1.3.1 Class Action Litigation Often Requires Large Up-Front Investments

Litigating a consumer class action can be both time consuming and expensive. Because the defendant’s potential exposure in most class cases amounts to a substantial sum, the defendant’s attorney will almost always litigate the case vigorously. Therefore, before filing a class case, plaintiffs’ counsel must determine whether the time and financial resources necessary to represent the class will be available.

Plaintiffs’ counsel will usually have to advance money to cover the costs of class notice, discovery costs, and possibly expert witness fees. The class representative almost never has the funds to advance all these costs or to pay an hourly rate for the attorney’s time. Furthermore, attorney fee agreements between the plaintiffs’ counsel and the named representatives in a class action will not conclusively govern the fees collected if the case is settled or tried. Rather, the court will determine any and all fees and expenses that plaintiffs’ counsel will be allowed to receive.

Discovery in a class action will invariably be more time consuming, difficult, and expensive than in a single plaintiff case. As the size of the class increases so will the complexity in obtaining and organizing information needed for certification, trial, and proof of damages.

As a result of changes to the United States Code—known as the Class Action Fairness Act of 2005—and the changes to Federal Rule of Civil Procedure 23, the planning, filing, and pursuit of a class action has become increasingly more complex, time consuming, and expensive. Due to the fact that a permissive interlocutory appeal of a certification ruling is permitted by subdivision (f) of Rule 23, plaintiff’s counsel potentially faces two appeals in any class action. If the defendant seeks to invoke an arbitration provision as a barrier to suit, there could be yet a third appeal from the district court’s arbitration ruling.

Furthermore, after a class is certified, the claims, issues, or defenses asserted therein may be settled, voluntarily dismissed, or compromised only with court approval and only after notice to the class, as the court may direct. In the absence of a settlement, notice of class certification is still required. The cost of that notice—including preparation of class lists, printing the notices, postage costs—will usually fall on plaintiff’s counsel.

Finally, even if plaintiff’s counsel should successfully navigate all of the code sections, procedural rules, scheduling orders, and the first potential appeal of the class certification ruling, a successful result in settlement will often bring out objectors, no matter how favorable the settlement, and a new set of issues to be dealt with while some objector with little or no involvement earlier in the case pursues an appeal.

The good news is that attorney fees may be significantly higher in a class action than in an individual action, even if the amount of attorney time and cash investment is equivalent. In individual settlements, there is usually little room for a significant attorney fee if the consumer plaintiff is to receive a reasonable recovery. Although there are some federal statutes that permit an attorney fee to be paid to the prevailing party, those statutes generally limit such fees to a lodestar calculation based on time spent. Furthermore, for some individual consumer claims, there may be no statutory basis for an attorney fee award. In contrast, the “common fund” concept allows fees to be based on a reasonable percentage of a fund when a pool of money is recovered or protected for a class.

Some class actions involve too much work and too many up-front costs to be handled by a small law office alone. For example, only a law firm of substantial size or a group of smaller firms could handle a case such as the “Chevymobile” class suit against General Motors Corporation, in which a series of consolidated class actions was brought on behalf of nationwide classes of persons who purchased Oldsmobile cars with Chevrolet engines and transmissions. The litigation lasted seven years, including two appeals and two trials, before the action was settled. The Moby Dick of class cases involving procedural issues is Eisen v. Carlisle & Jacquelin, which lasted six and a half years and involved three court of appeals decisions before reaching the U.S. Supreme Court. In contrast, an example of a class action that required more limited resources was a case against a health care insurer in which the primary issue was the interpretation of a written policy and ultimately resolved on summary judgment as a matter of law.

One way of addressing the resource problem is to co-counsel with other firms, thereby reducing the burden on each firm and allowing for the involvement of firms with both subject-matter and class action expertise. In determining whether or not to pursue a class action and whether to seek co-counsel, a plaintiff’s attorney should consider, among other factors: (1) the size of the class and the difficulty of identifying class members, as these affect notice costs; (2) whether the merits of the case are resolvable on summary judgment or if a trial will be necessary; and (3) how complex, costly, and time consuming discovery and trial will be. Courts will likewise consider these factors in determining whether plaintiffs’ counsel can adequately represent the class.
1.3.1 Class Action Litigation Often Requires Large Up-Front Investments

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Footnotes

15 This is generally permitted by the ABA Model Rules of Professional Conduct. See Am. Bar Ass’n, Model Rules of Professional Conduct [1], Rule 1.8 (2004), available at www.americanbar.org; §§ 10.2.4.4 [2], 14.7.9 [3], infra.

However, the ability of the named plaintiff (or counsel on their behalf) to advance litigation costs may be challenged by the defendants in opposing class certification. See § 10.3.4.4 [4], infra.

16 See generally Ch. 19 [5], infra.

17 See § 1.3.2 [6], infra.

18 Fed. R. Civ. P. 23(e).

19 Exceptions may exist, however, for example when a plaintiff is granted summary judgment before or at the time of class certification. See § 13.7.2 [7], infra.

20 See generally Ch. 19 [5], infra.

21 See § 19.1.2 [8], infra.

22 Oswald v. McGarr, 620 F.2d 1190 (7th Cir. 1980); In re Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106 (7th Cir. 1979).


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