

the jurisdictional amount. When jurisdiction is based on a “federal question” claim, and diversity jurisdiction is not available, a nonfederal claim can be joined only if the court has supplemental (pendent) jurisdiction over it. The court will have supplemental (pendent) jurisdiction over the claim if it is regarded as part of the same case or controversy as the federal claim.

EXAMPLE

Plaintiffs claimed that the defendant appropriated plaintiffs’ literary work in such a way as to (i) infringe federal law copyright, and (ii) constitute state law unfair competition. There was federal pendent jurisdiction over the state claim. [Hurn v. Oursler, 289 U.S. 238 (1933)]

c. Class Actions

1) Prerequisites

Named representatives will be permitted to sue on behalf of a class if:

- a) The class is so **numerous** that joinder of all members is **impracticable**;
- b) There are **questions of law or fact** common to the class;
- c) The **named parties’ interests are typical** of the class;
- d) The named representatives will ensure the **fair and adequate representation** of the interests of absent members of the class [Fed. R. Civ. P. 23(a)]; and
- e) The action meets the definition of **any** of the following three types of class actions found in Rule 23(b):
 - (1) Separate actions by class members would create a **risk of inconsistent results** or, as a practical matter, **would impair the interests of other absent members of the class**; or
 - (2) A defendant has acted or refused to act on grounds applicable to the class and **injunctive or declaratory relief is appropriate** for the class as a whole (as in employment discrimination claims; but note that in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Supreme Court rejected an effort to recover monetary relief in such a class action); or
 - (3) There are **questions of fact or law common to members** of the class that **predominate** over individual issues and a class action is superior to the alternative methods of adjudication.

2) Consideration in Treating Case as a Class Action

The court should determine at an early practicable time whether the action may be maintained as a class action, that is, whether to “certify” a class, but may determine at any time thereafter that the action is not an appropriate one for class action treatment. In determining whether to treat the case as a class action, the

court should consider, inter alia, the following factors: (i) the interest of individual control, (ii) the extent and nature of litigation elsewhere on the same subject, (iii) the desirability of having the whole package in this court, and (iv) the difficulties in managing the class action.

a) Court Must Define Class Claims, Issues, or Defenses

The court, in certifying a class, must “define the class and the class claims, issues, or defenses.”

b) Appointment of Class Counsel

The court must appoint class counsel for every certified class, who must fairly and adequately represent the interests of the class. [Fed. R. Civ. P. 23(g)(1)]

3) Effect of Judgment

All members of a class will be *bound* by the judgment rendered in a class action *except* those in a “common question” class action [Fed. R. Civ. P. 23(b)(3)] who notify the court that they do not wish to be bound (“opting out”). Members of Rule 23(b)(1)—e(1) above—and 23(b)(2)—e(2) above—classes cannot opt out.

4) Class Action Not Mooted If Class Representative’s Claim Mooted

If the substantive claim of the individual representing the class is mooted, this *does not* render the class action moot. [United States Parole Commission v. Geraghty, 445 U.S. 388 (1980)—release from prison of named plaintiff in class action suit challenging parole procedure did not moot entire class action suit]

5) Notice

a) Notice Required in Common Question Suits

Notice to all members of the class *of the pendency* of the class action is required under Rule 23 only in “*common question*” suits [Fed. R. Civ. P. 23(b)(3)], so that class members can opt out. The notice must state (i) the nature of the action, (ii) the definition of the class, (iii) the class claims, issues, or defenses, and (iv) the binding effect of a class judgment. Notice may be by first-class mail, electronic means, or other appropriate means.

b) Notice Discretionary in Other Types of Class Action Suits

Notice to members of the class of the pendency of the class action in other class suits is discretionary with the court. [See Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974); Oppenheimer v. Sanders, 437 U.S. 340 (1978)]

Note: Notice of *dismissal or settlement* is a separate notice that must be given to class members of all types of class actions. (See 6)a), *infra*.)

6) Jurisdiction

a) Diversity Action

In class actions founded on diversity, only the *citizenship of the named representatives* of the class is taken into account to establish diversity. The Supreme Court held that the amount in controversy requirement is satisfied in

a class action that invokes diversity of citizenship if **any named representative's** claim exceeds \$75,000. The class action may proceed in federal court **even if class members' claims do not exceed \$75,000**. The claims by the class members that do not exceed \$75,000 come within the court's supplemental jurisdiction. [Exxon Mobil Corp. v. Allapattah Services, III.C.3., *supra*]

b) Federal Question Action

If the class asserts a claim arising under federal law, it can invoke federal question jurisdiction. In that sort of case, of course, the citizenship of the parties and the amount in controversy are irrelevant. (*See IV., supra.*)

7) Court Approval of Dismissal or Settlement

The court must approve the dismissal or settlement of a class action. The class must satisfy the requirements for certification under Rule 23(a) and (b) before a court can approve a class settlement (*see 1*), above).

a) Notice of Dismissal or Settlement

Moreover, notice of the proposed dismissal or settlement must be given to all members of the class in a manner as directed by the court. [Fed. R. Civ. P. 23(e)] This notice is required in all types of class actions, unless the judgment will not bind the class. The purpose of notice to class members is to allow them to object to the proposed dismissal or settlement when the court holds a "fairness hearing" to determine whether to approve the dismissal or settlement. (*See below.*)

b) Procedures for Settlements of Class Action Suits

The court must hold a settlement hearing (usually called a "fairness hearing") if the judgment will bind the class and permits settlement only if the court finds the terms to be fair, reasonable, and adequate, considering such factors as whether:

- (i) The class representative and class counsel have fairly and adequately represented the class;
- (ii) The settlement was negotiated at arm's length;
- (iii) The relief provided to the class is adequate in light of the risks and delays of further litigation, the effectiveness of distributing relief to the class, and attorneys' fees; and
- (iv) The settlement treats all class members equitably.

The court must make a finding supporting its conclusion that the settlement meets that standard. Parties seeking approval of a settlement must inform the court of any collateral agreements made in connection with the class settlement.

(1) "Opt Out" Provision

The court may refuse to approve a settlement of a common question class action if members are not provided a new opportunity to opt out.

Thus, members who received notice of the pendency of the class action (*see* 4), above) but declined to opt out may be permitted a second opportunity to opt out, essentially to reject the terms of the settlement and proceed on their own.

(2) Court Approval Required for Payment in Connection with Objection

The court also must approve, after a hearing, any payments or other consideration made to a party so that she will forgo an objection or appeal.

c) Appeal of Approval of Settlement

A class member who objects to the approval of settlement may bring an appeal of the approval of settlement. [Devlin v. Scardelletti, 536 U.S. 1 (2002)]

8) Appeal of Class Action Certification Decision

Although a court's order granting or denying the certification of a class is not a final judgment in the case, a party may *seek* review of the decision in the court of appeals under Rule 23(f). (*See* X.C.6., *infra*.) The court's decision on the type of notice to give may not be immediately appealed.

d. Class Action Fairness Act

The Class Action Fairness Act ("CAFA") relaxes federal jurisdictional requirements for *some* class actions in an effort to make it easier for class action plaintiffs to file in federal court and for class action defendants to remove class actions from state to federal court. (Congress had concluded that some state courts had certified class actions inappropriately and that greater access to federal courts would protect defendants from such perceived abuses.)

1) Subject Matter Jurisdiction Under the CAFA

Under the CAFA, subject matter jurisdiction is established if:

- a) *Any* class member (not just the representative, but anyone in the plaintiff class) is of diverse citizenship from *any* defendant;
- b) The amount in controversy *in the aggregate* (that is, adding all the class claims together) *exceeds \$5 million*; and
- c) There are at least *100 members* in the proposed class or classes.

2) Removal Under the CAFA

Additionally, in a case falling under the CAFA, *any* defendant, rather than *all* defendants, may remove the case from state to federal court. Moreover, there is no in-state defendant limitation on removal—the case may be removed under the CAFA even if a defendant is a citizen of the forum.

3) Excluded Actions

- a) **Primary Defendants Are States or Governmental Entities**
There is no federal court jurisdiction under the CAFA if the primary defendants are states, state officials, or other governmental entities against whom the court may be foreclosed from ordering relief.
 - b) **Claims Based on Securities Laws or Regarding Corporate Governance**
There is no federal court jurisdiction under the CAFA over a class action that *solely* involves a claim under *federal securities laws*, or that relates to the *internal affairs of a corporation and is based on the laws of the state of incorporation*.
- 4) **Local Considerations May Defeat Jurisdiction**
The CAFA has some provisions designed to defeat federal jurisdiction in class actions that are relatively local in nature. These provisions contain some unclear terms.
- a) **Mandatory Decline of Jurisdiction**
A district court *must* decline jurisdiction provided by the CAFA if: (i) *more than two-thirds* of the members of the proposed plaintiff class *are citizens of the state in which the action was filed*; (ii) *a defendant* from whom “*significant relief*” is sought is *a citizen of that state*; (iii) the “*principal injuries*” were incurred *in the state in which the action was filed*; and (iv) no similar class action has been filed within *the prior three years*.
 - b) **Discretionary Decline of Jurisdiction**
A district court *may* decline jurisdiction provided by the CAFA if *more than one-third but less than two-thirds* of the proposed plaintiff class are *citizens of the state in which the action was filed* and the “*primary defendants*” *are also citizens of that state*. In that case, the court considers a variety of factors, including whether the claims involve matters of national interest, whether the claims will be governed by the law of the state in which it was filed, and whether the state has a “distinct nexus” with the class members, the alleged harm, or the defendants.
- 5) **Protections Under the CAFA**
The CAFA adds a number of protections that apply to settlements in *all* class actions in federal court.
- a) **Coupon Settlements**
Sometimes, class action settlements provide that the class members are to receive coupons good for purchase of further goods or services from the defendant. The court may approve such a settlement only after *holding a hearing* and *making a finding that the settlement is fair*, and it may also require that *unclaimed coupons be distributed to charitable organizations*. If attorneys’ fees in such cases are to be based on the value of the settlement to the class, they must be limited to the value of the coupons actually redeemed by class members, rather than the total amount available to class members. Alternatively, attorneys’ fees can be based on the amount of time class counsel reasonably expended on the action.

b) Protection Against Loss by Class Members

In some consumer class actions, some class members have actually lost money, because attorneys' fee awards required them to pay the lawyers more than they received from the settlement. A court may approve a settlement that would have that effect only if it makes a written finding that nonmonetary benefits to the class member *substantially outweigh* the monetary loss.

c) Protection Against Discrimination Based on Geographic Location

The court may not approve a settlement that provides larger payouts for some class members than others solely because the benefitted class members are located closer to the court.

d) Notification of Federal and State Officials

Settling defendants are required to give notice of proposed settlements to identified federal and state officials. Final approval of the proposed settlement may not be issued until at least 90 days after the notice is served. A class member who demonstrates that required notice was not provided may choose not to be bound by the settlement.

e. Shareholder Derivative Suits

[Fed. R. Civ. P. 23.1]

1) Minority Shareholder Allegations

A minority shareholder, suing on behalf of other minority shareholders to enforce some right of the corporation which the corporation refuses to assert, *must allege* in a *verified* complaint that:

- (i) She was *a shareholder at the time* of the transaction complained of (or received her shares thereafter by operation of law);
- (ii) The action is not a *collusive* effort to confer jurisdiction on the court that it would otherwise lack; and
- (iii) She made a *demand on the directors* and, if required by state law, on the shareholders, or the reasons why she did not make such demands. For this requirement, facts must be pleaded with particularity.

Rule 23.1, like Rule 23, requires that the class representative be able to fairly and adequately represent the class.

2) Corporation Named as Defendant

The corporation must be named as a defendant if those who control the corporation are antagonistic to the action sought by the plaintiffs. If not so named, the court will align the corporation as a defendant to reflect the antagonism.

3) Jurisdictional Amount and Venue

The judgment runs to the corporation; therefore, the jurisdictional amount looks to the damages allegedly suffered by the corporation. By statute, venue is proper wherever the corporation could have sued the same defendants (usually in the state of its incorporation). [28 U.S.C. §1401]