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A practical insight to cross-border Class and Group Actions work

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Chapter 32

USA - Washington D.C.

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1 Class/Group Actions

1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

The District of Columbia, or Washington, D.C., is not a state, but rather a constitutionally created federal district. Like a state, however, Washington, D.C. has its own court system that operates independently from the federal courts that also exercise jurisdiction over the District. The Superior Court of the District of Columbia is the trial court of general jurisdiction for Washington, D.C. In comparison, Washington, D.C.'s principal federal trial court is the United States District Court for the District of Columbia. Both court systems provide for the maintenance of class actions for handling a series or group of related claims. In the Superior Court, such actions are controlled by D.C. Superior Court Rule of Civil Procedure 23. This rule is almost identical to Federal Rule of Civil Procedure 23, which governs class actions in District Court.

1.2 Do these rules apply to all areas of law or to certain sectors only e.g. competition law, security/financial services. Please outline any rules relating to specific areas of law.

The class action mechanism in both court systems applies to virtually all areas of law. Certain types of group actions, such as shareholder derivative actions, however, are governed by additional procedures. See D.C. Super. Ct. R. Civ. P. 23.1; Fed. R. Civ. P. 23.1. Additionally, various statutory regimes may limit the availability of class actions. District of Columbia v. Jerry M., 717 A.2d 866, 873 (D.C. 1998) (regarding the Prison Litigation Reform Act).

1.3 Does the procedure provide for the management of claims by means of class action (whether determination of one claim leads to the determination of the class) or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group?

Generally, in both of Washington, D.C.'s court systems, the Rule 23 class action device allows courts to decide claims brought by class representatives and have those decisions bind the class.

1.4 Is the procedure "opt-in" or "opt-out"?

Except where provided by an underlying statute, such as 29 U.S.C. § 216(b), there are no "opt-in" class actions. A class member, however, may be able to "opt-out" of a (b)(3) class in both court systems. See question 1.10 below.

1.5 Is there a minimum threshold/number of claims that can be managed under the procedure?

Although neither court system's Rule 23 requires a minimum number of class members, any class must be "so numerous that joinder of all members is impracticable." The Superior Court and D.C. Court of Appeals have not identified a precise number of class members that presumptively establishes joinder impracticality. However, the District Court has certified a class with as few as 30 members. Meijer, Inc. v. Warner Chilcott Holdings Co. III, 246 F.R.D. 293, 306 (D.D.C. 2007). Further, the District Court and its court of appeals have stated that the numerosity requirement is generally satisfied by a proposed class of at least 40 members and noted that as few as 25-30 class members should raise a presumption that joinder would be impracticable. Id.

1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?

Generally, to certify a class under both courts' Rule 23, class action plaintiffs must establish: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy, in addition to satisfying Rule 23(b)(1), (b)(2) or (b)(3). Fed. R. Civ. P. 23(a)-(b); accord D.C. Super. Ct. R. Civ. P. 23(a)-(b). The similarity of claims is evaluated in the commonality and typicality prongs, which tend to merge. Ford v. Chartone, Inc., 908 A.2d 72, 85 (D.C. 2006). Factual variations among class members will not destroy commonality, as long as a single aspect or feature of the claim is common to all proposed class members. Id. A class representative's claim is typical if his or her claim and those of the class arise from the same event or pattern or practice and are based on the same legal theory. Id.

1.7 Who can bring the class/group proceedings, e.g. individuals, group(s) and/or representative bodies?

Under both courts' Rule 23, class actions are typically brought by individuals or groups of individuals. However, certain statutes provide for an official body to initiate a group proceeding apart from Rule 23 class actions. See question 2.1 below.

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1.8 Where a class/group action is initiated/approved by the court, must potential claimants be informed of the action? If so, how are they notified? Is advertising of the class/group action permitted or required? Are there any restrictions on such advertising?

Superior Court Rule 23(c)(2) provides that all class members in a (b)(3) action are entitled to notice. The Rule leaves most aspects of notice to the parties to negotiate, but the trial judge ultimately decides what constitutes the "best notice practicable under the circumstances." Notice in District Court is governed by Rule 23(c)(2)(A)-(B). Neither Rule specifically discusses advertising, but it is a common vehicle for notice. Both court systems also require notice of settlement. Fed. R. Civ. P. 23(e); accord D.C. Super. Ct. R. Civ. P. 23(e).

1.9 How many group/class actions are commonly brought each year and in what areas of law, e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law.

The Superior Court does not maintain class action statistics, and the Administrative Office of the United States Courts does not currently publish class action caseload figures for the District Court. Regardless, class actions have been brought in either the Superior Court and/or District Court for a wide variety of claims, such as product liability, civil rights, securities/shareholder claims, competition/antitrust, consumer fraud, environmental issues, and employment issues.

1.10 What remedies are available where such claims are brought, e.g. monetary compensation and/or injunctive/declaratory relief?

Generally, the type of relief a class seeks is related to the type of class sought to be certified. For example, "[c]lass actions seeking mainly monetary relief usually fall under Rule 23(b)(3), which not only implicates class member notification and opt-out rights but also mandates additional findings by the trial court." Ford v. Chartone, Inc., 908 A.2d 72, 88 (D.C. 2006). In comparison, (b)(1) and (b)(2) class actions are intended for cases where broad, class-wide injunctive or declaratory relief, respectively, is necessary to redress a group-wide injury, although such class actions may involve ancillary monetary relief. Ford, 908 A.2d at 87; Adair v. England, 209 F.R.D. 5, 12 (D.D.C. 2002); accord U.S. v. Trucking Emp., Inc., 75 F.R.D. 682, 692 (D.D.C. 1977).

2 Actions by Representative Bodies

2.1 Do you have a procedure permitting collective actions by representative bodies, e.g. consumer organisations or interest groups?

Procedures for representative actions, other than class actions, largely are governed by the particular enabling statute. For example, the District of Columbia's Consumer Protection Procedures Act ("DCCPPA") provisions allow the Director of the Department of Consumer and Regulatory Affairs to file a complaint on behalf of one or more consumers. D.C. Code § 28-3905(p).

2.2 Who is permitted to bring such claims, e.g. public authorities, state appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

It depends on the type of claim and the enabling statute. Compare D.C. Code § 28-3905(p) (regarding director representative actions), with D.C. Code § 28-3905(k)(1) (allowing "private attorney general" actions).

2.3 In what circumstances may representative actions be brought? Is the procedure only available in respect of certain areas of law, e.g. consumer disputes?

Again, the particular enabling statute controls circumstances and procedures for any representative action that may be permitted. See, for example, question 2.2 above.

2.4 What remedies are available where such claims are brought, e.g. injunctive/declaratory relief and/or monetary compensation?

Relief typically is monetary, but injunctive or declaratory relief may also be available. See question 1.10 above. Specific remedies, however, depend on the underlying substantive law.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

In class actions brought in both court systems, judges decide disputes regarding the law, and juries generally decide disputes regarding the facts. Due to the complex nature of class actions, courts may bifurcate liability and damage phases into separate trials.

3.2 How are the proceedings managed, e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

Generally, trial judges manage class action litigation. Neither the Superior Court nor District Court has a special class action division or judges. In District Court, however, under certain circumstances, the trial judge may refer issues to a magistrate judge or a special master.

3.3 How is the group or class of claims defined, e.g. by certification of a class? Can the court impose a "cut-off" date by which claimants must join the litigation?

In Superior Court, Rule 23(a)(2)(i) requires class plaintiffs to set forth a "definition of the alleged class" in the complaint. Within 90 days after the filing of a class action complaint, the plaintiff shall move for class certification under Rule 23(c)(1). The court, in ruling on the motion for class certification, ultimately decides whether the complaint's class definition is appropriate. Generally, any person encompassed in the certified class definition automatically is included in the class. Any applicable opt-out deadlines are case-specific and set by the court. The federal requirements in the District Court, as supplemented by its Local Rules, are similar.

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3.4 Do the courts commonly select "test" or "model" cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

No, the plaintiffs' counsel, not the court, will select class representatives to represent the interest of the absent class members. The preliminary issues, or certification issues, deal with whether the plaintiffs have met the requirements to proceed as a class action, as opposed to whether the claims would be successful on the merits. Garcia v. Johanns, 444 F.3d 625, 633 (D.C. Cir. 2006). After certification, courts examine the merits of the case, in other words, whether the class prevails on its claims. The resolution of the class representatives' claims decides certain issues for the class.

3.5 Are any other case management procedures typically used in the context of class/group litigation?

While a full review of class management tools is beyond the scope of this chapter, courts have a wide variety of management procedures available. See, e.g., Fed. R. Civ. P. 23(d)(1)-(2) (regarding conducting the action); Ford v. Chartone, Inc., 908 A.2d 72, 92 (D.C. 2006) (allowing conditional certification); accord Fed. R. Civ. P. 23(c)(1)(C) (same). Further, courts can fashion subclasses when appropriate. Fed. R. Civ. P. 23(c)(5); D.C. Super. Ct. R. Civ. P. 23 (c)(4)(B).

3.6 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

As in any other type of litigation, the parties typically bear the responsibility and cost of experts they may need to support their case. Each court system has rules dealing with the disclosure, qualification, and evidentiary concerns that affect the use of experts.

3.7 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Parties may depose their opposition's experts. To the extent experts prepare written reports, the reports are generally exchanged prior to trial. The timing of the exchange can vary. In the District Court, the exchange can be set by the court, agreed to by stipulation of the parties, and, in the absence of either, must occur at least 90 days before the trial date or the date the case is ready for trial. Fed. R. Civ. P. 26(a)(2)(C). In the Superior Court, Rule 26(b)(4) details discovery obligations pertaining to experts.

3.8 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

In both court systems, the parties generally are able to obtain discovery on any matter relevant to the litigation. This broad standard, especially in the class context, will place a significant and disproportional burden on class action defendants as compared to class action plaintiffs. Recent changes in the Federal Rules of Civil Procedure regarding obligations for electronically stored information, including its metadata, have made this burden more challenging. D'Onofrio v. SFX Sports Group, Inc., 247 F.R.D. 43, 47 (D.D.C. 2008).

3.9 How long does it normally take to get to trial?

Neither the Superior Court nor District Court maintains statistical information on how long it takes for a class action to get to trial. But civil litigation generally is slow, and due to its complex nature, class actions tend to progress at a slower pace.

3.10 What appeal options are available?

The only class-specific appeal rules concern the interlocutory appeal of a class certification order. D.C. Super Ct. R. Civ. P. 23(f) (permissive interlocutory appeals made must be made within ten days after entry of the class certification order, and interlocutory appeal does not stay proceedings in the Superior Court unless the trial judge or the Court of Appeals so orders); Fed. R. Civ. P. 23(f) (outlining same procedure for District Court). Of course, the normal rules regarding direct appeals of final orders also may be employed in each court system.

4 Time Limits

4.1 Are there any time limits on bringing or issuing court proceedings?

Class actions are procedural devices that allow the aggregation of claims to achieve certain efficiencies. As such, the time limits that govern the underlying substantive causes of action determine the time limits for bringing a class action and, accordingly, those who may be excluded from the class because their cause of action is time-barred.

4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the Court have discretion to disapply time limits?

Various doctrines may allow tolling of a particular statute of limitations, and such exceptions often turn on a case's specific facts. Fort Lincoln Civic Ass'n, Inc. v. Fort Lincoln New Town Corp. 944 A.2d 1055, 1076 (D.C. 2008) (affirming that the discovery rule did not toll limitations period due to timing of notice of appointment publication date); 28 U.S.C. § 2801(a) (dealing with tolling due to legal disability); D.C. Code § 16-3301(c) (addressing tolling period for action to quiet title obtained by adverse possession for infants or others under legal disability).

A separate issue concerns how tolling applies when a court denies class certification. A member of the purported class, after denial of certification, may intervene in an individual suit without penalty for the time period during which the class certification issue was pending, Wachovia Bank and Trust Co., N. A. v. Nat'l Student Mktg. Corp., 650 F.2d 342, 346 n.7 (D.C. Cir. 1980); accord District of Columbia v. Craig, 930 A.2d 946, 966 n.26 (D.C. 2007) (recognising the class tolling rule), or file his own action, Curtin v. United Airlines, Inc., 275 F.3d 88, 93 (D.C. Cir. 2001).

4.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Under District of Columbia law, generally "[t]he doctrine of equitable tolling permits, with respect to fraud, the tolling of the

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limitations period until the plaintiff discovers, or should have discovered through the exercise of due diligence, the fraudulent activity." Wachovia Bank and Trust Co., N. A. v. Nat'l Student Mktg. Corp., 650 F.2d 342, 349 (D.C. Cir. 1980) (applying District of Columbia law).

5 Remedies

5.1 What types of damages are recoverable, e.g. bodily injury, mental damage, damage to property, economic loss?

The types of damages recoverable in class actions are determined by the underlying statutes or causes of action upon which the class representatives elect to sue. Moreover, the procedural device of a class action is not meant to either enlarge or diminish the rights and relief that a party would be entitled to in an individual action. The type of damages, monetary, injunctive, or a combination of both, for example, substantially affects the type of class certified, as discussed in more detail above in question 1.10.

5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Medical monitoring is hotly contested. At least one Washington, D.C. court has denied certification for a medical monitoring class. Reed v. Philip Morris, Inc., No. Civ. 96-5070, 1999 WL 33714707, at *22 (D.C. Super. July 23, 1999).

5.3 Are punitive damages recoverable? If so, are there any restrictions?

Whether punitive damages are recoverable depends on the underlying substantive law. Chatman v. Lawlor, 831 A.2d 395, 400 (D.C. 2003) (defining standard for tort cases); D. Cablevision Ltd. P'ship v. Bassin, 828 A.2d 714, 725-26 (D.C. 2003). Statutes also may limit the recovery of punitive damages for certain causes of action. Bassin, 828 A.2d at 727-29; Cowan v. Youssef, 687 A.2d 594, 603 n.11 (D.C. 1996); D.C. Code § 2-308.02 (District government not liable for punitive damages in contract actions). Additionally, certain federal laws also may limit punitive damages. Daka, Inc. v. Breiner, 711 A.2d 86, 104 (D.C. 1998) (noting cap for punitive damages in Title VII cases); Chatman v. Lawlor, 831 A.2d 395, 405 (D.C. 2003).

5.4 Is there a maximum limit on the damages recoverable from one defendant e.g. for a series of claims arising from one product/incident or accident?

The purpose of a class action is to recover all damages on behalf of all class members to the extent they can be proven. However, the damages that are recoverable depend on the substantive law for the underlying claims.

5.5 How are damages quantified? Are they divided amongst the members of the class/group and, if so, on what basis?

In class actions, as with other litigation, the amount of damages to which a claimant is entitled will depend on the substantive law upon which a claim is based, proof of any alleged damages, and weighing of that proof by a factfinder. The practical difficulties of class actions that surround this, however, have led to certain innovations such as *cy pres* distributions. Boyle v. Giral, 820 A.2d 561, 569-70 (D.C. 2003) (*cy pres* distributions "including the entire amount of [a] consumer settlement fund rather than just the residue, are being used or advocated increasingly where direct distribution of settlement funds to individual class members is impractical; and where important consumer goals, such as disgorgement of ill-gotten gains from and deterrence of future over-pricing and manipulation of market allocation by the offending entities, can be achieved").

5.6 Do special rules apply to the settlement of claims/proceedings, e.g. is court approval required?

Each court's respective Rule 23(e) provides that a class action cannot be dismissed or settled "without approval from the Court." Each court's Rule 23(e) also mandates that notice of any settlement shall be given to all members of the class in such manner as the Court directs. In practice, the mechanics of class settlement procedures will be case-specific and developed primarily by the parties.

6 Costs

6.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party? Does the "loser pays" rule apply?

While there are exceptions, the District of Columbia follows the "American Rule": the parties to an action must pay for their legal fees and costs in litigation, unless such expenses are specifically provided for by statute. Schlank v. Williams, 572 A.2d 101, 108 (D.C. 1990). One exception, for example, is when the other party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." Id. (internal quotation marks omitted). In addition, many substantive statutes provide for recovery of attorneys' fees by the prevailing plaintiff from a defendant.

6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ("common costs") and the costs attributable to each individual claim ("individual costs") allocated?

Due to the representative nature of class actions, in which absent class members have only a passive litigation role, attorneys for the prevailing class are not entitled to charge absent class members for their attorneys' fees. See Passtou, Inc. v. Spring Valley Ctr., 501 A.2d 8, 11-15 (D.C. 1985). Instead, any plaintiffs' attorneys' fees paid typically come from monies won on behalf of the class. See id. Thus, class members do not directly pay for their representation; instead, they pay indirectly by having their recoveries reduced to pay attorneys' fees.

6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

Though not specifically discussed in the class action context, courts generally condition a voluntary dismissal on the requirement that the plaintiff pay the defendant's attorneys' fees and costs to compensate the defendant for the unnecessary expense that the litigation has caused. Thoubboron v. Ford Motor Co., 809 A.2d 1204, 1211 (D.C. 2002).

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6.4 Do the courts manage the costs incurred by the parties, e.g. by limiting the amount of costs recoverable or by imposing a "cap" on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Recoverable fees and costs generally are determined at the end of the proceeding. Generally, the appropriate formula for calculating an award of attorneys' fees begins with calculation of the "lodestar", in other words, the number of hours expended multiplied by a reasonable hourly fee. Gen. Fed'n of Women's Clubs v. Iron Gate Inn, Inc., 537 A.2d 1123, 1130 (D.C. 1988), which is then adjusted by the court, Bagley v. Found. for Pres. of Historic Georgetown, 647 A.2d 1110, 1115 (D.C. 1994). In both court systems, costs may be recoverable and may be enumerated by rule or statute. 28 U.S.C. § 1920; Fed. R. Civ. P. 54(d); D.C. Super Ct. R. Civ. P. 54(d), 54-I.

7 Funding

7.1 Is public funding, e.g. legal aid, available?

For the general availability of legal aid for potential class or group actions, the Legal Aid Society of the District of Columbia, at http://www.legalaiddc.org, may be able to provide information.

7.2 If so, are there any restrictions on the availability of public funding?

To the extent public funding or legal aid is available, any restrictions likely would be specific to the particular organisation providing the service.

7.3 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Rather than contingency fees, and in addition to statutes allowing the recovery of attorneys' fees, the "common fund" doctrine can encourage class action plaintiffs' lawyers to pursue class litigation. See Wells v. Allstate Ins. Co., 557 F. Supp. 2d 1, 6 (D.D.C. 2008). This doctrine permits class action plaintiffs' attorneys to recoup their costs from funds or pools of money they win on behalf of the class. See Passtou, Inc. v. Spring Valley Ctr., 501 A.2d 8, 12 (D.C. 1985). Fee awards in common-fund cases have ranged from fifteen to forty-five percent. Wells, 557 F. Supp. 2d at 6.

7.4 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

The class action device is, in a sense, third party funding of the class claims. The lawyers representing the class typically pay for the costs of litigation on behalf of the class and rely on successful litigation or settlement to recoup those expenses.

8 Other Mechanisms

8.1 Can consumers' claims be assigned to a consumer association or representative body and brought by that body? If so, please outline the procedure.

See questions 2.1 to 2.4 above.

8.2 Can consumers' claims be brought by a professional commercial claimant who purchases the rights to individual claims in return for a share of the proceeds of the action? If so, please outline the procedure.

This generally will depend on the underlying claim and in conjunction with general standing jurisprudence.

8.3 Can criminal proceedings be used as a means of pursuing civil damages claims on behalf of a group or class?

Generally, no. See United States v. Phillip Morris USA, Inc., 396 F.3d 1190, 1202 (D.C. Cir. 2005) (prospective remedies under federal R.I.C.O. are proper but disgorgement is not).

8.4 Are alternative methods of dispute resolution available, e.g. can the matter be referred to an Ombudsperson? Is mediation or arbitration available?

Arbitration agreements often seek to prevent the maintenance of class actions. These provisions are hotly litigated, but at least one court in Washington D.C. has held, "[T]he existence of a provision excluding class action procedures from arbitration does not render the arbitration provision in this case unconscionable and unenforceable." Szymkowicz v. DIRECTV, Inc., No. 07-0581PLF, 2007 WL 1424652 (D.D.C. May 9, 2007). The Superior Court has instituted a Mandatory Arbitration Program, but one of the categorical exceptions is class actions. District of Columbia v. Ortiz, 574 A.2d 286, 287 n.1 (D.C. 1990). Details on other mediation options are provided on the Superior Court's website at https://www.dccourts.gov.

8.5 Are statutory compensation schemes available, e.g. for small claims?

The class action is a mechanism to allow recovery of small claims. Indeed, Rule 23(b)(3) primarily is concerned with "the vindication of individuals with potentially small recoveries who have little incentive to prosecute an action." Reed v. Philip Morris, Inc., No. 96-5070, 1999 WL 33714707, at *12 (D.C. Super. July 23, 1999).

8.6 What remedies are available where such alternative mechanisms are pursued, e.g. injunctive/declaratory relief and/or monetary compensation?

The types of remedies available depend on the underlying substantive claims.

9 Other Matters

9.1 Can claims be brought by residents from other states/countries? Are there rules to restrict "forum shopping"?

Neither court system prevents non-Washington, D.C. residents from filing class actions in the District of Columbia. However, a person or class action having little or no connection to Washington, D.C. may encounter both procedural and substantive hurdles to maintaining a class action. Gipson v. Wells Fargo & Co., 563 F. Supp. 2d 149, 159 (D.D.C. 2008) (transferring class action based on forum selection clause and minimum contacts with Washington, D.C.). Defendants also may upset plaintiffs' forum choice by removing a class action brought in the Superior Court to District Court. 28 U.S.C. §§ 1331(d)(1)-(d)(11), 1453, and 1711-1715.

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9.2 Are there any changes in the law proposed to promote class/group actions in Washington D.C.?

As of September of 2008, there were no changes pending to the class action rules for Washington, D.C.'s Superior Court or the federal district Court for the District of Columbia. However, class action law, be it local or federal, is a developing field.

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