THE CLASS ACTIONS LAW REVIEW

FOURTH EDITION

Editor
Camilla Sanger

THE LAWREVIEWS

THE CLASS ACTIONS LAW REVIEW

FOURTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in May 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Camilla Sanger

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

PRODUCTION AND OPERATIONS DIRECTOR
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Caroline Fewkes

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-439-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAN SCHJØDT

ARENDT & MEDERNACH

ARNTZEN DE BESCHE

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

CRAVATH, SWAINE & MOORE LLP

DENTONS

GORRISSEN FEDERSPIEL

HENGELER MUELLER

JOHNSON WINTER & SLATTERY

KACHWAHA & PARTNERS

KENNEDYS

LENZ & STAEHELIN

LOYENS & LOEFF

MATHESON

PINHEIRO NETO ADVOGADOS

S HOROWITZ & CO

SLAUGHTER AND MAY

TAMAYO JARAMILLO & ASOCIADOS

URÍA MENÉNDEZ

CONTENTS

Chapter 22

UNITED STATES

Timothy G Cameron and Sofia A Gentel[1]

I INTRODUCTION TO CLASS ACTIONS IN THE UNITED STATES

This chapter addresses class actions in US federal courts and provides a practical overview as to how such actions typically proceed. In federal courts, the class action mechanism permitted by the Federal Rules of Civil Procedure allows '[o]ne or more members of a class' to prosecute a lawsuit 'as representative parties on behalf of all members' of the class.[2] In the US, the class action is viewed as promoting judicial efficiency – permitting courts efficiently to resolve, together, a multiplicity of actual and potential individual lawsuits premised upon the same factual events and legal claims.[3] 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 are precluded from later seeking to re-litigate the same claims against that defendant (including in an individual capacity).[4]

Class actions are a long-standing part of the American legal landscape, at both the state and federal level. Class actions are routinely used to prosecute a wide variety of substantive claims, including consumer fraud, labour and employment, products liability, antitrust and securities claims.

Class actions are explicitly permitted in both the US federal and state systems.[5] This chapter focuses solely on federal class actions, which are provided for by Rule 23 of the Federal Rules of Civil Procedure.

---

1 Timothy G Cameron is a partner and Sofia A Gentel is an associate at Cravath, Swaine & Moore LLP in New York City.

2 Fed. R. Civ. P. 23(a).

3 See, e.g., *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.') (internal citation omitted).

4 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, e.g., *Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees, Inc.*, 779 F.3d 102, 107–8 (2d Cir. 2015). This principle applies to judgments in class actions. *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984).

5 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 U.S.C. Section 1332(d).

A typical class action under Rule 23 follows a series of distinct procedural steps. 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, then the court will next determine whether or not a plaintiff class should be 'certified' (i.e., confirming whether the case is appropriate for class action treatment, and defining 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 certification, notice is typically provided to members of the class – actual notice, where possible, or publication notice through newspapers and the internet – and class members are given an opportunity to opt out (or express their desire to be excluded from the class). The case is then litigated on the merits 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 a result on the merits (e.g., after a trial). A final judgment from either a trial or settlement will bind all class members who have not affirmatively opted out of the class action. In addition, any settlement must expressly be approved by the court as fair to the class.

II THE YEAR IN REVIEW

Notable decisions in 2019 concerning class actions included the following cases.

In *Lamps Plus, Inc v. Varela*,[6] the Supreme Court held that where an arbitration agreement is ambiguous as to whether the parties to the agreement agreed to class-wide arbitration (as opposed to only individual arbitration), class-wide arbitration is not permitted under the agreement.[7] The Court first emphasised that the Federal Arbitration Act (FAA) 'requires courts to enforce arbitration agreements to their terms', and that 'arbitration is strictly a matter of consent'.[8] The Court then pointed out that class arbitration lacks the key benefits traditionally associated with arbitration: lower costs, greater efficiency and speed, and informality.[9] As a result, the Court concluded that ambiguity is not enough to conclude that parties consented to forgoing those main advantages of arbitration.[10] Moreover, the Supreme Court found that a state law principle concerning contractual interpretation, *contra proferentem* (counselling that contracts should be construed against their drafter), was pre-empted in this context by the FAA 'to the extent [the principle] stands as an obstacle to the accomplishment of the full purposes and objectives of the FAA', and could therefore not be used against the drafter of the agreement to argue that class-wide arbitration should be permitted under the agreement in question.[11]

In *Nutraceutical Corp v. Lambert*,[12] the Supreme Court held that Rule 23(f), which requires that an appeal from an order granting or denying an order of class certification must be filed within 14 days of the order being entered, is not subject to equitable tolling.[13] Equitable

6 139 S.Ct. 1407.
7 id. at 1419.
8 id. at 1415.
9 id. at 1416.
10 id.
11 id. at 1418.
12 139 S.Ct. 710.
13 id. at 717-18.

tolling is a tool that allows a court to 'soften' certain deadlines in instances where one has missed a deadline but was nevertheless 'diligent, reasonably mistaken, or otherwise deserving' of tolling.[14] However, the Court stated that whether a specific rule can be subject to equitable tolling depends on 'whether the text of the rule leaves room for such flexibility'.[15] The Court found that there was no such flexibility in this context. First, it found that Rule 23(f) showed a clear intent to preclude tolling because the Rule was a procedural claim-processing rule phrased in an unqualified manner.[16] Second, the Court noted that while the Federal Rule of Appellate Procedure (FRAP) 2 permits the equitable suspension of 'any provision of these rules in a particular case', FRAP 26(b) carves out an exception to FRAP 2 by stating that a court of appeals 'may not extend the time to file . . . a petition for permission to appeal'.[17] Finally, the Court pointed to FRAP 5, which states that a petition for permission to appeal 'must be filed within the time specified'.[18] Therefore, the Court found that there was no flexibility with respect to the deadline set in Rule 23(f) so as to permit equitable tolling.[19]

III PROCEDURE

i Commencing proceedings

Like any other lawsuit, a class action is initiated when a 'named plaintiff' (or certain 'named plaintiffs') files a complaint.[20] However, a complaint filed on behalf of a putative class must also contain (1) a definition of the proposed class, (2) pleading as to why class action treatment is appropriate and consistent with the requirements of the Federal Rules of Civil Procedure, and (3) any other pleadings required by statute or case law for the prosecution of a class action in specific contexts (e.g., to comply with the requirements of the Private Securities Litigation Reform Act of 1995 in securities class actions). Otherwise, 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.

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 Federal Rules of Civil Procedure.[21] Such motions are typically decided before the court certifies the class.[22]

ii Appointment of lead plaintiff and lead counsel

If the complaint survives a motion to dismiss, then in certain cases it may be appropriate for the court to appoint a 'lead plaintiff' and 'lead counsel', to represent the putative class even 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

14 id. at 714.
15 id.
16 id. at 715.
17 id.
18 id.
19 id.
20 Fed. R. Civ. P. 3.
21 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).
22 Managing Class Action Litigation, Federal Judicial Center, at 9 (2010).

plaintiff and lead counsel helps clarify who will then have primary responsibility on behalf of the class for filing an amended complaint (which often occurs following consolidation of multiple cases) or seeking certification of the class.

The Private Securities Litigation Reform Act of 1995 (PSLRA) provides specific guidance to courts concerning the appointment of a 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.[23] Then, no later than 90 days after that publication, the court must consider 'any motion made by a purported class member' even if the individual was not named in the original complaint, and the court must appoint as lead plaintiff the member of the class that the court determines to be 'most capable of adequately representing the interests of class members'.[24]

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.[25] 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'.[26]

The court-appointed lead plaintiff is then empowered, 'subject to the approval of the court', to 'retain counsel to represent the class'.[27]

iii Class certification

Rule 23(c)(1)(A) of the Federal Rules of Civil Procedure 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'. This occurs following a motion for class certification filed by the named or lead plaintiff, which typically is opposed by the defendant.

In recent years, the Supreme Court of the United States has issued a series of decisions regarding class certification in different contexts. The Court has indicated that plaintiffs bear the burden of 'affirmatively demonstrat[ing] . . . compliance' with all of the class certification requirements of Rule 23,[28] and that motions for class certification should only be granted if the district court is 'satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied'.[29] As a result of those decisions, and a greater focus by litigants on class certification, these motions are typically hotly contested by defendants.

To meet the requirements of Rule 23 – and thus demonstrate to a court that class certification is warranted – a plaintiff must satisfy all of the requirements of Rule 23(a) and one of the requirements of Rule 23(b). Those rules are discussed below.

---

23 15 U.S.C. Section 77z-1(a)(3)(A)(i). 15 U.S.C. Section 77z-1 is part of the Securities Act of 1933. The PSLRA enacted parallel provisions related to appointment of lead plaintiff and lead counsel in the Securities Exchange Act of 1934. See 15 U.S.C. Section 78u-4.

24 15 U.S.C. Section 77z-1(a)(3)(B)(i).

25 15 U.S.C. 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 U.S.C. Section 77z-1(a)(3)(A)(i).

26 15 U.S.C. Section 77z-1(a)(3)(B)(iii)(II).

27 15 U.S.C. Section 77z-1(a)(3)(B)(v).

28 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011).

29 *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).

Federal Rules of Civil Procedure, Rule 23(a)

All class actions must satisfy the four requirements of Rule 23(a). Rule 23(a) requires plaintiffs affirmatively to 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 a showing that 'the class is so numerous that joinder of all members is impracticable'.[30] Generally, there is no numerical threshold for determining whether a class is sufficiently numerous. Rather, courts must examine 'the specific facts of each case'.[31]

Commonality requires a demonstration that 'there are questions of law or fact common to the class'.[32] This requirement was addressed in *Wal-Mart Stores, Inc v. Dukes*.[33] There, the Supreme Court found that class certification of a Title VII discrimination case was inappropriate because Wal-Mart had ceded control over employment decisions to regional managers in different geographic locations, so there was insufficient overlap in questions of law and fact among the proposed class.

To satisfy the requirement of typicality, the plaintiffs must demonstrate that 'the claims or defences of the representative parties are typical of the claims or defences of the class'.[34] 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.

Finally, plaintiffs must show that 'the representative parties will fairly and adequately protect the interests of the class'.[35] Here, the primary inquiry for courts is to 'uncover conflicts of interest between named parties and the class they seek to represent'.[36] Courts also will assess the adequacy of proposed class counsel at this stage.[37] In assessing the adequacy of class counsel, courts must conclude that the representative's counsel is 'qualified, experienced and capable of handling the litigation'[38] and that class counsel will represent the interests of the class as a whole.[39]

30 Fed. R. Civ. P. 23(a)(1).

31 *Gen. Tel. Co. of the Nw. v. Equal Employment Opportunity Comm'n*, 446 U.S. 318, 330 (1980).

32 Fed. R. Civ. P. 23(a)(2).

33 564 U.S. 338 (2011).

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

35 Fed. R. Civ. P. 23(a)(4).

36 *Amchem Prod., 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.

37 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).

38 *In re Avon Sec. Litig.*, 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, and as such, in those cases 'the qualifications of class counsel are generally more important in determining adequacy than those of the class representatives'. id.

39 See, e.g., *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').

Federal Rules of Civil Procedure, Rule 23(b)

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).[40] The subsection of Rule 23(b) most commonly invoked as a basis for class certification is Rule 23(b)(3), 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).[41]

The purpose of the predominance inquiry is to test 'whether proposed classes are sufficiently cohesive to warrant adjudication by representation'.[42] '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 generalised, class-wide proof.'[43]

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:

> *(A) the class members' interests in individually controlling the prosecution or defense of separate actions;*
> *(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;*
> *(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and*
> *(D) the likely difficulties in managing a class action.*[44]

The class certification order

If the court finds certification is proper under the requirements of Rule 23, Paragraphs (a) and (b), 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 the procedural mechanism for appointing the class representative and class counsel. Such orders may be altered or amended before final judgment.[45] 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.[46]

40 *Amchem Prod, Inc. v. Windsor*, 521 U.S. 591, 614 (1997).
41 Fed. R. Civ. P. 23(b)(3).
42 *Amchem Prod, Inc.*, 521 U.S. at 623.
43 *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation omitted).
44 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).').
45 Fed. R. Civ. P. 23(c)(1)(C).
46 Fed. R. Civ. P. 23(c)(5).

Notice of class certification and opting out of the class

Once the class is certified, absent class members – namely, class members other than the named or lead plaintiffs who nonetheless 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 with the opportunity to 'request[] exclusion' from the class (commonly referred to as 'opting out').[47] Those 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).[48]

Affording absent class members the opportunity to exclude themselves from a class action comports with the due process requirements set out in the Fifth and Fourteenth Amendments to the US Constitution.[49] Under US law, an individual typically is not 'bound by a judgment . . . in a litigation in which he is not designated as a party', and judicial enforcement of such a decision would violate due process requirements.[50] As discussed above, final resolution of a class action will bind absent class members and preclude future litigation of their claims against that defendant. To comport with due process, this opt-out mechanism ensures that absent class members in a Rule 23(b)(3) class action will not be bound by a final resolution if that class member affirmatively elects to not participate in the case.

The type of notice required to be provided to class members following certification of a Rule 23(b)(3) class action is 'the best notice that is practicable under the circumstances', and where individuals can be identified 'through reasonable effort', individual (or actual) notice is required.[51] Notice may be provided by regular mail, electronic means or any 'other appropriate means'.[52]

Notice must be 'clearly and concisely state[d] in plain, easily understood language'.[53] Notice must, at a minimum, state: (1) 'the nature of the action', (2) 'the definition of the class', (3) 'the class claims, issues, or defenses', (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 under Rule 23(c)(3)'.[54]

Rule 23 does not set out a categorical rule for the amount of time absent class members must be given to respond to this notice. That is usually set at the discretion of the court. Generally, federal courts are advised to provide a minimum of 30 days from when notice is first sent; opt-out periods of 60 to 90 days are preferred.[55] Where the class is sizeable, or actual notice is not practicable, those periods can be significantly longer. As explained above,

47 Fed. R. Civ. P. 23(c)(2)(B)(v).

48 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, 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).

49 See *Phillips Petroleum Co v. Shutts*, 472 U.S. 797, 812 (1985).

50 See *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940).

51 Fed. R. Civ. P. 23(c)(2)(B).

52 Fed. R. Civ. P. 23(c)(2)(B).

53 Fed. R. Civ. P. 23(c)(2)(B).

54 Fed. R. Civ. P. 23(c)(2)(B).

55 Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide, Federal Judicial Center, at 4 (2010).

if a party does not affirmatively request exclusion from the class during this opt-out period, he or she will be included in the class and – subject to a potential further round of opt-outs in the case of a settlement – bound by the final resolution of the claim.

iv Litigation on behalf of the class

After entry of the certification order, provision of notice and the completion of opt-outs, the class action is then litigated on the merits by class counsel acting on behalf of the class. As the case proceeds, the class representative and class counsel control the action on behalf of the class. Other class members do not participate in most phases of litigation, even though those class members will be bound by any final judgment in the action, unless the individual elected to opt out of the class.

Rule 23 provides the court flexibility in conducting the proceeding. For example, 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'.[56]

Litigation of class actions is similar to other civil proceedings in federal courts, in that federal procedural and evidentiary rules still apply. This was highlighted in *Tyson Foods, Inc v. Bouaphakeo*.[57] There, the court considered whether to establish a categorical rule regarding the use of representative evidence to establish class-wide liability (instead of requiring individual proof of liability, which would be likely to preclude class certification, because individual issues would predominate over common class issues). The court declined to create such a 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.[58]

v Settlement

This section focuses on procedural aspects of a 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 when the court enters a judgment approving a settlement.[59] If the parties want to settle a case before the court has entered a Rule 23(c) class certification order, then courts may resort to use of a 'settlement class' mechanism. This is 'a device whereby the court postpones the formal certification procedure until the parties have successfully negotiated a settlement, thus allowing a defendant to explore settlement without conceding any of its arguments against certification'.[60]

56 Fed. R. Civ. P. 23(d)(1).

57 136 S. Ct. 1036 (2016).

58 id. at 1046.

59 Fed. R. Civ. P. 23(c)(3).

60 *In re Gen Motors Corp Pick-Up Truck Fuel Tank Prod. Liab Litig*, 55 F.3d 768, 786 (3d Cir. 1995).

Preliminary approval of a settlement

The first step in the class settlement process involves preliminary approval of the proposed settlement by the court under Rule 23(e)(1). For the court to direct notice of a settlement proposal to all class members it must find that it will likely be able to, first, approve the settlement under Rule 23(e)(2) and, second, certify a settlement class (if it has not already done so).[61] The parties must provide the court with information sufficient to enable it to determine whether to give notice under that standard.[62] The type of information that parties may provide at the preliminary approval stage includes 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. Some relevant factors courts consider in granting preliminary approval of class action settlements are whether settlement negotiations occurred at arm's length between capable experienced counsel and whether there was sufficient meaningful discovery.[63]

Settlement notice

Following entry of preliminary approval, adequate notice of the settlement must be provided to the class. Rule 23(e)(1)(B) requires the court to direct notice in a reasonable manner to 'all class members who would be bound' by a proposed settlement, voluntary dismissal or compromise. Failure to give adequate notice of settlement is not only a violation of Rule 23, but also may violate due process protections.[64] Settlement notice provides absent class members the ability to object to the propriety of the settlement, and, in the case of 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.[65]

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', as required by Rule 23(e)(2). In making that determination the court must consider whether:

> *(A) the class representatives and class counsel have adequately represented the class;*
> *(B) the proposal was negotiated at arm's length;*
> *(C) the relief provided for the class is adequate, taking into account:*
> *(i) the costs, risks, and delay of trial and appeal;*
> *(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;*
> *(iii) the terms of any proposed award of attorney's fees, including timing of payment; and*
> *(iv) any agreement required to be identified under Rule 23(e)(3); and*
> *(D) the proposal treats class members equitably relative to each other.*[66]

61 Fed. R. Civ. P. 23(e)(1)(B).

62 Fed. R. Civ. P. 23(e)(1)(A).

63 See, e.g., *Long v. HSBC USA Inc.*, 2015 WL 5444651, at *3 (S.D.N.Y. Sept. 11, 2015); *Danieli v. Int'l Bus. Machines 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.

64 See *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 113–14 (2d Cir. 2005).

65 Fed. R. Civ. P. 23(e)(4).

66 Fed. R. Civ. P. 23(e)(2).

The objections of any class members to the settlement – which can be presented in writing or orally, at the discretion of the court – will also typically be considered by the court as part of the fairness hearing. 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, there must be 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.[67] To determine whether an individual is properly part of the settlement class, absent class members generally must participate in a claims process, which involves executing and submitting documentation demonstrating their entitlement to a share of the settlement funds, and, typically, an individual release of claims against the defendant. The processing of these individual class member claims is often handled by private, for-profit companies retained by class counsel.

vi Attorneys' fees and costs

Rule 23(h) specifically authorises courts to 'award reasonable attorney's fees and nontaxable costs', upon motion under Rule 54 of the Federal Rules of Civil Procedure (which sets out general procedures for claims for attorneys' fees). Rule 23(h) also provides that class members, or the party from whom payment is sought, may object to this motion for attorneys' fees. In both instances, the court must determine the award is reasonable.[68]

IV CROSS-BORDER ISSUES

In recent years, an important cross-border issue concerning US class actions – particularly in the context of securities class actions – has involved the question of which claims may properly proceed as part of a class action in US courts. In *Morrison v. National Australia Bank Ltd*, the 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'.[69] In addressing that issue, the Court applied the long-standing principle of US law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction

67 See, e.g., *City of Providence v. Aeropostale, Inc.*, 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).

68 Fed. R. Civ. P. 23(h).

69 561 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 per cent – invoked Rule 10b-5. Cornerstone Research, Securities Class Action Filings, at 9 (2017).

of the United States'.[70] 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'.[71] The Court further held that it was not sufficient that 'some domestic activity is involved in the case'.[72] Rather, 'it is . . . only transactions in securities listed on domestic exchanges, and domestic transactions in other securities, to which [Section] 10(b) applies'.[73] 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'.[74]

Morrison is generally credited with restoring the presumption against the extraterritorial application of US statutes, unless they explicitly so specify. That principle can impact the availability of the US class action mechanism, in US courts, to foreign litigants.

V OUTLOOK AND CONCLUSIONS

Several interesting decisions on class action law can be expected in 2020. As one example, the US Court of Appeals for the Sixth Circuit has granted review of *In re National Prescription Opiate Litigation*[75] to determine whether a district court order certifying a 'negotiation class' of over 30,000 cities and counties suing opioid companies is permissible under Rule 23. Unlike a traditional class, the negotiation class in this case was certified not for the purposes of pursuing litigation, but solely to enable the plaintiffs to negotiate a lump settlement.[76] The district court in *In re National Prescription Opiate Litigation* noted that, in contrast to settlement classes, negotiation classes are certified before settlement discussions, which allows plaintiffs to exert further pressure on defendants during negotiations, and also enables defendants to know the size of the class and magnitude of opt-outs ahead of settlement negotiations.[77] The Sixth Circuit will decide whether it agrees with the district court's novel, and possibly 'powerful, creative and helpful' use of Rule 23.[78]

70 *Morrison*, 561 U.S. at 255.
71 id. at 265.
72 id. at 266.
73 id. at 267.
74 id. at 273 (emphasis added).
75 332 F.R.D. 532 (N.D. Ohio 2019).
76 id. at 537.
77 id.
78 id.

Appendix 1

ABOUT THE AUTHORS

TIMOTHY G CAMERON

Cravath, Swaine & Moore LLP

Timothy G Cameron is a partner in Cravath's litigation department. His practice encompasses a broad range of litigation that in recent years has included: securities litigation and shareholder derivative cases; general commercial disputes; antitrust; product liability; False Claims Act and healthcare litigation; tax litigation; and alien tort claims and international torts.

Mr Cameron has particular expertise in representing non-US clients in a wide variety of litigation (including class actions) in federal and state courts in the United States, as well as in arbitrations. He has extensive experience in dealing with complicated cross-border issues that can arise in such matters, including jurisdictional issues, reconciling US law with the application of local laws, class certification issues involving foreign putative class members and the difficulties of obtaining testimony from witnesses located outside the United States.

Mr Cameron was born in Auckland, New Zealand. He received his LLB (Hons.)/BCom degree in 1994 from the University of Auckland, New Zealand; an MComLaw degree with first-class honours in 1997 from the University of Auckland, New Zealand; and an LLM degree in 1998 from the University of Chicago Law School.

From February 1994 to September 1997, Mr Cameron practised law at Russell McVeagh McKenzie Bartleet & Co, in Auckland, New Zealand. He joined Cravath in 1998 and became a partner in 2005.

SOFIA A GENTEL

Cravath, Swaine & Moore LLP

Sofia A Gentel is an associate in Cravath's litigation department.

Ms Gentel was born in Espoo, Finland. She received an LLB degree with first-class honours from the University of Edinburgh in 2014 and a JD with honours from Columbia Law School in 2018. Ms Gentel joined Cravath in 2018.

CRAVATH, SWAINE & MOORE LLP

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
United States
Tel: +1 212 474 1000
Fax: +1 212 474 3700
tcameron@cravath.com
sgentel@cravath.com
www.cravath.com

CRAVATH, SWAINE & MOORE LLP

an LBR business

ISBN 978-1-83862-439-2