

TABLE OF CONTENTS

CHAPTER 1

Background to Class Action Litigation

§ 1.01	The Nature and Purpose of the Class Action	1-1
	[1] The Basic Elements of a Class Action	1-1
	[2] Purpose	1-5
§ 1.02	Historical Origins	1-10
	[1] The English Courts of Equity	1-10
	[2] United States Federal Courts	1-10
	[3] State Courts	1-14
§ 1.03	Recognizing and Analyzing Potential Class Action Litigation	1-16
§ 1.04	Rules, Guidelines and Interpretations	1-18
	[1] Federal Rule 23	1-18
	[a] The Contents of the Rule	1-18
	[b] General Interpretations	1-20
	[2] The Uniform Law Commissioners’ Model Class Actions Rule	1-20
	[a] The Uniform Rule Summarized	1-21
	[b] General Interpretations	1-23
	[3] State Class Action Rules	1-24

CHAPTER 2

Selecting a Proper Class Representative

§ 2.01	Individual Standing	2-2
	[1] Plaintiff Class Actions	2-2
	[a] Direct Injury	2-2
	[2] Defendant Class Actions	2-38

STATE CLASS ACTIONS

§ 2.02	Representative Standing	2-45
	[1] Practical Considerations	2-45
	[2] Typical Claims	2-46
	[3] Differing Damage Claims and the Effect on Typicality	2-65
	[4] Adequacy of Representation	2-69
	[a] Adequacy of the Class Representative	2-71
	[i] Pro Se Plaintiffs	2-73
	[ii] Professional Plaintiffs	2-74
	[iii] Relationship to Class Counsel	2-74
	[iv] Antagonistic Interests	2-76
	[v] The Payment of Litigation and Notice Costs	2-84
	[vi] Credibility, Reliability, Honesty and Mental Stability	2-86
	[vii] Sufficient Interest in Outcome	2-87
	[viii] Duties, Responsibilities and a Rational Approach to Litigation	2-89
	[ix] Significant Public Interest in Outcome	2-90
	[x] Authority to Act	2-90
	[xi] Knowledge of Lawsuit and Its Purpose	2-90
	[xii] Intervention to Satisfy Adequacy of Representation	2-94
	[xiii] Class Representative Incentive Awards	2-99
	[b] Adequacy of Class Counsel	2-100
	[c] Adequacy of Defendant Class Representation	2-106

CHAPTER 3

The Complaint

§ 3.01	Basic Pleadings	3-1
	[1] The Case Caption	3-3
	[2] Identifying the Named Parties and the Nature of the Action	3-3

TABLE OF CONTENTS

vii

	[3] Identifying the Class	3-4
	[4] Preliminary Statement	3-5
	[5] Damages	3-6
§ 3.02	Pleading Specific Causes of Action	3-8
	[1] Breach of Contract and Express Warranty	3-8
	[2] Common Law Fraud	3-9
	[3] Consumer Protection Statutes	3-10
	[4] Breach of Fiduciary Duty	3-10
	[5] Quasi-Contractual Claims	3-10
	[6] Negligence and Mass Torts	3-10
	[7] Violation of Federal and State Statutes	3-11
	[8] Declaratory Judgments and Injunctive Relief	3-11

CHAPTER 4

Pre-Class Certification Litigation Practice

§ 4.01	In General	4-3
§ 4.02	The Preliminary Conference and the Answer to the Complaint	4-5
	[1] The Preliminary Conference	4-5
	[2] The Answer	4-5
	[3] Recusal and Disqualification of Class or Defendant's Counsel	4-5
§ 4.03	Defendant's Motion to Dismiss	4-10
	[1] Failure to State a Claim	4-10
	[a] Facial Merit	4-20
	[b] Collateral Estoppel	4-20
	[2] Pleading Deficiencies	4-20
	[3] Lack of Jurisdiction and Improper Venue	4-23
	[a] Preemption and Primary and Exclusive Jurisdiction	4-23
	[b] Lack of Personal Jurisdiction	4-36
	[c] Lack of Subject Matter Jurisdiction	4-37
	[d] Claims Barred by Disposition in Prior Action or Accord and Satisfaction	4-41
	[e] Filed Rate Doctrine	4-46
	[f] Voluntary Payment Doctrine	4-48
	[g] Statute of Limitations	4-51

STATE CLASS ACTIONS

	[h]	Mandatory Arbitration and Forum Selection Clauses	4-56
	[i]	Change of Venue and <i>Forum Non Conveniens</i>	4-57
	[j]	Stay Imposed by Federal or Other State Court.	4-58.1
	[k]	Aggregation of Claims	4-58.1
	[l]	Non-Resident Class Members.	4-58.2
[4]		Standing	4-59
	[a]	Tolling of Statutory and Contractual Time Limitations.	4-79
	[b]	Cross-Jurisdictional Tolling.	4-85
[5]		Mandatory Arbitration Clauses	4-90
	[a]	Class Arbitration	4-94
	[b]	Class Action Waivers	4-97
	[c]	Enforceability.	4-101
[6]		Striking Class Allegations	4-110
[7]		Removal of State Court Class Actions to Federal Court and Remand Back.	4-129
[8]		Competing Class Actions.	4-140
	[a]	Motions to Stay or Consolidate Competing Class Actions	4-146
	[b]	Soliciting Class Members in Competing Class Actions	4-153
	[c]	Collateral Attacks: Challenging the Preclusive Effect of Judgments in Competing Class Actions	4-153
	[d]	Defendants' Interest in Buying Off Class Cheaply	4-157
	[e]	Settlements and Release of Claims	4-158
[9]		Plaintiffs' Motion to Strike Class Allegations	4-159
§ 4.04		Motions for Summary Judgment	4-203
	[1]	Defendant's Motion for Summary Judgment.	4-203
	[2]	Plaintiff's Motion for Summary Judgment or Preliminary Relief	4-221
§ 4.05		Destruction of Records	4-231
§ 4.06		Communicating with the Class Representative or with Potential and Actual Class Members	4-232
	[1]	Offers to the Class Representative and "Pick Off" Cases.	4-232

TABLE OF CONTENTS

ix

	[2] Court Control of Communications with Class Members	4-238
§ 4.07	Pre-Certification Discovery	4-243
	[1] Discovery of Plaintiffs	4-243
	[2] Discovery of Defendants	4-247
§ 4.08	Counterclaims	4-256
§ 4.09	Lawsuits and Sanctions Against Class Representatives and Class Members, Defendants and Their Attorneys	4-260

CHAPTER 5

Procedural Aspects of the Motion for Class Certification and Appeals

§ 5.01	Issues Before the Court	5-1
	[1] Burden of Proof	5-2
	[2] Status Prior to Class Certification	5-8
§ 5.02	The Timing and the Format of the Certification Motion	5-9
	[1] Timing	5-9
	[2] Format	5-12
	[a] Supporting Affidavits	5-12
	[b] Fruits of Discovery	5-13
	[c] Memorandum of Law	5-13
	[d] Evidentiary Hearing	5-13
	[e] <i>Ex Parte</i> Class Certification Orders	5-35
§ 5.03	Appeals of Certification Orders	5-37

CHAPTER 6

Requirements for Class Action Certification

§ 6.01	Overview	6-2
§ 6.02	Ascertainability	6-4
§ 6.03	Numerosity	6-14
§ 6.04	Commonality	6-29
	[1] Reserved	6-30
	[2] Reserved	6-30
	[3] Breach of Contract	6-30
	[a] Common Law Issues	6-30
	[b] Quasi-Contractual Theories of Liability	6-52

STATE CLASS ACTIONS

	[4]	Breach of Warranty	6-69
	[5]	Common Law Fraud	6-76
		[a] Reliance Presumed.	6-81
		[b] Class Wide Theories of Proof.	6-92
		[c] Uniform Misrepresentations	6-96
	[6]	Unfair and Deceptive Trade Practices.	6-101
		[a] Reliance	6-102
		[b] Uniformity and Presumptions	6-108
		[c] Class Wide Theories of Proof.	6-118
		[d] Nationwide Classes	6-125
		[e] California Unfair Competition Law.	6-127
	[7]	Breach of Fiduciary Duty	6-129
	[8]	Negligence	6-132
	[9]	Mass Torts	6-138
		[a] Mass Accidents and Toxics Torts.	6-155
		[b] Medical Monitoring.	6-168
		[c] Comprehensive Smoking Cessation Program	6-172
		[d] Reformulating Mass Tort Class Actions.	6-173
	[10]	Violation of State and Federal Statutes.	6-174
	[11]	Declaratory Judgments, Injunctive Relief and Mandatory and Limited Fund Class Actions	6-188
		[a] Challenging Governmental Operations	6-190
		[b] Challenging Private Entities	6-202.5
	[12]	State Civil RICO Claims	6-202.15
§ 6.05		Typicality of Claims and Adequacy of Representation	6-202.16
	[1]	Typicality	6-202.16
	[2]	Adequacy of Representation	6-202.16
§ 6.06		Predominance and Superiority	6-203
	[1]	Predominance.	6-203
	[2]	Superiority	6-209
§ 6.07		Manageability	6-250.6
	[1]	<i>De Minimis Damages</i>	6-281
	[2]	Fluid Recovery and <i>Cy Press</i> Concepts.	6-284
	[3]	Jurisdiction Over Non-Residents.	6-292
	[4]	Improper Venue and <i>Forum Non Conveniens</i>	6-296
	[5]	Choice of Law Considerations.	6-299
	[6]	Limiting Class Actions to One State.	6-316
	[7]	Trial Plans.	6-319
§ 6.08		Consideration of the Merits	6-322

TABLE OF CONTENTS

xi

§ 6.09	Selection of Lead Class Action Counsel	6-339
	[1] The Private Securities Litigation Reform Act.	6-340
	[2] Fee Auctions.	6-341
	[3] Race and Gender Diversity	6-343
	[4] Intervention and Substitution.	6-344
§ 6.10	Modification and Decertification Orders	6-348
§ 6.11	Sanctions Against Class Action Plaintiffs, Defendants and Their Attorneys	6-356
§ 6.12	Options after Dismissal from Class Action.	6-357

CHAPTER 7

Notice of the Action to Class Members

§ 7.01	Supreme Court Guidelines	7-1
§ 7.02	State Practice.	7-8
	[1] The Timing of the Notice	7-8
	[2] Mandatory vs. Discretionary Notice	7-9
	[3] Contents of the Notice	7-9
	[a] Opt-In v. Opt-Out Notice Provisions.	7-13
	[b] Claim Forms and Questionnaires.	7-18.1
	[c] Supplemental Notice	7-18.3
	[4] Methods of Notice	7-18.3
	[a] Notice by Mail.	7-19
	[b] Notice by Publication	7-20
	[c] Misleading Notices	7-22
	[5] Cost of Notice	7-23

CHAPTER 8

Discovery and Trial

§ 8.01	Preparing for Trial	8-1
§ 8.02	Discovery.	8-4
	[1] Discovery by Plaintiffs.	8-4
	[2] Discovery by Defendants.	8-5
§ 8.03	Trial of the Class Action	8-8
	[1] Bifurcation and Subclassing.	8-18
	[2] Representative Proof	8-23
	[a] Proving Damages.	8-25
	[i] Statistical Sampling.	8-25

STATE CLASS ACTIONS

	[ii] Appointing a Special Master . . .	8-27
	[b] Other Damage Theories	8-28
[3]	Using Class Members as Witnesses	8-40
[4]	Inferences, Circumstantial Evidence and Jury Instruction	8-45

CHAPTER 9

Settlements

§ 9.01	Settling Class Actions	9-3
§ 9.02	Approval of the Court	9-5
	[1] In General	9-5
	[2] The Court as Guardian of the Class	9-13
§ 9.03	Settlement Procedures	9-20
	[1] Stipulation of Settlement	9-20
	[a] Summarizing the Case	9-21
	[b] The Terms of the Settlement	9-21
	[i] No Admissions on the Merits	9-21
	[ii] Effective Date	9-21
	[iii] Circumstances Under Which the Stipulation Will Be Deemed Void	9-22
	[iv] Duties of the Parties	9-22
	[v] Withdrawal Rights	9-22
	[vi] Consideration	9-24
	[vii] Expansion of the Class	9-44
	[viii] Confidentiality	9-45
	[ix] Barring Class Counsel from Future Representation	9-46
	[x] Performing in Good Faith	9-47
	[xi] Governing Law	9-47
	[xii] Barring Future Claims	9-47
	[xiii] Waiver of Appeal Rights	9-55
	[xiv] Judgment Reduction	9-55
	[xv] Most Favored Nations	9-56
	[xvi] Vacatur of Jury Verdicts	9-56
	[xvii] Retention of Jurisdiction	9-57
	[xviii] Suspension of Relief	9-60
	[xix] Settlement Voidable	9-60
	[xx] Burden of Proof on Retained Claims	9-61
	[xxi] Enforcement; Attorneys' Fees and Costs	9-61

TABLE OF CONTENTS

xiii

	[xxii] Dismissal of Punitive Damages	9-61
	[xxiii] Limiting Settlement to Some Defendants.	9-61
	[xxiv] Eligibility Requirements.	9-62
	[xxv] Resolution of Disputes by Arbitration	9-62
[c]	Non-Cash Settlements: Products, Coupons, Certificates, Label Monitoring and Product Testing. . .	9-63
	[i] Transferability	9-82
	[ii] Aggregation of Coupons.	9-88
	[iii] Redemption Rate.	9-89
	[iv] Time of Redemption	9-94
	[v] Expert Evaluations of Coupons' Value	9-96
	[vi] Distribution of Coupons to Next Best Class	9-97
	[vii] The Problem of Attorneys' Fees	9-98
	[viii] Label Monitoring and Product Testing	9-103
	[ix] The Public Interest	9-104
[d]	<i>Cy Pres</i> Remedies: Settlements and Disposing of Unclaimed Settlement Funds	9-104
[e]	Merger Litigation and Disclosure Only Settlements	9-123
[2]	Preliminary Court Approval	9-125
	[a] Settlement Class Certification	9-133
[3]	Notice of the Proposed Settlement	9-139
	[a] Content of the Notice.	9-143
	[b] Methods of Notifying the Class	9-152
	[i] Notice by Mail, E-Mail and Fax	9-152
	[ii] Notice by Publication and Internet Website.	9-157
[4]	The Settlement Hearing.	9-159
	[a] Nature of the Hearing	9-160
	[b] Objections to the Proposed Settlement	9-162
	[i] Intervention By Objectors and Other Interested Parties and Standing to Appeal	9-167

STATE CLASS ACTIONS

	[ii]	Discovery By Intervenors, Objectors and Others	9-175
	[iii]	Procedural Objections	9-179
	[iv]	Substantive Objections	9-188
	[v]	Objectors' Incentive Awards, Attorneys' Fees, Costs and Bonds	9-204
	[c]	Factors in Evaluating Proposed Settlements	9-207
	[d]	Incentive Awards	9-242
[5]		Finality, Collateral Attacks and Injunctions	9-248
	[a]	Collateral Attacks on the Settlement	9-249
	[b]	Malpractice Claims Against Class Counsel	9-257
	[c]	Enjoining Nationwide State Court Class Actions	9-260

CHAPTER 10**Costs and Attorneys' Fees**

§ 10.01		Introduction	10-2
§ 10.02		Fees Based on a Percentage of Recovery	10-44
	[1]	Criticism of the Lodestar Method	10-52
	[2]	Attorneys' Fees in Coupon Claims-Made and Non-Cash Settlements	10-54
	[3]	Common Fund Fees Based Upon Benefits Generated for Opt-Outs and Other Non-Class Beneficiaries	10-56
	[4]	Interim Fee Awards	10-58
§ 10.03		The Lodestar Approach to the Payment of Fees	10-59
	[1]	Policy Considerations	10-59
	[2]	Time and Costs Records	10-65
	[3]	Establishing Beneficial Hours and Expenses	10-70
	[4]	Establishing the Hourly Rate	10-80
	[5]	Lodestar Computation	10-87
	[6]	Enhancement of the Lodestar	10-90
	[7]	Responsibility for Payment	10-102
	[8]	Fee Disputes	10-104
	[9]	Incentive Awards	10-107

TABLE OF CONTENTS

§ 10.04 Applying for the Fee and Notifying
the Class 10-108

[1] The Time of Filing the Application 10-108

[2] Disclosure of Fee-Sharing Arrangements 10-108

[3] Notice to the Class 10-113

[4] The Final Fee Application 10-115

[5] Incentive Awards And Objectors’
Counsels’ Fees 10-116

[6] Collateral Attacks on Settlements and
Awards of Class Counsel’s Fees &
Costs 10-117

[7] Litigation Loans 10-117

INDEX I-1

