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## **Erin Brockovich turns European : is there an interest for class actions?**

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## INTRODUCTION

Class actions are often related and associated to the American legal culture, as it is illustrated by several movies including the famous “Erin Brockovich” picture.

However, the class actions or collective redress actions exist also in other jurisdictions, notably in Europe.

Precisely, the European Commission has recently given an accurate definition of collective redress and of its aim in its communication named “Towards a European Horizontal Framework for Collective Redress”<sup>1</sup>, accompanying its “Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”<sup>2</sup>:

*“Collective redress is a procedural mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single court action. Collective redress facilitates access to justice in particular in cases where the individual damage is so low that potential claimants would not think it worth pursuing an individual claim. It also strengthens the negotiating power of potential claimants and contributes to the efficient administration of justice, by avoiding numerous proceedings concerning claims resulting from the same infringement of law.”*

Although collective redress and class actions exist in several jurisdictions in the world, there are some differences arising from different legal and procedural cultures, notably between the Common Law and the Civil Law legal systems.

Thus, the purpose of this questionnaire is to identify such differences as well as the common points between the collective redress and class actions in various jurisdictions.

There is also a particular focus on class actions in the anti-trust field, which is one of the main areas for such actions, as shown by the recent proposal for an EU “Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union”<sup>3</sup>.

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<sup>1</sup> COM(2013) 401/2

<sup>2</sup> C(2013) 3539/3

<sup>3</sup> COM(2013) 404 final

## 1. Existence and scope of class actions/collective redress actions

1.1 In your jurisdiction, is there any specific legislation dealing with class actions/collective redress actions, and is there a specific definition of such actions?

Yes. The Federal Rules of Civil Procedure govern civil actions in U.S. federal courts. Many state courts follow broadly similar rules at the state level. Federal Rule 23 authorizes class actions. A class action is usually defined as a lawsuit brought (or, rarely, defended) by one party on behalf of himself or herself and all others similarly situated, in which the representative party litigates common claims of a class of individuals or entities too numerous to effectively join the lawsuit themselves.

Class actions are exceptions to the rule that litigation is conducted by and on behalf of the named parties only, who must be the real parties in interest with respect to the claims before the court. Because class members not personally before the court will nevertheless be bound by the judgment in the case and unable to re-litigate the same claims or issues in future cases they might bring in their own names, class actions (and all representative litigation) implicate constitutional due process concerns (the maxim that a person may not be deprived of rights or property without due process of law). As a result, many of the procedural requirements imposed on class actions serve the interest of protecting the rights of the absent class members. Federal Rule 23 sets forth those requirements, effectively establishing the circumstances in which a class action may be brought.

Rule 23 is fundamentally procedural. It does not expand the jurisdiction of courts or confer, limit, or modify substantive rights provided by other laws. But in creating a procedural mechanism for class actions, Rule 23 has profound practical effects on the enforcement of rights and the contours of litigation in the United States.

Rule 23(a) identifies four characteristics required for all class actions: (1) the class must be of such a size that joinder of each member as an individual party is impracticable; (2) questions of fact or law common to the class exist and are material to the class's claims or opposing party's defense; (3) a member of the class is joined as a named party to the action and may act as class representative to litigate claims or defenses typical of the class; (4) the class representative will adequately represent the interests of the entire class. Those four requirements for class certification are often summarized as (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Though the contested issues naturally vary from case to

case, commonality and its close relative typicality often garner the most attention.

If all four of the requirements in Rule 23(a) are satisfied, a class action may proceed under any one (or more) of the three alternatives appearing in Rule 23(b): (1) a situation in which individual litigation runs the risk of creating a different standard of action for the party adverse to the class (this is very rarely used) or where an individual action would practically, though not technically, have the effect of binding class members anyway under the principles of *res judicata* (issue preclusion or claim preclusion); (2) a situation in which a party has taken or refused to take action with respect to a class as a whole, and final injunctive or corresponding declaratory relief having the effect of an injunction would be appropriate with respect to the entire class; and (3) any other circumstance in which the court determines that questions of fact or law predominate over any issues affecting class members on an individualized basis and a class action is a superior alternative to the other available methods for fair and efficient adjudication of the controversy. Class certification under Rule 23(b)(2) happens most often when the legality of an ongoing uniform policy or practice is disputed, such as in discrimination cases. Class certification under Rule 23(b)(3) happens most often when the class was subjected to the same alleged wrong (past or present) but the class members may have suffered in varying ways, most notably with respect to the extent of the damages suffered.

Two unwritten additional requirements for class actions have developed in case law: (A) the class must be clearly defined and objectively identifiable, so parties know with a high degree of certainty who is in the class and hence bound by the judgment in the case, and (B) litigating the action to judgment must be manageable by the court. When a class is not defined by an immutable characteristic (e.g., women who worked for Wal-Mart), ascertainability can present a problem unless the adverse party's business records establish with reasonable certainty who was affected by the challenged practice or product. Manageability may pose a problem when the party urging class-action treatment cannot propose a realistic way in which the case will be tried to verdict and judgment.

Certification of a class action lies within the discretion of the trial court, provided the party proposing the class carries its burden of satisfying the requisites of Rule 23(a) and one of the Rule 23(b) alternatives. But the district court's discretion is constrained by the requirements of Rule 23. Under Rule 23(f), interlocutory appellate review of class-certification orders is available (in the discretion of the appellate court) to correct legal errors or address a manifest abuse of the district court's discretion.

Unusually for the adversarial system in the United States, judges presiding over a class action have a duty to look out for the interest of the absent class members and ensure that the named plaintiffs and defendants are not conducting the case in a fashion that prejudices the rights or harms the interests of absent class members.

- 1.2 Are class actions/collective redress actions applicable to any legal action, irrespective of the legal ground and the area of law, or do they have a scope limited to some fields of law (such as consumer law, competition law, environmental law...)?

In *theory*, the class action procedure may be applied to any civil action, regardless of the legal claims asserted or the general area of law, unless a given statute expressly forbids class actions for some policy reason. Nothing in Rule 23 limits its application to certain legal subjects. But the class-action requirements may effectively make the procedure unavailable for certain kinds of claims. If resolving a given claim requires a plaintiff to prove some fact specific to the circumstances of the plaintiff, or a defendant raises a defense that applies uniquely to each plaintiff's claim, then individualized issues may predominate over common issues and make the class action device unsuitable. Those principles make equitable claims such as unjust enrichment ill-suited to class-wide adjudication. In the United States, the fields of law seeing the most class action activity of late are products liability, consumer protection, securities fraud, antitrust, and unlawful discrimination (on grounds of race, gender, sexual orientation, religion, etc.).

Some substantive laws forbid using class actions to redress alleged wrongs but leave open other procedural avenues. Most famously, the Fair Labor Standards Act (regulating the work day and week and requiring overtime pay at certain rates) does not permit class actions but does allow a "mass action" or "collective action," in which one party starts the case by purporting to represent the common interests of others, then individuals similarly situated to the plaintiff are given notice of the action and an opportunity to join as a named plaintiff.

- 1.3 Is there any interplay between several statutes, for instance between competition law and consumer law statutes? Is it allowed to bring a class action / collective redress action on the ground of several statutes, or is it mandatory to ground it on either set of statutes?

Unless expressly forbidden (such as by a provision of law making class actions unavailable for redress of wrongs under certain statutes), class actions may be grounded in any substantive provision of law, whether

statutory or common law. Claims under multiple legal theories, grounded in one or more statutes, may be combined in a single class action, subject to the usual rules on joinder of parties and claims. Adding claims may make a mandatory class action under Rule 23(b)(2) unsuitable or change the balance of the predominance/superiority analysis under Rule 23(b)(3), so practitioners must take care when deciding which claims to join in a single case. At the same time, leaving out of a case claims that the class members would otherwise have (known as claim-splitting) may reflect poorly on a putative class representative's adequacy, if the representative is putting his personal interest in getting a class certified over the interest of all class members in having their claims adjudicated economically.

1.4 Is it allowed to initiate summary/emergency proceedings in class actions / collective redress actions?

Yes. Emergency motions for injunctive relief, including preliminary injunctions designed to remain in place during the pendency of the action before the parties' rights have been finally determined, are permitted in class actions, subject to the usual rules governing the propriety of injunctions. There is some open question as to whether a preliminary injunction may burden one party for the benefit of a putative class before the class has been formally certified in accordance with the requirements of Rule 23. After a class has been certified, a preliminary injunction certainly may be entered for the protection of the class.

1.5 Through class actions/collective redress actions, is it possible to claim cessation of unlawful practices/behaviors ("injunctive relief actions") and/or to claim compensation for damage suffered ("compensatory relief actions")?

Yes, both forms of relief are available in class actions. Rule 23(b)(2) is most often invoked as the basis for certifying a class seeking an injunction, because the rule is tailored for cases addressing whether a party's action or inaction toward a class as a whole should be enjoined. Rule 23(b)(3) is most often invoked as the basis for certifying a class seeking damages (an injunction or declaratory judgment may be requested as well in the same case), as that rule allows for resolution of claims that do have individualized issues—damages most often are individualized—as long as the individualized issues do not predominate over the issues of fact or law common to the class. The last few years has seen extensive litigation over whether damages may be recovered by a class proceeding under Rule 23(b)(2). In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the United States Supreme Court decided that claims for individualized damages must be litigated under Rule 23(b)(3), though the Court left open the possibility that damages affecting the class as a whole (such as a group

remedy or possibly automatic statutory damages) could still proceed under Rule 23(b)(2). A hotly contested issue at present is whether “formulaic” damages may be pursued by a class under Rule 23(b)(2). As the Supreme Court observed in *Dukes*, substantial due process concerns militate in favor of damages claims proceeding under Rule 23(b)(3), in which class members have a right to receive notice of the action and opt-out of the class.

- 1.6 If it is possible to claim compensation, can every type of damage suffered by the victims can be compensated, or only some types of harms (material damages/bodily injuries, death)?

In theory, all types of damages may be recovered in a class action. But the more individualized the damages, and the more specific evidence necessary to prove or contest the damages, the more likely it is that common class issues will not predominate over individualized ones, so the class action may not satisfy the predominance test of Rule 23(b)(3). For example, in a products-liability case, issues surrounding whether the product was defective might be susceptible to determination as a class-wide issue in a class action, but the dollars recoverable by a given class member might need to be reserved for separate adjudication on an individualized basis.

- 1.7 Can the compensation awarded to the victims exceed the compensation that would have been awarded if the claim had been pursued by means of individual actions? More particularly, are punitive damages, leading to overcompensation in favour of the claimant party of the damage suffered, allowed and applied in class actions / collective redress actions?

The class action procedure does not itself, as a legal matter, increase the exposure to the defendant or the potential recovery by the plaintiff or class members. Class actions do not automatically put punitive damages or recovery of attorney’s fees into play when the underlying substantive law would not. As a practical matter, however, the class action may increase the exposure by aggregating claims not worth pursuing into a single large claim worth pursuing, thus converting zero practical liability into meaningful actual exposure. Punitive damages, treble damages (in the antitrust field, for example), and attorney’s fees may be pursued in class actions if the underlying substantive law provides for recovery on that basis. One of the economic rationales for punitive damages may have some diminished vitality in class actions, insofar as extracting from the defendant and giving to the plaintiff money in recognition of all the other claims not brought by other victims doesn’t apply if all the “other victims” are in the case by virtue of being members of the class.

- 1.8 More particularly in the anti-trust field, how does the ‘passing on’ defence (demonstrating that the claimant passed on the whole or part of the overcharge resulting from the infringement) play a role in your country and have such a defence been successful?

In the antitrust field, the passing-on defense was rejected by the United States Supreme Court in *The Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 88 S. Ct. 2224 (1968). On the other side of the coin, an indirect purchaser who paid the marked-up price charged by someone passing on the illegally high price has no claim against the anti-competitive manufacturer who sold to the middleman. *Illinois Brick Co. v. Illinois*, 97 S. Ct. 2061 (1977). So too an indirect seller cannot recover an undercharge resulting from the indirect buyer’s anticompetitive activities. The plaintiff and defendant in an antitrust suit must have dealt with one another directly. *Zinser v. Continental Grain Co.*, 660 F.2d 754 (10th Cir. 1981). For a discussion of how passing on can make a proposed class representative inadequate because he may have benefited from anticompetitive activity while other class members may have lost, see *Valley Drug Co. v. Geneva Pharm., Inc.*, 350 F.3d 1181 (11th Cir. 2003).

## **2. Standing and admissibility to bring class actions/collective redress actions**

- 2.1 In your jurisdiction, may the class actions / collective redress actions be brought by any group of individuals or legal persons claiming to have been harmed by the same alleged infringement (“collective actions”), and/or can they be brought by an authorized representative entity/ ad hoc certified entity/ public authority on behalf and in the name of two or more individuals or legal persons claiming to be victims of the relevant practice (“representative actions”)?

Anyone can bring a putative class action lawsuit, provided that the relevant underlying substantive law allows for the party’s claims to be adjudicated on a class action basis and the party has satisfied the procedural requirements for a class action. Whether a party can serve as a class representative (the lead plaintiff) in a federal class action lawsuit is governed by Federal Rule 23. A class representative and the class members he or she purports to represent must have similar claims that share common questions of law or fact that are material to the class’s claims or the opposing party’s defenses. In effect, that requirement typically means that the class members and class representative must have suffered similar injuries arising out of the same conduct, occurrence, policy, or practice. To the extent that individual questions of law or fact (including calculation or apportionment of damages) predominate over common class issues, the class cannot be certified. Additionally, the named class representative must have claims that are typical of the class’s claims and adequately represent



the interests of the entire class. (*See* Section 2.3, *infra*, for further discussion about the requirements for class representative.)

Class actions are usually brought as private actions; however, governmental agencies and regulators can participate in class actions as either class representatives or class members to the extent they have suffered the same injuries or have claims typical of the class's claims. Additionally, state governments may bring representative actions—as distinguished from class actions—in which the state represents the interests of its citizens but itself does not share the same injury or claims. The state acts in such cases as *parens patriae*; that is, as the legal representative of the state to vindicate the state's sovereign and quasi-sovereign interests, as well as the individual interests of the state's citizens. *Parens patriae* actions often include cases where a state has sought to enjoin a public nuisance or ensure the economic well-being of its citizenry. Examples include seeking an injunction to prevent the defendants from discharging sewage in a way that polluted a local river, cases where a state sought to maintain access to natural resources for its citizens, and cases where a state sought redress against retail pharmacies for alleged violations of state laws regarding generic-drug pricing.

Federal regulators, such as the Equal Employment Opportunity Commission and the Environmental Protection Agency, may also bring similar representative actions—that are not governed by class action rules—on behalf of certain categories of people (employees, for example) or large segments of the public. Additionally, the Fair Labor Standards Act (the “FLSA”) authorizes employees to recover unpaid minimum wages and overtime wages and seek redress for retaliatory discharge against employers through mass actions on the employee's own behalf and on behalf of any “similarly situated” employees. Collective/representative actions under the FLSA differ from traditional class actions in that employees who wish to be part of a claim must opt-in by filing a written consent, and courts generally hold that FLSA collective actions need not comply with the class action requirements of Rule 23.

2.2 Are there any criteria/rules defining the cases where one or another kind of actions referred to in 2.1 could apply?

Federal Rule 23 applies to class actions in the federal court system, whereas representative or mass actions that are not class actions will be governed by the specific statutes authorizing such actions, under either state and/or federal law.

2.3 In case of representative actions, are there rules defining the requirements for representative entities (for instance: a non-profit character; a relationship between the main objectives of the entity and the rights that are claimed to have been violated; financial/human resources/legal expertise requirements...), and can the representative entities be sanctioned if they do not comply with such requirements?

Federal Rule 23 requires that the class representative in a federal class action adequately protect the interests of absent class members he or she purports to represent. The adequacy of a class representative is a question of fact that will depend on the circumstances of each case and typically involves inquiry into two issues: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representative will adequately prosecute the action. Courts may also consider the qualifications of class counsel in connection with an examination of the adequacy of the class representatives. Courts should resolve issues of adequate class representation as early as possible in the litigation, and often do so in connection with class certification.

Only fundamental or substantial conflicts can render a named representative inadequate. Fundamental conflicts arise where, for example, some class members claim to have been harmed by the same conduct that benefitted other members of the class such that the class representative cannot vigorously prosecute the interests of the entire class because their interests are actually or potentially in conflict with the interests and objectives of other class members. Minor conflicts or differences among class members and the named representatives will ordinarily not support a finding of inadequacy so long as their shared common goals for the litigation predominate over any such differences.

In some cases, there can be considerable jockeying and competition among class members to be class representative. This can occur for many reasons unrelated to representative adequacy, including the potential for large attorney fees and enhanced damage awards for named plaintiffs, as well as control of the litigation. In the context of securities-fraud class actions, Congress addressed these concerns and other abuses through the Private Securities Litigation Reform Act of 1995 (“PLSRA”). Among other things, the PLSRA requires the court to identify and designate a lead plaintiff who the court determines to be the best representative for the other class members. That is a departure from the requirements generally applicable to class actions.

There are a number of actions a court can take if it determines that a named class representative is inadequate and/or finds substantial conflicts of interest among the class. The court can refuse to certify a party as a named

representative. It can also either dismiss the case or refuse class certification, thereby allowing the case to continue only for the benefit of (or against) the named parties. Other options for the court include certifying subclasses, limiting the class to individuals whose interests would be adequately protected by the named representatives, or requiring the joinder (addition) of other representatives to ensure adequate representation for the entire class.

2.4 Is the admissibility of a class action / collective redress action examined by the courts at an early stage of the proceedings, or is it ruled together with the merits of the case?

Admissibility of a class action (whether the claims may be litigated on a class basis), known as class certification in the United States, is one of the most heavily litigated issues and most important rulings—if not the most important ruling—in a putative class action. Rule 23(c)(1)(A) provides that “[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.” While either the plaintiffs or defendants may move for class certification, the court has an independent obligation to assess the appropriateness of the purported class action if neither party raises the issue.

In theory, the decision whether to certify a class is separate from a determination of the merits of the underlying claims. The court’s focus at class certification is whether the action satisfies the Rule 23(a) requirements of (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. (*See* the answer to Question 1.1, *supra*.) Certification is proper if the court “is satisfied, after rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551-52 (2011). If the court determines that one or more of these requirements are not met, the action cannot continue as a class action and certification will be denied—thereby leaving the class members to pursue their claims on an individual basis, if at all. The court has broad discretion in deciding whether to certify a class; and, if certification is denied for the entire class, the court may still allow the case to proceed as a partial class action.

Although evaluation of the merits of the underlying claims is an improper consideration at class certification, the court’s inquiry into the Rule 23(a) factors, particularly commonality, will often require the court to consider what the class will have to prove at trial to succeed on the merits and whether those elements can be established by common proof (making class action treatment appropriate) or individual proof (perhaps making class action treatment inappropriate). While such an inquiry at the class

certification stage involves analysis of the elements of the parties' claims and defenses, it does not cross the line into improper evaluation of the merits so long as the court does not engage in a determination of the class's probability of success on the merits. Yet, as the U.S. Supreme Court explained, the required "rigorous analysis" of class certification issues "will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Wal-Mart*, 131 S. Ct. at 2551-52.

2.5 Is it possible for third parties to bring actions? If so, are indirect purchasers able to bring actions with respect to antitrust infringements?

Whether a particular party, or parties, may assert a certain claim—as a class action or otherwise—will depend on the substantive law governing that claim rather than the procedural rules applicable to the maintenance of class action cases. Class action rules and procedure cannot confer standing on a party that would not otherwise not have legally recognized claim. See the answer to Question 1.8, *supra*, for a discussion of suits by indirect purchasers.

2.6 How may claims be aggregated? For example, is it possible for multiple plaintiffs to file a complaint jointly?

Class actions, by definition, are intended as a mechanism for multiple plaintiffs to resolve claims that could not be practicably joined or litigated on an individual basis. There are no set numerosity limits, and the number of claims that can be aggregated in a class action depends on the facts and circumstances of each case. Class actions have been certified with hundreds of thousands, and even millions, of class members and as few as thirteen class members. Some courts have held that the impracticability of joinder requirement is presumed at a level of forty class members. However, class size is not the sole consideration and courts will also assess other factors, including the nature of the action, the size of the individual claims, and the location of the members of the class or the property that is the subject matter of the dispute. At class certification, the plaintiff is not required to allege the exact number of class members, but the plaintiff must provide facts or demonstrate circumstances showing a reasonable estimate of class size. Courts will not certify a class based on speculation.

2.7 More generally, what procedural defences are available for defendants short of trial and therefore before the national court decides on the merits of a collective action?

Broadly, there are a number of procedural opportunities for a class action defendant to defeat the class claim prior to a trial on the merits. The first opportunity is at the pleading stage where the defendant can move to

dismiss the claim on the basis that the plaintiff has failed to state a cause of action against the defendant. Such a motion is often called a “so what” defense, in that the defendant argues that the plaintiff has no claim even if everything the plaintiff has alleged is true. A defendant can also challenge the court’s jurisdiction and/or argue that another venue or forum would be more appropriate for the resolution of the class claim. And, as discussed in response to Question 7.4, *infra*, defendants have had some success dismissing consumer class actions on the basis of mandatory arbitration clauses in the underlying service or product agreements.

After the motion to dismiss stage, a defendant’s next (and best) procedural opportunity to defeat a class action is at class certification. Class certification is often dispositive because the case cannot continue as a class action if certification is denied.

Should a defendant lose at the motion to dismiss stage and fail to block class certification, the next procedural opportunity to prevail before trial is at summary judgment, which typically occurs after the parties have completed fact and expert discovery. Summary judgment is akin to a trial on paper, and is only appropriate where there are no genuine, disputed issues of material fact and the moving party is entitled to judgment in its favor as a matter of law.

### **3. “Opt-in” vs “Opt-out” systems and information on the class action/collective redress action**

3.1 In your jurisdiction, is the claimant party/group formed on the basis of express consent of the natural or legal persons claiming to have been harmed (“opt-in” principle), or is it composed of all individual belonging to the defined group and claiming to have been harmed by the same of similar practice unless they actively opt out of the group (“opt-out” principle)?

This varies by the basis on which the mass action proceeds or the class representative seeks class certification. As a general rule, a mass action initiated by a lead plaintiff on behalf of others, such as (most commonly) for violations of the wage-and-hour rules in the Fair Labor Standards Act, proceeds as an opt-in class, with only those plaintiffs who receive notice of the action and take an affirmative step to join the litigation being treated as plaintiffs / part of the class. For an ordinary class action under Rule 23(b)(3), the class is formed on an opt-out basis. Potential members of the class have a right to notice of the class action and the class claims to be litigated and have some period of time to opt-out of the class. Opt-outs most commonly happen when a class member wants to proceed in its own name and control its own destiny by filing a separate individual claim.

The federal rules authorize a third option not presented by this question: a mandatory class. A class certified under Rule 23(b)(2) may proceed as a mandatory class with no right of class members to opt out, on the theory that the outcome of the litigation will by its very nature benefit or burden everyone in the class regardless of a personal wish to not be so benefited or burdened, such that opting out would be meaningless. An example of this would be a discrimination case: if a class representative sues the public bus operator in Birmingham, Alabama for an injunction against requiring African-American passengers to sit at the back of the bus as a condition of receiving service, all African-American members of the community will benefit from the injunction if granted, so there is no point to giving notice and affording a particular citizen an opportunity to opt-out of a lawsuit that will benefit him anyway; the potential burden on the absent class member is the risk of losing, and forbidding opt-outs in this situation protects successful defendants from having to defend the same case a second time when brought by a party who opted out.

### 3.2 What are the effects of the judgment on the victims in the “opt-in” or “opt-out” system chosen in your jurisdiction?

A judgment entered in an opt-in mass action will directly bind only those who opted in. Only such opt-ins will have a right to receive proceeds from the lawsuit or benefit from an injunction. Individuals who could have opted in but did not for some reason may, however, get some indirect benefit from a successful outcome in that the losing adverse party may be precluded from re-litigating in a follow-on case brought by bystanders an issue lost in the first case against the opt-ins. The opt-in system has some attractiveness for defendants because it starts with the smallest class possible—i.e., the named plaintiffs only—and grows in number and potential liability only as claimants take affirmative steps to join the class. That lower potential liability comes at the price of less preclusive effect of the judgment: the defendant can always expect someone who elected not to opt-in to suddenly appear and want money once liability is determined or a settlement is reached.

A judgment entered in an opt-out case will directly bind only those members of the class who did not opt out. Opt-outs will not be bound and will have no right to receive any proceeds of the lawsuit. Here again, though, opt-outs may get an indirect benefit from a successful class action, in that the losing defendant will be precluded from re-litigating an issue lost in the first case. For this reason, an opt-out system benefits a defendant by resolving a greater number of claims and resulting in a judgment (or settlement) binding on the greatest number of claimants. At the same time,

an opt-out system benefits the plaintiff's side by starting with the maximum size of the class (and hence the largest potential damages amount) and reducing it only by those who take affirmative steps to opt out.

3.3 May a member of the claimant party be free to leave the claimant party at any time before the final judgment is rendered or the case is otherwise settled, and if he/she/it may, on which conditions?

Generally, no. Once the time to opt-out of the class has expired, the size of the class should be fairly fixed. It would work great prejudice on a defendant if a class member could participate in a case until something goes wrong—such as the defendant prevailing on a defense—only to opt-out at that stage and re-litigate the matter in a subsequent lawsuit. This is known as one-way (outbound, of course) intervention, and it is best avoided. The same holds true for opt-in claimants: once they have chosen to cast their lot with the representative party, it would be unfair to the defendant to allow them to back out and bring a separate lawsuit. In mandatory classes, members cannot opt out at all, unless for some reason the court allows it.

3.4 May a natural or legal person claiming to have been harmed in the same mass harm situation be able to join the claimant party at any time before the judgment is rendered or the case is otherwise settled?

A court is required to grant a timely motion for intervention if a statute allows for it or if someone who is not adequately represented has an interest in the litigation and: (1) files a timely application; (2) proves his interest in the litigation; (3) demonstrates that the interest may be impaired by the disposition of the action; and (4) shows that the interest is not adequately protected by the parties to the action (this inadequacy standard is not as stringent as the initial adequacy requirement in Rule 23(a)). The court will usually set a time for parties to intervene as party of a scheduling order in the case. A scheduling order may be modified in the discretion of the court upon a showing of good cause.

A court has discretion to permit intervention upon a showing that the applicant has a claim or defense that shares a common question or fact or law with the principal claims in the case. Since a party qualified to intervene would ordinarily be a member of the class whose interests are presumably being represented by the class representatives and their counsel, intervention in this fashion would be unusual, unless the applicant is attempting to get his or her own lawyers directly involved in the case for some reason.

3.5 Is the defendant informed about the composition of the claimant party, and in which conditions?

Absolutely—it is essential. The class action complaint (the case-initiating document) should give some indication of the contours of the proposed class. The class-certification order must clearly define the class by some objective characteristics. And, as mentioned in response to Question 1.1, *supra*, the class must be ascertainable: the parties must be able to determine in some fashion who the members of the class are, in order to know who is bound by the judgment.

3.6 Are there any provisions regulating the way the victims of the practice are informed about a possible or actual class action / collective redress action? More particularly, are there safeguards regarding the protection of the reputation or the company value of the defendant before (and after) its responsibility for the alleged infringement is established by the final judgment?

Class actions involve four kinds of notice to the absent class members: certification of the class and class claims, proposed and actual settlement, proceedings for an award of attorney’s fees, and any other matter in the discretion of the trial judge. Except in cases proceeding under Rule 23(b)(1) and (b)(2) and for notices issued in the discretion of the trial judge, notice to absent class members is mandatory, to be delivered by the best practicable means, with the first notice to be issued promptly upon certification of the class. The cost is typically borne by the class representative or class counsel.

3.7 Is there any registry of class actions / collective redress actions in your jurisdiction? If there is such a registry, how is it possible to access it?

No. But the class action plaintiff’s bar is well networked, so information about pending class actions and settlements may be obtained from contacts active in the specialty. Additionally, the default rule in the United States is that court proceedings and records are generally open and public, such that information about class actions generally can be obtained with little difficulty.

#### **4. Interplay of class actions / collective redress actions and public enforcement**

4.1 In your jurisdiction, do class actions / collective redress actions have to follow on from infringement decisions adopted by public authorities in regulated policy areas like competition law (“follow-on actions”) or is it possible to start a



stand-alone action (ie, without a prior finding of infringement of any applicable antitrust laws by a national court or competent authority)?

There is no requirement that class actions have to follow decisions adopted by public authorities. Private litigants may bring any claims to the extent such claims exist under applicable substantive law or the parties premise their claims on a good-faith argument for the extension of existing law.

4.2 Are such stand-alone and/or follow-on actions available for both bilateral antitrust infringements (eg, a cartel) as well as unilateral antitrust infringements (eg, an abuse of a position of dominance)?

Generally, yes—so long as the asserted claims have a basis in existing substantive law or a good faith argument for the extension of existing law. In fact, it is quite common for class action litigation—particularly securities fraud, antitrust, and consumer protection cases—to be initiated immediately after a governmental agency has merely announced that it is investigating a business or product for potential violations. Adverse administrative action or unfavorable court rulings against a business often serve as a clarion call for the initiation of putative class actions.

4.3 In such cases, are there rules regulating access by claimants to documents obtained or produced by the public authority in the course of the investigation? What kind of devices to obtain evidence are available for plaintiffs? Is, for example, discovery possible in your country?

The full range of broad pre-trial American discovery is available in class action litigation, either under the Federal Rules of Civil Procedure or analogous state court rules. In the U.S., private litigants control discovery with only limited court oversight. Each party to a lawsuit has the right to demand that its opponent produce all documents in the opponent's possession, custody or control that relate to claims at issue in the case. Litigants also have the right to demand written answers to questions (interrogatories), sworn admission of certain facts related to the case, and answers to oral questions relating to the claims (depositions). Litigants are also entitled to similar access to third party companies and individuals that might have information related to the case. The only exception in class action litigation is that discovery from absent, unnamed class members is disfavored and not typically permitted.

Whether a class action litigant (or any litigant) may obtain documents directly from a public authority or government agency—typically through a Freedom of Information Act (“FOIA”) request—will depend upon whether that authority is involved in an ongoing investigation, whether the authority

has deemed the requested documents “public” or “confidential,” whether the requested documents have already been publicly released (in which case a formal FOIA request may be unnecessary) and whether the authority is required by law to disclose the requested information or maintain its confidentiality.

To the extent a party is seeking documents or information from a public authority that the authority obtained from a private party in the lawsuit or a third party, discovery of that same information should be sought directly (and can generally be obtained) from the source under applicable discovery rules. The fact that an individual or entity provided certain information to the government does not usually allow that individual or entity to resist production of the information during discovery.

4.4 Are there rules on limitation periods allowing potential claimants to wait with class actions until the public authority takes its decision as regards the infringement?

The procedural rules regarding class actions do not toll or extend the substantive limitations periods, and the fact that a public authority might be investigating a class action defendant will not alone suffice to toll any limitations period for private litigants. Conversely, a class action tolls the statute of limitations for all putative class members, at least until certification is denied or a class member opts out, at which point the limitations period begins to run again. A party considering whether to bring a class action lawsuit (or any kind of lawsuit), is well advised to consult the applicable limitations periods for the contemplated claims as early in the pre-filing investigation as possible.

Parties can, and often do, enter private tolling agreements that toll the applicable limitations period for filing a claim in order to discuss settlement, investigate the underlying facts or law, or allow some other related process or event to occur. Courts also have broad powers in many instances to stay proceedings in the interest of efficiency and justice, particularly where parallel or related proceedings are underway.

4.5 Does a decision of the national competition authority or national court create a rebuttable presumption of proof? For EU jurisdictions, how does the judgment of the Court of Justice EU in *Masterfoods* (20 September 2001, C-344/98) play a role in your country with respect to actions based on cartel damages?

A judgment in a criminal case or a civil enforcement action may be submitted as evidence, though the affected party may attempt to explain the circumstances. Statements made in court one case may be introduced in

another as judicial admissions. But the precise contours of the judgment or admission are of paramount importance. In one significant cross-border case recently, a corporation pled guilty to attempting to bribe foreign officials. In subsequent civil litigation by a competitor claiming to have been aggrieved by the attempted bribery, the corporation defended on the basis that the bribes were merely attempted not actually paid, in that an agent had kept the money, as the supposed bribes were fake, a way for the agent to get more from the corporation. To show causation, the competitor thus had to prove more than could be derived from the guilty plea and judgment of conviction.

## **5. Funding of the class actions / collective redress actions, attorney's fees**

5.1 In your jurisdiction, is it possible to have class actions financed by third parties who are not parties to the proceedings?

Yes. Financing of litigation in the United States is largely unregulated, except to the extent that bar ethics rules impose limits on what financing lawyers may provide to clients and to the extent that the adequacy requirement of Rule 23(a) forbids a class representative from having an interest adverse to that of the class members.

5.2 Is the claimant required to declare to the court, notably at the outset of the proceedings, the origin of the funds that it is going to use to support the legal action?

Typically not, unless the party opposing class certification makes an adequacy issue out of the proposed class representative's ability to prosecute the case to judgment (including by paying the costs of litigation). *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). American Bar Association Model Rule of Professional Conduct 1.8(E) permits attorneys to advance costs in all cases, including class actions, with repayment by the class representative or the class contingent upon the outcome of the lawsuit. (This model rule has not been adopted in all jurisdictions; some, such as New York, still follow a rule mandating that clients remain ultimately liable for advanced costs and expenses.) In practice, then, a well-financed plaintiff's law firm is more important to the funding of the costs of litigation than the class representative's personal means. And because the named plaintiff's lawyers and putative class counsel may agree to make payment of attorney's fees contingent upon the outcome of the case, the expenses requiring funding during the litigation may be limited to third-party expenses, such as court reporters, travel, expert fees, etc.

5.3 Can the court stay the proceedings for any reason relating to the funding of the action (for instance: conflict of interest between the financing third party and the claimant and/or its members; the third party has insufficient resources in order to meet its financial commitments to the claimant party; the claimant party has insufficient resources to meet any adverse costs should the collective procedure fail; the fund provider is a competitor of the defendant)?

These issues would not typically result in a stay of the proceedings but rather a decision not to certify the class, or not to certify a given named plaintiff as class representative, on the grounds that the class representative is not adequate to the task of representing the interests of the absent class members.

5.4 Do public funds providing financial support for potential claimants in collective redress/ class actions exist in your jurisdiction?

No. Potential plaintiffs may seek charitable support. But the most ready source of financial support for potential plaintiffs is the class action plaintiff's bar, subject to the usual ethical limitations on lawyers providing financial assistance to clients. If a potential claimant has a meritorious case but cannot fund it himself, all he has to do is find a plaintiff's lawyer willing to take the matter on a contingency basis.

5.5 Are contingency or success fees for legal services that cover not only representation, but also preparatory action, gathering evidence and general case management allowed in your jurisdiction?

Yes, subject to court approval as to the reasonableness of legal fees paid from the proceeds of the litigation.

5.6 Does the losing party of a class action / collective redress action have to reimburse necessary legal costs borne by the winning party ("loser pays principle"), and in which proportion?

If taken to judgment, the losing party in a case is usually required to pay the winning side's "costs." In most instances, such reimburseable "costs" are rather limited: filing fees, court reporter fees, fees for service of process, witness fees, photocopying and printing/binding charges, that sort of thing. "Costs" typically do not include fees payable to experts or attorney's fees. The loser in a class action has no obligation to pay the winner's general expenses of litigation, including expert's and attorney's fees, unless the underlying substantive law provides for such cost-shifting. Unless the statute sued under provides for an aggrieved party's recovery of attorney's fees, or the law for some other reason permits an award of attorney's fees

in the winning party's favor, then attorney's fees may be recovered from the common fund awarded to the class, subject to court approval.

5.7 More generally, are there any rules and/or safeguards aimed at avoiding incentives to abuse the collective redress systems?

In 2005, Congress passed the Class Action Fairness Act ("CAFA"). The objective of CAFA was to curb two forms of abuses: forum-shopping by plaintiffs and the class-action plaintiff's bar that was resulting in an unusual number of class action cases being filed in certain forums considered more favorable to plaintiffs ("class action hell" in the eyes of some defendants), and settlements engineered by named plaintiffs, class counsel, and defendants in a way to ensure handsome payouts to class counsel (who may have been perceived as driving the litigation anyway) and paltry or valueless awards to absent class members. CAFA created additional grounds, unique to putative class actions, for removing lawsuits from state courts to federal courts (in the eyes of some, state courts—particularly those having to stand for election—could be more subject to flattery from or influence by the class action plaintiff's bar than federal judges appointed for life). CAFA also required additional scrutiny of settlements, including by giving state attorney's general a right to receive notice of and an opportunity to object to a settlement affecting class members from their states. Settlements involving coupons for class members enjoy special judicial scrutiny, and CAFA requires attorney's fees awarded on the basis of coupons to consider the amount actually redeemed, not the value available.

5.8 Are the parties to an action able to insure against the cost risks?

Usually not directly, but possibly indirectly. A corporation usually indemnifies its directors and officers and buy directors-and-officers insurance that typically provides coverage for the costs of defending a claim, including a class action lawsuit, alleging securities fraud or other malfeasance. Professionals such as accountants and lawyers typically have errors-and-omissions coverage that may provide a defense and even pay claims brought as a class action. That sort of coverage may be come into play when, for example, investors in a fraudulent scheme bring class claims against accountants and lawyers for not having uncovered the scheme.

5.9 Is a defendant able to apply for an order for security of costs? If so, what are the difficulties to obtain such an order?

Such orders are very rarely granted in the United States, largely because of the “American Rule” that each side pays its own expenses of litigation. Because the costs subject to shifting as a “costs” charged to the losing party are most often fairly small, the expense of obtaining such an order usually makes it not worthwhile to pursue.

5.10 Are there (other) ethical or Bar rules in your country relevant with respect to class actions?

The ethical rules that have particular relevancy to class actions concern lawyers advancing the costs of the litigation and receiving payment of attorney’s fees as part of the judgment or settlement. As mentioned above, American Bar Association Model Rule of Professional Conduct 1.8(E) permits attorneys to advance costs in all cases, including class actions, with repayment contingent upon the outcome of the lawsuit, which basically means that repayment will come from the proceeds of a settlement or collection of a favorable judgment. Awards of attorney’s fees to class counsel are subject to approval by the court, and a great deal of litigation has flowed from controversies over fee awards. If authorized by the underlying substantive provision of law, class counsel may seek an award of attorney’s fees from the opposing party. In other circumstances, the attorney’s fees will be paid from, perhaps as a share of, the common fund generated for the class by the work of the attorneys. Methods of calculating the fee award vary, including a “lodestar” calculated by the number of hours reasonably worked times the hourly rate reasonably payable for similar non-contingent work, then adjusted up or down based on certain factors known as multipliers, such as the risk of the contingency and the quality of the work performed. Another approach considers twelve factors regarding the work performed. And yet another approach allows class counsel to take a percentage of the common fund, usually something in the range of 20-25% of the fund (as compared to 33% - 40% in other contingency cases, such as personal-injury work). For a primer on the various approaches, see *Camden I Condo. Ass’n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991).

## **6. Cross-border cases**

6.1 In your jurisdiction, are there specific international private law rules (conflict of law and of jurisdiction rules) applicable to class actions / collective redress actions, or do the general international private law rules apply to such actions?

There are no specific conflict of laws or jurisdictional rules in the United States relating to cross-border issues that apply solely to class actions.

6.2 Are there rules prohibiting a single collective action to take place in a single forum?

No, to the contrary, public policy in the United States seeks—where possible—to protect parties from needless multiple litigation and inconsistent obligations. That is often accomplished through the class action mechanism by allowing cases involving many claims and parties to be resolved in a single forum. That said, the same forum and venue rules and practices that apply to non-class action cross border cases also apply in class actions.

6.3 Can a representative entity designated by a foreign country have legal standing to bring representative actions in your jurisdiction?

A foreign plaintiff can bring a putative class action in the United States, so long as the foreign plaintiff satisfies the usual jurisdictional, due process, and standing requirements under American law—including the requirements of the particular substantive law at issue. An American court is not bound to certify a class representative solely on the basis that a foreign country has designated that entity as a party representative. The court may, however, consider that fact as part of its inquiry into the adequacy of the class representative and/or class certification.

6.4 What are the rules where there are several actions regarding the same facts and practices brought in different jurisdictions? Is it for example possible to bring an action against a company and/or individual domiciled outside of the jurisdiction (e.g., against a parent company domiciled outside of the jurisdiction which has a subsidiary within the jurisdiction)?

There are no rules unique to class actions that apply in situations where there are several actions proceeding in different jurisdictions at the same time that involve the same parties and the facts and issues. Generally speaking, a court faced with that situation may (upon its own initiative or in response to a request from one or more parties): (1) stay the litigation until common issues of law or fact are resolved in one or more of the related proceedings; (2) transfer or consolidate one or more of various proceedings to the extent it has jurisdiction and authority to do so; or (3) dismiss the case pending before it under the doctrine of *forum non conveniens* (inconvenient forum) so that the parties are forced to litigate the dispute in an alternative jurisdiction where one or more of the related cases is pending.

Whether a party can bring suit against a foreign entity with a subsidiary domiciled in the relevant jurisdiction will depend upon substantive rules of due process and personal jurisdiction that are separate and apart from the

rules governing class actions. Filing a lawsuit as a putative class action will not confer jurisdiction over a foreign party where jurisdiction would not otherwise exist. Broadly speaking, before a foreign (or out of state) defendant may be required to defend a case in the forum state, it must have “minimum contacts” with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. There must be some act by which the defendant “purposefully avails” itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

There are two different theories for personal jurisdiction in the United States: specific and general jurisdiction, both of which are heavily dependent on specific facts. Specific jurisdiction turns on only those facts concerning the actual dispute alleged in the lawsuit. In a contract dispute, for example, a court will consider several factors to determine whether the defendant should have reasonably expected that its actions would lead it to have to answer to a lawsuit in the forum state. These factors include the places of contract negotiation, execution and performance, as well as the location of any alleged breaches. The court will also consider where the plaintiff suffered the alleged harm. Even if some factors do not favour exercising jurisdiction, the court may nonetheless conclude that jurisdiction is appropriate. If the requirements for specific jurisdiction are met, the court will exercise jurisdiction over the defendant for that one specific case. In contrast, a court that has general jurisdiction over a defendant can hear any lawsuit against that defendant—regardless of whether the court would otherwise exercise specific jurisdiction over the dispute. To determine whether it has general jurisdiction over a defendant, a court will look at the totality of the defendant’s activities within the forum state and decide whether these contacts are sufficient in number and consistency to justify the court resolving any and all disputes involving that defendant. For example, the court will consider whether the defendant has employees in the state, whether it has offices within the state, the frequency of the defendant’s advertising within the state, and any other activity that connects the defendant to the state. Additionally, a court always has personal jurisdiction to hear lawsuits against citizens of the state in which the court sits. Once a court determines that it has general jurisdiction over a defendant, it may hear any case against that defendant—including class actions claims.

## **7. Alternative dispute resolution**

7.1 In your jurisdiction, is there any specific mechanism of collective alternative dispute resolution allowing the settlement of class actions / collective redress



actions? If so, are the parties required to engage in alternative dispute resolution prior to trial and are there implications for refusing?

The United States does not have any ADR methods specific to class action / mass action cases. The court may in its discretion order parties to participate in ADR, such as mediation or a facilitated settlement conference, but the court has no power to order parties to settle or to fashion a settlement for the parties. Other than contempt for refusing to comply with a court order regarding settlement discussions or mediation, refusing to participate in settlement discussions or ADR methods such as mediation has limited consequences. From a tactical standpoint, however, parties generally want to appear to the trial judge as amenable to settlement, not recalcitrant. So expressing willingness to engage in settlement or ADR, and notifying the court that a client is undertaking efforts in good faith to settle the case (the fact that efforts are being made, not what happened in the discussions), is perceived by many as likely to curry favor with the judge or at least to avoid creating an unfavorable impression.

7.2 Are the parties encouraged to settle the dispute out of court in any way, and is it a usual practice in your jurisdiction?

This varies from court to court, even from judge to judge. Some judges take a more active role, engaging with the parties to foment settlement talks, others never inquire about or comment on the possibility of settlement. As a reflection of the fundamentally adversarial nature of the U.S. legal system, many lawyers and parties are quite uncomfortable with the judge presiding over a case taking any interest at all or expressing any views on the possibility of settlement, never mind the terms, even though the court will ultimately be called upon to rule on the fairness of the settlement of a class action. Many lawyers and parties view settlement as a matter strictly among themselves for the judge to become involved in only when approving or rejecting the settlement as a whole.

Nevertheless, it is relatively commonplace for courts to refer or even order parties to non-binding mediation in an effort to foster settlement. Depending on the judge's practice and the groundrules followed by the mediator, the judge may or may not learn about the events at the mediation, including whether one party was more or less reasonable in approaching the settlement discussions. In cases large and small, resorting to non-binding mediation is now a tool routinely used in an effort to get the parties to settle. The amounts at stake in many class-action cases make them particularly suited to mediation.

While a variety of other ADR methods are available, they are used far less often than mediation, particularly for class action cases, as class action plaintiffs and counsel have a strong aversion to forums other than courts.

7.3 Are limitation periods applicable to the claims suspended during the period when the parties try and negotiate a settlement through collective alternative dispute resolution mechanisms or any other means?

No, not unless the limitations period is tolled for some other reason, such as by the pendency of the class action itself. Generally, a class action tolls the statute of limitations for all putative class members, at least until certification is denied or a class member opts out, at which point the limitations period begins to run again.

7.4 Can a seller of a good or any contracting party insulate himself/herself/itself from a class action by including, in the terms of use or in a purchase agreement, a mandatory arbitration clause, thus prohibiting the consumer from bringing a class action in court?

Yes. Arbitration agreements are generally enforceable under federal law (and any contrary state law is preempted) and are often seen as a way to escape class action litigation. Arbitration agreements may include a class-action waiver that would prevent class treatment of claims that could otherwise be brought on a class-wide basis. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). And courts may not force parties to arbitrate on a class-wide basis unless the parties agreed to do so. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). The principal exception to the strong federal policy in favor of enforcing arbitration agreements would be specific statutes that make arbitration agreements unenforceable as between certain parties or for certain kinds of claims. *See, e.g.*, 10 U.S.C. § 987(f)(4) (Military Lending Act provision rendering arbitration agreements between creditors and borrowers covered by the Act unenforceable).

## **8. Enforcement of the court decision**

8.1 Are there any provisions regulating the way the victims of the practice are informed about decision rendered in a class action / collective redress action concerning them? If there are such provisions, who is in charge of such information (the court/ an independent entity/ the claimant/the defendant)?

Yes, the requirements and procedures for notice to absent class members in class actions are discussed in the answer to Question 1.2, *supra*.

8.2 Are there any provisions regulating the way the court order is enforced and the possible compensation paid by the defendant? If there are such provisions, who is in charge of the enforcement, notably of the payment of the damages (a public authority/ an independent entity/ the claimant/the defendant)?

Court orders and judgments entered in a class action proceeding are enforced in the same manner as orders in non-class actions are enforced, with the exception that disbursement of the litigation proceeds to the class and payment of attorneys' fees to class counsel are administered in a process that is overseen and approved by the court. The available compensation to the class and class counsel will depend upon the remedies allowed by the underlying statute or common law rule that gave rise to the class claims.

8.3 In relation to injunctive orders, are there rules ensuring their effective compliance by the losing defendant (for instance: payment of a fixed amount for each day's delay or any other amount provided)?

Yes. Courts have authority and discretion—both inherent and by statute—to encourage and ensure compliance with court rulings granting both injunctive and monetary relief. These rules are not specific to class actions, but can include contempt of court proceedings, escalating fines for non-compliance or delayed compliance, and other sanctions that comport with due process.