

# A Primer on Class Actions: The Players, Procedures, Laws, and Litigation

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# Rule 23 Basics

# Rule 23 Basics

- Four Prerequisites Under FRCP 23(a)(1-4)
  - **Numerosity** – class must be so numerous that joinder of all members is impracticable;
  - **Commonality** – must be common questions of law or fact;
  - **Typicality** – claims or defenses of class representatives must be typical of claims or defenses of class members; AND
  - **Adequacy of the Representation** – representative parties must fairly and adequately protect interests of class

# Rule 23 Basics

- Types of Class Actions – In addition to above requirements, case must fall into one of FRCP 23(b) types of class actions:
  - Separate actions would create risk of inconsistent adjudications—23(b)(1), “limited fund”; no “opt out”;
  - Separate actions would create risk of adjudications that would be dispositive of interests of other members not parties to adjudication (same);
  - Party opposing class acted on grounds that make injunctive or declaratory relief appropriate—23(b)(2), no “opt out”, must seek “primarily” injunctive relief; OR

# Rule 23 Basics

- Types of Class Actions (cont.)
  - Common questions of law or fact predominate over questions affecting individual members and class action is superior to other methods of adjudication. Rule 23(b)(3).
    - “Opt out” rights
    - *This* is where the action is (> 90%)
    - Availability of *MONEY DAMAGE\$*

# Rule 23 Basics

- Numerosity, Rule 23 (a)(1)
  - Not fixed in stone
  - Presumption of numerosity varies by circuit (20-40 class members is the range)
  - Critical factor is ease of joinder
  - Rarely grounds to oppose, but
  - Plaintiffs' burden to establish

# Rule 23 Basics

- Common Questions of Law or Fact, Rule 23(a)(2)
  - Requires only “a” common question
  - Distinguish from “predominance” requirement (23(b)(2))
  - Rule 23(a)(2) commonality applied permissively, but
    - Still plaintiff’s burden
    - Ask: “Are all class members alleging same wrongdoing?”
    - Extremely broad discrimination claims may be vulnerable (See, e.g., Staton v. Boeing Co., 327 F.3d 938, 953 (9<sup>th</sup> Cir. 2003))



# Rule 23 Basics

- Typicality, Rule 23(a)(3)
  - Focus is on comparing the named plaintiff's claims to other putative class members' claims
  - Can it fairly be said: "As go the claims of the representative, so go the claims of the class"?
  - The key concern is due process: Is it fair to absent class members (and the defendant) to have their claims turn on the facts and theories of the named plaintiff(s)?
  - Look for "wedge" issues (unique defenses; standing)
  - Overlap with commonality requirement

# Rule 23 Basics

- Adequacy of Representation, Rule 23(a)(4)
  - Two elements: adequacy of the named rep., and adequacy of plaintiff's counsel;
  - Focus is on the representative: Does he or she have any potential conflicts with other class members? Is he/she engaged? (Culver v. City of Milwaukee)
  - Ask: "Did some class members benefit from the challenged conduct?"
  - Do not ignore adequacy of counsel, especially if spotty track record or published judicial criticism
  - Again, its plaintiffs' burden

# Rule 23 Basics

- Predominance
  - The “shooting match” in most oppositions to motion to certify
  - Fact specific
  - Claim specific
  - Defense specific
  - State law (in nationwide class)
  - Injury in fact
  - Individual reliance
  - Causation

# Federal Jurisdiction Over Class Actions

- Previous discussion focused on requirements for class action to be *certified*. In addition to those requirements, federal court must also have subject matter jurisdiction.
- Federal Question Jurisdiction: federal court can hear case if class claims arise under federal law.

# Federal Jurisdiction Over Class Actions

- Diversity of Citizenship:
  - Complete diversity requirement: all named plaintiffs must have diverse citizenship from all defendants (i.e. no plaintiff can be from same State as any defendant); AND
  - Amount in controversy requirement: at least one **named plaintiff** must meet the amount in controversy requirement (currently, must exceed \$75,000). See *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005).

# Class Action Fairness Act

# CAFA

- Diversity of Citizenship – CAFA’s Expansion:
  - Expands diversity jurisdiction to hear most state-law based class actions if following requirements are met:
    - Numerosity: proposed plaintiff class has at least 100 members;
    - Amount in controversy: aggregate amount must exceed \$5 million (exclusive of interest and costs); AND
    - Diversity: Must be diversity between at least one class member and one defendant

# CAFA

- Note:
  - 100 class members and \$5 million amount in controversy requirements: In most circuits, a district court should consider affidavits to support a prima facie showing of these requirements;
  - For a large corporate defendant, this will likely require defense counsel to act quickly to gather facts to support these requirements and to locate a potential affiant.



# CAFA

## Local Controversy Exception

- District court shall decline to exercise jurisdiction over class action where more than 2/3 of class members are citizens of State in which action was originally filed and at least one defendant:
  - is a citizen of the State in which the action was originally filed;
  - is a defendant from whom significant relief is sought; AND
  - whose alleged conduct forms a significant basis for claims asserted AND
- the principal injuries resulting from alleged conduct of each defendant were incurred in State in which action was originally filed AND no other class action has been filed asserting same/similar allegations against any of the defendants in preceding 3 years. 28 U.S.C.A. § 1332(d)(4)(A).

# CAFA

- **Local Controversy Exception (Cont'd)**
- What is “significant relief”?
  - Determined relative to the relief sought against other co-defendants
  - “Whether a putative class seeks significant relief from an in-state defendant includes not only an assessment of how many members of the class were harmed by the defendant’s actions, but also a comparison of the relief sought between all defendants and each defendant’s ability to pay a potential judgment.”
  - “Relief must be measured with respect to that sought by the entire class.”

# CAFA

## Home State Exceptions

- District court shall decline to exercise jurisdiction over class action where primary defendants and 2/3 or more of class members are citizens of State in which action was originally filed. 28 U.S.C.A. § 1332(d)(4)(B).
- District court may decline to exercise jurisdiction over class action where primary defendants AND between 1/3 and 2/3 of class members are citizens of State in which action was originally filed. 28 U.S.C.A. § 1332(d)(3). The decision to exercise CAFA jurisdiction in these cases is discretionary and court should consider 6 statutory factors.
- “Primary defendants”: those defendants who are the real “targets” of the lawsuit, i.e., the defendants that would be expected to incur most of the loss if liability is found. Includes defendants (1) who have greater liability exposure; (2) are most able to satisfy potential judgment; (3) are sued directly, as opposed to vicariously, or for indemnification or contribution; (4) are the subject of significant portion of claims asserted by plaintiffs; or (5) are the only defendants named in one particular cause of action.

# CAFA

- “Mass Actions” Under CAFA: Subject to certain exceptions, a suit not brought as a class action may be deemed a class action under CAFA if it is a “mass action.”
- “Mass Action”: “any civil action...in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs’ claims involve common questions of law or fact.”
- In practice, plaintiffs can avoid the “mass action” provision by joining fewer than 100 plaintiffs.

# CAFA

- Important Note: CAFA supplements existing bases for federal jurisdiction; it does not replace these bases.
- There are still gaps in federal jurisdiction over class actions:
- CAFA's expanded diversity jurisdiction does not reach securities or corporate governance related class actions.
  - Such class actions were previously addressed by other federal reform statutes, including the Private Securities Litigation Reform Act and the Securities Litigation Uniform Standards Act.
- CAFA's expanded diversity jurisdiction also does not reach class actions where the "primary" defendants are States, state officials or government entities against which a federal court "may be foreclosed from ordering relief." 28 U.S.C.A. § 1332(d)(5)(A).

# Removal of Class Actions – Post-CAFA

- Four Main Considerations:
  - (1) Who can remove?
  - (2) What consent, if any, is required to remove?
  - (3) What is the deadline for removal?
  - (4) Is the remand decision reviewable?

# Removal of Class Actions – Post-CAFA

- Any defendant, including defendants who are citizens of the State in which the case is filed, can remove. 28 U.S.C.A. § 1453(b).
- Action may be removed by any defendant without the consent of all defendants. 28 U.S.C.A. § 1453(b).
- The 1-year limitation under § 1446(b) does not apply. 28 U.S.C.A. § 1453(b).
- Remand decisions reviewable if appeal application is filed within 7 days. Court of appeals must decide appeal within 60 days of acceptance, with maximum extension of 10 days – or “any period of time” if all parties agree to extension. 28 U.S.C.A. § 1453(c).

# Important Strategic Considerations

## Re: Removal

- Simply because CAFA may provide a basis for defendant to remove, does not necessarily mean that it should do so. Consider:
  - Are state court's procedural rules on class certification more advantageous?
  - Background, experience, docket of the judge.
  - Are state court's procedural rules on admissibility of expert testimony more favorable?
  - Where will lawsuit be resolved more quickly?
  - Where will defendant have more opportunities for interlocutory appellate review?



# Burden of Proof

- On Removal:

- Generally, a defendant seeking removal has the burden to establish that removal is proper and that the district court has jurisdiction, and any doubt is resolved against removability.

- On Remand:

- Under CAFA, a plaintiff seeking remand of a class action based on an exception in the statute has the burden to prove its application.

# Defense Strategy

# Defense Strategies

- Pre-suit
  - Pay attention to your client's industry
  - Look for opportunities to advise clients on ways to minimize exposure to class actions in their business practices
  - Example: interject elements of individualized judgment and discretion into decisionmaking
  - Example: exercise caution re. uniform representations and presentations

# Defense Strategies

- EACH CASE IS UNIQUE
  - What are the prospects of defeating certification in the type of case you have?
  - Some types of class actions are much more likely to be certified than others (e.g., securities vs. common law fraud)
  - What's at stake (\$)?
  - What are clients' priorities?
  - What are clients' resources?

# Defense Strategies

- Three Bites at the apple:
  - Motion to dismiss
  - Defeat Class Certification
  - Settle or Win at Trial

# Defense Strategies

- Should you ask for Bifurcated Discovery?
  - Often beneficial to defendant
  - Slows down class certification process
  - Focuses more scrutiny on the certification question
  - May foster settlement discussions
  - Gives defense an opportunity to marshal compelling factual record of individualized issues
  - Provides better record for appellate review

# Defense Strategies

- “Reverse” Bifurcated Discovery?
  - Rare
  - Larger claims, where risk of follow-on (non-class) lawsuits
  - Limited fact discovery to permit defendant to move for summary dismissal without reaching class discovery
  - Illustrates importance of crafting strategy in each case to maximize the client’s objectives

# Defense Strategies

- Should you ask for an evidentiary hearing?
  - Focuses attention on the certification question
  - Allows your expert(s) to shine
  - Build record for possible appellate review
  - Affect on state court judges may be especially pronounced



# Defense Strategies

- Insurer strategy
  - If there is coverage (e.g., D & O insurance on a securities claim), you must design a strategy that anticipates insurer participation and (hopefully) cooperation
  - Good relation with insurer counsel pays dividends to the client
  - Consider whether other counsel should handle coverage disputes

# Defense Strategies

- Common Mistakes:
  - Not devoting enough resources to the certification opposition
  - Allowing plaintiffs to frame the issues
  - Real certification arguments comes in the reply
  - Inadequate record (for trial court and appeal)
  - Inadequate settlement strategy
  - Failure to partner with insurance counsel
  - Excessive risk aversion towards trial

# Settlements

# Key Concepts

## Re: Settlement Of Class Action Cases

- Class Action Settlements
- Rule 23(e)
  - settlement must be “fair, reasonable, and adequate”
  - “side agreements” must be identified
  - class member may object to proposed settlement (objection may be withdrawn only with court’s approval)
  - authorizes a “second” opt-out opportunity: court may require that class members be given opportunity to opt out at a time when class members can make informed decision based on proposed settlement terms

# Key Concepts

## Re: Settlement Of Class Action Cases

- Rule 23(g)(3)
  - authorizes court to appoint interim counsel to represent putative class during the period before class certification
- Rule 23(c)(2)(B)
  - requires that certification notice be concise, clear, and in “plain, easily understood language.”
  - Model clear-notice forms can be found at Federal Judicial Center website – [www.fjc.gov](http://www.fjc.gov)

# Key Concepts

## Re: Settlement Of Class Action Cases

- Attorney Fee Awards
- Rule 23(g) authorizes court to include fee provisions in order appointing class counsel, require that class counsel provide interim fee reports as case progresses, and direct potential class counsel to provide express terms of attorney fee award.
- Rule 23(h) requires attorney fee request to be “reasonable” (courts look to variety of factors, including results actually achieved for class members) and requires that class members be notified of attorney fee motion by class counsel and be given opportunity to object. If class member objects, court may authorize objector to investigate proposed fee award through discovery.

# Key Concepts

## Re: Settlement Of Class Action Cases

- FRCP 23 requirements (except for manageability) apply equally to settlement classes
- In some respects, class settlements require even greater scrutiny on certification. See *Amchem v. Windsor*, 521 U.S. 591, 620 (1997)

# Key Concepts

## Re: Settlement Of Class Action Cases

- Caution!
  - In certain circumstances, a defendant may be “judicially estopped” from opposing class certification if it has previously endorsed a class settlement that was later rejected (Carenege v. Household Int’l Inc.)
  - Strategies: emphasize manageability; limit settlement class to one that is more distinct



# Key Concepts

## Re: Settlement Of Class Action Cases

- *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985):
  - Law of forum state may be constitutionally applied to claims of all class members only where it does not conflict in any material way with any other law which could apply.
  - Where law of forum state does materially conflict, law of forum state may be applied to all class members only if forum has significant contacts or a significant aggregation of contacts to class members' claims.
  - While minimum contacts test did not apply, absent class plaintiffs still must receive notice of litigation, an opportunity to opt out, and adequate representation to satisfy due process.

# Key Concepts

## Re: Settlement Of Class Action Cases

- Application of Shutts: *State v. Homeside Lending, Inc.*, 826 A.2d 997 (Vt. 2003)
- Facts/Procedure: Following class action settlement in Alabama in *Hoffman*, national class action against banks alleging that banks required mortgagors to maintain excessive amounts in escrow accounts, Vermont brought collateral action seeking injunction, refund of monies, and civil penalties. Superior Court granted summary judgment to banks on ground that case was precluded by Alabama's judgment in national class action. State of Vermont appealed. Supreme Court of Vermont reversed, holding that settlement in *Hoffman* should not be given preclusive effect because it failed to provide absent class members with adequate notice and representation while also denying them due process.

# Key Concepts

## Re: Settlement Of Class Action Cases

### Problems with the *Hoffman* Settlement – Lessons Learned:

- Settlement resulted in net loss for many class members. This issue is addressed by CAFA.
- Minimum contacts analysis: Because attorneys' fees awarded under settlement imposed burdens on class members that exceed benefit, Court held that this was a case where plaintiff class may be as burdened as a defendant—and consequently, stricter minimum contacts test of *International Shoe* applied. Court found that no minimum contacts existed between Vermont plaintiffs and Alabama and therefore Alabama court could not have personal jurisdiction over Vermont residents in the class.

# Key Concepts

## Re: Settlement Of Class Action Cases

### **Problems with the Hoffman Settlement – Lessons Learned** *(cont'd)*:

- Notice provisions: Court found that substance of notice was unacceptable. The wording was complicated, the source and amount of attorney fees was undeterminable, and the critical term “economic benefit” was not defined. Consequently, notice did not allow absent class members to make an informed decision regarding their participation in the lawsuit and any consent to Alabama’s jurisdiction was invalid.

# Key Concepts

## Re: Settlement Of Class Action Cases

- Inadequate representation – both by class representatives and class counsel:
  - Class representatives were given incentive payments of \$2,500. Receiving a greater economic benefit than the benefits of settlement induced representatives to support settlement regardless of how it treated other class members.
  - There was also a basic conflict of interest between class counsel and class members with respect to attorneys' fees: fees came from plaintiffs' escrow accounts and not as a separate item of damages paid by defendants (which meant that defendants had no direct economic interest in how attorneys' fees were calculated).

# Key Concepts

## Re: Settlement Of Class Action Cases

- “Clear Sailing” provision: Settlement agreement contained provision whereby defendants agreed that they would not oppose attorneys’ fee request and would remain silent at fairness hearing.
- Because of the “clearing sailing” provision and unusual method of deriving attorneys’ fees, Court held that defendants had no incentive to protect interests of class members and indeed failed to do so.

# Key Concepts

## Re: Settlement Of Class Action Cases

- Certification Standard for Class Action Settlements – Two-Pronged Analysis
- Standard court uses to assess propriety of class action settlements:
  - Whether a proper class exists (critical where settlement is reached prior to class certification) AND
  - Whether proposed settlement is fundamentally fair, adequate and reasonable.
- Defendants can help shape these factors by strategically timing motions to dismiss to highlight weaknesses in plaintiff's case and motions for settlement certification, crafting terms of proposed settlements, and demonstrating the value of the settlement to class members (often through experts).

# Key Concepts

## Re: Settlement Of Class Action Cases

- Other Considerations:
  - Class Representatives: Most typical inquiry is whether representative suffered in same manner as other class members might have suffered.
    - Defendants can avoid this problem by conducting thorough discovery of class representative and aggressively challenging his adequacy if it becomes apparent that class representative has not suffered same harm as class members. Defendants can also prevail upon plaintiffs' counsel the need to add additional representatives to shore up any deficiencies.
  - Reverter Provisions: Provisions that permit defendant to recover funds not claimed by class members.
  - "Clear Sailing" Provisions: agreement where party paying fee agrees not to contest amount to be awarded by fee-setting court so long as award falls beneath a negotiated ceiling.
  - Courts are suspicious of these provisions—and a settlement agreement that contains both provisions may be considered presumptively unfair.



# Key Concepts

## Re: Settlement Of Class Action Cases

- Attorneys' Fees: The greater the cash benefits to the class relative to the cash payment to class counsel, the higher the likelihood of approval (and vice versa). CAFA specifically addresses disproportionate settlements and is discussed below.
  - Defendants can protect against the perception that class counsel agreed to an unfair settlement on behalf of class members in order to obtain higher fees by refusing to discuss attorneys' fees until after the parties have reached an agreement-in-principle on substantive claims.
- Conflict of Laws: Parties must assure that law being applied by court does not conflict with laws of any other state potentially interested in lawsuit. This may require defendant in nationwide class action settlement to conduct 50-state survey to assure that no conflict of law exists both with respect to substantive claims being settled and relief being offered in settlement.

# CAFA's Impact on Class Action Settlements

- CAFA has increased court scrutiny over certain types of settlements as well as attorneys' fees.
- Coupon Settlements:
  - May only be approved after court holds hearing to determine whether, and makes written finding that, settlement is fair, reasonable, and adequate for class members. 28 U.S.C.A. § 1712(e).
  - The portion of any attorneys' fee award to class counsel that is attributable to the award of coupons shall be based on value to class members of coupons that are redeemed. 28 U.S.C.A. § 1712(a). Court may receive expert testimony on actual value to class members of coupons that are redeemed.
  - Court may require that proposed settlement agreement provide for distribution of portion of value of unclaimed coupons to charitable or governmental organizations.

# CAFA's Impact on Class Action Settlements

- Disproportionate Settlements: CAFA also imposes heightened scrutiny on disproportionate settlements.
- Protection against discrimination based on geographic location: Court may not approve a proposed settlement that provides for payment of greater sums to some class members than to others solely on basis that class members to whom greater sums are to be paid are located in closer geographic proximity to court. 28 U.S.C.A. § 1714.
- Protection against loss by class members: Court may approve proposed settlement under which any class member is obligated to pay sums to class counsel that would result in net loss to class member only if court makes written finding that nonmonetary benefits to class member substantially outweigh monetary loss. 28 U.S.C.A. § 1713.

# CAFA's Impact on Class Action Settlements

- Notice Requirements: Within 10 days of defendant filing proposed class settlement with court for approval, defendant must send settlement, copy of complaint, and certain related materials to “appropriate Federal official” and “appropriate State official” of each State in which a class member resides. 28 USCA § 1715(b)
- “Appropriate Federal official” is usually Attorney General of the United States. 28 USCA § 1715(a)(1)
- See 28 USCA § 1715(a)(2) for “Appropriate State Official.”

# CAFA's Impact on Class Action Settlements

- Court may not give final approval to class settlement until at least 90 days after defendant gives required settlement notice to appropriate officials. 28 U.S.C.A. § 1715(d). This means the government officials will have time to decide if they want to object to the settlement or otherwise oppose its approval.
- Compliance with notice requirements is critical. A defendant's failure to send the required notice to government officials allows a class member to refuse to comply with and not be bound by the settlement agreement. 28 U.S.C.A. § 1715(e). This means that the class member could sue the defendant again on the claims that were settled.
- 28 U.S.C.A. § 1715(e)(2) provides a "safe harbor" in that class member may not refuse to be bound if defendant gave notice to appropriate Federal official and State attorney general. This avoids concern as to whether or not defendant selected each state's "appropriate" state official in a nationwide settlement.
- Some class action administrators maintain a list of all state attorneys general for notice purposes.

# CAFA's Impact on Class Action Settlements

- Strategic Considerations In Light of CAFA's Impact on Class Action Settlements:
  - Notice provisions could make it more difficult, time consuming and expensive to gain approval of settlement if federal and state officials take a more active role in objecting to settlements.
  - Increased scrutiny of coupon settlements may lead to less flexibility for parties trying to negotiate a class action settlement because plaintiff's counsel may now demand more cash settlements.

# Questions To Consider When Crafting Settlement

- Does settlement class satisfy predominance requirement?
- Which state's law is to be applied and are the constitutional standards set forth in *Shutts* satisfied?
- Are there conflict of law issues with respect to substantive claims or settlement relief that would either defeat predominance or violate due process requirements?
- Should a 50-state case law survey be conducted to analyze conflict of law issues?
- Does the settlement structure negatively impact the class in any way which would trigger the stricter minimum contacts analysis applied in *Homeside*?
- Does settlement comply with due process notice requirements?
- Is the notice in plain English and not legalese?

# Questions To Consider When Crafting Settlement

- Is notice being provided in a manner to provide reasonable notice to all known class members?
- Is notice being directed to appropriate federal and state officials if required?
- Do class representatives adequately represent the class?
- Would discovery or motion to dismiss bring to light any deficiencies?
- Do class representatives represent all of the necessary jurisdictions implicated by the class action?
- Is it necessary to negotiate with class counsel to replace or add class representatives to address deficiencies or conflicts?



# Questions To Consider When Crafting Settlement

- Should the settlement provide for confirmatory discovery?
- Does class counsel adequately represent the class?  
Do any conflicts exist?
- Are attorneys' fees reasonable in comparison to compensation awarded to the class?
- Are attorneys' fees to be paid out of the economic benefit to be conferred upon the class?
- Is the defendant agreeing to a reverter or clear-sailing provision in the settlement agreement?

# Questions to Ask Outside Counsel

# Questions to Ask (by inside counsel)

- What is your experience defending this type of case?
- What issues should I be worried about?
- What can you tell me about the judge?
- How can we:
  - (a) best defeat this case,
  - (b) in the most cost-effective way?
- What kind of discovery are we looking at?
- Am I covered (insurance)?
- What happens if we lose the motion to dismiss?
- What happens if we lose certification motion?
- What thoughts do you have about settlement?

# Questions to Answer (by inside counsel)

- What can you tell me about the claim?
- How does your business work in this area?
- How do your business practice compare with your competitors?
- Who are the most knowledgeable people in your organization?
- How sensitive are privacy issues?
- What types of documents or computer records are generated and kept?
- Who is the records guru?
- What kind of insurance might be applicable?
- Who is the responsible risk management contact?

# Questions to Answer (by inside counsel)

- Are there any special concerns you have?
- What can you tell me about key company witnesses?
- What is management's attitude toward this case?
  - (a) taking it seriously?
  - (b) defeat at any cost, or "strike" suit attitude?
- Any inside "experts"?
- Other resources?
- What are your marching orders?
- What do you want me to do?
- How do you want me report?

# Questions