

UNIFORM LAW COMMISSIONERS' MODEL CLASS ACTIONS [ACT] [RULE]

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Section 1. [Commencement of a Class Action].

One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if:

- (1) the class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable; and
- (2) there is a question of law or fact common to the class.

COMMENT

This section sets forth the requirements that must be satisfied if a class action is to be brought. Section 2 authorizes the certification of a class action.

Section 2. [Certification of Class Action].

(a) Unless deferred by the court, as soon as practicable after the commencement of a class action the court shall hold a hearing and determine whether or not the action is to be maintained as a class action and by order certify or refuse to certify it as a class action.

(b) The court may certify an action as a class action, if it finds that (1) the requirements of Section 1 have been satisfied, (2) a class action should be permitted for the fair and efficient adjudication of the controversy, and (3) the representative parties fairly and adequately will protect the interests of the class.

(c) If appropriate, the court may (1) certify an action as a class action with respect to a particular claim or issue, (2) certify an action as a class action to obtain one or more forms of relief, equitable, declaratory, or monetary, or (3) divide a class into subclasses and treat each subclass as a class.

COMMENT

The standard established under 2(b)(2) is elaborated in Section 3(a) and that established under 2(b)(3) is elaborated in Section 3(b).

Section 3. [Criteria Considered].

(a) In determining whether the class action should be permitted for the fair and efficient adjudication of the controversy, as appropriately limited under Section 2(c), the court shall consider, and give appropriate weight to, the following and other relevant factors:

(1) whether a joint or common interest exists among members of the class;

(2) whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class;

(3) whether adjudications with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests;

(4) whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole;

(5) whether common questions of law or fact predominate over any questions affecting only individual members;

(6) whether other means of adjudicating the claims and defenses are impracticable or inefficient;

(7) whether a class action offers the most appropriate means of adjudicating the claims and defenses;

(8) whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions;

(9) whether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding;

(10) whether it is desirable to bring the class action in another forum;

(11) whether management of the class action poses unusual difficulties;

(12) whether any conflict of laws issues involved pose unusual difficulties; and

(13) whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class.

(b) In determining under Section 2(b) that the representative parties fairly and adequately will protect the interests of the class, the court must find that:

(1) the attorney for the representative parties will adequately represent the interests of the class;

(2) the representative parties do not have a conflict of interest in the maintenance of the class action; and

(3) the representative parties have or can acquire adequate financial resources, considering Section 17, to assure that the interests of the class will not be harmed.

COMMENT

The factors listed in Section 3(a)(1) to (13), possibly along with other factors, are to be considered by the court in determining whether or certify the action as a class action. The factors may be given different weight by the court.

After an action has been brought as a class action, if the court determines that there is pending in another court an action which encompasses the action pending both as to general class and claim, it may refuse under Subsection 3(a)(9) and (10) to certify the action against or on behalf of the class if it concludes that this forum is not the most appropriate one. The court in making this decision should consider the sequence of the suits, the residence of the members of the class, where the transaction or occurrence involved took place, where the relevant evidence is available, and other pertinent facts.

Section 4. [Order on Certification].

(a) The order of certification shall describe the class and state: (1) the relief sought, (2) whether the action is maintained with respect to particular claims or issues, and (3) whether subclasses have been created.

(b) The order certifying or refusing to certify a class action shall state the reasons for the court's ruling and its findings on the facts listed in Section 3(a).

(c) An order certifying or refusing to certify an action as a class action is appealable.

(d) Refusal of certification does not terminate the action, but does preclude it from being maintained as a class action.

COMMENT

If class certification is denied, subsection (d) presupposes the existence of rules of civil procedure which will allow the action to continue with the representative parties as properly joined parties.

Denial of certification and the allowance of a personal action under subsection (d) does not affect any possible intervention or joinder of class members who are not representative parties under the applicable state laws.

Section 5. [Amendment of Certification Order].

(a) The court may amend the certification order at any time before entry of judgment on the merits. The amendment may (1) establish subclasses, (2) eliminate from the class any class member who was included in the class as certified, (3) provide for an adjudication limited to certain claims or issues, (4) change the relief sought, or (5) make any other appropriate change in the order.

(b) If notice of certification has been given pursuant to Section 7, the court may order notice of the amendment of the certification order to be given in terms and to any members of the class the court directs.

(c) The reasons for the court's ruling shall be set forth in the amendment of the certification order.

(d) An order amending the certification order is appealable. An order denying the motion of a member of a defendant class, not a representative party, to amend the certification order is appealable if the court certifies it for immediate appeal.

COMMENT

An order amending an order of certification is an appealable order as is an order certifying or refusing to certify an action as a class action.

A member of a defendant class can attempt to get out of a class action by seeking an amendment of the order of certification. If a member of a defendant class seeks an amendment which would delete him or her from the class and the court refused to make such an order, an appeal can be taken if the court certifies it for appeal.

Under Section 5(b) the court may order notice given of an amendment if it deems it desirable in light of the nature of the amendments and the notice previously given.

Section 6. [Jurisdiction over Multi-State Classes (Reserved)].

COMMENT

The Section is reserved for provisions that may be added to govern jurisdiction of the person over class members who are non-residents or lack traditional minimum contacts with the state. See *Phillips Petroleum Company v. Shutts*, 472 U.S. 797, 86 L.Ed.2d 628 (1985), rendering obsolete the jurisdictional limitations of this Section as contained in the 1976 version.

Amendments

The 1987 amendment deleted former Official Text provisions and reserved this section.

Section 7. [Notice of Action].

(a) Following certification, the court by order, after hearing, shall direct the giving of notice to the class.

(b) The notice, based on the certification order and any amendment of the order, shall include:

(1) a general description of the action, including the relief sought, and the names and addresses of the representative parties;

(2) a statement of the right of a member of the class under Section 8 to be excluded from the action by filing an election to be excluded, in the manner specified, by a certain date;

(3) a description of possible financial consequences on the class;

(4) a general description of any counterclaim being asserted by or against the class, including the relief sought;

(5) a statement that the judgment, whether favorable or not, will bind all members of the class who are not excluded from the action;

(6) a statement that any member of the class may enter an appearance either personally or through counsel;

(7) an address to which inquiries may be directed; and

(8) other information the court deems appropriate.

(c) The order shall prescribe the manner of notification to be used and specify the members of the class to be notified. In determining the manner and form of the notice to be given, the court shall consider the interests of the class, the relief requested, the cost of notifying the members of the class, and the possible prejudice to members who do not receive notice.

(d) Each member of the class, not a representative party, whose potential monetary recovery or liability is estimated to exceed \$100 shall be given personal or mailed notice if his identity and whereabouts can be ascertained by the exercise of reasonable diligence.

(e) For members of the class not given personal or mailed notice under subsection (d), the court shall

provide, as a minimum, a means of notice reasonably calculated to apprise the members of the class of the pendency of the action. Techniques calculated to assure effective communication of information concerning commencement of the action shall be used. The techniques may include personal or mailed notice, notification by means of newspaper, television, radio, posting in public or other places, and distribution through trade, union, public interest, or other appropriate groups.

(f) The plaintiff shall advance the expense of notice under this section if there is no counterclaim asserted. If a counterclaim is asserted the expense of notice shall be allocated as the court orders in the interest of justice.

(g) The court may order that steps be taken to minimize the expense of notice.

COMMENT

The hearing required by subsection (a) can be combined with the hearing required by Section 2(a).

Personal mailed notice to all members of the class is not required by this Act. For consideration of the notice required by the U.S. Constitution, see *Gant v. City of Lincoln*, 225 N.W.2d 549 (Neb.1975), and *Cartt v. Superior Court in and for County of Los Angeles*, 50 Cal.App.3d 960, 124 Cal.Rptr. 376 (Ct.App.1975).

The notice to be given may vary as to the persons to be notified and the form of notice and, to some extent, the content. Subsection (c) indicates that the court must consider a number of factors in deciding what type of notice to give.

Subsection (g) allows the court to order a defendant who has a mailing list of class members to co-operate with the representative parties in notifying the class members. Use of a computer or enclosing notice in a regular mailing would be possibilities.

Section 8. [Exclusion].

(a) A member of a plaintiff class may elect to be excluded from the action unless (1) he is a representative party, (2) the certification order contains an affirmative finding under paragraph (1), (2), or (3) of Section 3(a), or (3) a counterclaim under Section 11 is pending against the member or his class or subclass.

(b) Any member of a plaintiff class entitled to be excluded under subsection (a) who files an election to be excluded, in the manner and in the time specified in the notice, is excluded from and not bound by the judgment in the class action.

(c) The elections shall be [docketed] [made a part of the record] in the action.

(d) A member of a defendant class may not elect to be excluded.

COMMENT

Under some circumstances members of a plaintiff class cannot elect to be excluded because they are indispensable parties. This would be determined by the court in ruling on certification considering the criteria of Section 3(a). Such situations might arise in actions comparable to those under Federal Rule 23(b)(1); see 3B,

Moore's Federal Practice, ¶23.35. In most situations members of a plaintiff class will be permitted to elect to be excluded.

A class member aggrieved by an affirmative finding under Section 3(a)(1), (2) or (3) might seek relief through one of the extraordinary writs or through an interlocutory appeal if authorized by the state practice.

Section 9. [Conduct of Action].

(a) The court on motion of a party or its own motion may make or amend any appropriate order dealing with the conduct of the action including, but not limited to, the following: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given as the court directs, of (i) any step in the action, (ii) the proposed extent of the judgment, or (iii) the opportunity of members to signify whether they consider the representation fair and adequate, to enter an appearance and present claims or defenses, or otherwise participate in the action; (3) imposing conditions on the representative parties or on intervenors; (4) inviting the attorney general to participate with respect to the question of adequacy of class representation; (5) making any other order to assure that the class action proceeds only with adequate class representation; and (6) making any order to assure that the class action proceeds only with competent representation by the attorney for the class.

(b) A class member not a representative party may appear and be represented by separate counsel.

COMMENT

The rules governing civil procedure in the courts of the state normally will govern procedures in class actions. Section 9 covers certain matters which deserve special consideration. Section 9(a)(4) does not limit the power of the attorney general to participate in litigation under other applicable provisions.

Section 10. [Discovery by or against Class Members].

(a) Discovery under [applicable discovery rules] may be used only on order of the court against a member of the class who is not a representative party or who has not appeared. In deciding whether discovery should be allowed the court shall consider, among other relevant factors, the timing of the request, the subject matter to be covered, whether representatives of the class are seeking discovery on the subject to be covered, and whether the discovery will result in annoyance, oppression, or undue burden or expense for the member of the class.

(b) Discovery by or against representative parties or those appearing is governed by the rules dealing with discovery by or against a party to a civil action.

COMMENT

Under Section 10 members of the class not representative parties and not appearing are not treated as parties to the litigation for discovery purposes. Discovery can be obtained of these members only on order of court.

Discovery against representative parties may include the representative parties' fee arrangement with

counsel. Disclosure of this arrangement is required under Section 17.

Section 11. [Counterclaims].

(a) A defendant in an action brought by a class may plead as a counterclaim any claim the court certifies as a class action against the plaintiff class. On leave of court, the defendant may plead as a counterclaim a claim against a member of the class or a claim the court certifies as a class action against a subclass.

(b) Any counterclaim in an action brought by a plaintiff class must be asserted before notice is given under Section 7.

(c) If a judgment for money is recovered against a party on behalf of a class, the court rendering judgment may stay distribution of any award or execution of any portion of a judgment allocated to a member of the class against whom the losing party has pending an action in or out of state for a judgment for money, and continue the stay so long as the losing party in the class action pursues the pending action with reasonable diligence.

(d) A defendant class may plead as a counterclaim any claim on behalf of the class that the court certifies as a class action against the plaintiff. The court may certify as a class action a counterclaim against the plaintiff on behalf of a subclass or permit a counterclaim by a member of the class. The court shall order that notice of the counterclaim by the class, subclass, or member of the class be given to the members of the class as the court directs, in the interest of justice.

(e) A member of a class or subclass asserting a counterclaim shall be treated as a member of a plaintiff class for the purpose of exclusion under Section 8.

(f) The court's refusal to allow, or the defendant's failure to plead, a claim as a counterclaim in a class action does not bar the defendant from asserting the claim in a subsequent action.

COMMENT

Nothing in this Act precludes a party opposing the class from bringing an action against a member of the class concurrently with the class action or in the future. Subsection (f) makes the ordinary rules concerning compulsory counterclaims inapplicable in a class action under this Act.

The expense of notification of actions involving counterclaims is to be determined as provided in Section 7(f).

Section 12. [Dismissal or Compromise].

(a) Unless certification has been refused under Section 2, a class action, without the approval of the court after hearing, may not be (1) dismissed voluntarily, (2) dismissed involuntarily without an adjudication on the merits, or (3) compromised.

(b) If the court has certified the action under Section 2, notice of hearing on the proposed dismissal or compromise shall be given to all members of the class in a manner the court directs. If the court has not ruled on certification, notice of hearing on the proposed dismissal or compromise may be ordered by the court which

shall specify the persons to be notified and the manner in which notice is to be given.

(c) Notice given under subsection (b) shall include a full disclosure of the reasons for the dismissal or compromise including, but not limited to, (1) any payments made or to be made in connection with the dismissal or compromise, (2) the anticipated effect of the dismissal or compromise on the class members, (3) any agreement made in connection with the dismissal or compromise, (4) a description and evaluation of alternatives considered by the representative parties and (5) an explanation of any other circumstances giving rise to the proposal. The notice also shall include a description of the procedure available for modification of the dismissal or compromise.

(d) On the hearing of the dismissal or compromise, the court may:

(1) as to the representative parties or a class certified under Section 2, permit dismissal with or without prejudice or approve the compromise;

(2) as to a class not certified, permit dismissal without prejudice;

(3) deny the dismissal;

(4) disapprove the compromise; or

(5) take other appropriate action for the protection of the class and in the interest of justice.

(e) The cost of notice given under subsection (b) shall be paid by the party seeking dismissal, or as agreed in case of a compromise, unless the court after hearing orders otherwise.

COMMENT

This section covers class actions brought under Section 1 until certification has been refused under Section 2, as well as class actions certified under Section 2.

Section 13. [Effect of Judgment on Class].

In a class action certified under Section 2 in which notice has been given under Section 7 or 12, a judgment as to the claim or particular claim or issue certified is binding, according to its terms, on any member of the class who has not filed an election of exclusion under Section 8. The judgment shall name or describe the members of the class who are bound by its terms.

COMMENT

Section 13 deals with the application of a class action judgment to the members of the class. This Act does not deal with the preclusive effect of a class action upon a member of the class who has requested exclusion. This is a matter which is governed by the normal rules of res judicata/preclusion.

Section 14. [Costs].

(a) Only the representative parties and those members of the class who have appeared individually are

liable for costs assessed against a plaintiff class.

(b) The court shall apportion the liability for costs assessed against a defendant class.

(c) Expenses of notice advanced under Section 7 are taxable as costs in favor of the prevailing party.

COMMENT

Section 14 specifies the liability of class members when costs are assessed against the class and provides for assessment of the expenses of notification under Section 7.

The nature of other costs and assessments against parties in a class action is left to the law generally applicable in the state.

Section 15. [Relief Afforded].

(a) The court may award any form of relief consistent with the certification order to which the party in whose favor it is rendered is entitled including equitable, declaratory, monetary, or other relief to individual members of the class or the class in a lump sum or installments.

(b) Damages fixed by a minimum measure of recovery provided by any statute may not be recovered in a class action.

(c) If a class is awarded a judgment for money, the distribution shall be determined as follows:

(1) The parties shall list as expeditiously as possible all members of the class whose identity can be determined without expending a disproportionate share of the recovery.

(2) The reasonable expense of identification and distribution shall be paid, with the court's approval, from the funds to be distributed.

(3) The court may order steps taken to minimize the expense of identification.

(4) The court shall supervise, and may grant or stay the whole or any portion of, the execution of the judgment and the collection and distribution of funds to the members of the class as their interests warrant.

(5) The court shall determine what amount of the funds available for the payment of the judgment cannot be distributed to members of the class individually because they could not be identified or located or because they did not claim or prove the right to money apportioned to them. The court after hearing shall distribute that amount, in whole or in part, to one or more states as unclaimed property or to the defendant.

(6) In determining the amount, if any, to be distributed to a state or to the defendant, the court shall consider the following criteria: (i) any unjust enrichment of the defendant; (ii) the willfulness or lack of willfulness on the part of the defendant; (iii) the impact on the defendant

of the relief granted; (iv) the pendency of other claims against the defendant; (v) any criminal sanction imposed on the defendant; and (vi) the loss suffered by the plaintiff class.

(7) The court, in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him.

(8) Any amount to be distributed to a state shall be distributed as unclaimed property to any state in which are located the last known addresses of the members of the class to whom distribution could not be made. If the last known addresses cannot be ascertained with reasonable diligence, the court may determine by other means what portion of the unidentified or unlocated members of the class were residents of a state. A state shall receive that portion of the distribution that its residents would have received had they been identified and located. Before entering an order distributing any part of the amount to a state, the court shall give written notice of its intention to make distribution to the attorney general of the state of the residence of any person given notice under Section 7 or 12 and shall afford the attorney general an opportunity to move for an order requiring payment to the state.

COMMENT

Subsection (c)(3) is similar to subsection 7(g) in its purpose and scope and should be construed similarly.

Subsection 15(c)(5) provides for the possibility of escheat of funds available for the payment of the judgment if the court, applying the relevant criteria, so orders. The escheat provision is similar to that found in the Model Escheat of Postal Savings System Accounts Act.

If the court decides that undistributed funds available for the payment of the judgment should be distributed to the defendant, the court under subsection 15(c)(7), "in order to remedy or alleviate any harm done, may impose conditions on the defendant respecting the use of the money distributed to him." For example, if the plaintiff class sued for damage done because of the discharge of pollutants by the defendant and the class won a money judgment, the court might distribute to the defendant funds undistributed to the plaintiff class on condition that the defendant use the funds to install pollution-control devices.

Section 16. [Attorney's Fees].

(a) Attorney's fees for representing a class are subject to control of the court.

(b) If under an applicable provision of law a defendant or defendant class is entitled to attorney's fees from a plaintiff class, only representative parties and those members of the class who have appeared individually are liable for those fees. If a plaintiff is entitled to attorney's fees from a defendant class, the court may apportion the fees among the members of the class.

(c) If a prevailing class recovers a judgment for money or other award that can be divided for the purpose, the court may order reasonable attorney's fees and litigation expenses of the class to be paid from the recovery.

(d) If the prevailing class is entitled to declaratory or equitable relief, the court may order the adverse party to pay to the class its reasonable attorney's fees and litigation expenses if permitted by law in similar cases not

involving a class or the court finds that the judgment has vindicated an important public interest. However, if any monetary award is also recovered, the court may allow reasonable attorney's fees and litigation expenses only to the extent that a reasonable proportion of that award is insufficient to defray the fees and expenses.

(e) In determining the amount of attorney's fees for a prevailing class the court shall consider the following factors:

(1) the time and effort expended by the attorney in the litigation, including the nature, extent, and quality of the services rendered;

(2) results achieved and benefits conferred upon the class;

(3) the magnitude, complexity, and uniqueness of the litigation;

(4) the contingent nature of success;

(5) in cases awarding attorney's fees and litigation expenses under subsection (d) because of the vindication of an important public interest, the economic impact on the party against whom the award is made; and

(6) appropriate criteria in the [state's Code of Professional Responsibility].

COMMENT

Most of the factors listed in subsection (e) are taken from *Lindy Bros. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973).

Section 17. [Arrangements for Attorney's Fees and Expenses].

(a) Before a hearing under Section 2(a) or at any other time the court directs, the representative parties and the attorney for the representative parties shall file with the court, jointly or separately: (1) a statement showing any amount paid or promised them by any person for the services rendered or to be rendered in connection with the action or for the costs and expenses of the litigation and the source of all of the amounts; (2) a copy of any written agreement, or a summary of any oral agreement, between the representative parties and their attorney concerning financial arrangements or fees and (3) a copy of any written agreement, or a summary of any oral agreement, by the representative parties or the attorney to share these amounts with any person other than a member, regular associate, or an attorney regularly of counsel with his law firm. This statement shall be supplemented promptly if additional arrangements are made.

(b) Upon a determination that the costs and litigation expenses of the action cannot reasonably and fairly be defrayed by the representative parties or by other available sources, the court by order may authorize and control the solicitation and expenditure of voluntary contributions for this purpose from members of the class, advances by the attorneys or others, or both, subject to reimbursement from any recovery obtained for the class. The court may order any available funds so contributed or advanced to be applied to the payment of any costs taxed in favor of a party opposing the class.

COMMENT

Section 17 requires this information to be disclosed in order to assist the court in making determinations concerning (1) adequacy of representation by the representative parties and by the attorney for the class, (2) any possible collusion between the representative parties and the attorney for the class, and (3) any possible conflict of interests among the representative parties and the class members.

This section is grounded on the idea that representative parties are fiduciaries for the class and that class actions are unique and require treatment different from ordinary actions.

If the information available under this section shows that an action has been improvidently brought, action can then be taken under Section 9(a)(5) or (6).

Section 18. [Statute of Limitations].

The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. The statute of limitations resumes running against a member of a class:

- (1) upon his filing an election of exclusion;
- (2) upon entry of an order of certification, or of an amendment thereof, eliminating him from the class;
- (3) except as to representative parties, upon entry of an order under Section 2 refusing to certify the action as a class action; and
- (4) upon dismissal of the action without an adjudication on the merits.

COMMENT

Section 18 adopts the principles of *American Pipe and Construction Co. v. Utah*, 415 U.S. 952, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), which held that the commencement of a class action under Federal Rule 23 suspends the applicable statute of limitation to all members of the class pending a determination of class action status.

Section 19. [Short Title].

This [Act] [Rule] may be cited as the "Uniform Law Commissioners' Model Class Actions [Act] [Rule]."

COMMENT

With the deletion of the jurisdictional and reciprocal provisions of former Section 6, the need for uniformity is diminished, and the Act or Rule is therefore re-titled as "Model."

Amendments

Former section 19 [Uniformity of Application and Construction] was omitted in 1987.

Former section 20 was renumbered 19.

Section 20. [Repeal].

The following acts and parts of acts are repealed:

Amendments

Former section 20 was renumbered 19 in 1987.

Former section 21 was renumbered 20.

Section 21. [Time of Taking Effect].

This [Act] [Rule] shall take effect

Amendments

Former section 21 was renumbered 20 in 1987.

Former section 22 was renumbered 21.