

Class Actions 101: A Primer for Corporate Boards of Directors

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For individuals who serve on corporate boards of directors, the prospect of a class action lawsuit against the corporation is undoubtedly daunting. The goal of this primer is to demystify some of the key procedural and conceptual aspects of class action litigation and to help board members (especially non-attorneys) understand what to expect. **Basic Definitions** A “class action” is a form of lawsuit in which an individual or entity (commonly referred to as the “named plaintiff,” “lead plaintiff,” or “class representative”) brings common claims on behalf of themselves and a defined group or “class” of unnamed, similarly situated individuals or entities against a defendant in order to obtain relief for all members of the class. The named plaintiff is generally represented by attorneys or law firms collectively referred to as “class counsel.”

The complaint filed with the court ordinarily must contain a proposed “class definition” describing the group of individuals or entities that the named plaintiff seeks to represent in the lawsuit. The proposed class may also be divided into “sub-classes” with differing claims.

“Class certification” is the procedure by which a court determines whether a lawsuit may proceed to trial as a class action. The requirements for class certification are governed by procedural rules adopted by state and federal courts. In all federal courts, for example, the requirements for class certification are governed by [Federal Rule of Civil Procedure 23](#). Each state has its own procedural rule(s) governing class certification, although the rules in many states are patterned after Rule 23. **Jurisdiction** Class actions may be filed in either state or federal court. Federal courts have jurisdiction to hear class claims arising under federal laws. Additionally, the [Class Action Fairness Act of 2005](#) (“CAFA”) provides that, subject to certain exceptions, federal courts have jurisdiction over putative class actions in which (1) there are at least 100 class members, (2) any plaintiff is a citizen of a different state from any defendant, and (3) the amount in controversy exceeds \$5 million. If a putative class action filed in state court satisfies these requirements and none of the exceptions to CAFA jurisdiction apply, the defendant may seek “removal” of the case to federal court. This is often important to corporate defendants because federal courts generally are viewed as less likely to allow

a class action to be maintained than some state courts. In certain instances when multiple class actions of a similar type are pending before multiple different federal courts, the cases may be transferred to a single federal court for coordinated or consolidated pretrial proceedings under Multidistrict Litigation (“MDL”) procedures. **Types of Claims** With few exceptions, virtually any type of legal or equitable claim that may be asserted by an individual plaintiff may also be brought as a putative class action if the named plaintiff is able to allege that the claim satisfies the requirements for class certification under the applicable state or federal rule. Such claims may involve requests for money damages, a declaration of the parties’ respective rights and obligations, and an injunction against the defendant. **Duration** The length of time between the filing of a class action complaint and the final resolution of the case (whether pretrial, at trial, or on appeal) is impossible to predict with certainty due to a wide variety of factors that affect the pace at which such litigation proceeds. As a rule of thumb, however, a non-complex class action may take as long as one to two years to resolve. More complex class actions may take as long as two to three years to resolve at the trial court level. Highly complex or highly contentious class actions could take five years or more to resolve at the trial court level. Moreover, if the parties pursue and exhaust all available appeals over the course of the lawsuit, the timeframe for reaching a final resolution will be extended significantly. **Class Certification Procedure** Procedures for obtaining class certification vary depending upon the jurisdiction in which the lawsuit is pending. Typically, however, after the named plaintiff’s complaint is filed, the parties will be required to participate in a pretrial process referred to as “discovery,” during which both sides will request and produce documents, information, and deposition testimony on issues relevant to the claims and defenses asserted in the case.

The named plaintiff will be required to file a written motion asking the court to certify the lawsuit as a class action. The named plaintiff’s motion typically must be supported by evidence sufficient to demonstrate that the legal requirements for class certification are met in the case. The defendant is ordinarily allowed to file a written brief explaining why the class should not be certified. Although the named plaintiff bears the burden of proof on the class certification issue, the defendant’s brief may also be supported by evidence demonstrating why the legal requirements for class certification are not met in the case. The trial court may convene a hearing to receive oral argument from the parties’ lawyers and additional witness testimony on the class certification issues. The trial court will ultimately enter an order that either grants or denies class certification. If class certification is denied, the lawsuit may continue only as to the named plaintiff’s individual claims. If class certification is granted, the lawsuit will proceed (potentially all the way to trial) as a class action unless the court decertifies the class at any point before entering a final judgment.

After class certification is granted but before trial, the court typically must approve a plan for providing reasonable notice to the unnamed class members. The notice will explain to the unnamed class members what they must do, if anything, to take part in or opt out of the ultimate result of the litigation and the timeframe they have for doing so. After the notice period is complete, the defendant may have additional opportunities to ask the court (1) to “decertify” the case as a class

action or (2) to resolve the case on “summary judgment” before trial based on pure points of law and/or undisputed facts that dispose of all or some of the class claims. Unless the case is disposed of or resolved before trial, the case will proceed to trial and final judgment. **Availability of Appeal** The availability of appeal varies by jurisdiction. In many jurisdictions, however, the trial court’s order granting or denying class certification may be immediately appealed to one or more higher courts. In federal courts, for example, Federal Rule of Civil Procedure 23(f) permits a party to seek leave to appeal an order granting or denying class certification to a federal Circuit Court of Appeals. In many jurisdictions, a party may also choose to appeal a grant or denial of class certification after a final judgment is entered in the case. **Cost to Defend** The cost of defending against a class action is impossible to predict with certainty, but a class action of even moderate complexity can cost between \$500,000 to \$800,000 annually to litigate through class certification, excluding the cost of trial, the cost of any appeals, and the amount of any final judgment. See [The 2012 Carlton Fields Class Action Survey: Best Practices in Reducing Cost and Managing Risk in Class Action Litigation](#) at pp. 11-16. After a lawsuit is filed and some preliminary investigation is completed, the corporate legal department may coordinate with outside litigation counsel to perform a preliminary case assessment for purposes of (1) developing a litigation budget that takes into account the anticipated demands of the litigation and all associated costs, and (2) assessing the corporation’s potential financial exposure in the litigation. Additionally, corporate legal departments may investigate at the very outset of the litigation (1) whether the cost of defending against the class claims may be covered by an insurance policy or a contractual indemnification, or (2) whether there may be a statutory or contractual basis for shifting attorneys’ fees and costs to the other party. **Discovery Issues** The pretrial phase of a lawsuit in which the parties request and produce documents, information, and deposition testimony is referred to as “discovery.” The discovery process is typically governed by rules of procedure that vary from jurisdiction to jurisdiction. Producing documents, information, and witnesses during the discovery process can be costly, burdensome, and disruptive of day-to-day business operations of a corporation. This is especially true in cases where electronic records, including email correspondence, are sought by the opposing party in discovery. All parties are expected to comply with their discovery obligations under the relevant rules. Such discovery obligations frequently include a duty to preserve relevant paper and electronic documents, including emails, during the litigation and to invest the time to collect relevant documents and information at the direction of the corporate legal department and/or outside litigation counsel. Discovery obligations must be taken seriously because courts have the ability to impose sanctions on parties that fail to comply with their discovery obligations. **Settlement Considerations** The parties may settle a class action lawsuit at any time during the litigation and, in fact, many courts will require parties to engage in formal mediation. Class action settlements may take a variety of different forms. In some cases, it may be possible to reach a settlement with the named plaintiff on his or her individual claims before the class certification issue is decided by the court. In many cases, however, the plaintiff will insist on a classwide settlement. If a classwide settlement is reached, the rules in many jurisdictions require the terms of the settlement to be evaluated by the trial court for fairness to the absent class members. Even if a court accepts a proposed classwide settlement, the rules in

many jurisdictions require that the court provide absent class members an opportunity to object to a proposed classwide settlement. Thus, even if the named plaintiff and the defendant agree to settle a class action on specific terms, there is a risk that the court may reject the proposed settlement based on its own evaluation of the fairness of the settlement or on the objection(s) of one or more class members. **Exposure to Attorneys' Fees & Costs** A defendant's potential liability for attorneys' fees and costs varies greatly depending upon the nature of the claims asserted in the case, the law of the jurisdiction in which the case is pending, and the terms of any settlement. Because attorneys' fees and costs are often exponentially higher in class action litigation than in individual lawsuits, they often figure prominently in any assessment of the defendant's potential financial exposure in the litigation.

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