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High Hurdles to Class Actions Remain Even in the Time of COVID-19
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Before 2020, most people only associated the term Corona with a beer. Now, Corona will be at the heart of the American judicial system for years to come. Legal experts anticipate a significant increase in the number of class actions as a direct result of the COVID-19 crisis. In fact, the dam has already started to break for universities (alleged to have failed to refund tuition payments), banks (alleged to have improperly distributed relief funds); music venues and promoters (alleged to have failed to offer refunds for canceled events), and many other industries that are also reeling from the effects of the COVID-19 pandemic.

Class actions are unique because they are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979). To achieve class certification, the plaintiff must "satisfy through evidentiary proof" both the four factors listed in Rule 23(a) (numerosity, commonality, typicality, and adequate representation), and at least one of the provisions of Rule 23(b). *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013) (holding that Rule 23 is not a pleading standard; each requirement must be satisfied "through evidentiary proof.").

So, focusing on Rule 23(a), what hurdles does a plaintiff have to overcome to achieve class certification? Here's a brief primer on the four Rule 23(a) requirements:

- Numerosity. A plaintiff must show that "the class is so numerous that joinder of all members [of the class] is impracticable." Fed. R. Civ. P. 23(a)(1). While the numerosity factor imposes no absolute limitations and is based on the facts of each particular case, this standard does require that the class be sufficiently large such that it would be difficult, if not impossible, to litigate the merits of each individual claim.
- Commonality. A class action may be certified only if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). Here, courts must find that the cases of the numerous plaintiffs have common matters at issues and that the court's findings on those common matters "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). Significantly, plaintiffs cannot certify a class unless they can show that they suffered the "same injury" as the potential class member. *Id*. at 348.
- Typicality. A plaintiff's claim is typical if "it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re American Medical Sys.*, 75 F.3d at 1078. "A necessary consequence of the typicality requirement is that the representative's interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 542 (6th Cir. 2012)
- Adequacy. Finally, before certifying a class, the court must find that the "representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Typically, in considering the adequacy of representation, the court must find that the interests of the class representative coincide with those of the rest of the class and that the class representative and his attorney are prepared to prosecute the action

> vigorously, tenaciously and with adequate financial commitment. *See, g., Ridings v. Canadian Imperial Bank of Commerce Tr. Co. (Bahamas)*, 94 F.R.D. 147, 154 (N.D. Ill. 1982)

Accordingly, Rule 23(a) sets some high hurdles for any plaintiff seeking to represent a class. While the COVID-19 pandemic has many people suffering similar problems, achieving class certification for those problems is easier said than done.

Kevin C. Baltz is a seasoned litigator representing companies across a number of industries in commercial litigation, financial services litigation and trucking litigation. He has successfully represented clients in contract disputes, fraud claims, wrongful foreclosure actions, trade secrets claims, and other business tort cases. Kevin also regularly serves as counsel in arbitration proceedings before the American Arbitration Association (AAA) and the Financial Industry Regulatory Authority (FINRA).