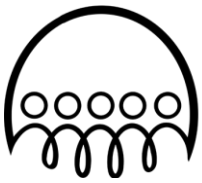

OBSERVATOIRE DES ACTIONS DE GROUPE
et autres Actions Collectives

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1. Preliminary

a. Historical Considerations

The United States has the reputation of being a litigious nation: This reputation is, in no small part, a product of the class action lawsuit procedure. However, while the modern concept of the class action lawsuit is uniquely American, the history of representative actions is far older than the United States. Class actions—the concept that a small group of plaintiffs seeking redress could represent a wider group of plaintiffs—has existed since at least medieval times.[1]

While representative actions are, in large part, associated with the United States, there is no singular statute that governs the process of claim aggregation. Most states have adopted a procedure for intra-state class actions. At the federal level, there are two distinct mechanisms that govern the class action procedural process.

Rule 23 of the Federal Rules of Civil Procedure governs the conditions that must be met for a class action to proceed. Because of the complexities of the class action procedure and the sophisticated nature of litigation, the legislature streamlined the process of entering into Federal court with the Class Action Fairness Act of 2005. (See 28 U.S.C. 1332)

b. Class Action Procedural Reform

Rule 23 of the Federal Rules of Civil Procedure dictates the conditions in which a party to a lawsuit can serve as the representative of a group. Representatives of a group must

[1] *History of Class Action Lawsuits*, LEVIN PAPANTONIO RAFFERTY (last accessed 10 November 2021) https://www.levinlaw.com/history-class-actions.

show (1) Commonality (2) Typicality (3) Numerosity (4) Adequacy of representation. (See FRCP 23(a)). These requirements apply to both the certification of *plaintiffs and defendants as a class*. The Class Action Fairness Act of 2005 reformed the class action procedural requirements for bringing a representative action within the federal court system and firmly entrenched consumer law actions within the federal courts.

Firstly, the CAFA streamlined the class action procedure by changing the subject-matter jurisdiction requirements. The Constitution of the United States mandates that an action or claim can only be brought where there is proper subject-matter jurisdiction. Simply put, a federal court can hear a case only where there is a federal question before the court or where the parties of the lawsuit are sitting in diversity. Traditionally, federal courts have interpreted the diversity jurisdiction requirement as that of complete diversity. Complete diversity requires that each plaintiff be domiciled in a different state than that of each defendant and that the plaintiffs plead damages of more than $75,000.

However, the legislative branch, through the Class Action Fairness Act, allowed for federal courts to adjudicate class actions in situations of minimal diversity- meaning that a large class of plaintiffs and defendants could be domiciled within the same state so long as one plaintiff was domiciled in a different state from at least one defendant. Under the CAFA, so long as the plaintiffs claim over $5,000,000 in the aggregate, no individual plaintiff need meet the $75,000.01 requirement. The procedure of minimal diversity has been particularly advantageous to toxic-tort claims, mass litigation, and consumer law, where there are thousands of potential plaintiffs. Consumer protection litigation has particularly benefited from the relaxed subject-matter jurisdiction requirements.

But, the Class Action Fairness Act not only relaxed subject-matter jurisdiction requirements, but also modified the scope of available remedies, especially in consumer protection actions.

c. Modified Remedies

The Class Action Fairness Act did not just facilitate access to federal courts, but also changed the nature of settlement and the remedies available in consumer actions. If a class survives a motion for certification and a motion to dismiss, the class has usually gained sufficient leverage and proffered sufficient information to prompt settlement negotiations. Under the CAFA there are increased burdens placed on the representative parties at the settlement stage.

The "Consumer Class Action Bill of Rights" (See *Section 3 of the CAFA*) provides for increased judicial scrutiny prior to settlement. Under the CAFA, the Court can only approve of a settlement where it makes a written determination as to whether the proposed settlement is "fair, reasonable, and adequate for class members." (See **§** 1712(e)).[2]

Moreover, the act requires different notification and pleading requirements for each form of redress. Notably, the CAFA made coupon settlement a disfavored form of relief in consumer protection actions. Prior the CAFA defednants would often agree to and argue for coupon settlements.[3] Section 3 of the CAFA mandates that in a coupon settlement action attorney's fees are directly tied to the amount of *redeemed coupons*. Under the CAFA, the

[2] PUB. L. NO. 109-2 (Feb. 18, 2005) https://www.congress.gov/109/plaws/publ2/PLAW-109publ2.pdf.
[3] Reig, Erway, Sharkey, *The Class Action Fairness Act of 2005: Overview, Historical Perspective, and Settlement Requirements*, 40 TORT TRIAL & INS. L. JOURNAL 1087 https://www-jstor-org.ezproxy.lib.uconn.edu/stable/pdf/25763748.pdf?refreqid=excelsior%3A48a169e9d31d683c01a4fbab11392f79.

Court is empowered to allocate funds from the settlement to charitable or governmental organizations. (See § 1712(e)).

d. Due process concerns and the binding nature of Class Settlement

It is a central tenet of the American Legal System that due process provides that parties to a litigation have the right to participation and the right to be meaningfully heard. Class actions, because of their binding nature that limit subsequent individual actions, have the power to destroy the protections afforded by the due process clause.

The adoption of the CAFA increased the burdens on the parties to notify all of the potential members of the class prior to settlement. The CAFA provides that in any instance when a motion for settlement has been entered and the defendants agree, they must notify state and federal governmental officials of the nature of the action and the details of the settlement. Moreover, the CAFA mandates that the defendants give class members sufficient notice that would be calculated with sufficient specificity as to apprise class members of pendency of the action. Under the CAFA, defendants are directed to provide personal information about the class members if possible and provide that information to the government. (See § 1715) The burden rests on defendants to provide the information, identify the proper government officials and to make a good faith effort to ascertain the correct class.

This method of defendant notice is problematic and can directly undermine the constitutional protections afforded to litigants under the due process clause. While Rule 23 of the federal rules of civil procedure does provide that class members may "opt-out" there is a general consensus that opting out requires a written notice to the attorneys. Moreover, one can not opt out from a class that they were not aware existed. Failure of a defendant to adequately apprise a class member of the action can be catastrophic and can deprive one of the right to be meaningfully heard.

2. How to Form a Class

In the American federal system, the Supreme Court has stated that a claim will survive only where the plaintiff states a claim upon which relief can be granted and bolsters it with sufficient information to render their theory not only possible, but plausible. (See *Iqbal v. Ashcroft* 566 U.S. 662). To survive a motion to dismiss- a 12(b) motion- the claim must have a facial plausibility based on factual allegations that indicate the defendant's liability. (*Id.*)

While the considerations of commonality, typicality, adequacy, and numerosity are important determinations for the Court to make, a class can only be certified after the discovery process has commenced. The discovery process that occurs prior to class certification is an important threshold consideration for the Court and is dispositive as to whether there is sufficient evidence to proceed to the next steps of litigation. In general, plaintiffs are entitled to the discovery procedure prior to class certification. Oftentimes, pre-trial discovery is split into two phases, one for the litigation on the merits and a narrow discovery phase limited to issues regarding class certification.

Federal courts are directed, by the FRCP, to certify the class "at an early practicable time." This change was a result of the 2003 amendments to the FRCP rule 23. In the context of class actions, this means that the plaintiffs recount a series of facts which are plausible to justify discovery requests. Discovery is a discretionary process and must be proportionate to the scope of the inquiry. In other words, the plaintiffs must plead and justify their discovery requests by offering sufficient evidence *prior to certification* to show a probability that commonality, adequacy, typicality and numerosity requirements will be met.

The requirement that a Court grant certification as early as possible is very important to class action litigation, especially in the area of consumer protection law. Granting or

denying certification indicates to the respective parties the nature of the forthcoming litigation and will hasten settlement discussions.

3. Characteristics of a Class

The first step of bringing a class action in the American federal courts is to establish a "class." Federal Rule of Civil Procedure 23(a) lists four separate prerequisites that must be met in order to establish a "class."[1] A member may sue—or be sued—as a representative on behalf of all members on the basis of numerosity, commonality, typicality, and adequacy of representation.[2] Each of these prerequisites must be satisfied in order to establish a class. If even one of these prerequisites fail to be satisfied, then the party will not be a "class" and the court will refuse to move to the second stage of class action analysis.

The first of these requirements, numerosity, ensures that there are enough physical members in the potential class to justify a class action suit. The class must be so numerous that joinder by any other device (such as compulsory or permissive joinder) is entirely impracticable.[4] While there is no magic number that delineates the threshold between joinder and class action, any party with more than forty members will be joined by class action.[5] Thus, parties composed of thirty members may be composed as class actions, but there is room for litigation on the basis of whether a class fewer than forty members will be practicable.

Commonality, the second prerequisite, stipulates that there must be questions of law or fact that are common to the class.[6] Naturally, this requirement provides ample room for judicial interpretation, and thus presents a large hurdle to parties seeking a class action.

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[4] *Id.* at 23(a)(1).
[5] Daniel J. Butler & Christopher M. Pardo, *Numerosity and Rule 23: It's Not (Only) About the Numbers*, HUNTON ANDREWS KURTH, (February 3, 2021) https://www.huntonlaborblog.com/2021/02/articles/class-actions/numerosity-and-rule-23-its-not-only-about-the-numbers/.
[6] *Id.* at 23(a)(2).

Supreme Court Justice Antonin Scalia famously ruled on the issue of commonality in *Wal-Mart Stores, Inc. v. Dukes*.[7] In this particular case, Dukes sought relief, damages, and backpay for some 1.5 million female Wal-Mart employees across the nation.[8] Dukes alleged that local managers discriminated against women with respect to pay and promotions.[9] Further, Dukes argued that Wal-Mart's failure to limit managerial discretion over pay and promotions resulted in disparate treatment.[10] To this effect, Dukes tendered an expert witness to testify that Wal-Mart's corporate culture was vulnerable to gender bias.[11] However, the Court determined that the statistical and anecdotal evidence presented failed to demonstrate a common mode of managerial discretion across the entire company.[12]

Specifically, Justice Scalia wrote that the plaintiff must demonstrate that the class members have "suffered the same injury" and have a claim based on a "common contention."[13] For example, assertions of discrimination made against the same supervisor would clearly be based on a common contention. As more supervisors become the subject of these assertions, the commonality weakens. Such was the case in *Wal-Mart*, where the discretion of managers across the nation was called into question

Most importantly, this common contention must be "capable of classwide resolution."[14] There was not enough "glue" to hold all of the justifications for millions of managerial decisions under one common roof.[15] Justice Scalia places high value on class action as a tool for judicial efficiency by bringing forward the requirement that the Court be

[7] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 353-54.
[12] *Id.*
[13] *Id.* at 350.
[14] *Id.*
[15] *Id.* at 352.

able to cure the common contention in a single act. Because it would be impossible to say that examining all of the class members' claims would yield a common explanation for the decisions of local management, the class action in *Wal-Mart* is inappropriate. More simply, plaintiffs seeking a class action must define a common question which yields a common answer.[16]

The third requirement, typicality, asserts that claims or defenses of representative parties must be typical of the claims or defenses of the class.[17] This involves a careful analysis of the harm sustained by the representative and his or her motives for bringing suit. Often, the representatives have faced more damages than the rest of the class. Where this discrepancy is significant or the representative is motivated by self-interest, the requirement will likely not be satisfied. However, the representative's claims do not need to by identical to the class to satisfy the typicality requirement.[18] At the state level, courts have determined that the test for typicality focuses on the predominance of questions of law or fact, rather that questions targeting individual members.[19] For example, typicality exists where the representative's claims arise out of the same "event, practice, or course of conduct" that gives rise to the claims of the class, which are based in the "same legal theory."[20]

Finally, adequacy of representation requires that the representative parties will fairly and adequately protect the interest of the class.[21] This prerequisite rooted in the understanding that (1) the lawyer will be representing a large swath of people and must therefore be

[16] *Righting the Class Action Ship: Wal-Mart Stores, Inc. v. Dukes*, MCGUIRE WOODS (June 22, 2011) https://www.mcguirewoods.com/client-resources/Alerts/2011/6/rightingtheclassactionship.
[17] Fed. R. Civ. P. 23(a)(3).
[18] *Iron Workers Loc. Union No. 17 Ins. Fund & its Trustees v. Philip Morris Inc.*, 182 F.R.D. 523, 537 (N.D. Ohio 1998).
[19] *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 7 (1986), *aff'd*, 69 N.Y.2d 979, 509 N.E.2d 347 (1987).
[20] *Gautreaux v. Louisiana Farm Bureau Cas. Ins. Co* , 2019-17 (La. App. 3 Cir. 10/2/19), 280 So. 3d 694, 707.
[21] Fed. R. Civ. P. 23(a)(4).

competent and (2) the representative of the class will be representing a large swath of people and must therefore be unwilling to "sell out" the remainder of the class.[22] Where such conflicts of interest arise between the representative and the class, the conflict must be a fundamental difference, to defeat the adequacy of representation requirement.[23] Note that the latter of these rationales relates closely to the third prerequisite of typicality.[24] This prerequisite necessarily involves due process rights, and thus adequacy of representation can be addressed throughout the duration of litigation as circumstances change.[25]

Once each of the requirements numerosity, commonality, typicality, and adequacy of representation have been satisfied, the class is officially a "class" for the purposes of a class action. Courts will then look to the second step of Rule 23 analysis in Rule 23(b) to determine whether the class action can be maintained.

[22] *Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 99 (2d Cir. 2007) (explaining that counsel must be qualified, experienced, and generally able to conduct litigation); *Johnson v. Meriter Health Servs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012) (explaining that conflicts of interest between class members must be more than hypothetical to defeat adequacy of representation).
[23] *In re Deepwater Horizon*, 739 F.3d 790, 813-14 (5th Cir. 2014) (describing that a fundamental difference is that which is beyond the naturally occurring differences between members of a class).
[24] *Stirman v. Exxon Corp.*, 280 F.3d 554, 563 (5th Cir. 2002).
[25] *See, Lyons v. Georgia-Pac. Corp. Salaried Emps. Ret. Plan*, 221 F.3d 1235, 1253 (11th Cir. 2000).