

IN-DEPTH

# Class Actions

USA



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# Class Actions

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# USA

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## Introduction

This chapter addresses class actions in US federal courts and provides a practical overview of how such actions typically proceed. In federal courts, the class action mechanism permitted by the Federal Rules of Civil Procedure (FRCP) allows "[o]ne or more members of a class" to prosecute a lawsuit "as representative parties on behalf of all members" of the class.<sup>[1]</sup> In the United States, the class action is designed to promote judicial efficiency – permitting courts to resolve, together, a multiplicity of actual and potential individual lawsuits premised upon the same factual events and legal claims.<sup>[2]</sup> Additionally, US class actions are structured to ensure finality; therefore, it is a fundamental principle of US class action law that class members – including absent class members who do not opt out of the class – are bound by the result of the class action litigation and precluded from later seeking to re-litigate the same claims against that defendant (including in an individual capacity).<sup>[3]</sup> In the United States, class actions are routinely used to prosecute a wide variety of substantive claims, including consumer fraud, labour and employment, product liability, antitrust and securities claims. As a result, class actions have become a ubiquitous part of the US legal landscape, at both the state and the federal levels. This chapter focuses solely on federal class actions, which are established and governed primarily by Rule 23 of the FRCP, but class actions are explicitly permitted in both the US federal system and virtually all state systems as well.<sup>[4]</sup>

A typical class action under Rule 23 follows a series of distinct procedural steps, as described in greater detail below. First, a class action is initiated by the filing of a complaint by a named plaintiff (or plaintiffs) on behalf of a putative (or proposed) class. If defendants choose to file a motion to dismiss and the case survives, the court will then determine whether or not the putative class should be "certified" (ie, determine whether the case is appropriate for class action treatment and define the specific class on behalf of which the case will then be litigated). The court will also appoint class representatives and class counsel to represent the class. Following class certification (if it is granted), notice is typically provided to members of the class – actual notice, where practical, or publication notice through newspapers and the internet – and class members are given an opportunity to opt out (ie, express their desire to be excluded from the class).<sup>[5]</sup> The case is then litigated by the class representatives and class counsel on behalf of the class (excluding the opt-outs), until such time as there is either a settlement or an adjudication on the merits (eg, after a trial). A final judgment or settlement will generally bind all class members who have not opted out. Class settlements require court approval to ensure that the resolution is fair, adequate and equitable to all class members.

## Year in review

Notable decisions in 2025 concerning class actions included the cases discussed below.

In 2021, the US Supreme Court decided *TransUnion v Ramirez*, which considered the extent to which individual class members must demonstrate article III constitutional standing (ie, a concrete, cognisable injury) to sue, and recover monetary damages, in federal court.<sup>[6]</sup> The Supreme Court held that all class members must demonstrate a concrete harm, not

just a violation of a statutory right; accordingly, the Court determined that only 1,853 of the 8,185 class members had actually suffered an injury sufficient to satisfy federal standing requirements.<sup>[7]</sup> Since *TransUnion*, courts have continued to grapple with and emphasise the importance of standing in class actions.<sup>[8]</sup>

As explained by the Fifth Circuit in *Wilson v Centene Management Company, LLC*, “the line between the issues of standing and class certification is hazy” as both are an inquiry into whether the proper party is before the court, which can lead to issues when the class representative seeks to litigate harms not precisely analogous to the harms suffered by other class members.<sup>[9]</sup> The Fifth Circuit had previously declined to weigh in on the circuit split regarding the appropriate test for determining a plaintiff’s standing at the class-certification stage.<sup>[10]</sup> As followed by the Second and Eleventh Circuits, the “more intensive ‘standing approach’ ... compare[s] the injuries or interests of the named plaintiff with those of the putative class and will hold that the named plaintiff lacks standing for the class claims if his or her harms are not sufficiently analogous to those suffered by the rest of the class” before proceeding to class-certification analysis.<sup>[11]</sup> Meanwhile, as followed by the First, Third, Sixth and Ninth Circuits, the “more forgiving ‘class certification approach’ ... evaluates only a named plaintiff’s individual standing” and then the named plaintiff’s “representative capacity” is addressed later, under Rule 23’s class-certification analysis.<sup>[12]</sup> In *Wilson*, the Fifth Circuit expressly adopted the more lenient class-certification approach, explaining that evaluating only the named plaintiff’s standing and then proceeding to class-certification analysis, “appropriately serves the distinct functions and rationales of Article III standing and class certification under Rule 23” by allowing them to serve their respective functions.<sup>[13]</sup>

Also in 2025, the Supreme Court granted *certiorari* to address another circuit split regarding article III standing at the class-certification stage. Specifically, the Court granted limited *certiorari* to address the question of “whether a federal court may certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of the proposed class lack any Article III injury”.<sup>[14]</sup> The case in question, *Laboratory Corp*, involved legally blind individuals alleging that LabCorp’s new self-service touch screen check-in kiosks at service centres illegally discriminated against them.<sup>[15]</sup> The Ninth Circuit upheld class certification for all legally blind individuals who were unable to use LabCorp’s self-service kiosks during the applicable time period, explaining that “LabCorp’s allegation that some potential class members may not have been injured does not defeat” class certification, because “Rule 23 permits certification of a class that potentially includes more than a *de minimis* number of uninjured members.”<sup>[16]</sup>

The Ninth, Seventh and Eleventh Circuits allow class certification even where there are more than a minimal number of uninjured members in the proposed class, so long as the number is not too large, which is the most permissive standard of the Circuits.<sup>[17]</sup> In comparison, the First and District of Columbia Circuits do not allow class certification where the proposed class contains more than a minimal number of members who have not suffered an injury.<sup>[18]</sup> And finally, the Second and Eighth Circuit employ the most stringent approach, and do not allow for a class to be certified if it contains any members who did not suffer an injury.<sup>[19]</sup>

The Fourth Circuit also recently addressed the uninjured class members and class certification issue in *Mr. Dee’s Inc. v Inmar, Inc.*<sup>[20]</sup> In that case, the Fourth Circuit affirmed the district court’s refusal to certify a class of manufacturer purchasers who allegedly

overpaid for coupon processing services due to the defendants' price-fixing conspiracy, because plaintiffs failed to show that nearly one-third of the class overpaid, creating a predominance issue.<sup>[21]</sup> Citing *TransUnion*, the Fourth Circuit went on to say that "attempting to define a class with such a high share of uninjured members also raises Article III standing concerns".<sup>[22]</sup> However, the Fourth Circuit also noted that *TransUnion* left open the question of "whether every class member must demonstrate standing *before* a court certifies a class".<sup>[23]</sup>

*Laboratory Corp* was expected to resolve this question and the corresponding circuit split, but the Supreme Court ultimately dismissed the case "as [certiorari had been] improvidently granted", leaving the circuit split intact.<sup>[24]</sup> Justice Kavanaugh was the only Justice to dissent, stating that the Court should have ruled that "a federal court may not certify a damages class that includes both injured and uninjured members", aligning with the Second and Eighth Circuits' approach that bars uninjured members at class certification.<sup>[25]</sup>

In 2025, there were also notable developments pertaining to class actions being used to challenge federal government actions. In *Trump v CASA*, individuals, organisations and states filed suits to enjoin the implementation and enforcement of President Trump's Executive Order No. 14160, which identifies circumstances in which a person born in the United States is not recognised as an American citizen.<sup>[26]</sup> Three district courts concluded that the Executive Order is likely unlawful and "entered a universal preliminary injunction barring various executive officials from applying the policy to *anyone* in the country".<sup>[27]</sup> The government then filed applications seeking to partially stay the universal preliminary injunctions and to limit them to the parties of the cases, and the Supreme Court considered the question of whether Congress granted federal courts the authority to universally enjoin the enforcement of an executive or legislative policy.<sup>[28]</sup> After reviewing the statutory authority that federal courts possess under the Judiciary Act of 1789, and the sorts of equitable remedies "traditionally accorded by courts of equity", the Court found that "universal injunction[s] can be justified only as an exercise of equitable authority, yet Congress has granted federal courts no such power".<sup>[29]</sup> The Court emphasised that courts generally may administer complete relief between the parties to a case, and that while party-specific injunctions sometimes advantage non-parties they do so only incidentally.<sup>[30]</sup> While holding that universal injunctions likely exceed the federal district courts' equitable authority under the Judiciary Act, the Court suggested that a procedurally proper class action under Rule 23 would be an appropriate case for granting widespread injunctive relief.<sup>[31]</sup> Justice Kavanaugh's concurrence also explained that class actions seeking injunctive relief under Rule 23(b)(2) may provide plaintiffs who are challenging the legality of a new federal statute or executive action an avenue to "classwide relief that may, for example, be statewide, regionwide, or even nationwide".<sup>[32]</sup>

Another important decision impacting the landscape of federal class actions was the Ninth Circuit's decision in *Faulk v JELD-WEN*.<sup>[33]</sup> Plaintiffs, David and Bonnie Faulk, brought a class action in state court alleging state-law breach of oral warranty claims against an Alaska and a Delaware corporation, and the defendants removed the case to federal court under the Class Action Fairness Act (CAFA).<sup>[34]</sup> The Faulks then sought to remand the action to state court and file a second amended complaint that removed the class action allegations – potentially destroying federal jurisdiction by eliminating the sole basis for federal subject matter jurisdiction in their complaint (CAFA jurisdiction).<sup>[35]</sup> Ninth Circuit precedent previously called for jurisdiction to be determined at the time of removal, and

therefore the district court found that “post-removal amendments to narrow (or eliminate) a class do[] not destroy CAFA jurisdiction”.<sup>[36]</sup> But earlier in 2025, the Supreme Court held in *Royal Canin* that because a plaintiff is the “master of the complaint”, when a plaintiff removes the basis for federal jurisdiction from her complaint, that plaintiff “alter[s] a federal court’s authority”.<sup>[37]</sup> In *Royal Canin*, the Supreme Court clarified that “[w]hen an amendment excises the federal-law claims that enabled removal, the federal court loses its supplemental jurisdiction over the related state-law claims” and the case must therefore return to state court.<sup>[38]</sup> The Ninth Circuit applied this logic to jurisdiction under CAFA, and held that there was no federal subject matter jurisdiction over the Faulks’ second amended complaint once the class allegations were removed, and remanded the case to state court.<sup>[39]</sup> The Ninth Circuit confirmed that for actions originating as class actions too, the plaintiff is the “master of the complaint” and if a plaintiff amends their complaint post-removal to remove all class allegations, and no other basis for federal subject matter jurisdiction exists, a federal court loses jurisdiction and must remand to state court.

## Procedure

### Types of action available

The class action mechanism is available to litigants in any case where it would facilitate an efficient resolution and complies with the requirements of FRCP Rule 23. FRCP Rule 23 has two main prongs: FRCP Rule 23(a) and FRCP Rule 23(b). To prosecute a class action, litigants must satisfy all four of the requirements of Rule 23(a) and one of the requirements of Rule 23(b).

#### FRCP Rule 23(a)

Rule 23(a) requires plaintiffs to affirmatively demonstrate that the class action meets four prerequisites, referred to in shorthand form as (1) “numerosity” (Rule 23(a)(1)), (2) “commonality” (Rule 23(a)(2)), (3) “typicality” (Rule 23(a)(3)) and (4) adequacy of representation (Rule 23(a)(4)).

Numerosity requires that “the class is so numerous that joinder of all members is impracticable”.<sup>[40]</sup> Generally, there is no numerical threshold for determining whether a class is sufficiently numerous. Rather, courts must examine “the specific facts of each case”.<sup>[41]</sup> Commonality requires that “there are questions of law or fact common to the class”.<sup>[42]</sup> In *Wal-Mart Stores, Inc. v Dukes*, the Supreme Court explained that the commonality inquiry seeks more than just “the raising of common ‘questions’ – even in droves – but rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation”.<sup>[43]</sup> As a result, the Court in *Wal-Mart* rejected class certification in a Title VII gender discrimination case where plaintiffs alleged that the exercise of discretion by regional managers across Wal-Mart led to discrimination in pay and promotions.

Typicality requires that “the claims or defences of the representative parties are typical of the claims or defences of the class”.<sup>[44]</sup> The commonality and typicality requirements are

similar in nature to, but less onerous than, the Rule 23(b)(3) "predominance" inquiry, which is discussed below.

Adequacy of representation requires that "the representative parties will fairly and adequately protect the interests of the class".<sup>[45]</sup> Here, the primary task for courts is to "uncover conflicts of interest between named parties and the class they seek to represent".<sup>[46]</sup> Courts also will assess the adequacy of proposed class counsel at this stage.<sup>[47]</sup> In assessing the adequacy of class counsel, courts must conclude that the representative's counsel is "qualified, experienced, and capable of handling the litigation"<sup>[48]</sup> and that class counsel will represent the interests of the class as a whole.<sup>[49]</sup>

#### FRCP Rule 23(b)

In practice, parties most commonly invoke subsection (3) of Rule 23(b), which provides that a class action may be maintained where the prerequisites of Rule 23(a) are satisfied and the court finds that (1) "questions of law or fact common to class members predominate over any questions affecting only individual members" (known as the "predominance" requirement under Rule 23(b)) and (2) "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (known as the "superiority" requirement). In addition to fulfilling the requirements under Rule 23(a), "parties seeking class certification must show that the action is maintainable" under Rule 23(b).<sup>[50]</sup> Rule 23(b) provides three types of class actions. A class action may be maintained if (1) prosecuting separate actions would create a risk of varying or inconsistent adjudications that would establish incompatible standards of conduct or risk adjudications that would be dispositive of other class members' interests or would substantially impair or impede their ability to protect their interests; (2) the party opposing the class has refused to act in a manner that applies generally to the class, making injunctive or declaratory judgment appropriate; or (3) questions of law or fact common to class members predominate over questions affecting individual members and the class action is superior, in the interests of fairness and efficiency, to alternative methods of adjudication.<sup>[51][52]</sup> The purpose of the predominance inquiry is to test "whether proposed classes are sufficiently cohesive to warrant adjudication by representation".<sup>[53]</sup> "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".<sup>[54]</sup>

In determining whether a class action satisfies the superiority requirement of Rule 23(b)(3), courts assess the following non-exhaustive statutory factors listed in Rule 23:

1. the class members' interests in individually controlling the prosecution or defence of separate actions;
2. the extent and nature of any litigation concerning the controversy already begun by or against class members;
3. the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
4. the likely difficulties in managing a class action.<sup>[55]</sup>

## Commencing proceedings

Like any other lawsuit, a class action is initiated when a plaintiff files a complaint.<sup>[56]</sup> In a class action, the plaintiff who files the complaint is commonly referred to as the "named plaintiff". A complaint filed on behalf of a putative class must also contain (1) a definition of the proposed class, (2) factual allegations showing that class action treatment is appropriate and consistent with the requirements of the FRCP and (3) any other pleadings required by statute or case law for the prosecution of a class action in specific contexts (eg, to comply with the requirements of the Private Securities Litigation Reform Act of 1995 (PSLRA) in securities class actions). Additionally, the complaint in a federal class action is subject to the same requirements as other complaints filed in federal cases – including the requirement that plaintiffs sufficiently allege a claim upon which relief can be granted.<sup>[57]</sup> Failure to meet these requirements may be grounds for a defendant's motion to dismiss the class action complaint pursuant to Rule 12(b)(6) of the FRCP.<sup>[58]</sup> Such motions are typically decided before the court certifies the class.<sup>[59]</sup>

### Appointment of lead plaintiff and lead counsel

In certain cases, federal courts will generally appoint a "lead plaintiff" and "lead counsel" to represent the putative class, often before class certification. That typically occurs in securities class action cases, where multiple proposed class actions can be filed by different named plaintiffs. Appointment of a lead plaintiff and lead counsel helps clarify who will have primary responsibility for prosecuting the litigation on behalf of the putative class, including filing an amended complaint if necessary (which often occurs following consolidation of multiple cases) or seeking certification of the class.

The PSLRA provides specific guidance concerning the appointments of lead plaintiff and lead counsel in securities class actions. The PSLRA requires the named plaintiff to publish notice of the class action "in a widely circulated national business-oriented publication" no later than 20 days after filing the class action complaint.<sup>[60]</sup> Then, no later than 90 days after that publication, the court must consider "any motion made by a purported class member" for appointment as lead plaintiff, even if the individual was not named in the original complaint, and the court must appoint as lead plaintiff the member of the class whom the court determines to be "most capable of adequately representing the interests of class members".<sup>[61]</sup>

In appointing lead plaintiff, the court is instructed to "adopt a presumption" in favour of plaintiffs with "the largest financial interest" in the class action.<sup>[62]</sup> This presumption can be rebutted by evidence showing that the presumptive lead plaintiff "will not fairly and adequately protect the interests of the class" or "is subject to unique defences that render such plaintiff incapable of adequately representing the class".<sup>[63]</sup> The court-appointed lead plaintiff is then empowered, "subject to the approval of the court", to "retain counsel to represent the class".<sup>[64]</sup>

## Procedural Rules

In addition to the various rules that govern all federal litigation, class actions must comply with certain unique requirements and procedural steps. For example, before a class action can be adjudicated on the merits, a class action must be formally certified to ensure compliance with FRCP Rule 23, and class members must be provided with notice consistent with constitutional principles of due process.

### Class certification

FRCP Rule 23(c)(1)(a) requires that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action". A named or lead plaintiff will initiate this process by filing a motion for class certification.

In recent years, the Supreme Court of the United States has issued several important decisions refining the rules around class certification and increasing the stakes of this step in class action litigation. The Court has clarified that plaintiffs bear the burden of "affirmatively demonstrat[ing] ... compliance" with all the class certification requirements of Rule 23,<sup>[65]</sup> and that a motion for class certification should be granted only if the district court is "satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied".<sup>[66]</sup> As a result of those decisions and a greater focus by litigants on class certification, these motions are typically hotly contested by defendants.

To achieve class certification, a plaintiff must satisfy various requirements set out in Rule 23(a) and one of the requirements of Rule 23(b). Those rules are discussed above.

### The class certification order

If the court finds that certification is proper under subsections (a) and (b) of Rule 23, the court will then enter a "certification order" pursuant to Rule 23(c). The certification order is important because it defines the class of individuals that – subject to opt-outs – will be bound by the action as it proceeds. The certification order is also typically the procedural mechanism for appointing the class representative and class counsel, other than in securities class actions governed by the PSLRA. Such orders may be altered or amended before final judgment.<sup>[67]</sup> For example, in appropriate circumstances, the court may elect to divide a class into subclasses, which "are each treated as a class" under Rule 23.<sup>[68]</sup>

### Notice of class certification and opting out of the class

Once the class is certified, absent class members – class members other than the named or lead plaintiffs who fall within the definition of the certified class – must, in the case of a Rule 23(b)(3) class action, be given notice and provided an opportunity to "request[] exclusion" from the class (commonly referred to as "opting out").<sup>[69]</sup> Individuals who opt out, normally by providing written notice in the manner prescribed by the court, will not be bound by final resolution of the class action and may bring a separate case against the defendant based on the same underlying claim at some later date (subject to any applicable statute of limitations).<sup>[70]</sup>

Affording absent class members the opportunity to exclude themselves from a class action comports with the due process requirements of the Fifth and Fourteenth Amendments to the US Constitution.<sup>[71]</sup> Under US law, an individual is typically not "bound by a judgment ... in a litigation in which he is not designated as a party".<sup>[72]</sup> However, as discussed above, final resolution of a class action binds absent class members and precludes future litigation of their claims against that defendant. By giving class members the ability to affirmatively elect not to participate in the case, the opt-out mechanism preserves the due process rights of absent class members not to be bound by a litigation judgment without their consent.

To satisfy the notice requirement in a Rule 23(b)(3) class action, class members are entitled to "the best notice that is practicable under the circumstances", and where individuals can be identified "through reasonable effort", actual notice is required.<sup>[73]</sup> Notice may be provided by regular mail, electronic means or any "other appropriate means".<sup>[74]</sup> Notice must be "clearly and concisely state[d] in plain, easily understood language".<sup>[75]</sup> Notice must, at a minimum, state (1) "the nature of the action"; (2) "the definition of the class"; (3) "the class claims, issues, or defences"; (4) "that a class member may enter an appearance through an attorney if the member so desires"; (5) "that the court will exclude from the class any member who requests exclusion"; (6) "the time and manner for requesting exclusion"; and (7) "the binding effect of a class judgment on members".<sup>[76]</sup> Rule 23 does not set a categorical rule for the amount of time absent class members must be given to respond to this notice; therefore, courts have discretion to order deadlines. Typically, federal courts will provide anywhere from 30 to 90 days to permit class members to opt out.<sup>[77]</sup> Where the class is particularly large, or actual notice is not otherwise practicable, those periods can be significantly longer. Of course, if a party does not affirmatively request exclusion from the class during this opt-out period, they will be included in the class and bound by the final resolution of the claim, though they will generally have a further opportunity to opt out from a settlement should one be reached.

#### Litigation on behalf of the class

After class certifications, notice and opt-outs, the class action may then be litigated on its merits. Although all class members will be bound by any final judgment, absent class members generally do not participate in most phases of the litigation; the class representative and class counsel manage the action on behalf of the class.

Rule 23 provides the court flexibility in conducting the proceeding. Rule 23 provides that the court may issue orders to "determine the course of proceedings", to "impose conditions on the representative parties" or to "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly".<sup>[78]</sup> Litigation of class actions is otherwise similar to litigation of other civil proceedings in federal court. For example, federal procedural and evidentiary rules still apply. In *Tyson Foods, Inc. v Bouaphakeo*, the Supreme Court considered the use of representative evidence (eg, statistical sampling), as opposed to individual proof of liability, to establish predominance of common questions of law and fact in connection with obtaining class certification under Rule 23(b)(3).<sup>[79]</sup> The Court declined to create a categorical rule, explaining that the permissibility of representative evidence "turns not on the form a proceeding takes – be it a class or individual action – but on the degree to

which the evidence is reliable in proving or disproving the elements of the relevant cause of action" pursuant to Federal Rules of Evidence 401, 403 and 702.<sup>[80]</sup>

## Damages and costs

In class action litigation, the availability of damages and other remedies is typically set by the substantive statute underlying the action. For example, in securities class actions under section 11 of the Securities Act of 1933, which imposes liability for false and misleading statements in a registration statement, class members may recover statutory damages that "represent the difference between the amount paid for the security" and either (1) the value at the time of the suit, (2) the price of the security when sold in the market before the suit or (3) the price at which the security was disposed of after the suit but before judgment, if resulting damages are less than damages calculated based on the security price at the time of the suit.<sup>[81]</sup> In antitrust class actions, claimants can seek "treble damages" or "threefold the damages ... sustained", in addition to costs and reasonable attorneys' fees.<sup>[82]</sup>

Rule 23(h) also authorises courts to "award reasonable attorney's fees and non-taxable costs", upon motion under Rule 54 of the FRCP (which sets out general procedures for claims for attorneys' fees). Rule 23(h) provides that class members, or the party from whom payment is sought, may object to this motion for attorneys' fees. Upon a motion for attorneys' fees or any objection, the court must determine that the award is reasonable.<sup>[83]</sup> In some cases, courts may closely scrutinise requests for attorneys' fees.

## Settlement

In the United States, the vast majority of civil litigation is resolved by settlement.<sup>[84]</sup> Class action litigation is no different. Unlike traditional settlements, however, class action settlements require court approval.<sup>[85]</sup> The following sections focus on procedural aspects of class action settlement, as set out in Rule 23(e), and the jurisprudence that has evolved around those requirements.

### The settlement class

Rule 23(c) requires class certification before any entry of final judgment, including a court order approving a class action settlement.<sup>[86]</sup> If the parties seek to settle a case before the court certified a class, courts may postpone the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding its arguments against certification.<sup>[87]</sup>

### Preliminary approval of a settlement

Under Rule 23(e)(1), parties seeking court approval of a class action settlement must first obtain preliminary approval of the proposed settlement. As part of preliminary approval, the parties "must provide the court information sufficient to enable it to determine whether to give notice of the proposal to the class".<sup>[88]</sup> A court must also find that it would be likely to approve the settlement under Rule 23(e)(2) and certify a settlement class (if it has not already done so).<sup>[89]</sup> To provide the court with sufficient information at the

preliminary approval stage, parties typically provide details of the settlement, the nature of any compensation to be provided to class members and any agreements regarding the payment of attorneys' fees and costs to class counsel. When deciding whether to grant preliminary approval, courts will consider whether settlement negotiations occurred at arm's length and whether there was sufficient meaningful discovery.<sup>[90]</sup>

#### Settlement notice

Following entry of preliminary approval, the parties must provide adequate notice of the settlement to the class. The court must direct notice "in a reasonable manner to all class members who would be bound" by a proposed settlement.<sup>[91]</sup> Not only is failure to give adequate notice of settlement a violation of Rule 23, it may also violate due process protections.<sup>[92]</sup> Settlement notice provides absent class members with the ability to object to the propriety of the settlement, and, in Rule 23(b)(3) class actions, "the court may refuse to approve a settlement" unless it affords class members a "new opportunity to request exclusion" (or opt out) from the class settlement.<sup>[93]</sup>

#### Fairness hearings

Once notice of the settlement has been given, the court will hold a "fairness hearing" to determine whether the proposed settlement is "fair, reasonable, and adequate".<sup>[94]</sup> In making that determination, the court must consider whether:

1. the class representatives and class counsel have adequately represented the class;
2. the proposal was negotiated at arm's length;
3. the relief provided for the class is adequate, taking into account:
  1. the costs, risks, and delay of trial and appeal;
  2. the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;
  3. the terms of any proposed award of attorney's fees, including timing of payment; and
  4. any agreement required to be identified under Rule 23(e)(3); and
4. the proposal treats class members equitably relative to each other.<sup>[95]</sup>

At the fairness hearing, courts will also typically consider the objections of any class members to the settlement, which can be presented in writing or orally, at the discretion of the court. Persons who have opted out of the class do not have standing to object to the settlement. Following a fairness hearing, the court may enter a final order and judgment

approving the class action settlement and granting the class plaintiffs' motion for an award of attorneys' fees and costs in favour of class counsel (discussed further below).

#### Settlement claims processing and allocation of settlement funds

Following settlement of a class action, among other requirements, the parties must administer a process for determining how, and to which class members, the settlement funds should be distributed. Most settlements establish a "plan of allocation", setting out a formula or some other method of distributing settlement proceeds to members of the class.<sup>[96]</sup> To determine whether an individual is properly part of the settlement class, absent class members generally participate in a claims process, which involves executing and submitting documentation demonstrating their entitlement to a share of the settlement funds and agreeing to individual release of claims against the defendant. Private, for-profit companies are generally retained by class counsel to handle the processing of class member claims.

## Cross-border issues

In recent years, US class actions, particularly securities class actions, have raised important cross-border issues regarding the proper role of US courts. In *Morrison v National Australia Bank Ltd*, the US Supreme Court was asked to "decide whether [Section] 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges".<sup>[97]</sup> To address that issue, the Court applied a long-standing principle of US law "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States".<sup>[98]</sup> The Court observed that "there is no affirmative indication in the Exchange Act that [Section] 10(b) applies extraterritorially" and "therefore conclude[d] that it does not".<sup>[99]</sup> The Court further held that it was not sufficient that "some domestic activity is involved in the case";<sup>[100]</sup> rather, section 10(b) applies "only [to] transactions in securities listed on domestic exchanges, and domestic transactions in other securities".<sup>[101]</sup> As a result of *Morrison*, class plaintiffs seeking to bring a valid section 10(b) claim must allege more than a domestic impact or effect; they must allege "a manipulative or deceptive device or contrivance ... in connection with the purchase or sale of a security listed on an American stock exchange" or "the purchase or sale of any other security in the United States".<sup>[102]</sup>

*Morrison* is widely viewed as having restored a presumption against the extraterritorial application of US statutes, unless they explicitly so specify. That principle can have an impact on the availability of the US class action mechanism, in US courts, to foreign litigants.

## Outlook and conclusions

Throughout 2025, courts continued to grapple with article III standing requirements in class action lawsuits, especially following *TransUnion*, and continued to weigh in on issues

surrounding class action certification. Looking ahead to 2026, a case with major potential ramifications for class action practice is currently on the Supreme Court docket. *Trump v Barbara* is a nationwide class action lawsuit challenging President Trump's Executive Order No. 14160 (the same executive order challenged in *Trump v CASA*). The United States District Court for the District of New Hampshire certified a nationwide class for injunctive relief under Rule 23(b)(2), and granted a preliminary injunction blocking the Executive Order from being applied while the case proceeds.<sup>[103]</sup> The Supreme Court granted *certiorari* at the end of 2025, before judgment was reached in the New Hampshire case.<sup>[104]</sup> This Supreme Court decision may fundamentally shape the role of class actions in challenging federal government policies going forward.

## Endnotes

- 1 Fed. R. Civ. P. 23(a). [^ Back to section](#)
- 2 See, eg, *Haynes v Planet Automall, Inc*, 276 F.R.D. 65, 73 (E.D.N.Y. 2011) ("The underlying purpose of the class action mechanism is to foster judicial economy and efficiency by adjudicating, to the extent possible, issues that affect many similarly situated persons.") (citation modified). [^ Back to section](#)
- 3 Fed. R. Civ. P. 23(c)(3); see also *Sosna v Iowa*, 419 U.S. 393, 403 (1975). Under US law, the doctrine of *res judicata* prevents parties from re-litigating claims where (1) a previous action resulted in an adjudication on the merits, (2) that action involved the same adverse parties and (3) the claims asserted in the subsequent action were already raised in that first action. See, eg, *Marcel Fashions Grp., Inc. v Lucky Brand Dungarees, Inc.*, 779 F.3d 102, 107–08 (2d Cir. 2015). This principle applies to judgments in class actions. *Cooper v Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984). [^ Back to section](#)
- 4 Under New York state law, for example, class actions are permitted pursuant to Rule 901 of the New York Civil Practice Law and Rules. State class action requirements often are similar to federal requirements. See Thomson Reuters, 50 State Statutory Surveys: Class Action Requirements (April 2018). The Class Action Fairness Act of 2015 provides for federal court jurisdiction over any class action where the matter in controversy exceeds US\$5 million, and any member of the class can establish diversity of citizenship from any defendant, provided that certain exceptions do not apply. See 28 USC section 1332(d)(2). [^ Back to section](#)
- 5 Certain federal class action claims are opt-in rather than opt-out, and require individuals to affirmatively join the class in order to be included in the lawsuit. For example, under the Fair Labor Standards Act, collective actions for unpaid minimum wages or overtime compensation require individuals to opt-in to receive compensation. See 29 USC section 216(b). Similarly, collective age discrimination lawsuits under the Age Discrimination Employment Act require individuals to affirmatively opt-in to be included. See 29 USC section 626(b). [^ Back to section](#)

- 6 *TransUnion LLC v Ramirez*, 141 S. Ct. 2190 (2021). [^ Back to section](#)
- 7 *id.* at 2200. Although all 8,185 class members alleged that TransUnion had violated certain rights under the Fair Credit Reporting Act by maintaining misleading credit reports, TransUnion only provided credit reports for 1,853 class members to third-party businesses. The Court found those 1,853 class members could therefore demonstrate "reputational harm", whereas the others could not. [^ Back to section](#)
- 8 In *Earl v Boeing*, the Fifth Circuit, citing *TransUnion*, held that the mere fact that consumers may have paid less had they known more information is not sufficient for standing to sue in federal court. *Earl v Boeing*, 53 F.4th 897, 901–03 (5th Cir. 2022). Other courts have decided the same issue differently. In *In re Evenflo Co, Inc, Mktg, Sales Pracs and Prods Liab Litig*, the First Circuit stated that nothing in *TransUnion* "indicated that some monetary harms are concrete while others are not", and that overpayment is an "actual economic loss" and "prototypical concrete harm". *In re Evenflo Co., Inc., Mktg., Sales Pracs. and Prods. Liab. Litig.*, 54 F.4th 28, 39 (1st Cir. 2022) (quoting *Gustavsen v Alcon Lab'ys, Inc.*, 903 F.3d 1, 8 (1st Cir. 2018)). Similarly, in *Horti v Nestle Healthcare Nutrition Inc.*, the Ninth Circuit held that plaintiffs had pleaded an injury sufficient to support standing because the plaintiffs' claim – that they purchased the product, which they otherwise would not have purchased – constituted a "tangible economic injury", in line with *TransUnion*. *Horti v Nestle Healthcare Nutrition, Inc.*, No. 22-16832, 2023 WL 8613601, at \*1 (9th Cir. Dec. 13, 2023). [^ Back to section](#)
- 9 *Wilson v Centene Mgmt. Co., L.L.C.*, 144 F.4th 780, 788 (5th Cir. 2025). [^ Back to section](#)
- 10 See *Chavez v Plan Benefit Servs., Inc.*, 108 F.4th 297 (5th Cir. 2024) (finding that plaintiffs satisfied both approaches to determining article III standing and proceeding to class-certification analysis). [^ Back to section](#)
- 11 *Wilson v Centene Mgmt. Co., L.L.C.*, 144 F.4th 780, 788-89 (5th Cir. 2025) (citation modified). [^ Back to section](#)
- 12 *id.* at 788. [^ Back to section](#)
- 13 *id.* at 789-90. [^ Back to section](#)
- 14 *Lab'y Corp. of Am. Holdings v Davis*, 145 S.Ct. 1133, 1134 (2025) (emphasis added). [^ Back to section](#)
- 15 *Davis v Lab'y Corp. of Am. Holdings*, No. 22-55873, 2024 WL 489288 (9th Cir. Feb. 8, 2024), *cert. granted in part*, 145 S. Ct. 1133 (2025), and *cert. dismissed as improvidently granted*, 605 U.S. 327, 145 S. Ct. 1608 (2025). [^ Back to section](#)
- 16 *id.* at \*2 n.1 (citation modified). [^ Back to section](#)

- 17** See *Olean Wholesale Grocery Coop., Inc. v Bumble Bee Foods LLC*, 31 F.4th 651, 669 (9th Cir. 2022) (rejecting the argument that Rule 23 does not permit certification of a class that potentially includes more than a *de minimis* number of uninjured class members); *Messner v Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (holding that a class should not be certified if it is apparent that it contains “a great many persons” who have not suffered injury, but noting that there is no precise measure for “a great many”); *Cordoba v DIRECTV, LLC*, 942 F.3d 1259, 1276 (11th Cir. 2019) (holding that a district court is not required to ensure that the class definition does not include any uninjured members prior to certification, but that a class cannot contain a large portion of uninjured members). [^ Back to section](#)
- 18** See *In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015) (holding that certification is possible even if the class includes a *de minimis* number of uninjured parties); *In re Rail Freight Fuel Surcharge Antitrust Litig. – MDL No. 1869*, 934 F.3d 619, 625 (D.C. Cir. 2019) (finding that a substantial number of class members lacked article III injury, exceeding the *de minimis* threshold). [^ Back to section](#)
- 19** See *Denney v Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (holding that no class may be certified that contains uninjured members who lack article III standing); *Johannesson v Polaris Industries Inc.*, 9 F.4th 981, 987 (8th Cir. 2021) (holding that a class cannot be certified if it contains uninjured members who lack standing). [^ Back to section](#)
- 20** *Mr. Dee’s Inc. v Inmar, Inc.*, 127 F.4th 925 (4th Cir. 2025). [^ Back to section](#)
- 21** *id.* at 933. [^ Back to section](#)
- 22** *id.* at 934. [^ Back to section](#)
- 23** *id.* (emphasis in original). [^ Back to section](#)
- 24** *Lab’y Corp. of Am. Holdings v Davis*, 605 U.S. 327 (2025). [^ Back to section](#)
- 25** *id.* at 328. [^ Back to section](#)
- 26** *Trump v CASA, Inc.*, 606 U.S. 831, 838 (2025). [^ Back to section](#)
- 27** *id.* (emphasis in original). [^ Back to section](#)
- 28** *id.* at 839-840. [^ Back to section](#)
- 29** *id.* at 841-850. [^ Back to section](#)
- 30** *id.* at 851. [^ Back to section](#)
- 31** *id.* at 849 (referring to universal injunctions as a class action workaround that lack the procedural protections set out in Rule 23). [^ Back to section](#)

- 32** id. at 869 (citation modified). [^ Back to section](#)
- 33** *Faulk v JELD-WEN, Inc.*, 159 F.4th 618, 620 (9th Cir. 2025). [^ Back to section](#)
- 34** id. at 621. [^ Back to section](#)
- 35** See id. See also 28 USC section 1332(d) (granting federal courts original jurisdiction over class actions if there is minimal diversity, at least 100 class members, and an aggregate amount in controversy over US\$5 million). [^ Back to section](#)
- 36** *Faulk v JELD-WEN, Inc.*, 159 F.4th 618, 621 (9th Cir. 2025) (citation modified). [^ Back to section](#)
- 37** *Royal Canin U. S. A., Inc. v Wullschleger*, 604 U.S. 22, 35, 39 (2025). [^ Back to section](#)
- 38** id. at 25-26. [^ Back to section](#)
- 39** *Faulk v JELD-WEN, Inc.*, 159 F.4th 618 (9th Cir. 2025). [^ Back to section](#)
- 40** Fed. R. Civ. P. 23(a)(1). [^ Back to section](#)
- 41** *Gen. Tel. Co. of the Nw. v Equal Emp. Opportunity Comm'n*, 446 U.S. 318, 330 (1980). [^ Back to section](#)
- 42** Fed. R. Civ. P. 23(a)(2). [^ Back to section](#)
- 43** 564 U.S. 338, 350 (2011). [^ Back to section](#)
- 44** Fed. R. Civ. P. 23(a)(3). [^ Back to section](#)
- 45** Fed. R. Civ. P. 23(a)(4). [^ Back to section](#)
- 46** *Amchem Prods., Inc. v Windsor*, 521 U.S. 591, 625 (1997). In *Amchem*, for example, the Supreme Court found that plaintiffs with present asbestos-related illnesses had interests that were potentially adverse to class members who were exposed to asbestos but had not yet manifested injury. id. at 625–28. [^ Back to section](#)
- 47** Rule 23(c) instructs courts to "appoint class counsel under Rule 23(g)". Rule 23(g) explicitly requires courts to ensure that class counsel will "fairly and adequately represent the interests of the class". Fed. R. Civ. P. 23(g)(1)(B). In making this assessment, courts must consider "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class". Fed. R. Civ. P. 23(g)(1)(A). [^ Back to section](#)

- 48** *In re Avon Sec. Litig.*, No. 91 CIV. 2287 (LMM), 1998 WL 834366, at \*9 (S.D.N.Y. Nov. 30, 1998). As noted in *Avon*, in complicated class actions such as a securities class action, plaintiffs rely heavily on class counsel; as such, in those cases, "the qualifications of class counsel are generally more important in determining adequacy than those of the class representatives". *id.* ^ [Back to section](#)
- 49** See, eg, *Maywalt v Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995) (stating that the responsibility of ensuring "that the interests of class members are not subordinated to the interests of either the class representatives or class counsel rests with the district court"). ^ [Back to section](#)
- 50** *Amchem Prods., Inc. v Windsor*, 521 U.S. 591, 614 (1997). ^ [Back to section](#)
- 51** Fed. R. Civ. P. 23(b). ^ [Back to section](#)
- 52** Fed. R. Civ. P. 23(b)(3). ^ [Back to section](#)
- 53** *Amchem Prods., Inc.*, 521 U.S. at 623. ^ [Back to section](#)
- 54** *Tyson Foods, Inc. v Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation modified). ^ [Back to section](#)
- 55** Fed. R. Civ. P. 23(b)(3); see also *Zinser v Accufix Research Inst, Inc.*, 253 F.3d 1180, 1190 (9th Cir. 2001) ("In determining superiority, courts must consider the four factors of Rule 23(b)(3)."). ^ [Back to section](#)
- 56** Fed. R. Civ. P. 3. ^ [Back to section](#)
- 57** See generally *Ashcroft v Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007). ^ [Back to section](#)
- 58** Rule 12(b)(6) provides that a party may move to dismiss a complaint because the complaint "fail[s] to state a claim upon which relief can be granted". Fed. R. Civ. P. 12(b)(6). ^ [Back to section](#)
- 59** Managing Class Action Litigation, Federal Judicial Center, at 9 (2010). ^ [Back to section](#)
- 60** 15 U.S.C. section 77z-1(a)(3)(A)(i). 15 USC section 77z-1 is part of the Securities Act of 1933. The PSLRA enacted parallel provisions relating to appointment of lead plaintiff and lead counsel in the Securities Exchange Act of 1934. See 15 USC section 78u-4. ^ [Back to section](#)
- 61** 15 USC section 77z-1(a)(3)(B)(i). ^ [Back to section](#)
- 62** 15 USC section 77z-1(a)(3)(B)(iii)(I)(bb). This plaintiff must also have "either filed the complaint or made a motion" responding to the notice required by 15 USC section 77z-1(a)(3)(A)(i). ^ [Back to section](#)

- 63** 15 USC section 77z-1(a)(3)(B)(iii)(II). [^ Back to section](#)
- 64** 15 USC section 77z-1(a)(3)(B)(v). [^ Back to section](#)
- 65** *Wal-Mart Stores, Inc. v Dukes*, 564 U.S. 338, 350 (2011). [^ Back to section](#)
- 66** *Comcast Corp. v Behrend*, 569 U.S. 27, 33 (2013); see also *Halliburton Co. v Erica P. John Fund, Inc.*, 573 U.S. 258, 280 (2014) (permitting defendants to offer lack of "price impact" evidence to rebut the "fraud on the market" presumption at the class certification stage). [^ Back to section](#)
- 67** Fed. R. Civ. P. 23(c)(1)(C). [^ Back to section](#)
- 68** Fed. R. Civ. P. 23(c)(5). [^ Back to section](#)
- 69** Fed. R. Civ. P. 23(c)(2)(B)(v). [^ Back to section](#)
- 70** Fed. R. Civ. P. 23(c)(3); see also *Amchem Prod, Inc. v Windsor*, 521 U.S. 591, 617 (1997). Notice to absent class members and, in some cases, of the opportunity to opt out is required at other stages of a class action litigation as well; most notably, notice must be given to class members who would be bound by any proposed settlement, voluntary dismissal or compromise. Fed. R. Civ. P. 23(e). [^ Back to section](#)
- 71** See *Phillips Petroleum Co v Shutts*, 472 U.S. 797, 812 (1985). [^ Back to section](#)
- 72** *Hansberry v Lee*, 311 U.S. 32, 40–41 (1940). [^ Back to section](#)
- 73** Fed. R. Civ. P. 23(c)(2)(B). [^ Back to section](#)
- 74** *ibid.* [^ Back to section](#)
- 75** *ibid.* [^ Back to section](#)
- 76** *ibid.* [^ Back to section](#)
- 77** Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, Federal Judicial Center, at 4 (2010). [^ Back to section](#)
- 78** Fed. R. Civ. P. 23(d)(1). [^ Back to section](#)
- 79** 136 S. Ct. 1036 (2016). [^ Back to section](#)
- 80** *id.* at 1046. [^ Back to section](#)
- 81** 15 USC section 77k(e). [^ Back to section](#)

- 82** 15 USC section 15(a). Under federal antitrust laws, plaintiffs can generally seek an injunction as well. See 15 USC section 26. [^ Back to section](#)
- 83** Fed. R. Civ. P. 23(h). [^ Back to section](#)
- 84** See, generally, Theodore Eisenberg and Charlotte Lanvers, "What is the Settlement Rate and Why Should We Care?", 6 J. Empirical Legal Stud. 111 (2009). [^ Back to section](#)
- 85** See Fed. R. Civ. P. 23(e). [^ Back to section](#)
- 86** Fed. R. Civ. P. 23(c)(3). [^ Back to section](#)
- 87** *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 786 (3d Cir. 1995). [^ Back to section](#)
- 88** Fed. R. Civ. P. 23(e)(1)(A). [^ Back to section](#)
- 89** Fed. R. Civ. P. 23(e)(1)(B). [^ Back to section](#)
- 90** See, eg, *Long v HSBC USA Inc.*, 2015 WL 5444651, at \*3 (S.D.N.Y. Sept. 11, 2015); *Danieli v Int'l Bus. Machs. Corp.*, 2009 WL 6583144, at \*4–\*5 (S.D.N.Y. Nov. 16, 2009). See also Fed. R. Civ. P. 23(e)(1) advisory committee's note to 2018 amendment. [^ Back to section](#)
- 91** Fed. R. Civ. P. 23(e)(1)(B). [^ Back to section](#)
- 92** See *Wal-Mart Stores, Inc. v Visa U.S.A., Inc.*, 396 F.3d 96, 113–14 (2d Cir. 2005). [^ Back to section](#)
- 93** Fed. R. Civ. P. 23(e)(4). [^ Back to section](#)
- 94** Fed. R. Civ. P. 23(e)(2). [^ Back to section](#)
- 95** Fed. R. Civ. P. 23(e)(2). [^ Back to section](#)
- 96** See, eg, *City of Providence v. Aeropostale, Inc.*, No. 11 Civ. 7132(CM)(GWG), 2014 WL 1883494, at \*10 (S.D.N.Y. May 9, 2014) (approving a plan of allocation distributing the settlement fund to class members on a pro rata basis). [^ Back to section](#)

- 97** 561 U.S. 247, 250–51 (2010). Rule 10b-5, which was promulgated pursuant to section 10(b) of the Securities Exchange Act of 1934, makes it unlawful "(a) [t]o employ any device, scheme, or artifice to defraud, (b) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) [t]o engage in any act, practice, or course of business which operates ... as a fraud or deceit upon any person, in connection with the purchase or sale of any security". 17 C.F.R. section 240.10b-5. In 2017, almost half of all federal securities class actions filed in the United States – 47 % – invoked Rule 10b-5. Cornerstone Research, Securities Class Action Filings, at 9 (2017). ^ [Back to section](#)
- 98** *Morrison*, 561 U.S. at 255. ^ [Back to section](#)
- 99** *id.* at 265. ^ [Back to section](#)
- 100** *id.* at 266. ^ [Back to section](#)
- 101** *id.* at 267. ^ [Back to section](#)
- 102** *id.* at 273. ^ [Back to section](#)
- 103** *Barbara v Trump*, 790 F. Supp. 3d 80 (D.N.H. 2025), cert. granted before judgment, No. 25-365, 2025 WL 3493157 (U.S. Dec. 5, 2025). ^ [Back to section](#)
- 104** *Trump v Barbara*, No. 25-365, 2025 WL 3493157 (U.S. Dec. 5, 2025). ^ [Back to section](#)

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