Summary Contents

Using the Digital Library ........................................ iii

The Leading Resource for All Consumer Law .............................. iv

Contents ...................................................................... ix

Chapter 1 Case and Claims Selection, Other First Considerations ......... 1

Chapter 2 Forum Selection ............................................... 29

Chapter 3 Venue ................................................................ 59

Chapter 4 Choosing the Class Definition .................................... 65

Chapter 5 Drafting the Complaint ........................................... 83

Chapter 6 Plaintiff’s Preliminary Actions to Protect the Class ............ 91

Chapter 7 The Defendant’s Response: Preliminary Motions, Individual Settlement Offers, Counterclaims, and More ....................... 103

Chapter 8 Discovery .......................................................... 123

Chapter 9 Representing the Named Plaintiff at Deposition ............... 159

Chapter 10 Class Certification .............................................. 169

Chapter 11 The Class Motion and Briefs ................................... 249

Chapter 12 Appeals of Certification Rulings ............................... 261

Chapter 13 Class Notice .................................................... 277

Chapter 14 Negotiations and Settlement ..................................... 295
<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter 15</td>
<td>The Court Settlement Approval Process</td>
<td>339</td>
</tr>
<tr>
<td>Chapter 16</td>
<td>Claims Administration and Distribution of Benefits</td>
<td>365</td>
</tr>
<tr>
<td>Chapter 17</td>
<td>The Class Action Trial</td>
<td>373</td>
</tr>
<tr>
<td>Chapter 18</td>
<td>Res Judicata and Collateral Estoppel</td>
<td>383</td>
</tr>
<tr>
<td>Chapter 19</td>
<td>Attorney Fees</td>
<td>391</td>
</tr>
<tr>
<td>Appendix A</td>
<td>Federal Rule of Civil Procedure 23 and Advisory Committee Notes</td>
<td>427</td>
</tr>
<tr>
<td>Appendix B</td>
<td>Federal Class Action Legislation</td>
<td>445</td>
</tr>
<tr>
<td>Appendix C</td>
<td>Survey of State Class Action Law—2019</td>
<td>451</td>
</tr>
<tr>
<td>Appendix D</td>
<td>NACA Class Action Guidelines—299 F.R.D. 160</td>
<td>749</td>
</tr>
<tr>
<td>Appendix E</td>
<td>Sample Agreements with Named Plaintiffs, Co-Counsel</td>
<td>777</td>
</tr>
<tr>
<td>Appendix F</td>
<td>Selected Class Action Websites</td>
<td>781</td>
</tr>
<tr>
<td></td>
<td>Index</td>
<td>783</td>
</tr>
</tbody>
</table>
Contents

Using the Digital Library ....................................................... iii

The Leading Resource for All Consumer Law ............................... iv

Chapter 1  Case and Claims Selection, Other First Considerations

1.1 How to Use This Treatise ......................................................... 1
  1.1.1 A Practical Guide to Litigating Class Actions ......................... 1
  1.1.2 All Subscribers Have Access to the Digital Version ..................... 1
  1.1.3 Subjects Covered in This Treatise ......................................... 1
  1.1.4 Legal Citations and Resources ............................................. 2
  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 ...................................... 7

1.6 Alternatives to Filing a Class Action ....................................... 7

1.7 Case and Claim Evaluation ..................................................... 8
  1.7.1 Introduction ................................................................. 8
  1.7.2 Arbitration Clauses and Class Action Waivers ............................. 8
    1.7.2.1 General .............................................................. 8
    1.7.2.2 Are Class Actions Available in an Arbitration Proceeding? .... 8
    1.7.2.3 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 (Shady Grove) .................................................. 10
  1.7.5 Forum Selection and Class Action Fairness Act of 2005 (CAFA) Removal .................................................. 12
  1.7.6 Is the Statute of Limitations Tolled by a Previous Class Action? ... 13
    1.7.6.1 General .............................................................. 13
    1.7.6.2 Does American Pipe Tolling Apply to Subsequent Class Actions? .......................... 13
    1.7.6.3 Tolling for Individual Actions—The American Pipe Tolling Doctrine ........................................ 15
  1.7.7 Do the Claims Lend Themselves to Class Certification? ................ 17
    1.7.7.1 Class Definition and Class Certification in General ............... 17
    1.7.7.2 Avoid Claims That Require Proof of Reliance or Other Individual Issues ..................................... 18
    1.7.7.3 Claims That Raise Primarily Legal Questions Are Ideal for Class Treatment ..................................... 18
    1.7.7.4 Avoid Claims That Are Technical Violations Yet Threaten Annihilating Damages ...................................... 18
1.7.7.5 Consider Whether Benefits Can Be Provided to
Class Members ................................. 19
1.7.7.6 Consider Claims for Equitable Relief ......... 19
1.7.8 Whether to Allege Multiple Claims .............. 20
  1.7.8.1 In General .......................... 20
  1.7.8.2 Manageability ..................... 20
  1.7.8.3 Some Risks of Omitting Claims .............. 21
1.7.9 Competing Lawsuits ................................ 21
1.8 Selecting Parties to Name As Defendants ........... 22
  1.8.1 Importance of Investigating Potential Defendants Before
  Filing an Action ................................ 22
  1.8.2 Techniques to Investigate Potential Defendants ....... 22
  1.8.3 Evaluating Information About Potential Defendants ... 24
1.9 The Class Representative ............................... 24
  1.9.1 What Makes a Client a Good Class Representative? ..... 24
  1.9.2 Client’s Individual Settlement Efforts Do Not Prevent Client’s
  Later Service As a Class Representative ............... 25
  1.9.3 Named Plaintiff’s Standing to Sue Multiple Defendants ... 26
  1.9.4 Is One Named Plaintiff Enough? ................. 26
  1.9.5 Counsel’s Relationship with the Class Representative .... 27

Chapter 2

Forum Selection

2.1 Considerations in Choosing Federal or State Court ........ 29
2.2 Federal Question Jurisdiction .................................. 31
2.3 Ordinary Federal Diversity Jurisdiction in Class Actions Not Governed
by the Class Action Fairness Act of 2005 (CAFA) ............... 31
  2.3.1 Introduction ................................ 31
  2.3.2 Complete Diversity of Citizenship .................. 32
  2.3.3 Amount in Controversy ............................ 32
    2.3.3.1 Not Every Class Member Must Have $75,000 in Controversy ... 32
    2.3.3.2 The Non-Aggregation Rule ................ 33
    2.3.3.3 The Common Fund Exception .............. 33
    2.3.3.4 General Rules of Computation ............. 33
    2.3.3.5 Punitive Damages ...................... 33
    2.3.3.6 Treble or Multiple Damages ............ 34
    2.3.3.7 Attorney Fees .......................... 34
    2.3.3.8 Injunctive Relief and Disgorgement ...... 34
2.4 Federal Diversity Jurisdiction and Removal Under the Class Action
  Fairness Act of 2005 (CAFA) .................................. 35
  2.4.1 Introduction .................................. 35
  2.4.2 Prerequisites of CAFA Jurisdiction ................... 36
    2.4.2.1 Class Allegations and Effect of Denial of Class Certification ... 36
    2.4.2.2 Class Size ................................ 37
    2.4.2.3 Minimal Diversity ....................... 37
    2.4.2.4 Amount in Controversy ................. 38
    2.4.2.5 Effective Date ........................... 38
  2.4.3 Exceptions to CAFA Jurisdiction ....................... 39
    2.4.3.1 General .................................. 39
    2.4.3.2 State Defendants ......................... 39
    2.4.3.3 Shareholder Derivative and Other Corporate Suits .......... 39
    2.4.3.4 Cases with a Close Nexus to the Forum State .......... 40
      2.4.3.4.1 Introduction ......................... 40
Chapter 9

Representing the Named Plaintiff at Deposition

9.1 General ................................................................. 159
9.2 Preparing the Named Plaintiff ........................................ 159
9.3 Explaining the Deposition Process to the Named Plaintiff .......... 160
  9.3.1 General Information on the Process .......................... 160
  9.3.2 Advice on Answering Questions ............................. 161
  9.3.3 When Class Counsel Objects to a Question ................... 162
9.4 Preparation for Specific Questions .................................. 162
  9.4.1 Background Questions ........................................ 162
  9.4.2 Named Plaintiff’s Familiarity with the Complaint .......... 163
  9.4.3 History of Legal Representation .............................. 163
  9.4.4 The Named Plaintiff’s Ability to Represent the Class .......... 163
  9.4.5 Mock Deposition of the Plaintiff ............................ 164
9.5 Objecting to Improper Questions at the Deposition .................. 165
  9.5.1 General ....................................................... 165
  9.5.2 Objections Concerning Attorney-Client Privilege .............. 165
  9.5.3 Examples of Objectionable Questions Impinging upon the 
        Attorney-Client Privilege ..................................... 166
  9.5.4 Other Types of Objections .................................. 166
  9.5.5 Named Plaintiff’s Financial Responsibility for Costs .......... 166
  9.5.6 Tactical Decisions .......................................... 167
9.6 Using Named Plaintiff’s Deposition Testimony at Class Certification 167

Chapter 10

Class Certification

10.1 Introduction ..................................................... 169
10.2 Interaction of Rigorous Analysis, Burden of Proof, and Merits Consideration 170
10.3 Rule 23(a) Preconditions for All Types of Class Actions ............ 174
  10.3.1 Numerosity and Impracticability of Joinder—Rule 23(a)(1) .......... 174
  10.3.2 Commonality—Rule 23(a)(2) ................................ 176
  10.3.3 Typicality—Rule 23(a)(3) .................................... 179
    10.3.3.1 General .................................................. 179
## Contents

10.3.3.2 Standing Issues ...................................................... 180  
  10.3.3.2.1 General ...................................................... 180  
  10.3.3.2.2 Article III standing of the named plaintiff ........ 181  
  10.3.3.2.3 Named plaintiff’s standing to assert different claims ....................... 182  
  10.3.3.2.4 Standing to sue multiple defendants .................. 183  
10.3.3.3 Unique Defenses .................................................. 184  
10.3.3.4 Typicality and the Relief Sought by Plaintiff .......... 184  
10.3.3.5 Options When Typicality Is Problematic .................. 185  
10.3.4 Adequacy of Representation—Rule 23(a)(4) ............... 185  
  10.3.4.1 Introduction .................................................. 185  
  10.3.4.2 Adequacy of Class Counsel ................................ 185  
  10.3.4.3 Class Representative’s Interests Must Be Both Similar to and Not Antagonistic to Other Class Members’ Interests .... 187  
  10.3.4.4 Plaintiff’s Ability to Pay Litigation Costs .............. 192  
  10.3.4.5 Plaintiff’s Credibility and Moral Character .......... 193  
  10.3.4.6 Plaintiff’s Understanding of the Class Action Process and Claims ....................... 194  
  10.3.4.7 Plaintiff’s Lack of Control over the Litigation ....... 196  
  10.3.4.8 Substitution and Intervention of Class Representatives .... 196  
  10.3.4.9  Subclasses .................................................. 198  
  10.4 Rule 23(b)(1) Certification ....................................... 199  
  10.4.1 Introduction .................................................. 199  
  10.4.2 Certification Under Rule 23(b)(1)(A) ...................... 199  
  10.4.3 Certification Under Rule 23(b)(1)(B) ...................... 200  
10.5 Rule 23(b)(2) Certification ......................................... 201  
  10.5.1 Relative Advantages of Rule 23(b)(2) Versus Rule 23(b)(3) Class Actions ....................... 201  
  10.5.2 General Standards for Rule 23(b)(2) Class Actions .... 201  
  10.5.2.1 Introduction .................................................. 201  
  10.5.2.2 Acting or Refusing to Act on Grounds Generally Applicable to the Class ....................... 202  
  10.5.2.3 Final Injunctive Relief ..................................... 203  
  10.5.2.4 Corresponding Declaratory Relief ...................... 204  
  10.5.3 Is Monetary Relief Available Under Rule 23(b)(2)? .... 205  
  10.5.3.1 Introduction and History ................................ 205  
  10.5.3.2 The Impact of Wal-Mart Stores, Inc. v. Dukes ......... 206  
  10.5.4 Innovative Uses of Rule 23(b)(2) ............................ 208  
  10.5.4.1 Introduction .................................................. 208  
  10.5.4.2 Rule 23(b)(2) Certification with Court-Ordered Notice and Opt Out ....................... 209  
  10.5.4.3 Hybrid Certification ........................................ 209  
  10.5.4.4 Issue Certification for Rule 23(b)(2) Classes ......... 210  
10.6 Rule 23(b)(3) Certification ......................................... 210  
  10.6.1 Text of Rule 23(b)(3) ........................................ 210  
  10.6.2 Superiority and Manageability ............................. 210  
  10.6.2.1 General .................................................. 210  
  10.6.2.2 Management Problems Dealing with Defendant’s Counterclaims ....................... 214  
  10.6.2.3 Problem of Individual Recoveries Being Small ....... 215  
  10.6.2.4 When Can Damages Be Aggregated in Lieu of Calculating Actual Damages for Each Class Member? .... 216
Chapter 10

10.6.2.5 Manageability of Choice-of-Law Issues
10.6.2.5.1 General
10.6.2.5.2 Manageability when the governing law is substantially uniform among the states
10.6.2.5.3 Applying the law of the state where the defendant has sufficient contacts
10.6.2.5.4 Subclasses as a means of dealing with differences in law
10.6.2.6 Problem of Potentially Annihilating Damages Arising from the Aggregation of Small Individual Recoveries

10.6.3 Predominance
10.6.3.1 General
10.6.3.2 Claims Based on Standard Forms or Uniform Contracts
10.6.3.3 Misrepresentation, Deception, and Fraud: The Question of Reliance
10.6.3.4 When a Statute Requires Proof of Consumer Status
10.6.3.5 Warranty-Type Claims
10.6.3.6 Individual Questions of Injury or Damages
10.6.3.7 Do Affirmative Defenses Impede Certification?

10.7 Issue Classes Under Rule 23(c)(4)
10.7.1 History of Rule 23(c)(4)
10.7.2 Issue Classes and Rule 23(b)(3)’s Predominance and Superiority Requirements
10.7.2.1 Introduction
10.7.2.2 The View That the Cause of Action As a Whole Must Meet the Requirements of Rule 23(b)(3)
10.7.2.3 The View That Meeting the Requirements of Rule 23(b)(3) Must Be Met As to an Issue Suffices for Rule 23(c)(4) Certification
10.7.2.4 The Multiple Factors Approach
10.7.2.5 Rule 23(c)(4) and 23(b)(3)’s Requirements in Other Circuits
10.7.3 Rule 23(b)(2) and Issue Classes

10.8 Can a Class of Opt Outs Be Certified?

Chapter 11

The Class Motion and Briefs
11.1 Motions for Class Certification
11.1.1 Timing of the Class Motion
11.1.2 Relationship Between the Statute of Limitations and Class Certification
11.1.3 Drafting the Class Motion and Brief
11.1.4 Class Certification Hearings
11.1.5 Relationship of Motions to Dismiss and for Summary Judgment to Class Certification Motion
11.2 Stipulation of Certification
11.3 Effect of Settlement Certification on Certification in Subsequent Litigation
11.4 Collateral Estoppel Effect of Denial of Certification
11.5 Decertification and Reconsideration Motions

Chapter 12

Appeals of Certification Rulings
12.1 General
12.2 Interlocutory Appeals Under Rule 23(f) Generally
## Contents

### 12.3 Circuit Standards for Exercising Discretionary Appellate Review

Under Rule 23(f) .......................................................... 264

12.3.1 Introduction .................................................. 264
12.3.2 First Circuit Standards ....................................... 264
12.3.3 Second Circuit Standards ..................................... 265
12.3.4 Third Circuit Standards ....................................... 266
12.3.5 Fourth Circuit Standards ....................................... 267
12.3.6 Fifth Circuit Standards ....................................... 267
12.3.7 Sixth Circuit Standards ....................................... 268
12.3.8 Seventh Circuit Standards .................................... 268
12.3.9 Eighth Circuit Standards ...................................... 269
12.3.10 Ninth Circuit Standards ...................................... 269
12.3.11 Tenth Circuit Standards ...................................... 269
12.3.12 Eleventh Circuit Standards .................................. 270
12.3.13 D.C. Circuit Standards ...................................... 271
12.3.14 Federal Circuit Standards .................................... 272

### 12.4 Appeals After Individual Settlement or Dismissal

272

### 12.5 Reassignment on Remand

275

---

### Chapter 13

**Class Notice**

13.1 Types of Class Notice ........................................ 277

13.1.1 Introduction .................................................. 277
13.1.2 Mandatory Notice to Rule 23(b)(3) Classes—Rule 23(c)(2)(B) ........................................ 277
13.1.3 Mandatory Notice of Settlement, Voluntary Dismissal, or Compromise—Rule 23(e)(1) ............. 279
13.1.4 Combining Certification Notice with Notice of Settlement or Dismissal ................................ 280
13.1.5 Discretionary Notice of Certification to Rule 23(b)(1) and (b)(2) Classes—Rule 23(c)(2)(A) ........ 280
13.1.6 Discretionary Notice to Protect Class Members and Fairly Conduct the Action—Rule 23(d)(1)(B) . 281
13.1.7 Potential Need for Notice to Uncertified Class ................................................................. 281

13.2 Due Process and Notice Requirements ................. 282

13.3 Content of Notice ............................................... 283

13.3.1 Requirements of Rule 23 ..................................... 283
13.3.2 Best Practices .................................................. 284
13.3.3 Anticipating Common Questions ............................ 286

13.4 Form and Style .................................................. 286

13.4.1 General ......................................................... 286
13.4.2 Claim Forms and Notice ..................................... 287

13.5 The Class List ................................................... 287

13.5.1 Compiling the Class List .................................... 287
13.5.2 Updating Class Members’ Addresses ......................... 288
13.5.3 Envelope and Return Envelope .............................. 288
13.5.4 Selecting the Return Address ............................... 289

13.6 Methods of Notice ............................................... 289

13.6.1 Introduction .................................................. 289
13.6.2 Mail .............................................................. 289
13.6.3 Publication ..................................................... 290
13.6.4 Web and Email Notice ....................................... 290

13.7 Costs of Notice .................................................. 292

13.7.1 Plaintiff Usually Bears the Initial Cost ................. 292
13.7.2 Shifting Costs to the Defendant .......................... 292
Chapter 15 The Court Settlement Approval Process

15.1 Filing the Proposed Settlement with the Court
   15.1.1 Overview .................................................. 339
   15.1.2 “Preliminary Approval” of Settlement ............... 341
   15.1.3 The Notice ................................................. 342
   15.1.4 The Timing of Opt-Out and Objection Deadlines .... 342

15.2 Standards for Approval of Class Action Settlements
   15.2.1 Introduction ............................................... 343
   15.2.2 First Circuit .............................................. 344
   15.2.3 Second Circuit .......................................... 344
   15.2.4 Third Circuit ............................................ 344
   15.2.5 Fourth Circuit .......................................... 346
   15.2.6 Fifth Circuit ............................................ 346
   15.2.7 Sixth Circuit ............................................ 346
   15.2.8 Seventh Circuit ......................................... 346
   15.2.9 Eighth Circuit ........................................... 346
   15.2.10 Ninth Circuit .......................................... 346
   15.2.11 Tenth Circuit .......................................... 346
   15.2.12 Eleventh Circuit ....................................... 347
   15.2.13 D.C. Circuit ........................................... 347
   15.2.14 Federal Circuit ........................................ 347

15.3 The Final Approval Motion ..................................... 347

15.4 The Fairness Hearing ............................................ 347

15.5 Objections to Settlement ....................................... 348
   15.5.1 Introduction ............................................... 348
   15.5.2 A Settling Defendant Cannot Object Based on a Change in the Law 348
   15.5.3 Non-Settling Defendants Usually Cannot Object to Settlement .... 349
   15.5.4 Non-Class Members Usually Cannot Object to Settlement ........... 349
   15.5.5 Standing to Object ....................................... 350
   15.5.6 Class Counsel and Advice to Class Members of the Right to Opt Out or Object. ........................................... 350
   15.5.7 Attorneys Not Representing the Class Can Advise Class Members About a Settlement ........................................... 351
   15.5.8 Restrictions on Communication Regarding Objections and Opt Outs ... 352
Chapter 15

15.5.9 Basic Grounds for Objection .................................................. 352
15.5.10 How and When to Object .................................................. 354
  15.5.10.1 Filing the Objection .................................................. 354
  15.5.10.2 Objectors and Intervention ........................................ 354
  15.5.10.3 Objector’s Right to Discovery ..................................... 356
15.5.11 Court Evaluation of Objections ......................................... 356
15.5.12 Withdrawal of Objections ............................................... 358
15.5.13 Attorney Fees for Objectors ............................................ 358
15.5.14 Appeals by Objectors .................................................... 359
  15.5.14.1 When Can an Objector Appeal? .................................... 359
  15.5.14.2 Standing to Appeal .................................................. 359
  15.5.14.3 Appeal Bonds for Objectors ....................................... 360
  15.5.14.4 Standard of Review on Appeal .................................... 362
15.6 Appeals by Third-Party Non-Objectors .................................. 363

Chapter 16

Claims Administration and Distribution of Benefits

16.1 General .................................................................................. 365
16.2 Tasks Involved in Claims Administration ............................... 365
16.3 Settlement Websites ............................................................. 366
16.4 Recording Class Members’ Responses to the Notice .................. 366
16.5 Responding to Class Members’ Telephone Inquiries .................... 367
16.6 Problems with Opt Outs and Late Claims ............................... 367
16.7 The Class Fund and Distribution of Benefits ......................... 368
  16.7.1 Defendant’s Payment of the Settlement Fund ..................... 368
  16.7.2 Qualified Settlement Funds ............................................. 368
    16.7.2.1 Introduction .......................................................... 368
    16.7.2.2 Definition of a Qualified Settlement Fund (QSF) .......... 368
    16.7.2.3 Timing of the Deduction for the Transferor ............... 369
    16.7.2.4 Income Taxation of a Qualified Settlement Fund (QSF) . 369
    16.7.2.5 Reporting and Withholding Obligations of a Qualified Settlement Fund (QSF) .......................................................... 369
    16.7.2.6 Taxation of Distributions to Claimants ....................... 369
  16.7.3 Preparing the Final Class List for Distribution of Benefits .... 370
  16.7.4 Sending Payments to Class Members .................................. 370
  16.7.5 Dealing with Undeliverable Checks and Deceased Claimants .... 371
  16.7.6 Determining the Validity and Amount of Claims; Court or Special Master Supervision of Claims Administration; Reports to the Court .......... 371
    16.7.6.1 Initial Determination of the Validity and Amount of Claims . 371
    16.7.6.2 Special Master Administration of Individual Claims Process .......................................................... 371
    16.7.6.3 Court Supervision of Claims Process ........................ 372
    16.7.6.4 Periodic and Final Reports ....................................... 372

Chapter 17

The Class Action Trial

17.1 Introduction ........................................................................... 373
17.2 Structure of the Trial ............................................................ 373
  17.2.1 General ............................................................... 373
  17.2.2 Preparing for Trial As Early As Possible ......................... 373
  17.2.3 Litigation Plan .......................................................... 373
  17.2.4 Trial by Jury ............................................................. 374
  17.2.5 Liability and Damages in One Trial ................................. 374
# Contents

17.2.6 Bifurcation of Liability and Damages ........................................... 374  
17.2.7 Innovative Trial Structures .............................................................. 375  
17.3 Proof of Liability .............................................................. 375  
17.3.1 General ........................................................................ 375  
17.3.2 Proof Through Class Representatives ........................................... 375  
17.3.3 Proof Through Class Members ..................................................... 375  
17.3.4 Proof Through Defendant’s Rule 30(b)(6) Representative or High Level Executive ......................................................... 376  
17.3.5 Proof Through Experts ................................................................. 376  
17.4 Proof of Damages ................................................................. 376  
17.4.1 Introduction ........................................................................... 376  
17.4.2 Standards of Proof ................................................................. 377  
17.4.3 Classwide Proof by Use of a Formula ........................................... 377  
17.4.4 Classwide Proof by Calculation of an Aggregate Sum ............... 377  
17.4.5 Classwide Proof by Sampling and Extrapolation ......................... 378  
17.4.6 Determination of Individual Damages ......................................... 378  
17.4.6.1 General ........................................................................ 378  
17.4.6.2 Individual Hearings After Resolution of Common Issues ....... 378  
17.4.6.3 Determination of Standard for Reprocessing ............................................. 379  
17.4.6.4 Determination Based on Defendant’s Records ....................... 379  
17.5 Jury Instructions, Interrogatories, and Special Verdicts ............................... 379  
17.5.1 General ........................................................................... 379  
17.5.2 Jury Instructions ................................................................. 379  
17.5.3 Use of Special Interrogatories and Special Verdicts to the Jury .......... 380  
17.6 Trial of Individual Counterclaims Against Class Members ......................... 380  

## Chapter 18  
Res Judicata and Collateral Estoppel  
18.1 Res Judicata Effect of a Class Action Judgment ........................................ 383  
18.1.1 General ........................................................................... 383  
18.1.2 No Res Judicata Without Adequate Representation ............................... 383  
18.1.3 No Res Judicata Without Proper Notice and Opportunity to Opt Out .... 385  
18.1.3.1 To Bind Class Members, Notice Must Be Sufficiently Informative and Disseminated in a Reasonable Manner ......................... 385  
18.1.3.2 Opting Out Avoids Res Judicata Bar ..................................................... 386  
18.1.4 Res Judicata Bar Limited to Subsequent Assertion of the Same “Cause of Action” ............................................................... 386  
18.1.5 Effect of Class Action Judgment Approving a Settlement on Claims Against Other Possible Defendants ........................................... 388  
18.1.6 Effect of a Class Action Judgment on an Individual’s Uncertified Claims That Theoretically Could Have Been Brought in a Prior Class Action ................................................................. 388  
18.1.7 Framing the Certification Motion and Notice to Avoid Overbroad Res Judicata ................................................................. 389  
18.2 Collateral Estoppel in the Class Action Context ........................................ 389  
18.2.1 General ........................................................................... 389  
18.2.2 Collateral Estoppel As to Class Members ........................................... 389  
18.2.3 Collateral Estoppel As to Class Defendant ........................................... 390  

## Chapter 19  
Attorney Fees  
19.1 Sources of Attorney Fees in Consumer Class Actions ........................................... 391  
19.1.1 General ........................................................................... 391  

xxiii
19.1.2  Common Fund and Common Benefit Doctrines ................................. 391
19.2  Statutory Attorney Fees ........................................................................ 392
  19.2.1  General ......................................................................................... 392
  19.2.2  Statutory Fees in Cases Resolved Without a Judgment and in Consent Decrees ................................................................. 395
    19.2.2.1  The Buckhannon Decision ......................................................... 395
    19.2.2.2  State Courts Do Not Uniformly Follow Buckhannon ............ 396
19.3  How Courts Determine Reasonable Fees Based on Recovery of a Common Fund .................................................................................. 397
  19.3.1  General Considerations ................................................................. 397
  19.3.2  Choice of Law When the Court Has Diversity or Supplemental Jurisdiction ............................................................................. 397
  19.3.3  The Two Competing Common Fund Methods: Percentage of Fund Versus Lodestar ................................................................. 398
  19.3.4  Weight of Current Federal Authority Prefers the Percentage-of-Fund Approach ................................................................. 399
  19.3.5  How to Compute a Percentage of the Recovery Award ................. 405
    19.3.5.1  Establishing the Percentage ....................................................... 405
    19.3.5.2  Establishing the Value of the Fund ............................................. 407
      19.3.5.2.1  In-kind services as part of the fund ........................................ 407
      19.3.5.2.2  When statutory attorney fees are added to the common fund ............................................................... 407
      19.3.5.2.3  When coupons are part of the settlement .............................. 408
      19.3.5.2.4  Cancellation of debt as part of the settlement ...................... 408
      19.3.5.2.5  Value of equitable relief ....................................................... 409
      19.3.5.2.6  Effect of amounts not paid to class members ...................... 409
      19.3.5.2.7  In computing the fund’s value, should costs .............. 410
                   first be deducted? ................................................................. 410
      19.3.5.2.8  Interest on the fund ............................................................ 411
  19.3.6  How to Use the Lodestar Method to Compute Common Fund Recoveries ......................................................................................... 411
    19.3.6.1  Continued Importance of Lodestar Calculations for Common Fund Cases ................................................................. 411
    19.3.6.2  The Hourly Rate ....................................................................... 411
    19.3.6.3  Compensable Time .................................................................. 413
    19.3.6.4  Time Records .......................................................................... 415
    19.3.6.5  Lodestar Multipliers in Common Fund Recoveries .................. 416
19.4  When and How to Apply for Fees ............................................................ 417
  19.4.1  General ......................................................................................... 417
  19.4.2  Approval of Negotiated Fee and Notice to the Class ..................... 418
19.5  Division of Fees Among Co-Counsel ..................................................... 420
  19.5.1  General ......................................................................................... 420
  19.5.2  Disclosure of the Fee Agreement to the Court ............................... 420
19.6  Tax Consequences of Attorney Fees ..................................................... 421
  19.6.1  Introduction .................................................................................. 421
  19.6.2  Why the Concern? ....................................................................... 422
  19.6.3  IRS Ruling Indicates Fees Are Not Necessarily Income to Class Members in Opt-Out Classes ................................................. 423
  19.6.4  Taxability of Certain Common Fund Attorney Fees ..................... 424
  19.6.5  Taxability of Statutory Attorney Fees ............................................. 424
    19.6.5.1  General .................................................................................. 424
Contents

19.6.5.2 No Tax Is Owed on Fees in “Civil Rights” Cases, Including Some Consumer Claims ........................................ 425
19.6.6 Generally Minimal Tax Implications If Tax Liability Distributed on a Pro Rata Basis to the Whole Class ....................... 426

Appendix A Federal Rule of Civil Procedure 23 and Advisory Committee Notes ........................................ 427
Appendix B Federal Class Action Legislation ......................................................................................................... 445
Appendix C Survey of State Class Action Law—2019 ............................................................................................ 451
Appendix D NACA Class Action Guidelines—299 F.R.D. 160 .................................................................................. 749
Appendix E Sample Agreements with Named Plaintiffs, Co-Counsel
   Introduction ......................................................................................................................................................... 777
   E.1 Sample Retainer Agreement ..................................................................................................................... 777
   E.2 Named Plaintiff’s Duties to the Class .......................................................................................................... 778
   E.3 Sample Co-Counsel Agreement .............................................................................................................. 779
Appendix F Selected Class Action Websites ........................................................................................................ 781
Index .................................................................................................................................................................. 783