Class actions have been possible in the US for many years and are the main procedure by which large-scale commercial disputes involving large numbers of claimants are resolved. The requirements around them are well-established: a court must certify the class before the action may commence and they are generally run on an opt out basis. Both compensatory and punitive damages are obtainable, if sufficiently egregious conduct on the part of defendants can be established. Recent decisions by the US Supreme Court have increased the burden on putative class action plaintiffs but also reinforced the continued viability of the class action mechanism, and the number of class actions is likely to continue to increase.

What forms of collective actions are permitted in this jurisdiction and under what authority?

The main procedure for collective actions in the US is the class action. Hundreds or thousands of claimants can be represented in one set of proceedings. Although rare, a defendant class action is also possible, particularly in insolvency-related litigation, in which a plaintiff seeks to pursue claims against a large number of defendants (e.g., a fraudulent transfer claim brought by a litigation trustee against former investors that received merger consideration shortly before a company’s bankruptcy). This review, however, focuses on plaintiff class actions.

The requirements for bringing a class action in the US federal courts are:

> numerosity – that there are too many would-be claimants to join them all in practice;

> commonality – the claims must all raise similar questions of fact or law;

> adequacy – the chosen representative must be appropriate;

> typicality – the representative’s claims must be typical of those of the other individuals; and

> superiority – a class action must be the most appropriate method of settling the dispute.

Class actions are also permissible in state courts. Each state has its own procedural requirements, which are largely similar to the federal court requirements.

An action may be maintained on behalf of a class only with the court’s approval. To do this, the plaintiffs seeking to represent the class must file a motion to have the class certified. Group actions by multiple parties with similar claims are also possible, although less frequently seen than class actions.
Huge damages awards can be made by juries to penalise businesses, which act in part to regulate commercial activity.
Recent decisions by the US Supreme Court have changed the face of class action litigation, increasing, in some circumstances, the burden on putative class action plaintiffs, both at the pleading stage as well as the class certification stage, but also reinforcing the continued viability of the class action mechanism.

> In a landmark decision, the Supreme Court in Wal-Mart v. Dukes, 131 S. Ct. 2541 (2011) unanimously reversed the certification of an approximately 1.5 million member class, composed of female Wal-Mart employees asserting gender discrimination claims. While the Court divided on the grounds for reversal, a five-member majority held that the plaintiffs’ claims for back pay did not qualify for class treatment because they did not satisfy the commonality requirement. In doing so, the majority adopted a stricter requirement than had previously been understood to apply to assessing commonality. Following Wal-Mart, it is now clear that plaintiffs must allege a “common contention” that is “of such a nature that it is capable of class-wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.” The Court also increased the burden of proof on plaintiffs at the class certification stage.

> In the securities law context, the Supreme Court declined in Amgen v. Connecticut Retirement Plan and Trust Funds, 133 S. Ct. 1184 (2013), to permit a defendant to challenge class certification on the grounds that the putative class would not be able to prove materiality, an essential element of the securities law claim. The Court reasoned that, for purposes of class certification, “materiality can be proved through [objective] evidence common to the class” and thus “materiality is a ‘common question’ for the purposes of” a class action. The case demonstrates that class certification remains a preliminary stage that must be viewed as distinct from the merits stage of federal class action litigation and that a defect in the merits case (which is not resolved through a motion to dismiss) cannot necessarily be used to defeat class certification.

> In Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013), however, the Supreme Court reinforced the strict requirements for maintaining a federal class action by reversing the certification of a class consisting of more than two million potential plaintiffs (in that case, current and former Comcast cable subscribers), reiterating the Court’s view that trial courts asked to certify a class must conduct a “rigorous analysis” of not only the pleadings in the case but also, where necessary, the merits of the claims, including whether damages could ultimately be established on a class-wide basis. The Supreme Court, extending its landmark rejection of class certification in Wal-Mart v. Dukes, set aside the lower court’s certification of the class because plaintiffs failed to provide sufficient evidence that damages were susceptible to determination across the entire class, and thus did not establish the requirement that common issues predominate over those affecting only individual members. Though the case was presented in the antitrust context, it is expected to be applied in cases involving different theories of liability.

In the wake of a series of high profile Supreme Court cases, including Amgen and Comcast, the focus will now be on the application and interpretation of the Court’s opinions by the lower federal courts.