

# Contents

Online Version of this Treatise . . . . .	v
What Your Library Should Contain . . . . .	vi
Chapter 1	
Case and Claims Selection, Other First Considerations . . . . .	1
1.1 How to Use This Treatise . . . . .	1
1.1.1 A Practical Guide to Litigating Class Actions . . . . .	1
1.1.2 Print and Online Versions . . . . .	1
1.1.3 Subjects Covered in This Treatise . . . . .	1
1.1.4 Legal Citations and Resources . . . . .	1
1.1.5 Appendices, Pleadings, Primary Sources, and Practice Tools . . . . .	2
1.2 The Need for Consumer Class Actions . . . . .	2
1.3 Challenges of Class Action Practice . . . . .	5
1.3.1 Class Action Litigation Often Requires Large Up- Front Investments . . . . .	5
1.3.2 Legislation, Court Decisions, and Corporate Practices Contribute to Limiting the Opportunities for Successful Consumer Class Actions . . . . .	6
1.4 Maintaining High Ethical and Practice Standards in Class Actions . . . . .	6
1.5 Co- Counseling with Other Attorneys . . . . .	6
1.6 Alternatives to Filing a Class Action . . . . .	7
1.7 Case and Claim Evaluation . . . . .	7
1.7.1 Introduction . . . . .	7
1.7.2 Arbitration Clauses and Class Action Waivers . . . . .	7
1.7.2.1 General . . . . .	7
1.7.2.2 The CFPB Proposal to Limit Arbitration of Class Actions . . . . .	8
1.7.2.3 Are Class Actions Available in an Arbitration Proceeding? . . . . .	8
1.7.2.4 Challenging the Arbitration Requirement . . . . .	9
1.7.3 Res Judicata effect of a Prior Class Action . . . . .	10
1.7.4 The Effect of State Law Limitations on Federal Class Actions ( <i>Shady Grove</i> ) . . . . .	10
1.7.5 Forum Selection and CAFA Removal . . . . .	12
1.7.6 Is the Statute of Limitations Tolloed by a Previous Class Action? . . . . .	12
1.7.6.1 General . . . . .	12
1.7.6.2 The <i>American Pipe</i> tolling doctrine . . . . .	12
1.7.6.3 When Does <i>American Pipe</i> Tolling Apply to Subsequent Class Actions? . . . . .	14
1.7.7 Do the Claims Lend Themselves to Class Certification? . . . . .	15
1.7.7.1 Class Definition and Class Certification in General . . . . .	15
1.7.7.2 Avoid Claims That Require Proof of Reliance or Other Individual Issues . . . . .	16
1.7.7.3 Claims That Are Not Fact-Intensive Are Ideal . . . . .	16
1.7.7.4 Avoid Claims That Are Technical Violations Yet Threaten Annihilating Damages . . . . .	16
1.7.7.5 Consider Whether Benefits Can Be Provided to Class Members . . . . .	17
1.7.7.6 Consider Claims for Equitable Relief . . . . .	17
1.7.8 Whether to Allege Multiple Claims . . . . .	18
1.7.8.1 In general . . . . .	18
1.7.8.2 Manageability . . . . .	18
1.7.8.3 Some Risks of Omitting Claims . . . . .	19
1.7.9 Competing Lawsuits . . . . .	19
1.8 Selecting Parties to Name As Defendants . . . . .	20
1.8.1 Importance of Investigating Potential Defendants Before Filing an Action . . . . .	20

1.8.2	Techniques to Investigate Potential Defendants . . . . .	20
1.8.3	Evaluating Information About Potential Defendants . . . . .	22
1.9	The Class Representative . . . . .	22
1.9.1	What Makes a Client a Good Class Representative? . . . . .	22
1.9.2	Client’s Individual Settlement Efforts Do Not Prevent Client’s Later Service As a Class Representative . . . . .	23
1.9.3	Named Plaintiff’s Standing to Sue Multiple Defendants . . . . .	24
1.9.4	Is One Named Plaintiff Enough? . . . . .	24
1.9.5	Counsel’s Relationship with the Class Representative . . . . .	25

Chapter 2

	Forum Selection . . . . .	27
2.1	Considerations in Choosing Federal or State Court . . . . .	27
2.2	Federal Question Jurisdiction . . . . .	28
2.3	Ordinary Federal Diversity Jurisdiction in Class Actions Not Governed by the CAFA . . . . .	29
2.3.1	Introduction . . . . .	29
2.3.2	Complete Diversity of Citizenship . . . . .	29
2.3.3	Amount in Controversy . . . . .	30
2.3.3.1	Not Every Class Member Must Have \$75,000 in Controversy . . . . .	30
2.3.3.2	The Non- Aggregation Rule . . . . .	30
2.3.3.3	The Common Fund Exception . . . . .	31
2.3.3.4	General Rules of Computation . . . . .	31
2.3.3.5	Punitive Damages . . . . .	31
2.3.3.6	Treble or Multiple Damages . . . . .	31
2.3.3.7	Attorney Fees . . . . .	31
2.3.3.8	Injunctive Relief and Disgorgement . . . . .	32
2.4	Federal Diversity Jurisdiction and Removal Under the Class Action Fairness Act of 2005 (CAFA) . . . . .	33
2.4.1	Introduction . . . . .	33
2.4.2	Prerequisites of CAFA Jurisdiction . . . . .	33
2.4.2.1	Class Allegations and Effect of Denial of Class Certification . . . . .	33
2.4.2.2	Class Size . . . . .	34
2.4.2.3	Minimal Diversity . . . . .	34
2.4.2.4	Amount in Controversy . . . . .	35
2.4.2.5	Effective Date . . . . .	35
2.4.3	Exceptions to CAFA Jurisdiction . . . . .	36
2.4.3.1	State Defendants . . . . .	36
2.4.3.2	Shareholder Derivative Suits . . . . .	36
2.4.3.3	Cases with a Close Nexus to the Forum State . . . . .	37
2.4.3.3.1	Introduction . . . . .	37
2.4.3.3.2	Citizenship of class members . . . . .	37
2.4.3.3.3	Local controversy exception . . . . .	38
2.4.3.3.4	Home state exception . . . . .	39
2.4.3.4	When Court Has Discretion to Decline Jurisdiction . . . . .	40
2.4.4	Removal and Remand Under CAFA . . . . .	41
2.4.4.1	Any Defendant May Remove a Case . . . . .	41
2.4.4.2	Time Limits for Removal . . . . .	41
2.4.4.3	Removal of “Mass Actions” . . . . .	42
2.4.4.4	<i>Parens Patriae</i> Enforcement Suits by the State . . . . .	43
2.4.4.5	Remand and Appeal of Orders Granting or Denying Remand . . . . .	44
2.4.4.6	Attorney Fees and Costs for Wrongful Removal . . . . .	45
2.5	Burdens of Proof for Diversity Jurisdiction . . . . .	45
2.5.1	Establishing the Amount in Controversy . . . . .	45
2.5.1.1	Filing in Federal Court . . . . .	45
2.5.1.2	Establishing the Amount in Controversy for Removal Purposes . . . . .	46

	2.5.2	Removal Jurisdiction . . . . .	48
	2.5.3	Exceptions to CAFA Removal . . . . .	49
	2.6	How to Keep a Class Action in State Court . . . . .	50
Chapter 3		Venue . . . . .	53
	3.1	General . . . . .	53
	3.2	Venue Based on the Residence of Corporate Defendants . . . . .	54
	3.3	Venue Based on Locus of “Substantial Events” . . . . .	54
	3.4	Venue with Multiple Defendants . . . . .	54
	3.5	Removed Actions . . . . .	55
	3.6	Change of Venue . . . . .	55
	3.7	Waiver of Venue Defenses . . . . .	55
Chapter 4		Choosing the Class Definition . . . . .	57
	4.1	General . . . . .	57
	4.2	Ascertainability and Identifiability of Class Members . . . . .	58
		4.2.1 Class Defined by Objective Criteria . . . . .	58
		4.2.2 Identifying Class Members . . . . .	61
	4.3	Defining the Class Based on Transactional Facts, the Injury Suffered, and the Relief Sought . . . . .	63
	4.4	Class Member Injury . . . . .	64
		4.4.1 The Misnomer of “Absent Class Member Standing” from a Constitutional Perspective. . . . .	64
		4.4.2 May a Class Be Certified If the Proposed Definition Covers Individuals Who Have Not Been Injured by the Challenged Practice? . . . . .	65
	4.5	Simplicity and Limiting the Class Size . . . . .	66
	4.6	Time Limitations on the Class Definition . . . . .	67
		4.6.1 The Statute of Limitations and the Starting Date for Class Membership . . . . .	67
		4.6.2 Other Factors in Setting the Starting Date for Class Membership . . . . .	68
		4.6.3 The Ending Date and Continuing Classes . . . . .	68
	4.7	Geographic Limitations and Multistate Class Actions . . . . .	69
		4.7.1 General . . . . .	69
		4.7.2 Strategic and Tactical Considerations . . . . .	69
	4.8	Defining the Class Using Subclasses . . . . .	70
	4.9	Responding to a Motion to Strike . . . . .	71
	4.10	Amending the Class Definition After the Case Is Filed . . . . .	71
Chapter 5		Drafting the Complaint . . . . .	73
	5.1	Introduction . . . . .	73
	5.2	General Pleading Considerations . . . . .	73
	5.3	Special Pleading Considerations— <i>Twombly</i> and <i>Iqbal</i> . . . . .	74
	5.4	The Sections of the Complaint . . . . .	75
	5.5	Pleading Class Allegations . . . . .	77
	5.6	Potential Problems and Pitfalls . . . . .	78
		5.6.1 Preventing and Preparing for CAFA Removal . . . . .	78
		5.6.2 Claim Splitting . . . . .	78
	5.7	Special Pleading Techniques . . . . .	78
	5.8	Reviewing the Complaint with the Client . . . . .	80
	5.9	Checklist for Complaint Completion . . . . .	81
	5.10	Review the Answer to the Complaint. . . . .	81
	5.11	Conclusion . . . . .	81
	5.12	Quick Reference . . . . .	81

Chapter 6	<b>Plaintiff’s Preliminary Actions to Protect the Class</b> . . . . .83 6.1 Introduction . . . . .83 6.2 Timing and Procedure . . . . .83 6.3 Preserving Defendant’s Records and Other Documents for Use by Plaintiff . . . . .84 6.3.1 Importance of Preserving Documents . . . . .84 6.3.2 Preliminary Actions to Preserve Documents and Electronically Stored Information Before Filing . . . . .84 6.3.3 Preliminary Actions to Preserve Documents and Electronically Stored Information After Filing . . . . .85 6.3.4 Specific Actions Relating to Preserving Electronically Stored Information . . . . .86 6.3.5 Plaintiff’s Preservation Motions and Defendant’s Motions for Protective Orders . . . . .87 6.3.6 Arguing the Motion . . . . .88 6.4 Preventing Improper Defense Contact . . . . .89 6.4.1 Potential Problems with Improper Defense Contact . . . . .89 6.4.2 Overview: Allowance and Restriction of Contact . . . . .89 6.4.3 Defense Communication with Putative Class Members Pre- Certification . . . . .90 6.4.4 Defense Communication with Class Members After Certification . . . . .93
Chapter 7	<b>The Defendant’s Response: Preliminary Motions, Individual Settlement Offers, Counterclaims, and More</b> . . . . .95 7.1 Introduction . . . . .95 7.2 General Limits on Defendant’s Ability to Delay . . . . .95 7.3 Attempts to Settle with or Moot the Claim of Individual Named Plaintiffs . . . . .96 7.3.1 General . . . . .96 7.3.2 Offers of Judgment and Settlement . . . . .97 7.3.2.1 General . . . . .97 7.3.2.2 What Constitutes a Case-Mooting Tender? . . . . .98 7.3.2.3 Is the Offer Sufficient to Moot Even the Class Representative’s Individual Claim? . . . . .99 7.3.2.4 An Individual Offer That Does Not Provide for Class Relief . . . . .100 7.3.2.4.1 General . . . . .100 7.3.2.4.2 Motion to strike offer of judgment . . . . .105 7.3.2.5 Consequences of an Individual Offer Made After Class Certification Has Been Granted . . . . .105 7.3.2.6 Consequences of an Individual Offer Made After Class Certification Has Been Denied . . . . .106 7.4 Motions to Dismiss . . . . .106 7.4.1 In General . . . . .106 7.4.2 Motions to Dismiss Based on Contractual Provisions Requiring Arbitration or Prohibiting Class Adjudication . . . . .106 7.5 Defendant’s Motion to Strike or Redefine the Class . . . . .108 7.6 Defendant’s Motion for Summary Judgment . . . . .108 7.7 Counterclaims Against Class Members . . . . .109 7.8 Efforts to Enjoin Copycat Class Actions . . . . .111
Chapter 8	<b>Discovery</b> . . . . .113 8.1 Discovery by the Class Plaintiffs . . . . .113 8.1.1 Formulating a Discovery Plan and Discovery Schedule . . . . .113 8.1.2 Incorporating Electronically Stored Information (ESI) into a Discovery Plan . . . . .115 8.1.3 Rule 26(f) Conference and Stipulations . . . . .115 8.1.4 Preservation Duties . . . . .117 8.1.4.1 General . . . . .117 8.1.4.2 Defendant’s Duty to Preserve: Litigating the Litigation Hold . . . . .117 8.1.4.3 Plaintiff’s Duty to Preserve: Avoiding Sanctions for Spoliation . . . . .118

8.1.5	Scope of ESI Discovery Requests . . . . .	119
8.1.6	Search Terms and Custodians . . . . .	119
8.1.7	Form of Production . . . . .	120
8.1.8	Discovery Directed to Class Certification . . . . .	121
8.1.8.1	Plaintiff’s Right to Class Discovery Prior to Certification . . . . .	121
8.1.8.2	How Much Pre-Certification Discovery Is Necessary? . . . . .	122
8.1.8.2.1	Can the class be certified without formal discovery? . . . . .	122
8.1.8.2.2	Are the allegations of the complaint sufficient for certification? . . . . .	123
8.1.8.2.3	Use of surveys to gain certification without discovery . . . . .	123
8.1.8.3	Discovery Directed to Identification of Class Members . . . . .	125
8.1.8.4	Discovery Directed to Proving Numerosity . . . . .	127
8.1.8.5	Discovery Directed to Proving Common Issues . . . . .	128
8.1.9	Personal Inspection of Defendant’s Record- Keeping System . . . . .	129
8.1.10	Effective Use of Requests for Admission . . . . .	130
8.1.11	Discovery from Third Parties . . . . .	131
8.1.12	Freedom of Information Act and Public Disclosure Requests . . . . .	133
8.2	Defendant’s Resistance to Plaintiff’s Discovery Efforts . . . . .	134
8.2.1	Introduction . . . . .	134
8.2.2	Efforts to Bifurcate Discovery Between “Class Issues” and “Merits Issues” . . . . .	134
8.2.3	Motion to Stay Discovery Pending Resolution of the Motion to Dismiss . . . . .	135
8.2.4	Motion for Protective Order . . . . .	136
8.2.5	Defendant’s Efforts to Limit Access to Documents . . . . .	138
8.3	Compelling Discovery Responses . . . . .	139
8.4	Discovery by Defendant . . . . .	139
8.4.1	Discovery to Harass Class Representatives or Members . . . . .	139
8.4.2	Deposition of Class Representatives . . . . .	141
8.4.3	Discovery from Class Members . . . . .	141
8.4.4	Discovery of Plaintiff’s Fee Agreement . . . . .	142

Chapter 9

	Representing the Named Plaintiff at Deposition . . . . .	145
9.1	General . . . . .	145
9.2	Preparing the Named Plaintiff . . . . .	146
9.3	Explaining the Deposition Process to the Named Plaintiff . . . . .	146
9.3.1	General Information on the Process . . . . .	146
9.3.2	Advice on Answering Questions . . . . .	146
9.3.3	When Class Counsel Objects to a Question . . . . .	147
9.3.4	Demeanor and Conduct . . . . .	148
9.4	Preparation for Specific Questions . . . . .	148
9.4.1	Background Questions . . . . .	148
9.4.2	Named Plaintiff’s Familiarity with the Complaint . . . . .	148
9.4.3	History of Legal Representation . . . . .	149
9.4.4	The Named Plaintiff’s Ability to Represent the Class . . . . .	149
9.4.5	Mock Deposition of the Plaintiff . . . . .	150
9.5	Objecting to Improper Questions at the Deposition . . . . .	150
9.5.1	General . . . . .	150
9.5.2	Objections Concerning Attorney- Client Privilege . . . . .	151
9.5.3	Examples of Objectionable Questions Impinging upon the Attorney-Client Privilege . . . . .	152
9.5.4	Other Types of Objections . . . . .	152
9.5.5	Named Plaintiff’s Financial Responsibility for Costs . . . . .	152
9.5.6	Tactical Decisions . . . . .	153
9.6	Using Named Plaintiff’s Deposition Testimony at Class Certification . . . . .	153

Chapter 10

	Class Certification . . . . .	155
10.1	Certification Under Rules 23(b)(1), (b)(2), (b)(3), and (c)(4) . . . . .	155

10.2	Interaction of Rigorous Analysis, Burden of Proof, and Merits Consideration . . . . .	156
10.3	Rule 23(a) Preconditions for All Types of Class Actions . . . . .	160
10.3.1	Numerosity and Impracticability of Joinder—Rule 23(a)(1) . . . . .	160
10.3.2	Commonality—Rule 23(a)(2) . . . . .	161
10.3.3	Typicality—Rule 23(a)(3) . . . . .	164
10.3.3.1	General . . . . .	164
10.3.3.2	Standing Issues . . . . .	166
10.3.3.2.1	General . . . . .	166
10.3.3.2.2	Standing of the named plaintiff . . . . .	167
10.3.3.2.3	Standing to assert different claims . . . . .	168
10.3.3.2.4	Standing to sue multiple defendants . . . . .	168
10.3.3.3	Unique Defenses . . . . .	168
10.3.3.4	Typicality and the Relief Sought by Plaintiff . . . . .	169
10.3.3.5	Options When Typicality Is Problematic . . . . .	169
10.3.4	Adequacy of Representation—Rule 23(a)(4) . . . . .	170
10.3.4.1	Introduction . . . . .	170
10.3.4.2	Adequacy of Class Counsel . . . . .	170
10.3.4.3	Class Representative’s Interests Must Be Both Similar to and Not Antagonistic to Other Class Members’ Interests . . . . .	171
10.3.4.4	Plaintiff’s Ability to Pay Litigation Costs . . . . .	175
10.3.4.5	Plaintiff’s Credibility and Moral Character . . . . .	176
10.3.4.6	Plaintiff’s Understanding of the Class Action Process and Claims . . . . .	177
10.3.4.7	Plaintiff’s Lack of Control over the Litigation . . . . .	179
10.3.4.8	Substitution of Class Representatives . . . . .	179
10.3.4.9	Subclasses . . . . .	180
10.4	Rule 23(b)(1) Certification . . . . .	180
10.4.1	Introduction . . . . .	180
10.4.2	Certification under Rule 23(b)(1)(A) . . . . .	180
10.4.3	Certification Under Rule 23(b)(1)(B) . . . . .	181
10.5	Rule 23(b)(2) Certification . . . . .	182
10.5.1	Relative Advantages of 23(b)(2) Versus 23(b)(3) Class Actions . . . . .	182
10.5.2	General Standards for 23(b)(2) Class Actions . . . . .	183
10.5.2.1	Introduction . . . . .	183
10.5.2.2	Acting or Refusing to Act on Grounds Generally Applicable to the Class . . . . .	183
10.5.2.3	Final Injunctive Relief . . . . .	184
10.5.2.4	Corresponding Declaratory Relief . . . . .	185
10.5.3	Is Monetary Relief Available Under Rule 23(b)(2)? . . . . .	186
10.5.3.1	Introduction and History . . . . .	186
10.5.3.2	The impact of <i>Wal-Mart Stores, Inc. v. Dukes</i> . . . . .	187
10.5.4	Innovative Uses of Rule 23(b)(2) . . . . .	189
10.5.4.1	Introduction . . . . .	189
10.5.4.2	23(b)(2) Certification with Court-Ordered Notice and Opt-Out . . . . .	189
10.5.4.3	Hybrid Certification . . . . .	190
10.5.4.4	Sequential Certification . . . . .	190
10.5.4.5	Partial Certification . . . . .	191
10.6	Rule 23(b)(3) Certification . . . . .	192
10.6.1	Text of Federal Rule of Civil Procedure 23(b)(3) . . . . .	192
10.6.2	Superiority and Manageability . . . . .	192
10.6.2.1	General . . . . .	192
10.6.2.2	Management Problems Dealing with Defendant’s Counterclaims . . . . .	195
10.6.2.3	Problem of Individual Recoveries Being Small . . . . .	196
10.6.2.4	When Can Damages Be Aggregated in Lieu of Calculating Actual Damages for Each Class Member? . . . . .	197
10.6.2.5	Manageability of Choice-of-Law Issues . . . . .	197
10.6.2.5.1	General . . . . .	197

	10.6.2.5.2	Manageability when the law is substantially uniform among the states . . . . .	200
	10.6.2.5.3	Applying the law of the state where the defendant resides . . . . .	201
	10.6.2.5.4	Subclasses as a means of dealing with differences in law . . . . .	202
	10.6.2.6	Problem of Potentially Annihilating Damages Arising from the Aggregation of Small Individual Recoveries . . . . .	203
	10.6.3	Predominance . . . . .	203
	10.6.3.1	General . . . . .	203
	10.6.3.2	Claims Based on Standard Forms . . . . .	208
	10.6.3.3	Misrepresentation, Deception, and Fraud: The Question of Reliance . . . . .	210
	10.6.3.4	When a Statute Requires Proof of Consumer Status . . . . .	216
	10.6.3.5	Warranty-Type Claims . . . . .	216
	10.6.3.6	Individual Questions of Injury or Damages . . . . .	217
	10.6.3.7	The Problem of Affirmative Defenses . . . . .	220
	10.7	Issue Classes Under Rule 23(c)(4) . . . . .	221
	10.7.1	History of Rule 23(c)(4) . . . . .	221
	10.7.2	The Relationship Between Subsection (c)(4) and the Predominance Requirement of Subsection (b)(3) of Rule 23 . . . . .	222
	10.7.2.1	Introduction . . . . .	222
	10.7.2.2	The Fifth Circuit Rule . . . . .	222
	10.7.2.3	The Second Circuit and Ninth Circuit Rule . . . . .	223
	10.7.2.4	The Third Circuit Rule . . . . .	224
	10.7.3	The Impact of the Supreme Court’s Decision in <i>Wal-Mart Stores, Inc. v. Dukes</i> on Issue Class Certification Under Rule 23(c)(4) . . . . .	224
	10.8	Decertification Motions . . . . .	225
Chapter 11		The Class Motion and Briefs . . . . .	227
	11.1	Motions for Class Certification . . . . .	227
	11.1.1	Filing the Class Motion at an Early Practicable Time . . . . .	227
	11.1.2	Relationship Between the Statute of Limitations and Class Certification. . . . .	227
	11.1.3	Drafting the Class Motion and Brief . . . . .	231
	11.1.4	Class Certification Hearings . . . . .	232
	11.1.5	Relationship of Motions to Dismiss and for Summary Judgment to Class Certification Motion . . . . .	236
	11.2	Stipulation of Certification . . . . .	237
	11.3	Effect of Settlement Certification on Certification in Subsequent Litigation . . . . .	238
	11.4	Collateral Estoppel Effect of Denial of Certification . . . . .	238
	11.5	Decertification and Reconsideration Motions . . . . .	239
Chapter 12		Appeals of Certification Rulings . . . . .	241
	12.1	General . . . . .	241
	12.2	Interlocutory Appeals Under Rule 23(f) Generally . . . . .	241
	12.3	Circuit Standards for Exercising Discretionary Appellate Review Under Rule 23(f) . . . . .	243
	12.3.1	Introduction . . . . .	243
	12.3.2	First Circuit Standards . . . . .	243
	12.3.3	Second Circuit Standards . . . . .	244
	12.3.4	Third Circuit Standards . . . . .	245
	12.3.5	Fourth Circuit Standards . . . . .	245
	12.3.6	Fifth Circuit Standards . . . . .	246
	12.3.7	Sixth Circuit Standards . . . . .	246
	12.3.8	Seventh Circuit Standards . . . . .	247
	12.3.9	Eighth Circuit Standards . . . . .	247
	12.3.10	Ninth Circuit Standards . . . . .	248
	12.3.11	Tenth Circuit Standards . . . . .	248

12.3.12	Eleventh Circuit Standards . . . . .	248
12.3.13	District of Columbia Circuit Standards . . . . .	249
12.3.14	Federal Circuit Standards . . . . .	250
12.4	Mootness Concerns After Settlement or Entry of Judgment . . . . .	250
12.5	Reassignment on Remand . . . . .	252

## Chapter 13

Class Notice . . . . .	253	
13.1	Types of Class Notice . . . . .	253
13.1.1	Introduction . . . . .	253
13.1.2	Mandatory Notice to Rule 23(b)(3) Classes—Rule 23(c)(2)(B) . . . . .	253
13.1.3	Mandatory Notice of Settlement, Voluntary Dismissal, or Compromise—Rule 23(e)(1) . . . . .	255
13.1.4	Combining Certification Notice with Notice of Settlement or Dismissal . . . . .	255
13.1.5	Discretionary Notice of Certification to 23(b)(1) and (b)(2) Classes—Rule 23(c)(2)(A) . . . . .	255
13.1.6	Discretionary Notice to Protect Class Members and Fairly Conduct the Action— Rule 23(d)(1)(B) . . . . .	256
13.1.7	Potential Need for Notice to Uncertified Class . . . . .	256
13.2	Due Process and Notice Requirements . . . . .	257
13.3	Content of Notice . . . . .	258
13.3.1	Requirements of Rule 23 . . . . .	258
13.3.2	Best Practices . . . . .	259
13.3.3	Anticipating Common Questions . . . . .	260
13.4	Form and Style . . . . .	261
13.4.1	General . . . . .	261
13.4.2	Claim Forms and Notice . . . . .	261
13.5	The Class List . . . . .	262
13.5.1	Compiling the Class List . . . . .	262
13.5.2	Updating Class Members’ Addresses . . . . .	262
13.5.3	Envelope and Return Envelope . . . . .	263
13.5.4	Selecting the Return Address . . . . .	263
13.6	Methods of Notice . . . . .	263
13.6.1	Introduction . . . . .	263
13.6.2	Mail . . . . .	264
13.6.3	Publication . . . . .	264
13.6.4	Web and E-Mail Notice . . . . .	265
13.7	Costs of Notice . . . . .	265
13.7.1	Plaintiff Usually Bears the Initial Cost . . . . .	265
13.7.2	Shifting Costs to the Defendant . . . . .	266

## Chapter 14

Negotiations and Settlement . . . . .	267	
14.1	Two Guiding Principles . . . . .	267
14.2	Settlement Before Certification . . . . .	268
14.2.1	Individual Settlements Before Certification . . . . .	268
14.2.2	Class- Wide Settlement Before Certification . . . . .	269
14.3	Settling with Some of Several Defendants . . . . .	270
14.4	Settlements When Related Class Actions Are Pending . . . . .	270
14.5	Settlements When Related Legislation Is Passed . . . . .	271
14.6	The Defendant’s Plea of Poverty . . . . .	272
14.7	Settlement Terms . . . . .	272
14.7.1	General . . . . .	272
14.7.2	Forms of Relief—Monetary, Injunctive, and Coupons . . . . .	272
14.7.2.1	General . . . . .	272
14.7.2.2	Requirement That Class Members Submit Claim Forms . . . . .	273
14.7.3	Tax Considerations in Settling Class Actions . . . . .	273
14.7.3.1	Introduction . . . . .	273



14.7.3.2	Is the Relief Obtained Taxable? . . . . .	273
14.7.3.3	Allocation Between Taxable and Non-Taxable Portions . . . . .	274
14.7.3.4	Recovery of Damages . . . . .	274
14.7.3.4.1	Reimbursement for diminished value of purchase . . . . .	274
14.7.3.4.2	Statutory, minimum, and multiple damages . . . . .	274
14.7.3.4.3	Damages emanating from physical injury . . . . .	274
14.7.3.5	Forgiveness of Indebtedness . . . . .	275
14.7.3.5.1	The general rule . . . . .	275
14.7.3.5.2	Exception for bankruptcy . . . . .	275
14.7.3.5.3	Exception for insolvency . . . . .	275
14.7.3.5.4	Exception for forgiveness of disputed debts . . . . .	276
14.7.3.5.5	Exception for operation of law . . . . .	276
14.7.3.5.6	Form 1099- C, evidencing debt cancellation . . . . .	276
14.7.4	Class Settlement Fund Versus Fixed Individual Recoveries . . . . .	277
14.7.5	Prohibition on Geographic Discrimination . . . . .	277
14.7.6	Distribution of Benefits . . . . .	278
14.7.7	The Named Plaintiff’s Individual Recovery . . . . .	279
14.7.8	Administrative Aspects of Settlement . . . . .	281
14.7.9	Reimbursement of the Class’s Expenses . . . . .	281
14.7.10	Release of Claims . . . . .	282
14.7.10.1	General . . . . .	282
14.7.10.2	NACA Consumer Class Action Guidelines on Class Member Releases. . . . .	284
14.7.10.3	Specific Releases to Avoid . . . . .	285
14.7.10.4	Releases Involving Homes . . . . .	285
14.7.11	Second Right to Opt Out . . . . .	286
14.7.12	Blow Provisions . . . . .	286
14.7.13	Agreements Not to Represent and to Limit Use of Information . . . . .	286
14.7.14	Non- Publicity Clauses . . . . .	286
14.7.15	Defendants Required to Notify Government Officials Promptly . . . . .	287
14.8	Coupon, Certificate, or “Scrip” Settlements . . . . .	287
14.8.1	General . . . . .	287
14.8.2	Likelihood That Coupons Will Be Redeemed . . . . .	291
14.8.3	Value of Coupons If Redeemed . . . . .	292
14.8.4	Attorney Fees in Coupon Settlements . . . . .	293
14.9	<i>Cy Pres</i> Distributions and Fluid Recovery Provisions . . . . .	295
14.9.1	Court Options When All or Part of a Recovery Cannot Be Paid Directly to Class Members . . . . .	295
14.9.2	<i>Cy Pres</i> Provisions Should Be Standard in Most Class Action Settlements . . . . .	296
14.9.3	Relationship of <i>Cy Pres</i> Recipient to the Class . . . . .	298
14.9.4	Procedure for Selecting <i>Cy Pres</i> Recipients . . . . .	300
14.9.5	Responsibilities of <i>Cy Pres</i> Recipients . . . . .	301
14.9.6	Attorney Fees and the Value of <i>Cy Pres</i> Awards . . . . .	301
14.9.7	Checklist in Seeking Approval of a Settlement with a <i>Cy Pres</i> Award . . . . .	302
14.10	Negotiating Attorney Fees . . . . .	302
14.10.1	Separate Negotiation of Fees . . . . .	302
14.10.2	Lump Sum Offers . . . . .	303
14.10.3	Method of Determining Fees . . . . .	304
14.10.4	Quick Pay Provision . . . . .	304
14.10.5	Fees for Post- Settlement Work . . . . .	304
14.11	Checklist Regarding Administrative Aspects of the Settlement . . . . .	305
14.12	Drafting the Proposed Settlement and Related Documents . . . . .	305
Chapter 15	The Court Settlement Approval Process . . . . .	307
15.1	Filing the Proposed Settlement with the Court . . . . .	307
15.1.1	Overview . . . . .	307
15.1.2	“Preliminary Approval” of Settlement . . . . .	308

	15.1.3 The Notice . . . . .	310
	15.1.4 The Timing of OptOut and Objection Deadlines . . . . .	310
15.2	Standard for Approval of Class Action Settlements . . . . .	310
	15.2.1 Introduction . . . . .	310
	15.2.2 First Circuit . . . . .	311
	15.2.3 Second Circuit . . . . .	311
	15.2.4 Third Circuit . . . . .	311
	15.2.5 Fourth Circuit . . . . .	312
	15.2.6 Fifth Circuit . . . . .	312
	15.2.7 Sixth Circuit . . . . .	312
	15.2.8 Seventh Circuit . . . . .	312
	15.2.9 Eighth Circuit . . . . .	313
	15.2.10 Ninth Circuit. . . . .	313
	15.2.11 Tenth Circuit . . . . .	313
	15.2.12 Eleventh Circuit . . . . .	313
	15.2.13 District of Columbia Circuit. . . . .	313
	15.2.14 Federal Circuit . . . . .	313
15.3	The Final Approval Motion . . . . .	313
15.4	The Fairness Hearing . . . . .	314
15.5	Objections to Settlement . . . . .	315
	15.5.1 Introduction . . . . .	315
	15.5.2 Non- Settling Defendants Usually Cannot Object to Settlement . . . . .	315
	15.5.3 Non- Class Members Usually Cannot Object to Settlement . . . . .	315
	15.5.4 Objection Must Relate to Interest of Class Member . . . . .	316
	15.5.5 Class Counsel Can Advise Class Members of the Right to Object . . . . .	317
	15.5.6 Attorneys Not Representing the Class Also Can Advise Class Members About a Settlement . . . . .	317
	15.5.7 Restrictions on Communication Regarding Objections and Opt-Outs . . . . .	318
	15.5.8 Basic Grounds for Objection . . . . .	318
	15.5.9 How to Object . . . . .	319
	15.5.9.1 Filing the Objection . . . . .	319
	15.5.9.2 Objectors and Intervention . . . . .	319
	15.5.9.3 Objector’s Right to Discovery . . . . .	320
	15.5.10 Court Evaluation of Objections . . . . .	321
	15.5.11 Withdrawal of Objections . . . . .	323
	15.5.12 Attorney Fees for Objectors . . . . .	323
	15.5.13 Appeals by Objectors . . . . .	324
	15.5.13.1 When Can an Objector Appeal? . . . . .	324
	15.5.13.2 Objector’s Appeal Bond Requirements . . . . .	324
	15.5.13.3 Standard of Review on Appeal . . . . .	326

Chapter 16	Claims Administration and Distribution of Benefits . . . . .	329
	16.1 General . . . . .	329
	16.2 Recording Class Members’ Responses to the Notice . . . . .	329
	16.3 Responding to Class Members’ Telephone Inquiries . . . . .	330
	16.4 Settlement Websites . . . . .	330
	16.5 Problems with Opt- Outs or Claims . . . . .	330
	16.6 The Class Fund and Distribution of Benefits . . . . .	331
	16.6.1 Defendant’s Payment of the Settlement Fund . . . . .	331
	16.6.2 Qualified Settlement Funds . . . . .	331
	16.6.2.1 Introduction . . . . .	331
	16.6.2.2 Definition of a QSF . . . . .	332
	16.6.2.3 Timing of the Deduction for the Transferor . . . . .	332
	16.6.2.4 Income Taxation of a QSF . . . . .	332
	16.6.2.5 Reporting and Withholding Obligations of a QSF; Taxation of Distributions to Claimants . . . . .	332

	16.6.3 Preparing the Final Class List for Distribution of Benefits . . . . .	333
	16.6.4 Sending Payments to Class Members . . . . .	333
	16.6.5 Dealing with Undeliverable Checks . . . . .	334
Chapter 17	The Class Action Trial . . . . .	335
	17.1 Introduction . . . . .	335
	17.2 Structure of the Trial . . . . .	335
	17.2.1 General . . . . .	335
	17.2.2 Preparing for Trial As Early As Possible . . . . .	335
	17.2.3 Litigation Plan . . . . .	335
	17.2.4 Trial by Jury . . . . .	336
	17.2.5 Liability and Damages in One Trial . . . . .	336
	17.2.6 Bifurcation of Liability and Damages . . . . .	336
	17.2.7 Innovative Trial Structures . . . . .	337
	17.3 Proof of Liability . . . . .	337
	17.3.1 General . . . . .	337
	17.3.2 Proof Through Class Representatives . . . . .	337
	17.3.3 Proof Through Class Members . . . . .	337
	17.3.4 Proof Through Defendant’s 30(b)(6) Representative or High Level Executive . . . . .	338
	17.3.5 Proof Through Experts . . . . .	338
	17.4 Proof of Damages . . . . .	338
	17.4.1 Introduction . . . . .	338
	17.4.2 Standards of Proof . . . . .	338
	17.4.3 Class- Wide Proof by Use of a Formula . . . . .	339
	17.4.4 Class- Wide Proof by Calculation of an Aggregate Sum . . . . .	339
	17.4.5 Class- Wide Proof by Sampling and Extrapolation . . . . .	339
	17.4.6 Determination of Individual Damages . . . . .	339
	17.4.6.1 General . . . . .	339
	17.4.6.2 Individual Hearings After Resolution of Common Issues . . . . .	340
	17.4.6.3 Determination of Standard for Reprocessing . . . . .	340
	17.4.6.4 Determination Based on Defendant’s Records . . . . .	340
	17.5 Jury Instructions, Interrogatories, and Special Verdicts . . . . .	341
	17.5.1 General . . . . .	341
	17.5.2 Jury Instructions . . . . .	341
	17.5.3 Use of Special Interrogatories and Special Verdicts to the Jury . . . . .	341
	17.6 Trial of Individual Counterclaims Against Class Members . . . . .	342
Chapter 18	Res Judicata and Collateral Estoppel . . . . .	343
	18.1 Res Judicata Effect of a Class Action Judgment . . . . .	343
	18.1.1 General . . . . .	343
	18.1.2 No Res Judicata Without Adequate Representation . . . . .	343
	18.1.3 No Res Judicata Without Proper Notice and Opportunity to Opt Out . . . . .	345
	18.1.3.1 To Bind Class Members, Notice Must Be Sufficiently Informative and Be Disseminated in a Reasonable Manner . . . . .	345
	18.1.3.2 Opting Out Avoids Res Judicata Bar. . . . .	346
	18.1.4 Res Judicata Bar Limited to Subsequent Assertion of the Same “Cause Of Action” . . . . .	346
	18.1.5 Effect of a Class Action Judgment on an Individual’s Uncertified Claims That Theoretically Could Have Been Brought in a Prior Class Action . . . . .	347
	18.1.6 Framing the Certification Motion and Notice to Avoid Over-Broad Res Judicata . . . . .	348
	18.2 Collateral Estoppel in the Class Action Context . . . . .	348
	18.2.1 General . . . . .	348
	18.2.2 Collateral Estoppel As to Class Members . . . . .	348
	18.2.3 Collateral Estoppel As to Class Defendant . . . . .	349

Chapter 19	Attorney Fees . . . . .	351
	19.1 Sources of Attorney Fees in Consumer Class Actions . . . . .	351
	19.1.1 General . . . . .	351
	19.1.2 Common Fund and Common Benefit Doctrines . . . . .	351
	19.2 Statutory Attorney Fees . . . . .	352
	19.2.1 General . . . . .	352
	19.2.2 Statutory Fees in Cases Resolved Without a Judgment and in Consent Decrees . . . . .	354
	19.2.2.1 The <i>Buckhannon</i> Decision . . . . .	354
	19.2.2.2 State Courts Do Not Uniformly Follow <i>Buckhannon</i> . . . . .	355
	19.3 How to Compute Fees That Are Based on a Common Fund . . . . .	355
	19.3.1 General Considerations . . . . .	355
	19.3.2 Choice of Law When the Court Has Diversity or Supplemental Jurisdiction . . . . .	356
	19.3.3 The Two Competing Common Fund Methods: Percentage of Fund Versus Lodestar . . . . .	356
	19.3.4 Weight of Current Authority Prefers the Percentage-of-Fund Approach . . . . .	358
	19.3.5 How to Compute a Percentage of the Recovery Award . . . . .	363
	19.3.5.1 Establishing the Percentage . . . . .	363
	19.3.5.2 Establishing the Value of the Fund . . . . .	365
	19.3.5.2.1 In-kind services as part of the fund . . . . .	365
	19.3.5.2.2 When statutory attorney fees are added to the common fund . . . . .	365
	19.3.5.2.3 When coupons are part of the settlement . . . . .	365
	19.3.5.2.4 Cancellation of debt as part of the settlement . . . . .	366
	19.3.5.2.5 Value of equitable relief . . . . .	366
	19.3.5.2.6 Effect of amounts not paid to class members . . . . .	367
	19.3.5.2.7 In computing the fund’s value, should costs be first deducted? . . . . .	368
	19.3.5.2.8 Interest on the fund . . . . .	368
	19.3.6 How to Use the Lodestar Method to Compute Common Fund Recoveries . . . . .	368
	19.3.6.1 Continued Importance of Lodestar Calculations for Common Fund Cases . . . . .	368
	19.3.6.2 The Hourly Rate . . . . .	369
	19.3.6.3 Compensable Time . . . . .	370
	19.3.6.4 Time Records . . . . .	372
	19.3.6.5 Lodestar Multipliers in Common Fund Recoveries . . . . .	373
	19.4 When and How to Apply for Fees . . . . .	374
	19.4.1 General . . . . .	374
	19.4.2 Approval of Negotiated Fee and Notice to the Class . . . . .	374
	19.5 Division of Fees Among Co-Counsel . . . . .	376
	19.5.1 General . . . . .	376
	19.5.2 Disclosure of the Fee Agreement to the Court . . . . .	376
	19.6 Tax Consequences of Attorney Fees . . . . .	377
	19.6.1 Introduction . . . . .	377
	19.6.2 Why the Concern? . . . . .	378
	19.6.3 IRS Ruling Indicates Fees Are Not Necessarily Income to Class Members in Opt-Out Classes . . . . .	379
	19.6.4 Taxability of Certain Common Fund Attorney Fees . . . . .	380
	19.6.5 Taxability of Statutory Attorney Fees . . . . .	380
	19.6.5.1 General . . . . .	380
	19.6.5.2 No Tax Is Owed on Fees in “Civil Rights” Cases, Including Some Consumer Claims . . . . .	381
	19.6.6 Generally Minimal Tax Implications If Tax Liability Distributed on a Pro Rata Basis to the Whole Class . . . . .	381
Appendix A	Federal Rule of Civil Procedure 23 and Advisory Committee Notes . . . . .	383
Appendix B	Federal Class Action Legislation . . . . .	397

Appendix C	Survey of State Class Action Law— 2015– 2016 . . . . .	403
Appendix D	NACA Class Action Guidelines—299 F.R.D. 160 . . . . .	679
Appendix E	Sample Agreements with Named Plaintiffs, Co-Counsel . . . . .	707
	E.1 Sample Retainer Agreement . . . . .	707
	E.2 Named Plaintiff’s Statement of Duty to the Class . . . . .	708
	E.3 Sample Co-Counsel Agreement . . . . .	709
Appendix F	Consumer Class Action Web Addresses . . . . .	713
	Index . . . . .	715