

# An Overview of Civil Litigation in the U.S.

presented by Martijn Steger | May 24, 2014

## General Explanation of Civil Litigation in the U.S.

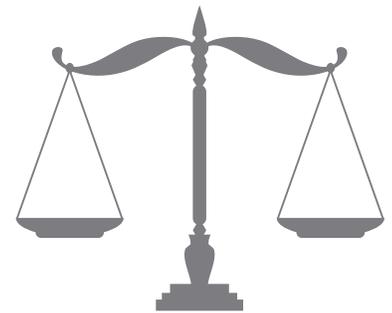
### U.S. litigation is governed by

- + Rules of Civil Procedure; and
- + Rules of Evidence.

### Rules of Civil Procedure:

 Address the procedures of how civil litigation is conducted to include:

- + the name, types, format and contents of written filings to the court;
- + the evidence that the parties can seek to discover and/or must provide to the other party;
- + oral hearings before the court; and
- + the conduct of trials.



### Rules of Evidence:

 Govern the admissibility, type and format of evidence allowed in hearings and trials. Evidence can be oral, physical, written or demonstrative.

- + *Expert witnesses*
  - + Experts often testify on issues such as injuries and damages that a party may have suffered and/or whether products are safe or dangerous.
  - + Experts also testify on the standard of care or practice expected in certain industries and whether such standard was met by a party.
- + Relevant evidence is introduced orally through the testimony of witnesses with knowledge of the matter and/or through documents such as contracts, invoices, emails, charts, photographs and videos.

### Trials:

 Generally jury trials are presided by a single judge who, depending on the type of court and jurisdiction, is either an elected or an appointed official.

- + Parties can agree to not have a jury hear its case, but it is a rare case in which both parties agree to not have a jury.
- + Juries are composed of common citizens in the community that have no preconceived opinions about the case and who are generally drawn from lists of registered voters.
- + Judges decide how the litigation and trials are conducted within the Rules of Evidence and Civil Procedure and decide all purely legal issues based on the adversarial system – which places a high value on what the lawyers choose to argue or not argue.
- + Of course, a party that loses a trial has the right to appeal to a higher appellate court.

### Juries:

 Juries hear all evidence deemed relevant by the parties and the judge, and decide all contested facts. Juries will decide who wins or loses the case and will also award the amount of damages to the prevailing party.

*Note: Jury trials are very rare, because over 90% of all civil cases are settled by the parties before trial starts. Parties can settle a case at any time that they reach an agreement, although consent of the court is required and sometimes is withheld, especially in class actions, if the judge believes the settlement is unfair to the class members.*

### Attorney's Fees:

 Generally, each party is responsible for its own attorneys' fees even if it wins the case.

- + In certain situations – those provided by statute or by a contractual provision – a winning party can recover its attorneys' fees from the losing party.

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## Civil litigation is generally divided into distinct phases:

1. Commencement of the Action
2. Discovery Phase
3. Motion Phase
4. Trial

**1 Commencement of the Action:** The Plaintiff files a written document called a Complaint in court and serves the other party with the Complaint.

- + The Complaint details in a general way the facts and legal claims against the other party.

Within the time allowed by the Rules of Civil Procedure, the party served with the Complaint, the Defendant, files in court and serves the Plaintiff with a response known as an Answer.

- + The Answer will contain a brief response to the allegations made in the Complaint, plus a listing of legal defenses to the Plaintiff's claims.

The Defendant can file claims against the Plaintiff (called a Counterclaim) to which the Plaintiff must then respond with an Answer to the Counterclaim.

**2 Discovery Phase:** In U.S. litigation the parties are allowed very broad latitude to discover and obtain documents and information from the other party and/or third-party witnesses about the claims and defenses in the litigation, as well as the claimed damages.

- + Parties are allowed to take discovery of any matter that could lead to the discovery of admissible evidence:
  - + documents can be obtained,
  - + persons who may not have relevant evidence but who have information that could lead to relevant evidence can be questioned.
- + Information can be "discovered" through various means:
  - + a duty on the parties to self-disclose relevant information they have, and intend to use, about the claims, defenses, damages, the identity and location of relevant documents and the name of witnesses;
  - + written questions and written request for documents sent by one party to the other (Interrogatories, Requests for Admission and Request for Production of Documents);
  - + oral questioning of witnesses under oath with questions and answers transcribed by a Court Reporter (Depositions).

*Document preservation:* Parties are under a legal obligation to preserve all relevant information and documents, including all electronic documents, including emails, as soon as it is known that litigation is possible or contemplated.

- + Failure to preserve relevant evidence can lead to severe court sanctions.

*Expert witnesses:* The discovery phase may also require parties to hire, work with and take discovery of various independent expert witnesses to address particular issues in the case.

- + Expert witnesses may be used and even required to address a variety of subjects, such as standards of care and acceptable practices in an industry or field.

*Cost of discovery:* The discovery phase in U.S. Civil litigation is often one of the most expensive phases for several reasons.

- + First, because of the broad latitude permitted for parties to search for relevant evidence, many potential witnesses are questioned in depositions and many documents are obtained, studied and reviewed.

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- + Judges and juries expect that the lawyers and parties will only present witnesses with relevant information and will only introduce documents that are relevant to the issues in the case.
  - + The witnesses called to testify have been previously questioned by both parties and their lawyers and the questions and answers are understood and known well before trial.
  - + If a document is hundreds of pages long then it is expected that the lawyers will know and understand the entire document and quickly focus on only those portions relevant to the issues in the trial.

## 3 Motions Phase

In general, all communications with the Court are in writing, and sometimes followed up with oral presentations or arguments to the Court.

Whenever a party desires something from the Court, the party files a written motion with the Court containing a request for the court to take some action.

- + The motion will contain the facts and supporting evidence for such facts upon which the request is premised, as well as citations to the statutes and case law that requires or allows the Court to act on the request.
- + Motions can be filed at any time by any party and can address many issues.

### *Most common issues:*

- + Disputes between the parties about the discovery process; or
- + Arguments by a party that certain claims or defenses of another party are not lawful or are not supported by the facts uncovered during the discovery process.
- + In some rare cases and if the facts uncovered during discovery for one of the parties is particularly strong in light of the applicable law, a party may successfully dispose of part or the entire case prior to trial through a motion process known as Summary Judgment.

## 4 Trial

Distinct phases of trial preparation:

- + Choosing a jury to hear the case;
- + Presentation of arguments and evidence by the Plaintiff to the jury;
- + Attack (cross examination) of the Plaintiff's evidence by the Defendant;
- + Presentation of arguments and evidence by the Defendant to the jury;
- + Attack (cross examination) of Defendant's evidence by Plaintiff;
- + Rebuttal evidence, if any, presented by the Plaintiff (and Defendant, if there is a counterclaim);
- + Closing oral arguments by Plaintiff and Defendant to the jury;
- + Instruction by the Judge to the jury on the law and issues to be decided by the jury; and
- + Deliberation and decision by the jury until it reaches a verdict.

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## Class Action: Overview

### Rule 23 of the Federal Rules of Civil Procedure:

- + Certification of class action
- + Rule 23(a):
  - + It must be impractical for plaintiffs to sue individually
  - + Plaintiffs must share a common complaint (of law or fact)
  - + Defendants must share a similar defense for all plaintiffs

### Federal Test: “rigorous analysis” test

*Walmart v. Dukes*, 131 S. Ct. 2541 (2011)

- + Rule 23 of the Federal Rules of Civil Procedure is not merely procedural
- + Prove class theory at certification stage; and
- + Prove the merits of their claims at trial for **each** member of the class.



*Note: Once the case goes to trial, ask the Court to require Plaintiff's counsel to present a plan for how the case can be presented and managed on a class-wide basis. Class counsel often presume that the case settles before trial and it becomes evident that there is no plan for how the case will be proved at trial. Make sure jury instructions require the plaintiffs to prove their claims on a class-wide basis.*

### Test in Ohio: “rigorous analysis” test

*Stammco, LLC, et al. v. United Telephone Company of Ohio et al.*, 136 Ohio St. 3d 231 (2013)

- + “Rigorous analysis” of the merits at the class certification stage to determine if certification is proper.



*Note: Look for potential class challenges and consider preemptive motion practice to defeat certification early in the litigation.*

In addition to satisfying Rule 23(a), Plaintiffs must also show at least one of the requirements of Rule 23(b):

- + Prosecution of separate actions by or against individual class members would create a risk of (A) inconsistent rulings with respect to class members, or (B) adjudication as to some individual class members would as a practical matter impair the interest of the rest of the class; or
- + the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
- + the court finds that the questions of law/ fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.



*Note: The court considers control elements, the extent/nature of any litigation already begun, the desirability of class action litigation under the specific circumstances, and the foreseeable difficulties in managing a class action.*

- + Defining the class (subclasses are possible)
- + Notification of all class members
- + Opting out of the class action
- + Appointing of class counsel by the court
- + Distribution of damages including reasonable attorney's fees

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**Class Action Fairness Act of 2005** (28 U.S.C. Sections 1332(d), 1453, and 1711–1715) gives federal courts jurisdiction over certain class actions if:

- + the amount in controversy exceeds \$5 million



*Note: Class representatives cannot agree to accept less than \$5 million in order to keep the case in state court.*

- + And any of the members of a class of plaintiffs is a citizen of a state different from any defendant.
- + *Most important exception:* If at least two-thirds or more of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the state in which the action was originally filed, jurisdiction remains with the state court.

Class action tests may vary depending on the type of claim (e.g. state consumer fraud claims, securities, antitrust)

## Recent trends:

- + Personal injury and other mass torts (products liability claims, particularly regarding pharmaceutical and medical devices) are viewed as inappropriate for class actions which resulted in an increase in consumer fraud actions brought by individuals, healthcare insurers and state attorney generals
  - + Attempt by Plaintiffs to create Multidistrict Litigation (MDL) proceedings or “aggregate” claims instead of class actions
- + Increase in class actions relating to securities and antitrust matters

## Multidistrict Litigation: Overview

- + 28 U.S. Code § 1407
- + The Judicial Panel on Multidistrict Litigation decides whether federal cases brought in two or more federal courts should be consolidated (“centralized”) for purposes of discovery and other pre-trial matters and heard by one federal judge (“transferee judge”).
- + MDL is not a type of class action, however, class actions are frequently litigated in MDL.
- + Considerations the Panel makes when deciding about MDL:
  - + Do the cases have one or more common questions in fact?
  - + Is the transfer for the convenience of all of the parties involved?
  - + Will the transfer promote judicial efficiency, economy, and fairness?
- + The Panel or another party can move to transfer the case into MDL.



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Martijn, who serves as chair of the firm’s Global Business practice, primarily assists clients with global business law issues, intellectual property matters and dispute resolution. Martijn offers the firm’s clients strategic advice to assist them in developing global markets. He counsels organizations of all sizes regarding international mergers, acquisitions and divestitures, strategic alliances, global logistics, licensing and intellectual property issues. Martijn also assists clients by managing cross-border legal services.

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