

Consumer Class Actions (6th ed. 2006)

Contents

CD-Rom Contents xxvii

Introduction 1

Chapter 1

Case and Claims Selection, Other First Considerations

1.1 Whether to File As a Class Action 3

 1.1.1 Introduction—Advantages of a Class Action 3

 1.1.2 Unique Advantage When Individual Damages Are Very Small 4

 1.1.3 Is the Individual Case Suitable for a Class Action? 6

 1.1.4 Required Resources to Pursue a Class Action 6

 1.1.5 Co-Counseling with Other Attorneys 7

 1.1.6 Small Classes vs. Individual Joined Actions 8

 1.1.7 California “Representative Actions” 8

1.2 The Class Representative 8

 1.2.1 What Makes a Client an Excellent Named Plaintiff? 8

 1.2.2 Is One Named Plaintiff Enough? 10

 1.2.3 Client’s Individual Settlement Efforts Do Not Prevent Client’s Later
 Service As a Class Representative 10

 1.2.4 The Client Authorization to Sue As a Class 10

 1.2.5 Keeping Track of the Class Representatives 12

 1.2.6 Defendant’s Attempts to Contact and Settle with the Named Plaintiff 12

1.3 Selecting Parties to Name As Defendants 13

 1.3.1 Importance of Investigating Potential Defendants Before Filing an Action 13

 1.3.2 Techniques to Investigate Potential Defendants 13

 1.3.3 Evaluating Information About Potential Defendants 14

 1.3.4 Named Plaintiff’s Standing to Sue Multiple Defendants 15

1.4 Checking for Related Lawsuits Before Filing the Class Action 16

1.5 Claims Well-Suited to Class Actions 16

 1.5.1 Claims That Are Not Fact-Intensive 16

 1.5.2 Claims That Do Not Assert Intentional Wrong-Doing 16

 1.5.3 Avoid Claims That Require Proof of Reliance or Other Individual Issues 16

 1.5.4 Avoid Claims Requiring Annihilating Damages 18

 1.5.5 Consider Claims That Can Request Equitable Relief 19

 1.5.6 Nature of Claims Should Support Selection of State or Federal Court 19

1.6 Whether to Allege Multiple Claims 20

 1.6.1 General 20

 1.6.2 Multiple Claims Leading to an Unmanageable Case 21

 1.6.3 Multiple Claims Complicate Class Definitions and Settlements 21

 1.6.4 Too Many Eggs in One Basket 22

 1.6.5 The *Janik* Dilemma—Potential Legal Malpractice Liability for Failure to
 Assert All Available Claims on Behalf of Class Members 22

1.7 Quick Reference 23

Chapter 2

Forum Selection

2.1 Considerations in Choosing Federal or State Court. 25

2.2 How to Obtain Federal Court Jurisdiction. 26

2.3 Federal Diversity Jurisdiction in Class Actions Prior to CAFA and for Suits Not Governed by CAFA 26

 2.3.1 Introduction. 26

 2.3.2 Citizenship of Class Members 26

 2.3.3 Each Class Member Need Not Have \$75,000 in Controversy 27

 2.3.4 The Common Fund Exception 27

 2.3.5 How to Compute the \$75,000 Jurisdictional Amount. 28

 2.3.5.1 General Rules of Computation. 28

 2.3.5.2 Punitive Damages 28

 2.3.5.3 Treble or Multiple Damages 28

 2.3.5.4 Attorney Fees 28

 2.3.5.5 Injunctive Relief and Disgorgement 29

 2.3.5.6 Removed Actions 29

2.4 Diversity Jurisdiction and Removal Rights Under the Class Action Fairness Act of 2005. 30

 2.4.1 Introduction. 30

 2.4.2 New Opportunities for *Plaintiffs* to Bring Federal Court Class Actions 30

 2.4.3 Removal of State Court Class Actions to Federal Court 32

 2.4.3.1 Introduction 32

 2.4.3.2 Effective Date of CAFA 32

 2.4.3.3 Who Can Remove a Case? 33

 2.4.3.4 Time Limits for Removal 34

 2.4.3.5 Burden of Proof 34

 2.4.3.6 Appeals from the Grant or Denial of Remand 35

 2.4.3.7 Attorney Fees and Costs for Wrongful Removal. 35

 2.4.4 Class Actions That Can Not Be Removed 35

 2.4.4.1 Small Class Actions. 35

 2.4.4.2 State Class Actions with a Close Nexus to the Forum State 36

 2.4.4.3 When Court Has Discretion to Decline to Permit Removal 36

 2.4.5 “Mass Actions”. 37

 2.4.6 How to Keep a Class Action in State Court 37

2.5 Proper Venue for Federal Court Actions. 38

 2.5.1 General. 38

 2.5.2 Venue Based on the Residence of Corporate Defendants. 39

 2.5.3 Venue Based on Where the Transaction Occurred 39

 2.5.4 Venue with Multiple Defendants. 39

 2.5.5 Removed Actions. 39

 2.5.6 Change of Venue 39

2.6 Coping with Binding Arbitration Agreements in Class Litigation 40

 2.6.1 Introduction. 40

 2.6.2 Challenging the Agreement’s Enforceability 40

 2.6.3 Framing the Complaint to Avoid the Scope of an Arbitration Clause 40

 2.6.4 Proceeding to Arbitration on a Class-wide Basis 41

2.7 Enforceability Challenges to Binding Arbitration Agreements 41

 2.7.1 Introduction. 41

 2.7.2 When Arbitration Clause Does Not Apply to Claim, Defendant, or Plaintiffs 42

 2.7.2.1 General 42

 2.7.2.2 What Claims Are Covered?. 42

 2.7.2.3 Which Defendants Are Covered?. 42

 2.7.2.4 Which Consumers Are Covered?. 43

Contents

2.7.3 When Federal Law Limits Applicability of the Arbitration Clause 43
2.7.3.1 The Magnuson-Moss Warranty Act 43
2.7.3.2 Credit Repair Organization Act 43
2.7.3.3 When Arbitration Clause Limits Federal Remedies 43
2.7.4 Arbitration Clauses May Not Be Enforceable in Insurance Cases 44
2.7.5 When Defendant Waives Right to Arbitrate Claim 44
2.7.6 Issues Relating to Consummation of the Arbitration Clause 45
2.7.7 Unconscionability 45
2.7.7.1 General 45
2.7.7.2 Procedural Unconscionability 46
2.7.7.3 Substantive Unconscionability 46
2.8 Availability of Arbitration on a Class-Wide Basis 47
2.8.1 Class Arbitration: The Next Big Thing? 47
2.8.2 Why Use Class Arbitration? 47
2.8.3 Class Arbitration Is Consistent with the FAA 48
2.8.4 Courts, Arbitrators Increasingly Recognize Class Arbitration 48
2.8.5 Interpreting an Ambiguous Provision Concerning Class-Wide Arbitration 49
2.8.6 When Clause Unambiguously Prohibits Class-Wide Arbitration 49
2.8.6.1 General 49
2.8.6.2 Why a Restriction on Class Arbitration Is Unconscionable 50
2.8.6.3 Choice of State Versus Federal Court and the Applicable State Law 51
2.8.6.4 Lightning Survey of Rulings on Unconscionability of Class Arbitration Waivers 51
2.9 How Class Arbitration Works 52
2.9.1 Who Administers the Class Claim, Establishes Class Arbitration Rules, and Certifies the Class? 52
2.9.1.1 General 52
2.9.1.2 AAA Class Arbitration Rules 52
2.9.1.3 JAMS Class Arbitration Rules 53
2.9.1.4 Implications of NAF's Lack of Class Rules 53
2.9.2 Definition of the Class 53
2.9.3 Issues Relating to Class Arbitration 54
2.9.4 Judicial Review of Class Arbitration Rulings 55
2.9.4.1 What Law Applies 55
2.9.4.2 Limits on Judicial Review 55
2.9.4.3 Further Limits on Interlocutory Rulings 55
2.9.4.4 Defendant Should Not Complain About Procedure It Chose 56
2.9.5 Confirmation of a Final Award 56

Chapter 3

Choosing the Class Definition

3.1 General 57
3.2 Identifiability and Ascertainability of Class Members 58
3.3 Defining the Class Based on Transactional Facts, the Injury Suffered, and the Relief Sought 59
3.4 Simplicity and Limiting the Class Size 60
3.5 Time Limitations on the Class Definition 61
3.5.1 The Statute of Limitations and the Starting Date for Class Membership 61
3.5.2 Other Factors in Affixing the Starting Date for Class Membership 61
3.5.3 The Ending Date and Continuing Classes 61
3.6 Geographic Limitations and Multistate Class Actions 62
3.6.1 General 62
3.6.2 Strategic and Tactical Considerations 62
3.6.3 Applying the Law of the State Where the Defendant Resides 63

Consumer Class Actions

3.6.4 When the Law Is Substantially Uniform Among the States 65
3.6.5 Subclasses As a Means of Dealing with Differences in Law 65
3.7 Defining the Class Using Subclasses 65
3.8 Amending the Class Definition After the Case Is Filed 67
3.9 Quick Reference 67

Chapter 4

Drafting the Complaint

4.1 Drafting the Complaint 69
4.1.1 The Allegations 69
4.1.2 The Exhibits 71
4.2 Showing the Complaint to the Client 71
4.3 Showing the Complaint to the Defendant 71
4.4 Quick Reference 72

Chapter 5

Plaintiff’s Preliminary Actions to Protect the Class

5.1 Introduction 73
5.2 Preservation of Class Members’ Files 73
5.2.1 Importance of Preserving Files 73
5.2.2 Immediate Request for Production 73
5.2.3 Motion for Document Preservation Order 74
5.2.4 Arguing the Motion 75
5.3 Improper Communications with Class Members 75
5.3.1 Standards for Noncommunication Order 75
5.3.2 Defense Communication with Putative Class Members 76
5.3.3 Defense Communication with Class Members 78
5.4 Dealing with Defendant’s Initiation of Collateral Cases Against Individual
Class Members 79
5.4.1 General 79
5.4.2 Protecting Class Members in Their Bankruptcy Cases 80
5.5 Quick Reference 80

Chapter 6

The Defendant’s Response: Preliminary Motions, Individual Settlement Offers, Counterclaims, and More

6.1 Introduction 81
6.2 General Limits on Defendant’s Ability to Delay 81
6.3 Attempts to Settle with Individual Named Plaintiffs 82
6.3.1 General 82
6.3.2 Offers of Judgment 83
6.4 Motions to Dismiss 85
6.5 Defendant’s Motions to Redefine the Class 86
6.6 Defendant’s Motion for Summary Judgment 86
6.7 Counterclaims Against Class Members 87
6.8 Quick Reference 89

Chapter 7

Discovery

7.1 Discovery by the Class Plaintiffs 91
7.1.1 Formulating a Discovery Plan and Discovery Schedule 91
7.1.2 Discovery Directed to Class Certification 92
7.1.2.1 Plaintiff’s Right to Class Discovery Prior to Certification 92
7.1.2.2 How Much Pre-Certification Discovery Is Necessary? 92
7.1.2.2.1 Can the class be certified without formal discovery? 92

Contents

7.1.2.2.2	Are the allegations of the complaint sufficient for certification?	93
7.1.2.2.3	Use of surveys to gain certification	94
7.1.2.3	Discovery Directed to Proving Numerosity	95
7.1.2.4	Discovery Directed to Proving Common Issues	95
7.1.2.5	Discovery Directed to Identification of Class Members	97
7.1.3	Effective Use of Requests for Admission	98
7.1.4	Personal Inspection of Defendant’s Recordkeeping System	98
7.2	Defendant’s Resistance to Plaintiff’s Discovery Efforts	99
7.2.1	Introduction	99
7.2.2	Efforts to Bifurcate Discovery Between “Class Issues” and “Merits Issues”	100
7.2.3	Motion to Stay Discovery Pending Resolution of the Motion to Dismiss	100
7.2.4	Motion for Protective Order	101
7.2.5	Defendant’s Efforts to Limit Access to Documents	103
7.2.5.1	In General	103
7.2.5.2	Agreement to Produce Only a Sampling of Class Documents	103
7.2.5.3	Copying of Documents	103
7.3	Compelling Discovery Responses	104
7.4	Discovery by Defendant	104
7.4.1	Discovery to Justify Removal Jurisdiction	104
7.4.2	Discovery to Harass Class Representatives or Members	104
7.4.3	Deposition of Class Representatives	105
7.4.4	Discovery from Class Members	105
7.4.5	Discovery of Plaintiff’s Fee Agreement	106
7.5	Quick Reference	106

Chapter 8

Representing the Named Plaintiff at Deposition

8.1	General	107
8.2	Preparing the Named Plaintiff	107
8.3	Explaining the Deposition Process to the Named Plaintiff	107
8.3.1	General Information on the Process	107
8.3.2	Advice on Answering Questions	108
8.3.3	When Class Counsel Objects to a Question	109
8.3.4	Demeanor and Conduct	109
8.4	Preparation for Specific Questions	109
8.4.1	Named Plaintiff’s Familiarity with the Complaint	109
8.4.2	History of Legal Representation	110
8.4.3	The Named Plaintiff’s Ability to Represent the Class	110
8.4.4	Mock Deposition of the Plaintiff	111
8.5	Objecting to Improper Questions at the Deposition	111
8.5.1	General	111
8.5.2	Objections Concerning Attorney-Client Privilege	112
8.5.3	Examples of Objectionable Questions Impinging on Attorney-Client Privilege	112
8.5.4	Named Plaintiff’s Financial Responsibility for Costs	112
8.6	Quick Reference	113

Chapter 9

Class Certification

9.1	Certification Under Rules 23(b)(1), (b)(2), and (b)(3)	115
9.2	Rule 23(a) Preconditions for All Types of Class Actions	116
9.2.1	Impracticability of Joinder/Numerosity—Rule 23(a)(1)	116
9.2.2	Commonality—Rule 23(a)(2)	117

Consumer Class Actions

9.2.3	Typicality—Rule 23(a)(3)	117
9.2.4	Adequacy of Representation—Rule 23(a)(4)	118
9.2.4.1	Adequacy of Class Counsel	118
9.2.4.2	Class Representative’s Interests Can Not Be Antagonistic to Other Class Members	119
9.2.4.3	Plaintiff’s Ability to Pay Litigation Costs	120
9.2.4.4	Plaintiff’s Understanding of the Class Action Process and Claims	121
9.2.4.5	Plaintiff’s Control over the Litigation	122
9.2.4.6	Substitution of Class Representatives	122
9.2.4.7	Subclasses	123
9.3	Rule 23(b)(1) Certification	123
9.4	Rule 23(b)(2) Certification	124
9.4.1	Relative Advantages of (b)(2) Versus (b)(3) Class Actions	124
9.4.2	General Standards for (b)(2) Class Actions	125
9.4.2.1	Introduction	125
9.4.2.2	Acting or Refusing to Act on Grounds Generally Applicable to the Class	125
9.4.2.3	Final Injunctive Relief	126
9.4.2.4	Corresponding Declaratory Relief	127
9.4.3	Relief Available Under Rule 23(b)(2)	128
9.4.3.1	Injunctive and Declaratory Relief	128
9.4.3.2	Monetary Damages	129
9.4.3.2.1	Damages traditionally recoverable when they do not predominate over other forms of relief	129
9.4.3.2.2	Seventh Circuit limits availability of (b)(2) actions seeking damages	129
9.4.3.2.3	Fifth Circuit follows the Seventh Circuit	130
9.4.3.2.4	The Second and Ninth Circuits balancing test	131
9.4.3.2.5	Creative alternatives	131
9.4.4	Innovative Uses of Rule 23(b)(2)	132
9.4.4.1	Introduction	132
9.4.4.2	23(b)(2) Certification with Court-Ordered Notice and Opt-Out	132
9.4.4.3	Hybrid Certification	132
9.4.4.4	Sequential Certification	133
9.4.4.5	Partial Certification	133
9.4.5	Application of Rule 23(b)(2) to Consumer Cases	134
9.5	Rule 23(b)(3) Certification	135
9.5.1	Superiority	135
9.5.1.1	General	135
9.5.1.2	Management Problems Dealing with Defendant’s Counterclaims	136
9.5.1.3	Problem of Individual Recoveries Being So Small As to Make Distribution Impractical	136
9.5.1.4	Manageability of Choice of Law Issues	137
9.5.2	Predominance	138
9.5.2.1	General	138
9.5.2.2	Claims Based on Standard Form Contracts	140
9.5.2.3	Misrepresentation, Deception, and Fraud: The Question of Reliance	140
9.5.2.4	When Statute Requires Proof of Consumer Status	142
9.5.2.5	Warranty-Type Claims	143
9.5.2.6	Individual Questions of Damages	143
9.6	The Class Motion and Briefs	144
9.6.1	Filing the Class Motion As Soon As Practicable	144
9.6.2	Drafting the Class Motion and Brief	145
9.6.3	Relation of Motion and Brief to the Discovery Schedule	146

Contents

9.6.4	Relation of Merits to Class Certification	146
9.6.4.1	Must the Class Motion Address the Merits?	146
9.6.4.2	Relationship of Motions to Dismiss and for Summary Judgment to Class Certification Motion	148
9.6.5	Stipulation of Certification	149
9.6.6	Effect of Settlement Certification on Certification in Subsequent Litigation	149
9.6.7	Collateral Estoppel Effect of Denial of Certification	150
9.7	Appeals of Certification Ruling	150
9.7.1	General	150
9.7.2	First Circuit Standards	151
9.7.3	Second Circuit Standards	151
9.7.4	Third Circuit Standards	152
9.7.5	Fourth Circuit Standards	153
9.7.6	Fifth Circuit Standards	153
9.7.7	Sixth Circuit Standards	154
9.7.8	Seventh Circuit Standards	154
9.7.9	Eighth Circuit Standards	154
9.7.10	Ninth Circuit Standards	155
9.7.11	Tenth Circuit Standards	155
9.7.12	Eleventh Circuit Standards	155
9.7.13	District of Columbia Circuit Standards	156
9.7.14	Federal Circuit Standards	157
9.8	Quick Reference	157

Chapter 10

Class Notice

10.1	Four Types of Class Notice	159
10.1.1	Introduction	159
10.1.2	The Rule 23(c)(2)(B) Mandatory Notice of Certification	159
10.1.2.1	Content of the Notice	159
10.1.2.2	The Best Notice Practicable	160
10.1.3	The Rule 23(b)(1) or (b)(2) Discretionary Certification Notice	161
10.1.4	The Rule 23(d)(2) Discretionary Notice to Protect Members of the Class or for Fair Conduct of the Action, Including Judgment	161
10.1.5	The Rule 23(e)(1)(A) Mandatory Notice for Settlement, Voluntary Dismissal, or Compromise	161
10.1.5.1	General	161
10.1.5.2	Content of the Notice	162
10.2	Notice by Publication	163
10.3	Web and E-Mail Notice	163
10.4	Drafting the Notice	164
10.4.1	General	164
10.4.2	The Proof of Claim Form	165
10.5	Compiling the Class List	165
10.6	Updating Class Members' Addresses	166
10.7	Selecting the Return Address	167
10.8	The Envelope and Return Envelope	167
10.9	The Cost of Notice	168
10.9.1	Plaintiff Usually Bears the Initial Cost	168
10.9.2	Shifting Costs to the Defendant	168
10.10	Combining the Rule 23(c) and Rule 23(e) Notices	168
10.11	Quick Reference	169

Chapter 11

Negotiations and Settlement

11.1	Two Guiding Principles	171
11.2	Settlement Before Certification	171
11.2.1	Individual Settlements Before Certification	171
11.2.2	Classwide Settlement Before Certification	173
11.3	Settling with Some of Several Defendants	174
11.4	Settlements When Related Class Actions Are Pending	174
11.5	Settlement Terms	175
11.5.1	General	175
11.5.2	Forms of Relief	175
11.5.3	The Defendant’s Plea of Poverty	176
11.5.4	Class Settlement Fund Versus Fixed Individual Recoveries	176
11.5.5	Prohibition on Geographic Discrimination	177
11.5.6	Distribution of Benefits	177
11.5.7	Administrative Aspects of Settlement	178
11.5.8	Reimbursement of the Class’s Expenses	178
11.5.9	The Release and Agreements Not to Represent	178
11.5.10	Nonpublicity Clauses	179
11.5.11	Defendants Required to Notify Government Officials	179
11.6	Coupon, Certificate, or “Scrip” Settlements	180
11.6.1	General	180
11.6.2	Likelihood That Coupons Will Be Redeemed	182
11.6.3	Value of Coupons If Redeemed	184
11.6.4	Attorney Fees in Coupon Settlements	185
11.7	<i>Cy Pres</i> or Fluid Recovery Distributions	186
11.7.1	<i>Cy Pres</i> Provision As Standard in Class Action Settlements	186
11.7.2	What Monies Should Be Distributed Pursuant to a <i>Cy Pres</i> Procedure	187
11.7.3	Relationship of <i>Cy Pres</i> Recipient to the Class	188
11.7.4	Procedure for Selecting <i>Cy Pres</i> Recipients	189
11.7.5	Responsibilities of <i>Cy Pres</i> Recipients	189
11.7.6	Attorney Fees and <i>Cy Pres</i> Use of Coupons	190
11.8	The Named Plaintiff’s Individual Recovery	190
11.9	Negotiating Attorney Fees	191
11.9.1	Separate Negotiation of Fees	191
11.9.2	Lump Sum Offers	192
11.9.3	Method of Determining Fees	193
11.9.4	Fees for Post-Settlement Work	193
11.10	Quick Reference	194

Chapter 12

The Proposed Settlement, the Fairness Hearing, and Objections to the Settlement

12.1	Introduction	195
12.2	Drafting the Proposed Settlement	195
12.3	Model Stipulation Provisions	195
12.4	Release of Claims	196
12.4.1	General	196
12.4.2	NACA Consumer Class Action Guidelines on Class Members’ Releases	198
12.4.3	Specific Releases to Avoid	199
12.4.4	Releases Involving Homes	199
12.5	Tax Implications of Settlement	200
12.5.1	Introduction	200
12.5.2	Is the Relief Obtained Taxable?	200
12.5.2.1	General	200

Contents

12.5.2.2	Recovery of Damages	200
12.5.2.2.1	Reimbursement for diminished value of purchase	200
12.5.2.2.2	Statutory, minimum, and multiple damages	201
12.5.2.2.3	Damages emanating from physical injury	201
12.5.2.3	Forgiveness of Indebtedness	201
12.5.2.3.1	The general rule	201
12.5.2.3.2	Exception for bankruptcy	202
12.5.2.3.3	Exception for insolvency	202
12.5.2.3.4	Exception for forgiveness of disputed debts	202
12.5.2.3.5	Exception for operation of law	203
12.5.2.3.6	Form 1099-C, evidencing debt cancellation	203
12.5.3	Practice Pointers	203
12.5.3.1	Settlement Documents' Characterization of Damages	203
12.5.3.2	Seeking Additional Damages to Offset Tax Consequences	204
12.6	Checklist Regarding Administrative Aspects of the Settlement	204
12.7	Filing the Proposed Settlement with the Court	205
12.7.1	Overview	205
12.7.2	Avoid the Illusion of "Preliminary Approval" of a Settlement	206
12.8	The Final Order	206
12.9	The Fairness Hearing	206
12.10	Objections to Settlement	207
12.10.1	Non-Settling Defendants Usually Can Not Object to Settlement	207
12.10.2	Non-Class Members Usually Can Not Object to Settlement	207
12.10.3	Objection Must Relate to Interest of Class Member	208
12.10.4	How Attorneys Not Representing the Class Can Advise Class Members About a Settlement	208
12.10.5	How to Object	209
12.10.5.1	Basic Grounds for Objection	209
12.10.5.2	Filing the Objection	209
12.10.5.3	Importance of Objectors Intervening in the Class Action and the Right to Intervene	209
12.10.5.4	Objector's Right to Discovery	210
12.10.5.5	Objections Based on Peculiar Concerns of Individual Class Member	210
12.10.6	Court Evaluation of Objections	211
12.10.7	Attorney Fees for Objectors	212
12.11	Quick Reference	212

Chapter 13

Claims Administration and Distribution of Benefits

13.1	General	213
13.2	Recording Class Members' Responses to the Notice	213
13.3	Responding to Class Members' Telephone Inquiries	214
13.4	Problems with Opt-Outs	214
13.5	The Class Fund and Distribution of Benefits	214
13.5.1	Receiving Payment from the Defendant	214
13.5.2	Preparing the Final Class List for Distribution of Benefits	214
13.5.3	Sending Checks to the Class	215
13.5.4	Dealing with Undeliverable Checks	215
13.6	Quick Reference	216

Chapter 14

The Class Action Trial and Its Res Judicata Effect

14.1	Introduction	217
14.2	Jury Instructions, Interrogatories, and Special Verdicts	217

Consumer Class Actions

14.2.1	General	217
14.2.2	Jury Instructions	217
14.2.3	Use of Special Interrogatories and Special Verdicts to the Jury.	218
14.3	Determination of Individual Damages.	218
14.3.1	General	218
14.3.2	Individual Hearings After Resolution of Common Issues.	218
14.3.3	Determination of Standard for Reprocessing	219
14.4	Res Judicata Effect of a Class Action Judgment.	219
14.4.1	Does Class Action Judgment Foreclose Other Claims Against Defendant?.	219
14.4.1.1	General.	219
14.4.1.2	Special Class Action Rules on Claims That Could Be Brought in the First Action	220
14.4.1.3	Framing the Certification Motion and Notice to Avoid Overbroad Res Judicata.	220
14.4.1.4	Other Implications of <i>Cooper</i>	220
14.4.1.5	Representation and Notice Must be Adequate for Res Judicata to Apply.	221
14.4.2	Rights and Obligations of Opt-Outs.	223

Chapter 15

Attorney Fees

15.1	Sources of Attorney Fees in Consumer Class Actions	225
15.1.1	Common Fund Doctrine.	225
15.1.2	Statutory Attorney Fees	225
15.1.3	Catalyst Fees	227
15.1.3.1	The <i>Buckhannon</i> Decision	227
15.1.3.2	Implications of <i>Buckhannon</i> for Settlements.	227
15.1.3.3	How to Settle Cases After <i>Buckhannon</i>	228
15.1.3.4	State Courts May Not Follow <i>Buckhannon</i>	229
15.2	How to Compute Fees Based on a Common Fund	229
15.2.1	General Considerations	229
15.2.2	The Two Competing Common Fund Methods: Percentage of Fund Versus Lodestar	230
15.2.3	Weight of Current Precedent Prefers the Percentage-of-Fund Approach	231
15.2.4	How to Compute a Percentage of the Recovery Award.	233
15.2.4.1	Establishing the Percentage	233
15.2.4.2	When Statutory Attorney Fees Are Added to the Common Fund.	235
15.2.4.3	Calculating the Value of Coupons.	235
15.2.4.4	Cancellation of Debt.	235
15.2.4.5	Value of Equitable Relief	235
15.2.4.6	Unclaimed Cash Awards	236
15.2.4.7	Should Costs Be First Deducted from the Fund?.	236
15.2.5	How to Use the Lodestar Method to Compute Common Fund Recoveries	236
15.2.5.1	Continued Importance of Lodestar Calculations for Common Fund Cases	236
15.2.5.2	The Hourly Rate	237
15.2.5.3	Compensable Time.	237
15.2.5.4	Time Records	238
15.2.5.5	Multipliers	238
15.3	When and How to Apply for Fees	239
15.3.1	General	239
15.3.2	Approval of Negotiated Fee and Notice to the Class.	239
15.4	Division of Fees Among Co-Counsel	240

Contents

	15.4.1 General	240
	15.4.2 Disclosure of the Fee Agreement to the Court	241
	15.5 Tax Consequences of Attorney Fees	241
	15.5.1 Introduction	241
	15.5.2 Why the Concern?	242
	15.5.3 IRS Ruling Indicates Fees Are Not Income to Class Members	242
	15.5.4 Fees Are Never Taxable in “Civil Rights” Cases, Including Some Consumer Claims	243
	15.5.5 Taxability of Other Common Fund Attorney Fees	243
	15.5.6 Statutory Attorney Fees	243
	15.5.7 Minimal AMT Implications If Tax Liability Distributed on a Pro Rata Basis to the Whole Class	244
	15.6 Quick Reference	244
Appendix A	Federal Rule of Civil Procedure 23 and Advisory Committee Notes	245
Appendix B	Federal Class Action Legislation	261
Appendix C	Survey of State Class Action Law—2005	267
Appendix D	NACA Consumer Class Action Guidelines	513
Appendix E	Sample Agreements with Named Plaintiffs, Co-Counsel	
	E.1 Sample Retainer Agreement	529
	E.2 Named Plaintiff’s Statement of Duty to the Class	531
	E.3 Sample Co-Counsel Agreements	531
	E.3.1 Introduction	531
	E.3.2 Agreement Establishing Fixed Percentages As to Attorney Fee Distribution in Common Fund Settlement	531
	E.3.3 Agreement Establishing Pro Rata Distribution of Attorney Fees in Common Fund Settlement	532
Appendix F	Sample Complaints	
	F.1 Original Federal Jurisdiction, Post-CAFA Complaint—UDAP/Fraud	535
	F.2 Original Federal Jurisdiction, Post-CAFA Complaint—Telephone Consumer Protection Act	537
	F.3 Original Federal Jurisdiction, Post-CAFA Complaint—UDAP	539
	F.4 Original Federal Jurisdiction, Post-CAFA Complaint—Secret Warranty	541
Appendix G	Motion for Remand Under the Class Action Fairness Act	
	G.1 Motion to Remand	551
	G.2 Memorandum of Law in Support of Motion to Remand	552
	G.3 Petition for Permission to Appeal Denial of Motion to Remand	555
Appendix H	Sample Discovery	
	H.1 Federal Fair Debt Collection Case (<i>Boddie</i>)	561
	H.1.1 Interrogatories	561

Consumer Class Actions

	H.1.2 Requests for Production of Documents	564
	H.1.3 Requests for Admissions	565
	H.2 Consumer Leasing Act and Deceptive Practices Case—Car Lease (<i>Shepherd</i>) . . .	566
	H.2.1 Interrogatories	566
	H.2.2 Requests for the Production of Documents	567
	H.2.3 Requests for Admissions	569
	H.2.4 Second Request for Production of Documents	570
	H.3 Deceptive Practices Case—Vendor’s Single Interest Insurance (<i>Ortiz</i>)	570
	H.3.1 Interrogatories	570
	H.3.2 Requests for Producton of Documents	571
	H.4 State Usury Case (<i>Adams</i>).	572
	H.4.1 Interrogatories	572
	H.4.2 Requests for Production of Documents	574
	H.4.3 Requests for Admissions	575
	H.5 Net Worth Discovery	576
Appendix I	Sample Response to Defendant’s Motion to Stay Discovery	579
Appendix J	Sample Pleadings to Compel Discovery	
	J.1 Motion to Compel Answers	583
	J.2 Certificate of Counsel That Parties Are Unable to Resolve the Dispute [Exhibit K]	584
	J.3 Proposed Order Compelling Defendant to Respond to Plaintiff’s Requests	585
	J.4 Memorandum in Support of Motion to Compel Answers	585
Appendix K	Sample Motions and Proposed Orders for Protection of Class Members’ Files	
	K.1 Motion and Proposed Order Presented in Federal Court Class Action (<i>Samuel</i>) . . .	593
	K.2 Motion and Proposed Order Presented in State Court Class Action (<i>Corral</i>)	594
Appendix L	Defense Communications with Class Members	
	L.1 Sample Letter Demanding That Defendant Cease Soliciting Releases from Putative Class Members and Void Any Releases Already Obtained	597
	L.2 Brief in Support of Plaintiff’s Motion to Restrict Defendant’s Communications with Class Members.	598
Appendix M	Plaintiff’s Brief in Opposition to Defendant’s Motion for Permission to Serve Discovery on Class Members	605
Appendix N	Requests for Class Certification	
	N.1 Sample Motions for Class Certification	609
	N.1.1 B(2) Class Action for Injunctive and Declaratory Relief (<i>Kalima</i>).	609
	N.1.2 TIL Disclosure Case—Hidden Finance Charge in Car Sale (<i>Willis</i>).	611
	N.1.3 TIL Untimely Disclosure Case (<i>Diaz</i>)	612
	N.1.4 Deceptive Practices Case—Vendor’s Single Interest Insurance (<i>Ortiz</i>)	612
	N.1.5 FDCPA Case—Foreclosure Attorney Fees and Costs (<i>Pettway</i>)	613
	N.1.6 ECOA Case—Auto Finance Discrimination (<i>Jones</i>)	614
	N.2 Sample Opening Memoranda in Support of Class Certification	614

Contents

N.2.1 Breach of Trust—B(2) Class Action for Injunctive and Declaratory Relief (*Kalima*) 614

N.2.2 FDCPA Cases—Foreclosure Attorney Fees and Costs (*Pettway*) 619

N.2.3 ECOA Case—Auto Finance Discrimination (*Jones*) 626

N.3 Sample Reply/Post-Argument Memoranda in Support of Class Certification . . . 634

N.3.1 Reply Brief in FDCPA Case—Foreclosure Attorney Fees and Costs (*Pettway*) 634

N.3.2 Post-Argument Memoranda on Notice in ECOA Case—Auto Finance Discrimination (*Jones*) 641

N.4 Motion for Appointment of Interim Class Counsel and Memorandum in Support 646

Appendix O

Appeals of Certification Rulings Under Rule 23(f)

O.1 Sample Petitions for Leave to Appeal Denial of Certification 649

O.1.1 ERISA—Challenge to Class Certification Under Rule 23(b)(3) Instead of Under Rules 23(b)(1) or (2) (*Selby*) 649

O.1.2 Wage Garnishment—Denial of Rule 23(b)(3) Certification (*Cliff*) 655

O.1.2.1 Petition to Appeal Denial of Class Action 655

O.1.2.2 Brief in Support of Petition to Appeal Denial of Class Action . . . 659

O.2 Sample Answer in Opposition to Petition for Leave to Appeal Grant of Certification 667

O.2.1 ECOA—Rule 23(b)(2)/(b)(3) Hybrid Class Certification 667

Appendix P

Challenges to Rule 68 Offers of Judgment (*Colbert*) 677

Appendix Q

Sample Notices

Q.1 Rule 23(c) Notice of Certification 687

Q.1.1 Notice of Certification: Lender Liability for Campground Misconduct (*Hughes*) 687

Q.1.2 Memoranda Seeking Allocation of Cost of Notice—Deceptive Motor Vehicle Sales (*Novogradac*) 689

Q.2 Rule 23(e) Settlement Notices 693

Q.2.1 Lender Liability for Campground Misconduct (*Hughes*) 693

Q.2.2 Used Car Sales (*Norris*) 698

Q.2.3 Predatory Lending by a Non-Bank Home Equity Lender (*Samuel*) 700

Q.2.3.1 Notice to the Complete Class 700

Q.2.3.2 Notice to the Subclass 705

Q.2.4 Federal Fair Debt Collection Case (*Boddie*) 707

Q.2.5 TIL Disclosure Case—Hidden Finance Charge in Car Sale (*Willis*) 711

Q.2.6 State Usury Case (*Adams*) 715

Q.2.7 Energy Overcharge Case (*Dwyer*) 719

Appendix R

Sample Stipulations of Proposed Settlements

R.1 Predatory Lending by a Non-Bank Home Equity Lender (*Samuel*) 725

R.2 Federal Fair Debt Collection Case (*Boddie*) 731

R.3 TIL Disclosure Case—Hidden Finance Charge in Car Sale (*Willis*) 733

R.3.1 Settlement with Dealer 733

R.3.2 Settlement with Related Lender/Assignee 736

R.4 Consumer Leasing Act and Deceptive Practices Case—Car Lease (*Shepherd*) . . . 738

R.5 State Usury Case (*Adams*) 744

Consumer Class Actions

Appendix S

Cy Pres Materials

S.1 Memorandum of Law in Support of *Cy Pres* Award to Consumer Advocacy Organizations 749
S.2 Plaintiff’s Memorandum of Law Supporting *Cy Pres* Award 752
S.3 Defendant’s Motion and Memorandum for Order Approving Final Distribution of Settlement Fund, Including *Cy Pres* Award 755
S.4 Amicus Brief in Support of Suggestion for *Cy Pres* Distribution of Property . . . 759

Appendix T

Sample Memoranda in Support of Approval of Class Settlement

T.1 Settlement Memorandum Post-2003 Amendments to Rule 23n (*Coleman*) 765
T.2 Predatory Lending by a Non-Bank Home Equity Lender (*Samuel*) 770
T.3 TIL Rescission Case—Home Improvement Contract (*Ogden*) 775
T.4 Consumer Leasing Act and Deceptive Practices Case—Car Lease (*Shepherd*). . . 777

Appendix U

Documents Relating to Objections to Settlement

U.1 Objections to Final Approval of Settlement (*Chavez*) 781
U.2 Objections to Settlement Agreement (*Boehr*) 787
U.3 Objections to Settlement Agreement (*Reynolds*) 792
U.4 Objections to Settlement Agreement and Fee Petition (*Robinson*). 809
U.5 Objections to Settlement Agreement and Fee Petition (*Buchet*) 814
 U.5.1 Objections to Settlement 814
 U.5.2 Memorandum in Support of Counsel for Objectors’ Request for Attorney Fees 821
U.6 Objections to Settlement Agreement (*Follansbee*) 823
U.7 Seeking Additional Discovery as Part of Settlement Objection. 825
 U.7.1 Objector’s Motion for Leave to Propound Document Requests 825
 U.7.2 Objector’s Document Requests. 826
U.8 “Dueling Class Actions”: Plaintiff’s-Appellee’s Reply Memorandum in Support of Emergent Motion Pursuant to Rule 23(d) 827
U.9 Opposition to Preliminary Approval of Class Action Settlement (*Groom*) 830
 U.9.1 Attorney Affidavit in Support of Opposition to Preliminary Approval of Class Action Settlement 830
 U.9.2 Memorandum of Points and Authorities in Opposition to Preliminary Approval of Class Action Settlement 833
U.10 Declaration in Support of Objectors to Proposed Class Action Settlement (*Campbell*) 838
U.11 Declaration in Support of Objectors to Proposed Class Action Settlement (*Dotson*) 844
U.12 Intervenor’s Objections to Class Action Settlement (*H&R Block*). 846

Appendix V

Attorney Fee Documents

V.1 Award of Attorney Fees and Reimbursement of Expenses (*Minnick*) 853
 V.1.1 Plaintiff’s Motion for Award of Attorney Fees and Reimbursement of Expenses. 853
 V.1.2 Plaintiff’s Memorandum of Law in Support of Plaintiff’s Award of Attorney Fees and Reimbursement of Expenses 854
 V.1.3 Plaintiff’s Reply to Memorandum of Law in Opposition to Motion for Award of Attorney Fees and Reimbursement of Expenses. 856
V.2 Memorandum of Law in Support of State Catalyst Award After Buckhannon (*Farkas/Kentucky*). 857

Contents

Appendix W	Consumer Class Action Web Links	863
	Index	865
	Quick Reference to Consumer Credit and Sales Legal Practice Series . . .	887
	About the Companion CD-Rom	905

