun-wei Chen Lee and Li Attorneys at Law	
India	31	United Kingdom	81
Shubhabrata Chakraborti, Dhruv Malik and Madhura Kulkarni Juris Corp, Advocates and Solicitors		Hayley Lund, Jamie Maples and Sarah Chaplin Weil Gotshal & Manges LLP	
Israel	39	United States	91
Hadas Bekel, Naama Ehrlich, Ran Sprinzak and Tomer Weissman Erdinast, Ben Nathan, Toledano & Co		Stacy Nettleton, Eric Hochstadt, David Singh, Luna Barrington, Bambo Obaro, Matthew Connors, Harlan Rosenson and Audrey Stano Weil Gotshal & Manges LLP	
Japan	46		
Oki Mori and Eri Akiyama Nagashima Ohno & Tsunematsu			

United States

Stacy Nettleton, Eric Hochstadt, David Singh, Luna Barrington, Bambo Obaro, Matthew Connors, Harlan Rosenson and Audrey Stano
Weil Gotshal & Manges LLP

OVERVIEW

Court system

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

The 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 13th 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, with few exceptions, discretionary.

Class actions can be litigated in state or, if there is a basis for federal subject matter jurisdiction, in federal court. There is federal subject matter jurisdiction if the case raises a federal question (eg, if it asserts claims arising under federal law; United States Code (USC) Chapter 28 section 1331) or if there is diversity in citizenship (USC Chapter 28 section 1332). Under the general rule, there is diversity jurisdiction where the matter in controversy exceeds US\$75,000 and is between citizens of different states (for class actions, the amount in controversy requirement is US\$5 million). These rules resulted in many class actions being litigated in state courts often perceived to be less favourable to defendants. However, in 2005, the United States Congress passed the Class Action Fairness Act (CAFA), which 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.

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.

Frequency of class actions

- 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.

Legal basis

- 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 federal law (see USC Chapter 28, section 1331); or in which the amount 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.

Types of claims

- 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.

Relief

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)).

Initiating a class action and timing

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

Class actions are initiated 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. 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 to cure 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.

There is no uniform limitation period for claims asserted in class actions. The limitation period (and any tolling of that period) will depend on the underlying claim being asserted. However, the limitation period for purported class members to file a claim is tolled once a purported class action asserting that claim is filed. If the class is not certified, the limitation period begins to run again and class members may assert that claim on an individual (but not a class) basis before the limitation period expires. Certain statutes, including certain federal securities statutes, also include statutes of repose, which are distinct from statutes of limitations, cannot be equitably tolled and are an absolute bar to asserting a claim. The time it takes to adjudicate class actions varies widely depending on the type of claim being asserted and the court in which the action is pending, but, if the action survives a motion to dismiss (ie, it plausibly states a claim for relief), it may last years.

CLASS FORMATION

Standing

7 | 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. To have standing to seek prospective injunctive relief, the named plaintiff(s) must generally also be at risk of future harm; allegations of past harm alone generally do not suffice.

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.

Participation

8 | 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, notice is not provided to putative class members 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 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.

Certification requirements

9 | 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 ‘ascertainability’ requirement, which means that members of the class must be identifiable by objective criteria and, in some jurisdictions, a reliable and feasible 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 to these federal rules because most states have a rule that mirrors Rule 23.

10 | How does a court determine whether the case qualifies for a 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 can take more than a year for a plaintiff to file a motion for class certification, often 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 enquiry cannot focus solely on whether the plaintiffs' claims satisfy the Rule 23 requirements, but whether the defendants' defences satisfy them, too. Defendants will often times 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.

Consolidation

11 | 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 United States Code 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 multidistrict litigation. The state courts have similar procedures available for the consolidation of related class actions.

PROCEDURE

Discovery

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.

Privilege and confidentiality

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

There are no unique professional privilege, litigation privilege or confidentiality rules for class actions. The rules governing privilege and confidentiality vary depending on where an action is pending. The rules governing privilege also vary depending on where purported privileged communications occurred and whether the action asserts claims arising under federal or state law. Confidential communications between an attorney and a client for the purpose of providing legal advice and confidential materials prepared by an attorney in connection with a litigation are generally privileged and protected from disclosure in certain circumstances, but the requirements for invoking the privilege, proving the privilege exists and the situations in which the privilege is waived can vary widely depending on where an action is pending, where communications occurred, and whether the action arises under federal or state law. Accordingly, when confronted with the issue of whether a document is protected from disclosure based on privilege or confidentiality, a party should carefully review the applicable law.

Testimony

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

In class actions, fact and expert testimony are usually submitted at the class certification stage to support or rebut the certification of a proposed class. The Federal Rules of Civil Procedure or the applicable state corollary govern disclosure of expert and fact testimony. In federal cases, fact and expert witnesses are disclosed pursuant to Rule 26 of the Federal Rules of Civil Procedure, which governs when and what information must be disclosed.

There are no special rules that govern testimony submitted in class actions, so the testimony must comply with the rules of evidence in the applicable federal or state court. At the class certification stage, the testimony is usually submitted in the form of a declaration or an affidavit, both of which require the declarant or affiant to declare under penalty of perjury that the statements set forth in the document are accurate and truthful. The court will order witness examinations at the class certification stage only if it decides to conduct a hearing on the class certification motion. The court has wide discretion to decide whether to conduct a class certification hearing and will only do so if it believes that hearing from the witnesses would be helpful.

At the class certification stage, the court looks beyond the pleadings to assess whether the case is appropriate for class treatment based on the factors of numerosity, commonality, typicality and adequacy, including whether individual issues predominate over any common issues. Therefore, allegations of class-wide liability, impact

and damages are insufficient at this stage and any testimony – whether expert or fact – must support each of these factors. In addition, under existing United States Supreme Court precedent, the expert’s testimony must correspond to the theory of liability and the court will often first determine whether the testimony is admissible before it can be used to support class certification or liability.

DEFENCE

Defence strategy

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

There are three main inflection points in a class action case that defendants should be conscious of: the motion to dismiss phase, the class certification phase, and the summary judgment phase.

The motion to dismiss phase is generally the first potential opportunity for the defendant to have the case dismissed or significantly narrowed. At this early stage of the case, because a class has not been certified, defendants do not need court approval to settle the case with the named plaintiffs only. Before the plaintiffs expend resources litigating the case, particularly if there is a threat that the court could dismiss the case or significantly narrow the case, the defendant might have an opportunity to broker a favourable settlement that resolves the case.

Class certification is another significant milestone and inflection point of any class action case. If a class is not certified, plaintiffs lose tremendous leverage, as the named plaintiffs’ individual damages are likely not very significant and often will not justify taking the case all the way to trial. Conversely, if a class is certified, plaintiffs become emboldened, as most defendants do not like to risk trying a class action case because of the significant liability exposure if the defendants were to lose at trial. As a result, many class action cases get resolved after the court rules on class certification, and during or after the resolution of any interlocutory appeals under Rule 23(f) of the Federal Rules of Civil Procedure. If the class is not certified, the plaintiffs would be eager to settle the case and sometimes would even dismiss the case on their own rather than proceed to trial on the named plaintiffs’ claims only. If the class is certified, defendants generally would want to come to some sort of amicable resolution before the case proceeds to trial to avoid the risk of a finding of liability as to the whole class.

The summary judgment phase also presents an opportunity for the defendant to settle the case. However, because plaintiffs would necessarily have invested resources into the case at this stage of the litigation, the amount that plaintiffs may be willing to settle the case for at this stage will likely be relatively more than the plaintiffs might have been willing to settle the case for at the outset of the case, even on an individual basis. Because an individual settlement with named plaintiffs only does not provide a defendant with ‘global peace’ on a claim(s), a defendant can settle on a class-wide basis even before class certification has been determined in the litigation. Like any class action settlement, it will be subject to court approval and the procedures laid out in Rule 23(e) of the Federal Rules of Civil Procedure.

Any class-wide settlement entered into either before or after the class is certified in the litigation context must be approved by the court. The court will evaluate any potential settlement to make sure that the settlement is ‘arm’s length’ and ‘fair, reasonable, and adequate’ to all class members under Rule 23(e) of the Federal Rules of Civil Procedure.

Joint defence agreements

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

There are no unique joint defence rules in class actions. A joint defence agreement is an attempt to memorialise that the interests of certain parties are sufficiently aligned that when they share privileged information with each other, that information does not lose its privilege (which normally occurs when a party shares privileged information with another party). Some courts have held that joint defence agreements are discoverable and other courts have held that they are not. Thus, it is prudent to operate on the assumption that a joint defence agreement could be discoverable and not include legal strategy or other potentially privileged information in the agreement.

The fact that parties enter into a joint defence agreement does not establish that their interests are so sufficiently aligned that they can share privileged information with each other without waiving privilege. Rather, a court will independently make the determination of whether the parties’ interests are sufficiently aligned (although the existence of a joint defence agreement is usually a helpful fact in establishing alignment of interests). Assuming the parties’ interests are sufficiently aligned such that they can share privileged information with each other without waiving privilege, the sharing of such information has the advantage of allowing parties and their attorneys to coordinate and pool knowledge and resources, creating a broader knowledge base and making litigation more efficient and less costly. The sharing of such information, however, can also have disadvantages – it can create group dynamics that make it more difficult for a joint defendant party to reach a settlement that does not include all other joint defendant parties, and, if a dispute later arises between the joint defendant parties, they may attempt to use privileged information against each other, which can result in a waiver of the privilege.

SETTLEMENT

Approval of settlements

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

Rule 23 of the Federal Rules of Civil Procedure requires court approval of all class-action settlements. A court must find that a settlement is, as a matter of process, the product of an arm’s length negotiation and, as a matter of substance, ‘fair, reasonable, and adequate’ to approve it. A court also 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 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 the settlement.

Objections to settlement

18 | May class members object to a settlement? How?

Yes, the notice that 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.

Separate settlements

19 | How are separate class action settlements handled?

Resolution of class action cases before a class is certified can be accomplished without approval by the court and generally only covers the named plaintiffs' claims. Individual class members can also opt out of the class settlement to pursue their claims individually. After a class member opts out, that class member is free to initiate a separate litigation against the defendant and attempt to settle their claims separately from the class action and without court approval.

The advantages to a plaintiff of proceeding individually, rather than as part of the class action, include the fact that the individual plaintiff would have a better opportunity to develop case strategy for his or her own individual case. A major hurdle to proceeding individually, however, is that, for the typical individual plaintiff, individual damages in class action cases are often not substantial enough to justify pursuing the litigation on an individual basis. The plaintiff would also not be able to leverage the work done by class counsel on behalf of the whole class.

JUDGMENT AND APPEAL

Preclusive effect

20 | 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 putative class action that was not actually certified by the court as a class action binds only the named plaintiff or plaintiffs.

Appeals

21 | 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) of the Federal Rules of Civil Procedure, 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 the plaintiff to pursue individually or too large for the defendant to defend such that the plaintiff or defendant will be forced to resolve the case based on non-merits-based considerations, or raises a legal issue that is important to that specific case, and which can be broadly applied to other cases; or is manifestly erroneous.

REGULATORY ACTION

Regulators

22 | What role do regulators play in connection with class actions?

Generally, regulators have some impact on class actions, particularly in the settlement context. Under the Class Action Fairness Act (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 has 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.

Private enforcement

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

In the civil system, minimum statutory damages in certain consumer protection statutes provide sufficient incentive for plaintiffs to bring class actions. Consumer protection statutes in the United States, like the Telephone Consumer Protection Act and the Fair Debt Collection Practices Act, require defendants to pay a minimum amount in damages if they are found to have violated the statutes. Because minimum statutory damages substantially increase the amount of damages that a plaintiff may receive, plaintiffs and their counsel are incentivised to bring lawsuits. Likewise, certain statutes like the Sherman Antitrust Act, which prohibits anticompetitive behaviour, provides for automatic trebled damages (ie, three times as much money in damages as the cost of the violation) if defendant is found to have violated the statute.

In the criminal system, the United States antitrust laws also provide incentives for plaintiffs to bring follow-on civil class actions. In the United States, if a company or person is found to be criminally liable by the federal government for antitrust violations, that judgment may be used as prima facie evidence of an antitrust violation in a subsequent civil suit. This relieves the plaintiff of having to prove that the defendant committed that same antitrust violation. However, the plaintiff cannot use it to prove the defendant committed broader or other antitrust violations.

ALTERNATIVE DISPUTE RESOLUTION

Arbitration and ADR

24 | What role do arbitration and other forms of alternative dispute resolution 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.

Court-ordered mediation

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

Courts in the United States often do order pretrial mediation in class actions. Indeed, courts often order several mediations to occur at various stages of an action (such as after the completion of fact discovery, after summary judgment motions have been submitted, and shortly before trial is scheduled to commence). The fact that a mediator supports a settlement is typically viewed positively by a court and will bolster the parties' contention that they reached a settlement at arm's length, but, even when a mediator supports a settlement, the court is still required to make an independent determination as to whether the settlement is 'fair, reasonable, and adequate'.

FEES, COSTS AND FUNDING

Contingency fees

26 | 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 or by the 'lodestar method', which is 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.

Cost burden

27 | 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.

Calculation

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

Prevailing parties in a civil litigation may recover costs pursuant to Rule 54(d)(1) of the Federal Rules of Civil Procedure. Rule 54 provides that 'costs – other than attorney's fees – should be allowed to the prevailing party'. United States Code Chapter 28, section 1920 enumerates the categories of costs that a court may tax, which include fees of the clerk and marshal, fees for printed or electronically recorded transcripts obtained for use in the case, fees and disbursements for printing and witnesses, fees for making copies of any materials or for exemplification, and docket fees. Some courts award costs for electronic discovery under section 1920(4), which provides for 'fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case'. Costs are not usually recoverable in cases that have settled unless it is otherwise provided for in the settlement agreement.

Third-party funding

29 | Is third-party funding of class actions permitted?

Third-party funding of class actions is 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 attorney work-product doctrine.

Public funding

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

The Legal Services Corporation is the single largest funder of civil legal aid for low-income Americans, and many states have an analogue. However, US law prohibits using Legal Service Corporation funds for class action litigation, and a number of states have adopted analogous restrictions. Those seeking public funding for class action litigation should research whether the state in which they may bring their claims permits public legal services funding for class actions.

Insurance

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

Insurance to protect against the risk of adverse judgments is an option for litigants. But it is required to be disclosed to the opposing side at the outset of the litigation through the initial disclosures under Rule 26 of the Federal Rules of Civil Procedure.

Transfer of claims

32 | 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'.

Distributing compensation

33 | 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-près. 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.

UPDATE AND TRENDS

Legal and regulatory developments

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

Class action reform has become a highly political issue in the United States, with Republican members of the US Congress generally pushing for reforms to curb perceived abuses and Democrat members of the US Congress generally opposing those reforms. In 2017, Republicans proposed the Fairness in Class Action Litigation Act, a bill proposing sweeping changes to the rules of class action. The bill would, among other things, preclude federal courts from certifying class actions unless the plaintiffs' lawyers could prove that every class member suffered the same injury and the identity of class members could be determined with reliable and feasible means. Relatives of the plaintiffs' lawyers would not be able to serve as class representatives. Plaintiffs' lawyers would have to disclose third-party funding deals. Class certification decisions would be automatically appealable. Attorneys' fee awards to plaintiffs' counsel would be limited to a reasonable percentage of payments actually received by class members and the value of any equitable relief. These changes proposed in this bill would resolve many of the issues courts in the US judicial system are grappling with, all in a manner favouring corporate defendants. The bill stalled in committee and, because the Democrats secured a majority of the US House of Representatives in the November 2018 election, is unlikely to regain momentum in the current US Congress. In September 2019, the US House of Representatives passed the Forced Arbitration Injustice Repeal Act (FAIR Act), a bill that would ban pre-dispute arbitration agreements in employment, consumer, antitrust and civil rights disputes. The FAIR Act passed in the House of Representatives on 20 September 2019. However, it is unlikely that this bill will be passed by the Republican-controlled Senate.

Given the current composition of the US Congress – with a Democrat-controlled House and a Republican-controlled Senate – most developments in class action litigation are occurring through judicial decision. The courts are divided on a wide range of issues, including:

- the enforceability of mandatory pre-dispute arbitration provisions: the US Supreme Court has generally affirmed the enforceability of pre-dispute arbitration provisions, but various challenges to arbitration provisions continue to percolate through the lower courts;
- various issues with respect to standing, including whether unnamed class members must have article III standing (eg, whether each must suffer injury-in-fact) and whether alleging violations of statutorily created privacy rights satisfies particularised harm as required for article III standing;
- issues regarding personal jurisdiction, including whether a defendant can be forced to defend itself in a nationwide class action if sued in a state where it is not subject to general jurisdiction;
- whether a court may certify a class where there is no reliable or feasible method to identify membership in the class;

- the viability of 'negotiation' class actions;
- the propriety of certifying piecemeal 'issue' classes pursuant to Federal Rule of Civil Procedure 23(b)(4) where all of the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) have not been satisfied; and
- what percentage of class members can be 'uninjured' while still ensuring that common issues will predominate over individual ones to satisfy Rule 23(b); and the standards for approving cy-près class settlements (where settlement funds are distributed to a charity or other non-profit related to the case, rather than to class members, often because the members of the class cannot be identified or where there are insufficient settlement funds available to make individual monetary payments).

A general trend is that US District Courts are also increasing scrutiny of proposed class-action settlements. For example, in late 2018, the Northern District of California adopted amended class-action settlement guidelines requiring plaintiffs' lawyers to make significant disclosures to a court when seeking preliminary approval of a class action settlement, including:

- the anticipated class recovery under the settlement;
- the potential recovery if plaintiffs had prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise;
- an estimate of the number or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator or counsel from other recent settlements of similar cases; and
- detailed information from class counsel regarding past distributions to classes in prior comparable class settlements, and detailed information regarding the amount of attorneys' fees that plaintiffs' counsel will be requesting.

The amended class-action settlement guidelines also require detailed disclosures in connection with a motion for final approval of a class-action settlement, including:

- information about the class members' response rate to the notice of the class-action settlement;
- the number of class members who submitted valid claims;
- the number of class members who elected to opt out of the class;
- the number of class members who objected to the settlement; and
- additional information regarding the attorneys' fees request.

Further, another hotly litigated issue is whether certification of a class is proper when some percentage of the class is uninjured. Recently, courts have both certified (eg, *In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litigation*, 967 F.3d 264 (3d Circuit 2020); *In re EpiPen (Epinephrine Injection, USP) Mktg. Sales Practices & Antitrust Litigation*, No. 17-MD-2785-DDC-TJJ, 2020 WL 1873989 (D. Kan. Feb 27, 2020)) and denied certification (eg, *In re Rail Freight Fuel Surcharge Antitrust Litigation*, MDL No. 1869, 934 F.3d 619 (DC Circuit 2019)) of such classes in the antitrust context.

Coronavirus

35 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The covid-19 pandemic brought about new opportunities for competitor collusion and exacerbated some of the other pre-existing issues

related to antitrust, such as price gouging and hoarding, as individuals and companies alike scrambled to adjust to sudden product shortages and the developing needs of consumers. To combat the heightened potential for anticompetitive behaviour owing to the pandemic, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) quickly confronted the situation by issuing a Joint Antitrust Statement Regarding COVID-19 in March 2020. The joint statement announced accelerated agency reviews of collaborative action and provided examples of acceptable types of cooperation among competitors through joint ventures and coordinated business efforts. The statement also delivered a warning to anyone attempting to use covid-19 'as an opportunity to subvert competition or prey on vulnerable Americans', as the two federal agencies vowed to keep a watchful eye towards agreements between individuals and businesses that restrain competition and stated that they would not hesitate to hold those accountable and prosecute any criminal violations of the antitrust laws. Specifically for alleged hoarders and price-gougers of personal protective equipment such as face masks, while typically a matter of state law, the DOJ is pursuing civil and criminal sanctions. Additionally, together with the Department of Health and Human Services, the DOJ has set up a 'COVID-19 Hoarding and Price Gouging Task Force' to identify suspected perpetrators and confiscate their supplies.

In New York, Governor Cuomo signed into law an act to amend the general business law in the state in relation to price gouging. The new law (S8189/A10270) substantially strengthened New York state's price gouging statute to prevent excessive price increases on essential goods and services. The law expanded protections against price gouging beyond consumer goods to include any products or services that are 'vital and necessary for the health, safety, and welfare of consumers or the general public', extending protection against price gouging beyond only consumers. The law now protects small businesses to hospitals and other health care providers, and even the state of New York, as they purchase products or services for the benefit of the public. The Office of the New York Attorney General has also been vigilant in protecting consumers from covid-19 profiteers, issuing more than 1,565 cease-and-desist orders to businesses that stand accused of violating the current law in response to the thousands of complaints of excessive prices. Separate from those orders, Attorney General Letitia James also filed two lawsuits, one against a wholesale grocery distributor for illegally increasing the wholesale prices for the sale of Lysol disinfectant products to stores in New York, and another suit against one of the nation's largest egg producers for illegally gouging the prices of more than four million cartons of eggs and charging New York customers up to four times the pre-pandemic price for one carton of eggs. Price gouging laws differ state to state, from how they are written and applied by state attorneys general to the scope of how and what they cover. For instance, some states such as Arizona, Colorado, Maryland and Montana do not have specifically codified price gouging statutes. However, other states, such as California, have broad price gouging statutes that can be expanded in duration and scope during a state of emergency. For example, Governor Gavin Newsome declared a state of emergency in response to covid-19 on 4 March 2020, signing Executive Order N-44-20, which, pursuant to California's price gouging statute, Penal Code 396, extended price gouging protections through 4 September 2020 and was subsequently extended even further to 4 March 2021. Accordingly, Penal Code 396 makes it illegal to increase the price of, among others, food items, construction materials, transportation services, consumer goods, or medical and emergency supplies to more than 10 per cent of what was being charged for that item on 4 February 2020. Additionally, violating California's price gouging statute can result in up to one year in jail and a fine of up to US\$10,000.

With the heightened scrutiny surrounding pricing and business collaborations in light of the covid-19 pandemic, the following are a list



Stacy Nettleton

stacy.nettleton@weil.com

Eric Hochstadt

eric.hochstadt@weil.com

David Singh

david.singh@weil.com

Luna Barrington

luna.barrington@weil.com

Bambo Obaro

bambo.obaro@weil.com

Matthew Connors

matthew.connors@weil.com

Harlan Rosenson

harlan.rosenson@weil.com

Audrey Stano

audrey.stano@weil.com

767 Fifth Avenue
New York
10153-0119
United States
Tel: +1 212 310 8000
Fax: +1 212 310 8007
www.weil.com

of best practices to adhere to in order to lessen the risk of violating the antitrust laws:

- if increasing costs of a product or service to a consumer, make sure there is a legitimate business reason for raising prices other than increased consumer demand; for example, higher costs from a supplier or added cost of additional labour; and
- for collaborations with a competitor, businesses should focus on purpose, scope and timing and be prepared to articulate why the collaboration is necessary to address covid-19 and how the proposed collaboration is sufficiently tailored in scope and time to achieve the stated purpose.

The following are examples of permissible collaborative activities designed to improve health and safety in response to the pandemic:

- in general, the FTC and DOJ view collaborations on research and development as an 'efficiency-enhancing integration of economic activity' and is typically procompetitive;
- sharing technical know-how, rather than company-specific data about prices, wages, outputs or costs may be 'necessary to achieve the procompetitive benefits of certain collaborations';
- collaborations on standards for patient management in the health-care setting, such as developing and discussing best practices to assist providers in clinical decision-making; and
- joint purchasing arrangements among healthcare providers, such as those designed to increase the efficiency of procurement and reduce transaction costs.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Investment Treaty Arbitration	Public M&A
Advertising & Marketing	Domains & Domain Names	Islamic Finance & Markets	Public Procurement
Agribusiness	Dominance	Joint Ventures	Public-Private Partnerships
Air Transport	Drone Regulation	Labour & Employment	Rail Transport
Anti-Corruption Regulation	e-Commerce	Legal Privilege & Professional Secrecy	Real Estate
Anti-Money Laundering	Electricity Regulation	Licensing	Real Estate M&A
Appeals	Energy Disputes	Life Sciences	Renewable Energy
Arbitration	Enforcement of Foreign Judgments	Litigation Funding	Restructuring & Insolvency
Art Law	Environment & Climate Regulation	Loans & Secured Financing	Right of Publicity
Asset Recovery	Equity Derivatives	Luxury & Fashion	Risk & Compliance Management
Automotive	Executive Compensation & Employee Benefits	M&A Litigation	Securities Finance
Aviation Finance & Leasing	Financial Services Compliance	Mediation	Securities Litigation
Aviation Liability	Financial Services Litigation	Merger Control	Shareholder Activism & Engagement
Banking Regulation	Fintech	Mining	Ship Finance
Business & Human Rights	Foreign Investment Review	Oil Regulation	Shipbuilding
Cartel Regulation	Franchise	Partnerships	Shipping
Class Actions	Fund Management	Patents	Sovereign Immunity
Cloud Computing	Gaming	Pensions & Retirement Plans	Sports Law
Commercial Contracts	Gas Regulation	Pharma & Medical Device Regulation	State Aid
Competition Compliance	Government Investigations	Pharmaceutical Antitrust	Structured Finance & Securitisation
Complex Commercial Litigation	Government Relations	Ports & Terminals	Tax Controversy
Construction	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Tax on Inbound Investment
Copyright	Healthcare M&A	Private Banking & Wealth Management	Technology M&A
Corporate Governance	High-Yield Debt	Private Client	Telecoms & Media
Corporate Immigration	Initial Public Offerings	Private Equity	Trade & Customs
Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)