

## CHAPTER 1

### Background to Class Action Litigation

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#### § 1.01 The Nature and Purpose of the Class Action

##### [1]—The Basic Elements of a Class Action

In the traditional lawsuit, a plaintiff commences an action by personally serving the defendant with a complaint. Assuming proper service, the parties physically appear before a court which has the jurisdictional power to adjudicate the issues raised. Based on their physical presence, the parties are theoretically given an opportunity to present their respective evidence and arguments, and whatever judgment is reached is binding on them.

The class action provides an exception to the traditional confrontation between plaintiff and defendant. In a class action, the named class plaintiff or named class defendant *represents* the interests of others with claims similar to those of the representatives, but who are physically absent from the court.<sup>1</sup> A member of a judicially

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<sup>1</sup> *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940).

“... It is a familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact

recognized class may never have to answer an interrogatory, execute an affidavit, give a deposition, or appear before the court, but under appropriate circumstances, the rights of such a class member are appropriately before the court on the premise of proper standing, both individual<sup>2</sup> and representative,<sup>3</sup> and adequate representation by the class representative.<sup>4</sup>

It is because the rights of absent parties are being adjudicated that most class action rules require the courts to closely monitor motions to dismiss,<sup>5</sup> motions to remove or remand,<sup>6</sup> competing class actions,<sup>7</sup>

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adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties, . . . or where the interest of the members of the class, some of whom are present as parties is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. . . .

“In all such cases, so far as it can be said that the members of the class who are present are, by generally recognized rules of law, entitled to stand in judgment for those who are not, we may assume for present purposes that such procedure affords a protection to the parties who are represented though absent, which would satisfy the requirements of due process and full faith and credit.” 311 U.S. at 43.

#### **State Courts:**

*California:* Downing v. San Diego Gas & Electric Company, 2010 Cal. App. LEXIS \*8491 (October 27, 2010) (“The relevant inquiry should always be whether uniform class-wide injury can be demonstrated for liability purposes such that only a separate damages inquiry needs to be individualized . . . Class treatment is proper only if the class judgment (certification) to be rendered can establish the basic issue of liability to the class . . . (class actions are appropriate where) the community of interest requirement could readily be established where ‘the issue of the defendant’s liability to the class as a whole could be determined by facts common to all’ (or) ‘liability to the class (may be) established by evidence defendant engaged in an illegal scheme to cheat or overcharge patrons, coupled with a showing from defendant’s own books that defendant was successful in his scheme’”). *Colorado:* Reyher v. State Farm Mutual Automobile Insurance Company, 2009 WL 4981898 (Colo. App. 2009) (“The basic purpose of a class action is ‘to eliminate the need for repetitious filing of many separate lawsuits involving the interests of large numbers of persons and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit’”).

*Louisiana:* Oliver v. Orleans Parish School Board, 2009 WL 3790594 (La. App. 2009).

*New Jersey:* Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 922 A.2d 710 (2007).

*New Mexico:* Romero v. Philip Morris Inc., 137 N.M. 229, 109 P.3d 768 (2005), *New York:* Globe Surgical Supply v. GEICO Insurance Company, 59 A.D.3d 129, 871 N.Y.S.2d 263 (2009); Klein v. Robert’s American Gourmet Food, Inc., 28 A.D.3d 63, 808 N.Y.S.2d 766 (2006).

*Rhode Island:* Cabana v. Littler, 612 A.2d 678 (R.I. Sup. 1992).

<sup>2</sup> See § 2.01 *infra*.

<sup>3</sup> See § 2.02 *infra*.

<sup>4</sup> See §§ 2.02[4], 4.03[8][c] *infra*.

<sup>5</sup> See § 4.03 *infra*.

<sup>6</sup> See § 4.03[7] *infra*.

<sup>7</sup> See § 4.03[8] *infra*.

and motions seeking summary judgment,<sup>8</sup> unauthorized communications with class members,<sup>9</sup> the filing of counterclaims against class representatives and class members,<sup>10</sup> discovery, both pre-class certification<sup>11</sup> and post-class certification,<sup>12</sup> trial,<sup>13</sup> settlements<sup>14</sup> and the certification of settlement classes,<sup>15</sup> and the awarding of attorneys' fees and costs.<sup>16</sup> For the same reasons, a class action must be subjected to a judicial screening process shortly after the action begins.

The screening process, referred to as a hearing on the issue of class certification, requires that the proposed class action meet certain prerequisites, including:

- (1) Does the class representative have individual<sup>17</sup> and representative standing?<sup>18</sup>
- (2) Are there a sufficient number of class members to make joinder impractical?<sup>19</sup>
- (3) Are there common legal or factual issues which can be efficiently adjudicated by the court on a class wide basis?<sup>20</sup>
- (4) Are the claims of the chosen representative typical of those of the members of the class?<sup>21</sup>
- (5) Will the chosen representative and his attorney vigorously and adequately represent the interests of absent class members?<sup>22</sup>
- (6) Is the proposed class action superior to any other available procedural device?<sup>23</sup>
- (7) Is the proposed class action manageable?<sup>24</sup>

If the court, after a proper hearing, finds that the action is worthy of class action treatment, then, in effect, all absent class members and their claims in the matter at hand are subject to the court's jurisdiction.<sup>25</sup> The court may, however, dismiss the proposed class action on

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<sup>8</sup> See § 4.04 *infra*.

<sup>9</sup> See § 4.06 *infra*.

<sup>10</sup> See § 4.09 *infra*.

<sup>11</sup> See § 4.08 *infra*.

<sup>12</sup> See § 8.02 *infra*.

<sup>13</sup> See § 8.03 *infra*.

<sup>14</sup> See §§ 9.01 to 9.03 *infra*.

<sup>15</sup> See § 9.03[2] *infra*.

<sup>16</sup> See §§ 10.01 to 10.04 *infra*.

<sup>17</sup> See § 2.01 *infra*.

<sup>18</sup> See § 2.02 *infra*.

<sup>19</sup> See § 6.03 *infra*.

<sup>20</sup> See § 6.04 *infra*.

<sup>21</sup> See §§ 2.02[2], 2.02[3], 6.05[1] *infra*.

<sup>22</sup> See §§ 2.02[4], 6.05[2], 6.09, 6.11 *infra*.

<sup>23</sup> See § 6.06 *infra*.

<sup>24</sup> See § 6.07 *infra*.

<sup>25</sup> See § 4.03[3] *infra*.

a variety of grounds,<sup>26</sup> both pre- and post-class certification, and it may modify or decertify the class at any time prior to judgment.<sup>27</sup>

In some types of actions, such as those seeking monetary damages, notice of class certification by first class mail and/or by publication may be required to be given to absent members of the class.<sup>28</sup> In other types of actions, such as those seeking declaratory or injunctive relief, notice of class certification may not be required. Under some circumstances, the members of the class may have the right to opt-out and not participate in the action. In other situations, class participation may be mandatory with members of the class given the opportunity of appearing through individually selected attorneys.

Once a class is properly formed and the requirements of due process met, the lawsuit proceeds along traditional lines with discovery. Although a class action may be tried before a judge and/or jury, unless, of course, the court certifies a settlement class,<sup>29</sup> it is more likely that it will be settled. A proposed settlement, compromise or dismissal must be preliminarily approved by the court, subject to final approval, generally, after the class members have received notice and been given the opportunity to object.

Counsel for the class should keep accurate time and cost records and must apply to the court for fees and costs with appropriate explanations and justifications for each request.

It bears repeating and remembering that from commencement to termination, the prosecution of class action litigation is subject to judicial inspection for the reason that the rights of absent parties are being litigated.

## [2]—Purpose

The recognized objectives of modern class actions are:

- (1) efficiency<sup>30</sup>

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<sup>26</sup> See § 4.03 *infra*.

<sup>27</sup> See § 6.10, *infra*.

<sup>28</sup> See §§ 7.01, 7.02 (notice of class certification), and 9.03[3] (notice of proposed settlement) *infra*.

<sup>29</sup> See § 9.01 *infra*.

<sup>30</sup> See, e.g.:

*Arkansas*: Georgia-Pacific Corp. v. Carter, 2007 WL 2955976 (Ark. Sup. 2007) (“Because they typically involve complex factual and legal questions, mass tort claims are exceedingly, if not prohibitively, expensive to litigate. . . . The case-by-case mode of adjudication magnifies this burden by requiring the parties and courts to reinvent the wheel for each claim.”).

*Colorado*: Jackson v. UNOCAL Corporation, 2009 WL 2182603 (Colo. App. 2009) (“The basic purpose of a class action is to eliminate the need for repetitious filing of many separate lawsuits involving the interest of large numbers of persons

- (2) avoidance of inconsistent adjudications<sup>31</sup>
- (3) protection of the interests of absent class members
- (4) relief for class members with individually small claims<sup>32</sup>
- (5) encouraging private attorneys general to commence and prosecute actions that will further the enforcement of law and discourage socially unacceptable conduct<sup>33</sup>

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and common issues of law or fact by providing a fair and economical method for disposing of a multiplicity of claims in one lawsuit”).

*Illinois*: Fakhoury v. Pappas, 916 N.E.2d 1161 (Ill. App. 2009). *Louisiana*: Dupree v. LaFayette Insurance Col. 51 So.3d 673 (La. Sup. 2010).

*Michigan*: Henry v. Dow Chemical Company, 2008 WL 207937 (Mich. App. 2008).

*Missouri*: Mitchell v. Residential Funding Corp., 334 S.W.3d 477 (Mo. App. 2010). *North Carolina*: Clark v. Alan Vester Auto Group, Inc., 2009 WL 2181620 (N.C. Super. 2009) (“The class action vehicle is one that seeks a balance between justice for the litigants and efficiency in resolution of class disputes. In this action, the court concludes that occasional and inevitable individual issues such as the potential discrete liability of a Vester Defendant as to a particular class member, or as to damages of various class members are outweighed by the interests of efficiency, judicial economy and the ends of justice”).

<sup>31</sup> See, e.g.:

*Louisiana*: Dupree v. LaFayette Insurance Company, 51 So.2d 673 (La. Sup. 2010) (“class action is a nontraditional litigation [procedure that permits a representative with typical claims to sue or defend on behalf of, and stand in judgment for, a class of similarly situated persons when the question is one of common interest to persons so numerous as to make it impracticable to bring them all before the court..The purpose and intent of the class action procedure is to adjudicate and obtain res judicata effect on all common issues applicable not only to persons who bring the action, but also to all others who are ‘similarly situated’”).

*New Jersey*: Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 922 A.2d 710 (2007) (“Unitary adjudication through class litigation furthers numerous practical purposes, including judicial economy, cost-effectiveness, convenience, consistent treatment of class members, protection of defendants from inconsistent obligations and allocation of litigation costs among numerous, similarly situated litigants.”).

<sup>32</sup> See:

*Illinois*: Fakhoury v. Pappas, 916 N.E.2d 1161 (Ill. App. 2009).

*Oklahoma*: Cuesta v. Ford Motor Company, 2009 WL 1066300 (Okla. Sup. 2009) (“It permits plaintiffs to ‘vindicat[e] the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more that consumed by the cost’”).

*Pennsylvania*: Thibodeau v. Comcast Corp., 912 A.2d 874 (Pa. Super. 2006) (“The average consumer, having limited financial resources and time, cannot individually present minor claims in court or in an arbitration. Our justice system resolves this inherent inequality by creating the procedural device which allows consumers to join together and seek redress for claims which otherwise would be impossible to pursue. . . . It is only the class action vehicle which makes small consumer litigation possible. . . . Should the law require consumers to litigate or arbitrate individually, defendant corporations are effectively immunized from redress of grievances.”).

<sup>33</sup> See, e.g., Farmers Group, Inc. v. Lubin, 222 S.W.3d 417 (Tex. Sup. 2007) (“Class actions were designed in part to ensure law enforcement by private attorneys general; it would be absurd to construe them to prevent the same kind of suit by a real attorney general.”).

Most states still have a liberal philosophy towards the prosecution of class actions,<sup>34</sup> although in recent years some state courts have

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<sup>34</sup> See, e.g.:

*Arizona*: ESI Ergonomic Solutions, LLC. v. United Artists, 50 P.3d 844 (Ariz. App. 2002).

*California*: Ketchedian v. Farmers Group, Inc., 2006 WL 13476 (Cal. App. 2006); Lee v. AT&T Wireless Services, Inc., 2006 Cal. App. LEXIS4582 (. 2006) (“The advantages of a class action are that it: allows redress of individual claims when the amount at issue, which may be as little as one dollar, would not be sufficient incentive for an individual lawsuit, while preventing the perpetrator of wrongful conduct from retaining the benefits of that conduct with impunity; benefits legitimate business enterprises by curtailing improper competition; and it avoids the burden of multiple actions involving identical claims.”).

*Florida*: Johnson v. Plantation General Hospital Limited Partnership, 641 So.2d 50, 58 (Fla. 1994) (“The purpose of the class action is to provide litigants who share common questions of law and fact with an economically viable means of addressing their needs in court.”).

*Illinois*: Smith v. Illinois Central Railroad Co., 363 Ill. App.3d 944( 2005) (“Created in the English courts of chancery as a convenient tool to afford partial justice to parties unable to join under the then-compulsory joinder rules, class suits have been recognized as an acceptable method in appropriate cases to advance the efficiency and economy of litigation, which is a principal purpose of the procedure. . . . The recognized objectives of class actions include judicial economy and efficiency, the protection of defendants from inconsistent obligations, the protection of the interests of absentees, access to judicial relief for small claimants and enhanced means for private attorney general suits to enforce laws and deter wrongdoing.”).

*Louisiana*: Guillory v. Union Pacific Corp., 817 So.2d 1234 (La. App. 2002) (“ . . . the principal justification for certification of a class . . . is ‘the vindication of the rights of groups of persons with negative value lawsuits’ and that this justification is ‘often used as the sole rationale for finding superiority’”); Doerr v. Mobil Oil Corporation, 811 So.2d 1135 (La. App. 2002) (“Finally, class actions may further substantive law by: (1) opening courts to claims not ordinarily litigated, thus enabling courts to enforce legislative policies underlying those causes of action; and (2) enabling courts to recognize the full implications of recognizing rights or remedies by allowing them to determine what outcome in litigation would best serve the policies underlying the causes of action. . . . Due to the ‘smallness’ of the recovery allowable to these plaintiffs, a class action is the appropriate procedural vehicle to process this dispute fairly and efficiently.”).

*Montana*: McDonald v. Washington, 862 P.2d 1150, 1153, 1158 (Mont. 1993) (mass tort economic losses from unclean drinking water would be “unremediable without class action status because most are minor in and of themselves”).

*New Jersey*: Iliadis v. Wal-Mart Stores, Inc., 191 N.J. 88, 922 A.2d 710 (2007) (“New Jersey courts . . . have consistently held that the class action rule should be liberally construed.”); Beegal v. Park West Gallery, 925 A.2d 394 (N.J. Super. A.D. 2007) (“Despite the complexity of management of a class action poses for a trial court ‘overarching principals of equity’ dictate that Rule 4:32-1 be liberally construed, especially in consumer fraud actions brought to redress common grievances, under circumstances that would make individual actions uneconomical to pursue.”).

*New York*: Klein v. Robert’s American Gourmet Food, Inc, 28 A.D.3d 63, 808 N.Y.S.2d 766 (2005) (“Here, a determination of the reasonableness of any settlement would require consideration of the fact that many of the Class members, because of the absence of proof of purchase, the cost of litigation and individually modest sums at stake could face significant obstacles in litigating their individual claims.”).

become more conservative<sup>35</sup> in their willingness to certify class actions, particularly those seeking to represent nationwide classes,<sup>36</sup>

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*North Dakota:* *Howe v. Microsoft Corp.*, 656 N.W.2d 285 (N.D. Sup. 2003) (“We will interpret Rule 23 so as to provide an open and receptive attitude toward class actions. . . . Rule 23 is a remedial rule which ‘continues to have as its objectives the efficient resolution of the claims or liabilities of many individuals in a single action, the elimination of repetitious litigation and possibly inconsistent adjudications involving common questions, related events or requests for similar relief, and the establishment of an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits.’”).

*Ohio:* *In re Consolidated Mortgage Satisfaction Cases*, 97 Ohio St.3d 465, 780 N.E.2d 556 (2002) (“ . . . as opposed to bringing each suit individually [plaintiffs] have an interest in grouping their actions due to the very small nature of the remedy sought. Since [plaintiffs] each seek only \$250 . . . they argue that as individual[s] . . . they do not have the financial wherewithal to undertake the expense of litigation to recover such a paltry sum . . . as a certified class . . . they can spread the cost of an action and more readily attack the practices of lenders”).

*Pennsylvania:* *Thibodaeu v. Comcast Corp.*, 912 A.2d 874 (Pa. Super. 2006) (“Class actions are still of great public importance. Class action lawsuits are and remain the essential vehicle by which consumers may vindicate their lawful rights. . . . It is only the class action vehicle which makes small consumer litigation possible. . . . Should the law require consumers to litigate or arbitrate individually, defendant corporations are effectively immunized from redress of grievances.”).

*Texas:* *Farmers Group, Inc. v. Lubin*, 222 S.W.3d 417 (Tex. Sup. 2007) (“Class actions were designed in part to ensure law enforcement by private attorneys general; it would be absurd to construe them to prevent the same kind of suit by a real attorney general. The Legislature has provided that the class action provisions here are to be liberally construed; requiring an attorney general to act solely as class counsel would not be a liberal construction. As this is the first attorney general who has ever brought an Insurance Code class action, we need not decide every question about how such actions will operate in the future; we decide only that the Legislature did not intend them to be identical to private class actions, else it would not have provided for both.”).

*Washington:* *Washington: Scott v. Cingular Wireless*, 161 P.3d 1000 (Wash. Sup. En Banc 2007) (“Washington courts favor a liberal interpretation of CR 23 as the rules avoids multiplicity of litigation, ‘saves members of the class the cost and trouble of filing individual suits and . . . also frees the defendant from the harassment of identical future litigation.’ ‘A primary function of the class suit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significance size and importance if taken as a group.’”).

*Wisconsin:* *Witt v. West Bend Mutual Insurance Co.*, 2005 WL 3388157 (Wis. Cir. 2005) (“ . . . the relatively small individual recoveries that are at stake in this case . . . make a class action the best vehicle for sorting out these disputes”).

<sup>35</sup> See, e.g.:

*California:* *Howard Gunty Profit Sharing Plan v. Superior Court*, 2001 Cal. App. LEXIS 288 (Cal. App. 2001) (“As a general proposition, class actions are favored in California. . . . But, the tide has turned and not all class actions are favored. In recent years, concern over potentially meritless securities lawsuits filed by ‘professional’ plaintiffs abounded. . . . Companies choose to settle, rather than face the enormous expense of discovery and trial ‘which has created an in terrorem effect on Corporate

and their willingness to enforce mandatory arbitration clauses prohibiting class actions and class-wide arbitration.<sup>37</sup>

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America.’ . . . In 1995 Congress passed the private Securities Litigation Reform Act which imposes stricter pleading requirements, limits precertification discovery, and limits the number of actions in which a person may be a lead plaintiff. . . . The purpose of the Act was, among other things, to empower investors to exercise primary control over private securities litigation, instead of their lawyers, and encourage defendants to fight abusive claims. . . . Indeed, lawyer-driven litigation and professional plaintiffs are the primary abuses which led Congress to enact the legislation. . . . While class actions are an important means to prevent a failure of justice in our judicial system, they also carry the potential to create injustice.”)

*Maryland*: *Cutler v. Wal-Mart Stores, Inc.*, 175 Md. App. 177, 927 A.2d 1(2007) (“Maryland does not share the liberal construction of the class rule. . . . Under Maryland case law, an issue is common to a class of plaintiffs, ‘only to the extent its resolution will advance the litigation of the entire case.’”).

*New Mexico*: *Romero v. Philip Morris Inc.*, 137 N.M. 229, 109 P.3d 768 (2005) (“While recognizing the useful purpose of Rule 1-023 we are mindful that courts must nevertheless conduct a rigorous analysis into whether the prerequisites of the rule are met before certifying a class. . . . Although the wisdom or form of class certification can be reconsidered after a class has been certified . . . courts should be careful not to postpone rigorous analysis into satisfaction of the prerequisites until after certification.”).

*Texas*: *Stonebridge Life Insurance Co. v. Pitts*, 236 S.W.3d 201 (Tex. Sup. 2007) (“we [have previously] rejected the ‘certify now and worry later’ approach, holding it is improper to certify a class when it cannot be determined from the outset that individual issues can be considered in a manageable, time-efficient and fair manner”); *Exxon Mobil Corp. v. Gill*, 221 S.W.3d 841 (Tex. App. 2007) (“To make a proper analysis, ‘going beyond the pleadings is necessary, as a court must understand the claims, defenses, relevant facts and applicable substantive law in order to make a meaningful determination of the certification issues.’ . . . Although it may not be an abuse of discretion to certify a class that could later fail, a cautious approach to class certification is essential. . . . We cannot indulge every presumption in favor of the trial court’s ruling on class certification.”).

<sup>36</sup> See §§ 6.07[5]-[7] *infra*.

<sup>37</sup> See § 4.03[5] *infra*.

See also:

“Justice Denied: One Year Later: The Harms to Consumers from the Supreme Court’s *Concepcion* Decision Are Plainly Evident”, Public Citizen and National Association of Consumer Advocates (2012)(“One year ago, the U.S. Supreme Court struck a devastating blow against a critical tool for protecting consumers’ rights. The Court ruled in *AT&T Mobility LLC v. Concepcion* (131 S. Ct. 1740 (April 27, 2011)) that corporations can bar consumers from pursuing cases as a class, even where state laws protect their right to do so . . . The decision upheld the business practice of blocking consumers from bringing class actions by forcing them to arbitrate disputes and, in the forced arbitration provisions of their consumer contracts, barring arbitration on a class basis . . . By itself, forced arbitration is inherently unfair because the corporation usually chooses the private arbitration company that will handle its disputes, creating a clear conflict of interest. Additionally, corporations can write the rules that govern arbitration proceedings involving them—such as rules concerning fees, discovery rights or hearing venues—giving them the ability to tilt the playing field. Corporations have refused entreaties from consumer groups to offer arbitration as a choice, not a mandate . . . At the time of the *Concepcion* ruling, for example,



courts in at least 19 states had used the unconscionability doctrine or similar legal principals to hold that corporations could not use arbitration provisions to bar consumers and employees from bringing class actions (see e.g., *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 30 Cal. Rptr. 3d 76 (2005)). *Concepcion* obliterated such state law. Citing the ‘national policy favoring arbitration’ the Court’s majority interpreted class actions as hostile to the institution of arbitration because it deemed them incompatible with the supposed streamlined nature of arbitration proceedings. Justice Antonin Scalia acknowledged the dissent’s claim that ‘class proceedings are necessary to prosecute small-dollar claims that might otherwise slip the legal system’. But Scalia wrote. ‘[s]tates cannot require a procedure that is inconsistent with the FAA . . .’”).

## § 1.02 Historical Origins

### [1]—The English Courts of Equity

Class actions grew out of the unwieldy principle applied by English courts of equity that “all persons materially interested, either legally or beneficially, in the subject matter of a suit, are to be made parties to it, either as plaintiffs or defendants, however numerous, so that there may be a complete decree which shall bind all.”<sup>1</sup> Applying this principle often meant that no relief could be obtained unless all interested parties were joined. In addition, the vast number of parties needed to be joined in some cases led to difficulties in just managing the case.

By the mid-sixteenth century, it became apparent that the difficulties of joinder of numerous parties could be overcome by a class action device through which a single party could represent the claims of “all persons materially interested, either legally or beneficially, in the subject matter of the suit.”<sup>2</sup>

Despite the sensible outlook of this view, class actions were permitted only in courts of equity; courts of law still prohibited them. It was not until 1873, with the enactment of the Supreme Court of Judicature Act, which merged the courts of law and equity, that class actions became universally recognized in the courts of England.<sup>3</sup>

Class actions as we know them in the United States are being considered in present-day Great Britain<sup>4</sup> and have been implemented in Australia<sup>5</sup> and Canada<sup>6</sup> in the Provinces of Quebec,<sup>7</sup> Ontario,<sup>8</sup> British

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<sup>1</sup> See *Report on Class Actions*, Ontario Reform Commission, pp.5-9 (1982).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See: Lindley, “Group Actions,” *Internat’l Travel L. J.*, Issue #4: England 177-181 (1997) (discussion of joinder and representative actions); Comment, “Second Thoughts—Reger Smith Considers the Legal Aid Board’s Latest Proposals for Class Actions,” 144 *New L.J.* 862 (June 24, 1994). Class actions for damages are not yet permitted in England because of the case of *Markt & Co. Ltd. v. Knight SS Co. Ltd.*, 2 KB 1021 (1910), which established that separate trials would be required to determine each individual’s damages.

<sup>5</sup> See: Spaareboom, *Class Actions: Australian Directions* (Adelaide: Phillips Fox 1997) (“Class actions are becoming an increasingly common feature of the Australian legal landscape. . . . Example(s) . . . are the U.S. Dalkon Shield litigation, the silicon implant litigation both in the United States and Australia, and on the local front, peanut butter and NSW oyster actions . . . [and] salmonella outbreaks. . . .”); Kell, “Before the High Court—Representative Actions: Continued Evolution or a Classless Society?” 15 *Sydney L. Rev.* 527 (1993).

<sup>6</sup> See Cooper and Gourlay, “National Classes in Canada,” 30 *C.A.R.* 293 (2009) (“Class proceedings remain relatively new to Canadian law . . . . While class proceedings are no longer in their infancy in Canada, they are still experiencing some growing pains, particularly in proceedings involving multijurisdictional classes of lit-

igant(s). The courts in different provinces are far from unanimous in their treatment of so-called ‘national classes,’ which purport to include class members from all or most provinces. As a result, class actions are still often commenced in several provinces simultaneously. Canada does not yet have a multidistrict litigation panel and therefore in such cases defendants must contend with multiple parallel proceedings. In some cases, counsel are able to agree in an approach that sees the action proceed first in one province, with the others held in abeyance. However, this is not always the case and defendants may be required to defend multiple proceedings simultaneously.”); Mercier, “Defending Multi-Jurisdictional Class Actions in Canada,” *For The Defense*, p. 71 (Oct. 2009) (“An increasing number of cross-border class action cases or settlements are before various Canadian provincial courts through parallel class action proceedings. Canada does not have a single governing class action statute, which is particularly important for international defense counsel to consider as they grapple with class action litigation arising in Canadian provinces . . . The Supreme Court of Canada has not ruled on the preclusive effect of international class judgments or settlements on Canadian claimants . . . Canadian provincial, class action statutes tend to follow one or two approaches: permitting inclusion of extra-provincial members within the class, subject to a right to opt-out, or requiring an extra-provincial member to opt-in to the action to be included in the class”); Marseille, “Arbitration And Class Actions in Canada: Where Do We Stand?,” 28 C.A.R. 123 (2007); Martin & Halasz, “Environmental Class Actions in Canada,” 28 C.A.R. 435 (2007); Cooper, “Recent Developments in Canadian Class Action Law-Cross-Border Issues in Canadian Class Proceedings,” 27 C.A.R. 8 (2006); Borrell, “The Evolving Evidentiary Standard for Certification in Canada,” 26 C.A.R. 680 (2005) (“Class action legislation has only been available in Canada’s common law provinces since 1993. . . . In the 12 years since class actions were introduced, Canadian courts have struggled with the extent to which the requirements for certification must be supported by evidence. . . . The first few cases deliberately took a large and liberal approach. . . . A number of recent cases have begun to impose a more exacting standard on Plaintiffs on certification. This can only be regarded as raising the bar for certification.”).

<sup>7</sup> Piche, *Quebec: The Canadian Jurisdiction Of Choice For Class Actions?*, 26 C.A.R. 559 (2005) (“In Quebec . . . the number of class actions filed by law firms and consumer protection groups has approached historic highs. In fact, Quebec is a key Canadian jurisdiction for class action activity and is likely to remain so in the future. Quebec offers a winning combination of Canadian plaintiffs: a complainant-biased certification process—described by some as a mere ‘rubber-stamp procedure’—and lenient courts at the certification stage. As a result, Quebec has earned the reputation of being the most plaintiff-friendly jurisdiction in the country in which to file a class action.”).

<sup>8</sup> See, e.g.: *Sutherland v. Canadian Red Cross Society*, 17 O.R. 3d 645, 21 C.P.C. 3d 137 (Gen. Div. 1994) (certification denied to mass tort brought by persons infected with HIV from tainted blood products); *Abdool v. Anaheim Management, Ltd.*, 15 O.R. 3d 39, 16 C.P.C. 3d 141 (Gen. Div. 1993) (certification denied to fraud action brought by condo owners; detrimental reliance is individual issue not subject to class treatment); *Peppiatt v. Nicol*, 16 O.R. 3d 133, 20 C.P.C. 3d 272 (Gen. Div. 1993) (class of owners of golf course alleging gross mismanagement, negligence, breach of trust and breach of contract certified).

See also: Martin & Halasz, “Environmental Class Actions in Canada,” 28 C.A.R. 435 (2007) (“This year marks the twenty-fifth anniversary since the Ontario Law Reform Commission . . . published its detailed Report on Class Actions.”); McGowan, “Class Actions in Ontario: A Quick Comparison to Rule 23,” 15 Class Action Reports 525 (1992).

Columbia,<sup>9</sup> Saskatchewan, Newfoundland, Manitoba, Alberta<sup>10</sup> and in the Federal Court of Canada.<sup>11</sup> Indeed, class action procedures are being considered and implemented in several European countries.<sup>12</sup>

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<sup>9</sup> See Sullivan, *A Guide to the British Columbia Class Proceedings Act* (Toronto: Butterworths, 1997).

<sup>10</sup> See Kotlas & Smith, “Class Actions in Canada: Another Western Province (Alberta) Enacts Legislation,” 28 C.A.R. 11 (2007).

<sup>11</sup> Piche, “Quebec: The Canadian Jurisdiction Of Choice For Class Actions?,” 26 C.A.R. 559 (2005) (“At present seven Canadian provinces have enacted comprehensive legislation dealing with class actions. Ontario was the first one to follow Quebec’s footsteps with the Class Proceedings Act of 1992. . . . In addition, the Federal Court of Canada . . . enacted a comprehensive set of rules to govern class proceedings in Federal Court.”).

<sup>12</sup> See Rihm, “European-Style Class Actions, For The Defense”, December 2012 (p. 87) (“The prospect of European-style class actions took another step forward recently when its European Parliament passed a resolution emphasizing the need to legislate a standard approach toward collective redress, that, class actions . . . The European Parliament emphasized . . . the importance of taking a opt-in approach that required an action for collective redress to identify and to make known all claimants seeking the collective redress when they filed a claim for collective redress, as opposed to the U.S. framework, which provides *res judicata* for all claimants who have not opted out before litigants agree to a settlement or a court hands down an award . . . While the ‘top-down approach’ taken by the European Commission and the European Parliament has received well-deserved public attention over the last years, a majority of 27 European Union member countries (have already) passed almost unnoticed collective redress legislation in the last two decades, including, among others, France in 1992, Portugal in 1995, The United Kingdom without Scotland and Spain in 2000, Sweden in 2003, Germany and The Netherlands in 2005, Italy and Greece in 2007, Bulgaria in 2006 and 2008, Denmark in 2008 and Poland in 2010”); Taffet & Garrod, “EU Eschews Features of U.S. Class Action Model”, [www.law.com/jsp/nylj](http://www.law.com/jsp/nylj) (1/18/2011) (“Increasingly, EU countries are introducing procedures for private representative, opt-in, opt-out class and other hybrid model actions, which have come to be known generally as ‘collective redress’ actions. Most EU countries now have some form of procedure for such collective redress actions, but the state of play is highly dynamic with varying models and standards evolving across the EU”); Nashi, “Italy’s Class Action Experiment”, 43 CNLILJ 147 (Winter 2010); Mulheron, “The Case For An Opt-Out Class Action For European Member States: A Legal And Empirical Analysis”, 15 CLMJEUURL 409 (Summer 2009); Geier, “Europe Feeling Friendlier Towards Class Actions,” N.Y.L.J. (Nov. 12, 2006) (“While class actions were for the most part unknown in Europe as recently as five years ago, the European landscape has shifted so that forms of class litigation are increasingly available to consumers, and more private parties are bringing antitrust claims. The French government presented a draft bill this month that would for the first time allow consumers to take companies to court collectively, rather than being forced to bring individual lawsuits. England, Sweden, Spain, Germany and the Netherlands already have some form of class litigation. The Irish, Italian and Finnish governments are considering legislation to implement lawsuit procedures that could be brought by multiple parties. Norway’s Mediation and Civil Procedure Act, which established an opt-in class action procedure similar to Sweden’s, takes effect next year. And Denmark’s justice minister submitted legislation to the Danish parliament in October that would implement an opt-in class action procedure similar to Norway’s. But European Union judicial systems, with rules that limit the discovery available to plaintiffs, bar punitive damages and makes losers pay lawyer fees on both

**[2]—United States Federal Courts**

As in England, the use of class actions in the United States originated in courts of equity, but even in these courts, the binding effect of a class action judgment was uncertain with respect to members of the class on whose behalf the action was brought. It was not until 1938 with the adoption of Rule 23 to the Federal Rules of Civil Procedure that class actions entered the modern era in the United States.

As originally adopted, Rule 23 was made applicable to courts of both law and equity and attempted to give the courts guidance on the kinds of actions to which the rule should be applied. This led to the recognition of three distinct types of class actions: (1) the “true” class action which involved jointly enjoyed rights of the parties; (2) the “hybrid” class action in which individual, as opposed to joint, rights to property were determined; and (3) the “spurious” class action which raised common questions of law or fact, but in which rights were individual and there was no claim to specific property.

In 1966, Federal Rule 23 was amended, the various types of class actions were discarded and provisions were added to protect the rights of the parties. The 1966 amendment of Federal Rule 23 began the modern era of class action litigation as we know it today leading to the aggregation and prosecution of a wide variety of claims<sup>13</sup> otherwise unlitigatable because of their *de minimus* nature and/or the complexity and difficulty of proving the case, particularly, with mass torts.<sup>14</sup> In 2001, various proposals were made by the Judicial Conference’s Advisory Committee on Civil Rules in response to criticisms of the perceived abuses of class actions.<sup>15</sup> These changes became effective on December 1, 2003 include, *inter alia*, a change in the time in which file a class certification motion from “as soon as practicable after commencement of the an action” to “at an early practicable time,”<sup>16</sup> allowing the court to order notice in all types of class actions including Rule 23(b)(1) and (b)(2) class actions<sup>17</sup> allowing

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sides, have not yet accommodated anything as broad and freewheeling as U.S.-style class action litigation.”).

<sup>13</sup> See § 6.04, *infra*, for the types of cases available for class treatment.

<sup>14</sup> See § 6.04[7], *infra*.

<sup>15</sup> See 22 Class Action Reports 122, Commentary (“On April 23-24, 2001 the Advisory Committee on Civil Rules voted to send out for public comment a wide range of Rule 23 ‘reform’ amendments aimed at curbing class action ‘abuses.’”).

<sup>16</sup> See Advisory Committee Notes, 2003 Amendments, Subdivision (c).

<sup>17</sup> *Id.* (“The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care . . . there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. . . .”).

class members a second opportunity to request exclusion from a Rule 23(b)(3) class action after settlement terms are made known,<sup>18</sup> a new section (g) on the appointment of class counsel<sup>19</sup> and a new section (h) on attorneys' fees.<sup>20</sup>

On February 18, 2005 The Class Action Fairness Act of 2005 ("The Act of 2005") became law<sup>21</sup> as a federal response to abuses, real and perceived, in the prosecution of class actions, primarily, in certain "pro-plaintiff" state courts. Public confidence in the virtue of class actions began to decline in the 1990's with the proliferation of coupon and certificate settlements that seemed to generate little of value for class members but often resulted in the award of extraordinary legal fees (in cash) to plaintiff's counsel.<sup>22</sup> The Act of 2005 addresses this problem by basing legal fees on the actual number of coupons redeemed<sup>23</sup> and/or upon time charges actually incurred in the prosecution of the class action<sup>24</sup> or the lodestar method,<sup>25</sup> as opposed to the more popular percentage method<sup>26</sup> of calculating reasonable attorneys' fees. In addition and more problematical, the Act of 2005 "Grants [federal] district courts original jurisdiction of any civil action in which the matter in controversy exceeds \$5 million, exclusive of interest and costs, and that is between citizens of different states, or citizens of a State and foreign State or its citizens or subjects."<sup>27</sup> In essence, defendants in multi-state, nationwide class actions brought in state courts may remove such class actions to federal district court which may retain, dismiss or remand depending upon the circumstances.<sup>28</sup>

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<sup>18</sup> *Id.* ("Subdivision (e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known.").

<sup>19</sup> *Id.* ("Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action.").

<sup>20</sup> *Id.* ("Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop and conclude class actions. . . . This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.").

<sup>21</sup> Public Law No: 109-002 (Feb. 18, 2005).

<sup>22</sup> See § 9.03[1][c][vii] *infra*.

<sup>23</sup> *Id.*

<sup>24</sup> See § 10.03 *infra*.

<sup>25</sup> *Id.*

<sup>26</sup> See § 10.02 *infra*.

<sup>27</sup> See N. 21 *supra*.

<sup>28</sup> *Id.*

**[3]—State Courts**

The emergence of class actions in the state courts as an alternative to federal litigation came about as the result of decisions by the United States Supreme Court reflecting a policy decision to discourage federally instituted class actions unless they involved a question of federal law. What the court did was to disallow the aggregation of claims for purposes of meeting the requisite dollar amount for federal diversity jurisdiction,<sup>29</sup> and subsequently held that each class member must individually meet the jurisdictional amount for federal jurisdiction.<sup>30</sup> In effect, these decisions relegated questions involving state or common law to the state courts. In addition, the Court has held that in federal class actions, it is the responsibility of the plaintiff class representative to pay the cost of notice by mail to class members.<sup>31</sup>

The Supreme Court again encouraged the development of state class actions when it decided that state courts were empowered to handle the full range of class litigation, including actions involving the nationwide marketing and delivery of goods and services, cases which necessarily generate nationwide classes.<sup>32</sup> The Supreme Court held that a state court has the power to approve the settlement of a nationwide class action which releases claims that were never filed and which were solely within the jurisdiction of a federal court.<sup>33</sup> And more recently, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*,<sup>34</sup> the petitioner filed a class action in diversity against Allstate seeking interest allegedly due and owing. The District Court held that it was deprived of jurisdiction by “N.Y. [CPLR] § 901(b), which precludes a class action to recover a ‘penalty’ such as statutory interest. Affirming, the Second Circuit . . . held that § 901(b) must be applied by federal courts sitting in diversity because it is ‘substantive’ within the meaning of *Erie Railroad Co. v. Tompkins*”.

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<sup>29</sup> *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969).

<sup>30</sup> *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973). For a discussion of recent developments regarding the aggregation of punitive damages, statutory damages, attorneys fees, disgorgement damages and the value of injunctive relief to meet the amount in controversy sufficient to invoke diversity jurisdiction and the use of supplemental jurisdiction over absent class members pursuant to 28 U.S.C. § 1367, see § 4.03[7][a], *infra*.

<sup>31</sup> *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

<sup>32</sup> *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Several states have accepted the responsibility of nationwide jurisdiction over non-resident class members. See § 6.07[3], N. 71, *infra*.

<sup>33</sup> *Matsushita Electric Industrial Co. Ltd. v. Epstein* 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996). See also § 9.03[1], N. 29, *infra*.

<sup>34</sup> *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Company*, 559 U.S. 393 (2010).

In reversing Justice Scalia writing for the majority stated:

“The question in dispute is whether Shady Grove’s suit may proceed as a class action. Rule 23 . . . creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his class as a class action . . . Thus, Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because § 901(b) attempts to answer the same question—i.e., it states that Shady Grove’s suit ‘may *not* be maintained as a class action’ (emphasis added) because of the relief it seeks—it cannot apply in diversity suits unless Rule 23 is *ultra-vires* . . . Rule 23 automatically applies ‘in all civil actions and proceedings in the United States district courts’”

There are several possible outcomes from the *Shady Grove* decision. First, there may be an increase in the number of class actions brought in federal court by New York State residents seeking to avoid the impact of CPLR § 901(b). Second, defendants in some class actions brought under CPLR Article 9 may be less anxious to remove such cases to federal court under the Class Action Fairness Act.<sup>35</sup> Third, other state statutes which seek to limit the use of class actions may be subject to review as well.<sup>36</sup>

As a consequence of the Supreme Court’s view and the increased awareness of the general public of their rights as consumers and citizens, the states began enacting progressive class action statutes that sought to improve on Federal Rule 23.<sup>37</sup>

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<sup>35</sup> See § 4.03[7][c], *infra*.

<sup>36</sup> See Dickerson, “State Class Actions: Game Changer,” *New York Law Journal*, p. 10 (April 6, 2010); Coyle, “Ruling Opens Federal Court Doors to Class Actions Barred by States,” *New York Law Journal*, p. 2 (April 2, 2010) (“The Court’s decision is good for those who use class actions as a remedy to corporate wrongdoing . . . But the decision will ‘upend’ a large number of state statutes that limit remedies which can be sought by class actions or that outright prohibit class actions”).

<sup>37</sup> For the class action rules of each state with the exception of Mississippi [see *American Bankers Insurance Co. v. Booth*, 830 So.2d 1205 (Miss. Sup. 2002) (“Mississippi has no statute setting forth guidelines for class actions. . . . However, class suits have been recognized in Mississippi as a matter of general equity jurisdiction.”)] and Virginia [see *America Online, Inc. v. Superior Court*, 108 Cal. Rptr.2d 699 (Cal. App. 2001) (Virginia forum selection clause not enforced since Virginia law does not allow consumer class actions or other consumer remedies available under California law)] see Grande, Vance and Corcoran, *Survey Of State Class Action Law, A Report of the State Laws Subcommittee of the Class Actions and Derivative Suits Committee* (2001).

“In 1985, the United States Supreme Court held in *Phillips Petroleum Co. v. Shutts*, 427 U.S. 797 (1985) that state courts [can], within certain due process



constraints, adjudicate claims of non-resident class members. The ruling opened the door for state courts to entertain multi-state and nationwide class actions that had traditionally been filed in federal forums . . . the succeeding decade witnessed a significant increase in the number of multi-state class actions being adjudicated in the state courts.

“The trend was fueled by several factors, not the least of which was the perception that state courts offered a more flexible forum for adjudication of both certification and liability issues, as well as for approval of class-wide settlements. . . . Accompanying the shift of much class action litigation from federal to state forums was an increase in the number of competing class actions, i.e., the filing of separate class action complaints, in different courts and by different plaintiffs, asserting essentially identical claims against the same defendant [See § 4.03[8], *infra*].

“The appeal of state court forums for class actions was enhanced when the U.S. Supreme Court ruled that state courts have subject matter jurisdiction to resolve nationwide class actions and that class settlements reached in state courts have preclusive effect even over federal claims that were not litigated in the state forum. *Matsushita v. Epstein*, 515 U.S. 367 (1996). The following year, the U.S. Supreme Court in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), confirmed that settlement classes are not exempt from the requirements of Rule 23 in a decision which, though technically applicable to both federal and state courts, reinforced the view that parties seeking approval for multi-state settlement classes might encounter fewer obstacles in state than in federal forums.”

See also: *Hall v. City of Ridgeland*, 37 So.3d 25 (Miss. Sup. 2010)(residents appeal denial of their challenge to City’s issuance of conditional use permit to developers seeking to construct a 13 story building; “The Developers also argue that the Protestants, by seeking to appeal ‘for and on behalf of those similarly situated persons comprising Z.O.N.E. (Zoning Ordinances Need Enforcement) are seeking an appeal in a manner not authorized by Mississippi law in that Rule 23 . . . expressly omits class actions and Rule 23.2 expressly omits actions related to unincorporated associations line Z.O.N.E. . . . It is true that Mississippi law does not permit class-action claims (however) this Court previously has allowed organizations of homeowners to appeal in zoning disputes..While Protestants should have made Z.O.N.E. an appellant rather than suing ‘for and on behalf of those similarly situated persons comprising Z.O.N.E.’, we agree with the Protestant’s arguments that ‘[t]he associational aspect of this appeal does not violate class action principals so as to be inconsistent with the provisions of the Miss. R. Civ. P.”).

### § 1.03 Recognizing and Analyzing Potential Class Action Litigation

The prosecution of a class action can consume an extraordinary amount of time and money. As previously noted, once a class is certified, a class action may not be settled without the express approval of the court.<sup>1</sup> In some states, court approval of a proposed settlement or compromise may be necessary, and notice of the proposal given to class members, even before class certification is granted.<sup>2</sup> Stated simply, it is far easier to start a class action than to end it.

In its formative stages, a class action begins as a potential lawsuit brought on behalf of an individual person or entity. Typically, an individual will, or may, sustain damages arising from the action or inaction of another individual or entity. In seeking the advice of an attorney, the aggrieved individual is initially seeking an equitable or legal remedy to an individual problem. The concept that a class action may be an appropriate procedural remedy to the individual's problem may arise either because other persons are similarly situated, and/or because of the limited nature of recoverable damages in an individual suit.

When recoverable damages are too small to warrant the considerable investment of time and money in an individual suit, and prosecuting a claim in Small Claims Court is not a viable alternative, the aggregation of many similar claims into a class action may be the only viable method by which to litigate the individual's claim. The economic non-viability of small claims has been one of the critical factors which some courts have considered in deciding whether or not to grant class action status.<sup>3</sup>

Regardless of the manner in which the potential class action arises, before instituting a class action, plaintiff's counsel should first examine the reported cases which deal with the subject matter similar to the case under consideration.<sup>4</sup> The cases will in all likelihood reveal how the courts in the various states have responded to class actions in particular areas of the law. The pertinent cases may reveal that class treatment is inappropriate, or they may reveal that a more detailed analysis is warranted.

An analysis of a proposed class action should include consideration of the following questions:

- (1) What are the individual merits of the claim at issue?

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<sup>1</sup> See § 9.02 *infra*.

<sup>2</sup> *Id.*

<sup>3</sup> See § 1.01[2] *supra*, §§ 6.04-.07 *infra*.

<sup>4</sup> See § 6.04 *infra*.

(2) Does the potential class representative have standing to assert his claim on his own behalf and on behalf of the class?

(3) Can the action be certified as a class action, i.e., does it meet the various prerequisites for class certification as set forth in the rules and/or case law of a given state?

(4) What are the administrative and management problems which are likely to arise, and how can those problems be overcome?

(5) What are the realistic economics of the proposed action, i.e., how are the various costs, including plaintiff's counsel's fees, to be paid, and does the potential recovery justify the investment of resources that will have to be made.