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United States
CLASS ACTIONS

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This country-specific Q&A provides an overview of class actions laws and regulations applicable in United States.

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UNITED STATES
CLASS ACTIONS

1. Do you have a class action or collective redress mechanism? If so, please describe the mechanism.

Class actions are a common mechanism in the United States for plaintiffs to bring claims collectively that would otherwise be too expensive or impractical to be brought on an individual basis. To bring a class action in a U.S. federal court, a representative class member(s) files a complaint on behalf of a putative class of similarly situated persons as described therein. For a case to proceed as a class action on behalf of the defined members of the class, the court must certify the class under the standards discussed below in Question 9. If a class is certified, any judgment will be binding on all class members, but members may have the ability to opt-out after the class is certified (and for certain causes of action, plaintiffs may be required to opt-in as discussed below in Question 8).

Most states provide for class actions as well; Mississippi and Virginia are often cited as the only states in which class actions are not available under state law. Many states, including Delaware, Florida, Oklahoma, and Virginia also provide for "mass actions" or "collective actions" in addition to class actions, as do certain federal statutes. The requirements to bring such mass or collective actions vary from state to state, but they generally differ from class actions in that all parties are plaintiffs and participate in the proceedings as individuals, with the right to have counsel of their own choosing.

2. Who may bring class action or collective redress proceeding? (e.g. qualified entities, consumers etc)

Class actions generally are not limited to particular types of plaintiffs. As long as the putative class meets the criteria discussed in Question 9, and jurisdictional and other requirements applicable to all cases are met, a case may proceed as a class action on behalf of consumers and/or businesses and other types of organizations.

3. Which courts deal with class actions or collective redress proceedings?

Class actions may be brought in any federal district court that has personal jurisdiction over the defendant(s) and subject matter jurisdiction over the controversy. Subject matter jurisdiction is discussed in Question 14. Similarly, class and/or other forms of collective actions may be brought in state courts of general jurisdiction as long as state-specific requirements are met, the court has subject matter jurisdiction, and the defendant is subject to personal jurisdiction in that court—i.e., the defendant is an individual who lives or works, or is an entity incorporated, headquartered, or doing business related to the claim asserted, in that state.

4. What types of conduct and causes of action can be relied upon as the basis for a class action or collective redress mechanism?

As long as the requirements for certifying a class discussed in Question 9 are met, and as long as the specific claim is not statutorily or otherwise barred, any cognizable legal claim may be asserted on a class-wide basis. Common class action claims cover a broad range of subject matters and causes of action. Cases that frequently present the problems that class actions are designed to address—i.e., cases with a large number of injured parties and/or claims that likely would not otherwise be brought because no single plaintiff has a claim large enough to warrant proceeding individually—include product liability, mass torts, consumer fraud, antitrust, securities fraud, civil rights, privacy, data breaches, and employment discrimination claims.

5. Are there any limitations of types of

claims that may be brought on a collective basis?

The federal Securities Litigation Uniform Standards Act of 1998 ("SLUSA") bars claims for securities fraud under state law from being brought as class actions where 1) the securities involved are traded nationally and are listed on a regulated national exchange and 2) damages are sought on behalf of more than 50 people. This is to prevent plaintiffs from circumventing the federal restrictions on securities fraud class actions, such as heightened pleading standards. Some states may bar class actions for certain types of claims entirely, such as certain types of taxpayer suits, or impose procedural limitations on class actions, such as first requiring exhaustion of administrative remedies or requiring an enforcing authority to first make a finding of fraud or deception under certain state consumer-protection statutes.

Potential plaintiffs, such as consumers or employees, can waive their right to bring class actions in end-user, employment, consumer finance, and similar types of contracts. The United States Supreme Court has upheld mandatory class action waivers in employment-related arbitration agreements and consumer agreements requiring individual arbitration of claims. There are exceptions and other limits on the enforceability of class action waivers, however. For example, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 voids class action waivers for claims alleging sexual assault or sexual harassment. In addition, courts may find certain contractual class action waivers to be unenforceable, e.g., if the surrounding circumstances render them unconscionable or if they would infringe statutory rights.

6. How frequently are class actions brought?

Class actions are a common feature of U.S. litigation. According to one litigation-tracking database, of 201,994 new cases filed in federal court in 2022, 3,169 were putative class actions (approximately 1.6%). By comparison, in 2021 and 2020, respectively, 3,860 (1.5%) and 4,963 (1.2%) putative class actions were filed in the federal courts.

7. What are the top three emerging business risks that are the focus of class action or collective redress litigation?

First, data breaches and privacy violations continue to generate significant risk of class action litigation. When hackers access consumers' private or confidential information held by private companies, affected parties can seek to hold those companies responsible for insufficiently protecting data from threats. A recent class action following a data breach settled for over $500 million, with potentially an additional $2 billion in payments to come. Consumers also can seek redress for companies' data-gathering protocols, despite potentially legitimate business purposes: an appellate court recently allowed a class action to proceed that alleged that the defendant collected identifying information about minor users without first obtaining their consent.

Second, antitrust claims continue to be a significant area for litigation risk. Regulators continue to vigorously investigate and enforce federal and state antitrust laws, increasing the likelihood that class actions will be brought based on facts and/or violations disclosed during enforcement actions, as discussed further in Question 19. Such "follow-on" class actions are expected to continue to increase.

Lastly, while not yet resulting in class action litigation to our knowledge, Environment, Social, and Governance ("ESG")-related disclosures are likely to be an emerging focus of class action litigation, as ESG-related issues are subject to both increasing regulation and public scrutiny.

8. Is your jurisdiction an "opt in" or "opt out" jurisdiction?

Most class actions in the U.S. federal courts are "opt out" proceedings. Federal Rule of Civil Procedure 23(b) (discussed further in Question 9) provides for three types of class actions. Rule 23(b)(3) applies when questions of law or fact common to the class predominate over the questions affecting only individual members. When a class is certified under Rule 23(b)(3), class members have a right to receive notice of class certification and an opportunity to opt out so that they can pursue their claims individually if they wish.

By contrast, Rule 23(b)(1) applies when separate proceedings would create a risk of inconsistent rulings that would establish incompatible standards of conduct by the defendant, or when individual proceedings would be dispositive of nonparties' interests or impair nonparties' ability to defend those interests. Rule 23(b)(2) typically applies when the representative plaintiff seeks injunctive or declaratory relief that would affect the class as a whole. Classes certified under either of these rules provide relief to and bind class members without any requirement to opt in and typically provide no right to opt out.

Opt-in requirements may be imposed by statute for

certain types of claims. For example, the Age Discrimination in Employment Act and the Fair Labor Standards Act both require plaintiffs to file written consents to join the action. These statutory claims generally are referred to as "collective actions" as opposed to "class actions."

9. What is required (i.e. procedural formalities) in order to start a class action or collective redress claim?

A putative class action is started like any other lawsuit, with a complaint filed in a court with apparent jurisdiction over the parties and claims. With respect to federal class actions, the court must certify the class under Federal Rule of Civil Procedure 23 for the case to proceed as a class action rather than on behalf of only the named plaintiff(s). The class certification process typically begins with a motion for class certification filed by the representative plaintiff(s), often after at least some discovery is conducted, as discussed in Question 1. The court must undertake a "rigorous analysis" to determine whether the representative plaintiffs have proven that their proposed class meets the requirements of Rule 23, which may involve an evidentiary hearing. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

As an initial matter, Rule 23 provides that certification orders "must define the class." Fed. R. Civ. P. 23(c)(1)(B). Some courts have held this to implicitly require the putative class representative to show that membership in the proposed class is "ascertainable"; i.e., that individual class members can be identified by reference to objective criteria separate from the mere fact of the alleged harm. Putative class representatives also must prove that the proposed class meets all of the requirements set forth in Fed. R. Civ. P. 23(a):

- **Numerosity (Rule 23(a)(1))**: The class must include so many members that including each of them as a separate plaintiff would be impracticable. Some courts have stated that 40 members is the minimum threshold for meeting the numerosity requirement. On the other hand, where a case involves hundreds of class members or more, numerosity is typically assumed and uncontested. The party seeking class certification need not provide the exact number of class members at the class certification stage; a good-faith estimate generally will suffice.
- **Commonality (Rule 23(a)(2))**: There must be at least one issue of law or fact common to the class. Speaking generally, even a single common issue is sufficient to satisfy this requirement. While the common issue need not be dispositive of the case, it must be central to it. The common issue also does not need to apply to all class members, but it must apply to most.
- Typicality **(Rule 23(a)(3))**: The claims of the representative plaintiff(s) must be typical of those of the absent class members. That is, they must arise from the same facts and pursue the same legal theories as those being asserted on behalf of absent class members, although they generally need not be identical to those of all absent class members.
- Adequacy **(Rule 23(a)(4))**: The interests of the absent class members must be adequately represented such that it is fair to bind absent class members to the judgment. This generally requires both that the representative plaintiff(s) has no significant conflicts of interest with the absent class members and that the attorneys representing the class have sufficient experience with class actions and the claims at issue.

In addition to meeting each of the requirements of Rule 23(a), the representative plaintiff must show that the class meets at least one of the criteria set forth in Rule 23(b):

- **Rule 23(b)(1)**: Separate actions by the individual class members would either risk establishing incompatible standards against the party being sued, or would be dispositive of absent class members' interests (such as cases addressing a utility's practices with respect to all its customers) or substantially impair their ability to protect those interests (such as "limited fund" cases, in which a defendant's assets are insufficient to satisfy all individual claims, which would leave later-filing plaintiffs empty-handed).
- **Rule 23(b)(2)**: The class seeks declaratory or injunctive relief where the party opposing the class "has acted or refused to act on grounds generally applicable to the class," such as civil rights cases arising out of discrimination against a particular group.
- **Rule 23(b)(3)**: Questions of law or fact common to the class predominate over the questions affecting only individual members, as determined by the court, and adjudicating the matter on a class-wide basis will be "superior to other available methods."

The requirements for bringing class actions in most state courts generally mirror those of bringing class actions in

federal courts, but there are exceptions, such as in California.

10. What remedies are available to claimants in class action or collective redress proceedings?

Class plaintiffs can sue for monetary damages as well as injunctive relief, declaratory relief, restitution, and other equitable remedies.

11. Are punitive or exemplary damages available for class actions or collective redress proceedings?

Nothing in the Federal Rules of Civil Procedure prohibits punitive damages in class actions, but the courts generally disfavor them. Punitive damages are available only if the substantive law underlying the causes of action asserted would allow punitive damages for an individual claim. In addition, differences in the availability of punitive damages under applicable state laws can preclude certification of nationwide punitive damages classes.

12. Are class actions or collective redress proceedings subject to juries? If so, what is the role of juries?

Class actions are generally tried before juries to the same extent as individual actions. Thus, claims for damages, i.e., "legal" claims, are generally tried before juries, while claims for injunctive relief, i.e., "equitable" claims, are tried before judges. A party must make a jury demand for any claim to be tried before a jury, typically at the outset of the case.

13. What is the measure of damages for class actions or collective redress proceedings?

The measure of damages in a class action varies depending on the type of claim and injury asserted in the case. For example, if class members paid a one-time flat fee later found to be unlawful, the damages owed to each class member might simply be a refund of the fee, with each class member receiving the same amount. Similarly, if class members prove that they overpaid for each unit of a product they purchased, those who bought multiple units might be entitled to larger awards than class members that bought only one unit. Calculating the damages owed to each individual class member can be quite complex. In such cases, the putative class must generally be able to demonstrate that there is a single method that will allow damages to be reliably measured and quantified for each individual class member.

There are several methods by which class-wide damages may be calculated. For example, an expert witness may utilize a mathematical formula or economic model based on the facts of the case and/or the defendant's records. In other cases, an expert witness might present representative evidence demonstrating the damages of a typical class member, which can then be used to approximate the damages suffered by the class as a whole. In complex cases, courts may bifurcate proceedings into a liability phase and a damages phase and/or appoint a special master to assist in the allocation of damages if liability is established.

14. Are there any jurisdictional obstacles to class actions or collective redress proceedings?

Class actions are largely subject to the same jurisdictional rules as individual actions. Representative plaintiffs may bring a putative class action in federal court, or the defendants may remove a putative class action from state court to federal court, if the court has subject matter jurisdiction or can meet the requirements of the Class Action Fairness Act of 2005 (CAFA).

Federal subject matter jurisdiction typically is based on either:

- **Federal question jurisdiction**: Federal question jurisdiction exists when the representative plaintiff asserts a claim under federal law, such as alleged antitrust violations under the Sherman Act; or
- **Diversity jurisdiction**: Diversity jurisdiction exists when the representative plaintiffs and all named defendants are citizens of different states, and the amount in controversy with respect to each separately named class representative is at least $75,000.

In addition, CAFA provides for federal jurisdiction when there are at least 100 plaintiffs in the putative class, at least one plaintiff is diverse from at least one defendant, and the aggregate sum of the plaintiffs' claims exceeds $5 million. CAFA expanded defendants' ability to litigate class actions in federal rather than state court.

As courts of general jurisdiction, state courts generally may preside over class actions so long as they are authorized under the state's procedural rules. Both federal and state courts also must have personal

jurisdiction over each defendant. A 2017 ruling by the Supreme Court limiting personal jurisdiction was thought to be likely to limit the availability of nationwide class actions, but its impact at the federal level has been limited. In *Bristol-Myers Squibb Co. v. Superior Court of California*, which was a mass tort action, not a class action, the Court held that state courts could not exercise personal jurisdiction over nonresident defendants based on injuries to nonresident plaintiffs that occurred outside of the forum. 582 U.S. 255 (2017). However, the weight of authority since then has held that *Bristol-Myers* does not apply to class actions brought in federal court.

15. Are there any limits on the nationality or domicile of claimants in class actions or collective redress proceedings?

Federal Rule of Civil Procedure 23 does not expressly limit the participation of non-U.S. citizens from participating in class actions as absent class members or even as putative class representatives. The requirements of commonality, typicality, adequacy, and superiority and predominance discussed in Question 9, however, may pose particular challenges to the certification of classes with members, or representatives, who are non-citizens. Differences in the circumstances giving rise to citizen's and non-citizens' claims may result in a failure to meet the commonality and typicality requirements of 23(a). For example, if a choice of law analysis results in different laws governing foreign class members' and U.S. citizens' claims, the proposed class may fail to meet the typicality requirement of Rule 23(a).

In addition, foreign class members create risks of re-litigation if the foreign jurisdiction does not recognize the U.S. court's judgment. Thus, some courts have declined to certify a class that includes foreign citizens on the ground that it does not meet the superiority requirement of Rule 23(b)(3). Similarly, the availability of an adequate remedy in an alternative forum may mean a class including foreign citizens fails the superiority requirement based on the principle of *forum non conveniens*. Logistical difficulties posed by inclusion of foreign class members, such as difficulty of providing notice, might also cause classes with foreign members to fail the superiority requirement.

16. Do any international laws (e.g. EU Representative Actions Directive) impact the conduct of class actions or collective redress proceedings? If so, how?

There are no international laws like the EU Representative Actions Directive that directly impact the conduct of class actions in the United States. That is, class actions in the United States are not generally governed by international treaties or requirements promulgated by treaty-based organizations. Non-U.S. law to which putative class members might be subject can affect the likelihood of class certification, however, as discussed in Question 15.

17. Is there any mechanism for the collective settlement of class actions or collective redress proceedings?

Federal Rule of Civil Procedure 23(e) provides that "claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval." A class action may be certified specifically for the purposes of settlement, or a class may be certified in order to proceed to trial and later settle. Settlement classes can be defined differently, including more broadly, than the putative class defined in the complaint. While a settlement class must still technically meet the requirements of Rule 23 discussed in Question 9, in practice courts often take a less rigorous approach to class certification in the settlement context.

18. Is there any judicial oversight for settlements of class actions or collective redress mechanisms?

As noted above, Federal Rule of Civil Procedure 23(e) provides that any class action settlement must be approved by the court. Approval is a three-step process. First, the court must determine whether to grant preliminary approval of the proposed class and settlement. Second, if preliminary approval is granted, notice must be given to all class members who would be bound by the proposed settlement, and the court must hold a fairness hearing, where class members must have an opportunity to object. Fed. R. Civ. P. 23(e)(1). In Rule 23(b)(3) cases, class members must also have an opportunity to opt out. If Rule 23(b)(3) class members already were given the opportunity to opt out at the class certification stage, the court nevertheless may, in its discretion, provide a second opportunity to opt out. Fed. R. Civ. P. 23(e)(4). The court may direct that notice of this second opportunity to opt out be sent along with notice of the settlement and fairness hearing, or the court may require that it be sent after the fairness hearing. Third, the court must determine whether to grant final approval, which requires the court to

conclude that the settlement is "fair, reasonable, and adequate." The court will consider whether the class representative and class counsel have adequately represented the class, the proposal was negotiated at arm's length, the relief provided to the class is adequate, and the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2).

19. How do class actions or collective redress proceedings typically interact with regulatory enforcement findings? e.g. competition or financial regulators?

Regulatory enforcement proceedings frequently serve as a catalyst for class action litigation. Such "follow-on" class actions are often filed on the heels of the public disclosure of a regulatory investigation or governmental enforcement action (civil or criminal), with a representative plaintiff asserting claims incorporating facts alleged in a plea, indictment, complaint, or other statement disclosing of the prior proceeding. Common types of follow-on cases include civil actions following (or during) criminal antitrust prosecutions investigations. When class actions are initiated during the course of a criminal investigation, the U.S. Department of Justice commonly seeks to stay civil discovery until the completion of the investigation and related prosecutions. Under the Antitrust Criminal Penalty Enhancement & Reform Act ("ACPERA"), defendants that have been granted leniency under the Department of Justice Antitrust Division's Leniency Program can avoid treble antitrust damages and joint and several liability if they provide to civil plaintiffs timely, "satisfactory cooperation."

Similarly, class action litigation may lead to government enforcement. Plaintiffs also may contact regulators in the midst of class action litigation to try to spur concurrent investigations, and enforcement agencies have opened investigations based on what is disclosed in the course of a public class action. Whatever the impetus for a governmental enforcement action, private plaintiffs inevitably will seek to make use of guilty pleas, criminal convictions, leniency grants, and related cooperation obligations in subsequent civil litigation, subject to the applicable rules of evidence and court rulings as to admissibility.

20. Are class actions or collective redress proceedings being brought for 'ESG' matters? If so, how are those claims being framed?

To date, it appears that no class actions based directly on ESG matters have been filed, but they are expected to be. The United States Securities & Exchange Commission recently proposed three new rules that could provide the basis for such class actions in the future. These rules govern climate-related disclosures, the naming of funds after ESG matters, and ESG disclosures generally. If the rules are finalized, certain companies would be required to make additional disclosures concerning ESG matters. These disclosure requirements, combined with increased interest in ESG claims by the class action plaintiffs' bar, may lead to ESG-related class action litigation.

21. Is litigation funding for class actions or collective redress proceedings permitted?

Litigation funding for class actions is generally permitted in the U.S., although the regulation of litigation funding arrangements vary from state to state. While litigation funding is permitted, the extent to which it has been used to fund class actions in the U.S. is unknown because most litigation funding arrangements typically remain undisclosed. However, a few federal courts where class actions are frequently litigated, including the United States District Court for the Northern District of California, require disclosure of any person or entity who funds the prosecution of a class claim. The class action plaintiffs' bar in the United States remains experienced and well-funded and litigates numerous class actions in many different industries at any given time, and thus is able to self-fund a significant amount of class action litigation without regard to the availability of third-party litigation funding.

22. Are contingency fee arrangements permissible for the funding of class actions or collective redress proceedings?

Most class actions in the United States are believed to involve some form of contingency fee arrangement. Contingency arrangements further the policy rationale for class actions, which is to facilitate claims that otherwise would not be brought due to the cost of pursuing them individually.

23. Can a court make an 'adverse costs' order against the unsuccessful party in class actions or collective redress proceedings?

In the U.S., fee shifting is governed by the statute, contract, or other law underlying the dispute; class actions otherwise are not subject to unique fee shifting

rules. Under the “American Rule,” litigants typically pay their own attorneys’ fees unless a statutory or contractual exception applies. However, many statutes that provide the basis for class actions do provide for an award of attorneys’ fees to a successful plaintiff. For example, substantially prevailing plaintiffs may obtain an award of reasonable attorneys’ fees under federal and state antitrust laws. In addition, substantially prevailing defendants may seek an award of attorneys’ fees if the claim or litigation conduct was frivolous and/or asserted in bad faith. In addition, a court may award attorneys’ fees to a prevailing party if authorized under the parties’ contract.

24. Are there any proposals for the reform of class actions or collective redress proceedings? If so, what are those proposals?

No significant proposals to reform class actions currently are being considered by Congress or the Advisory Committee on Civil Rules, which is a standing committee established by the Supreme Court to study and recommend changes to the Federal Rules of Civil Procedure.

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