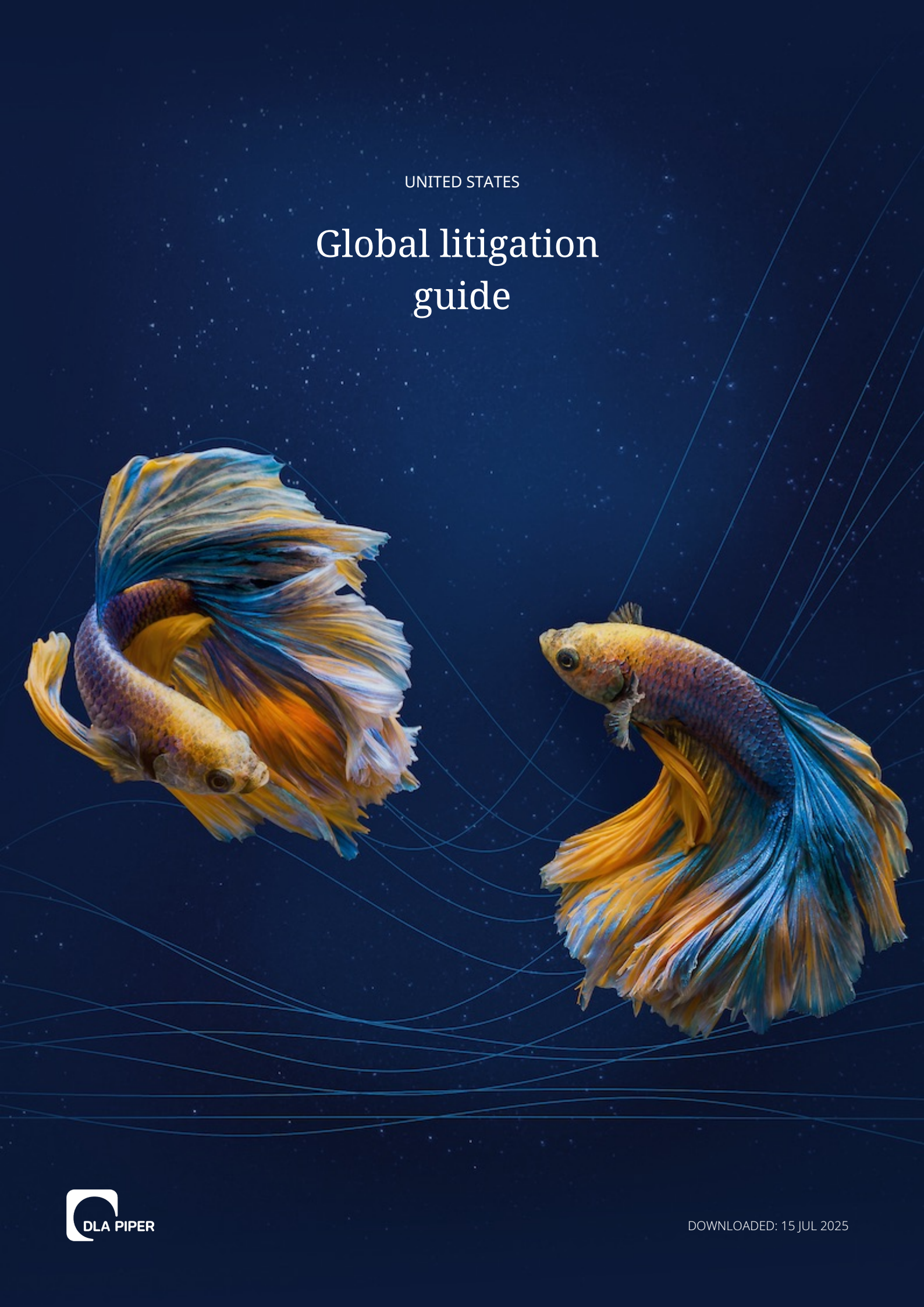
UNITED STATES

Global litigation guide



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About

Welcome to The Global Litigation Guide (the **"Guide"**) which has been prepared by DLA Piper's civil litigation experts around the world for the purpose of presenting key aspects of civil litigation in jurisdictions in which DLA Piper operates.

For each country, the Guide focuses on the following aspects:

- Overview of court system
- Limitation
- Procedural steps and timing
- Disclosure and discovery
- Default judgment
- Appeals
- Interim relief proceedings
- Prejudgment attachments and freezing
- Costs
- Class actions

This global Guide provides practitioners, in-house counsel and clients with a comparative source of reference that covers some of the intricacies of civil litigation in 30 jurisdictions worldwide. DLA Piper has prepared separate guides that deal with matters that are closely related to civil litigation, such as DLA Piper's guide to Legal Professional Privilege and (coming soon) DLA Piper's guide to Third Party Funding. Criminal or administrative litigation (as well as litigation relating to other specialist areas of law that require different procedures such as tax and employment) are outside the scope of the Guide.

The Guide is not a substitute for legal advice. Should you have a civil claim, or if you would like further information, please contact any of the individuals listed in the Guide.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.

Key contacts

Ewald Netten
Partner
DLA Piper Nederland N.V.
ewald.netten@dlapiper.com
T: +31 20 5419 865

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Overview of court system

The analysis below describes the judicial system and practices in the federal courts of the US as well as most state courts. There are numerous deviations from the prevailing approach that vary by state.

The US has a federal system of government that is divided into three branches:

- the legislative branch;
- the executive branch; and
- the judicial branch.

The federal judicial branch is divided into three levels of courts: (i) the U.S. Supreme Court, (ii) 13 U.S. Circuit Courts of Appeals; and (iii) U. S. District Courts. The federal judicial system operates under a common law system.

The U.S. Supreme Court is the highest court in the United States. Few cases originate in the U.S. Supreme Court; the court instead primarily acts as an appellate court for decisions originating in the lower courts. The U.S. Supreme Court has discretion to hear appeals from the Courts of Appeals and typically accepts between 100 and 150 cases per year out of thousands it is asked to review. Nine justices appointed to lifetime terms rule on these cases after receiving written submissions and hearing oral argument.

13 appellate courts, called the U.S. Courts of Appeals, sit below the U.S. Supreme Court. The United States is geographically divided into 94 judicial districts, which in turn are grouped into 12 regional circuits, each of which has its own U.S. Court of Appeals. The U.S. Courts of Appeals generally review the decisions of the U.S. District Courts and federal agencies within their circuits to determine whether the law was correctly applied. In addition to the 12 regional circuits defined geographically, there is one specialized U.S. Court of Appeal—the Federal Circuit Court of Appeals—which has nationwide jurisdiction over certain subject matters, consisting largely of patent and administrative law matters. U.S. Courts of Appeals decisions typically are made by a panel of three judges appointed to lifetime terms.

The United States has 94 federal trial courts, called the U.S. District Courts, corresponding to the 94 judicial districts. There is at least one U.S. District Court in each state. Decisions in the U.S. District Courts are usually made by one of the judges assigned to that district; as with U.S. Supreme Court justices and U.S. Courts of Appeals judges, U.S. District Court judges are appointed to lifetime terms. U.S. District Court judges can rule on both civil and criminal cases, but generally only do so in cases that involve questions of federal law or disputes between citizens of different states. The vast majority of disputes are instead heard by state courts.

Each of the 50 states has its own court system that operates separately from the federal system. Most states have structures similar to the federal courts, with trial courts assigned to particular geographic areas (usually at the county level), one or more intermediate appellate courts, and a state supreme court. In most states, the state supreme court has discretion to hear appeals from the intermediate appellate courts. Delaware is a notable exception; while the state hears many important business disputes, due to its small size has no intermediate appellate court. The state supreme courts are the final arbiters of the laws of their state absent the existence of a federal issue (for example, alleged unconstitutionality of a state statute). Thus, there are certain limited instances when an issue decided by a state supreme court may be elevated to the U.S. Supreme Court. All but one state operates under a common law system. The exception is the state of Louisiana, which is a civil law jurisdiction (primarily derived from the French Napoleonic code with some common law influences).

Notable state variations:

- **Delaware**: No intermediate appellate court exists in Delaware, due to its relatively small size. All appeals are heard by the Delaware Supreme Court as a matter of right.

Limitation

The statute of limitations is a time limit imposed by law during which a party may bring legal action. The limitation period for civil claims varies by jurisdiction and depends on the nature of the claim being brought. These periods typically range from between one and six years but can be longer depending on the applicable state law and the claim at issue. Once the limitations period expires, a court lacks jurisdiction to hear even an otherwise valid claim.

Procedural steps and timing

The litigation process is broadly similar across state and federal courts. Individual litigants may be represented by counsel or can choose to represent themselves (these self-represented individuals are referred to as "*pro se*"). Corporations are generally required to retain an attorney to represent them. In federal court and in most states, proceedings are initiated by a complaint, which is the initial document filed with the U.S. District Court or the state trial court that outlines the factual basis of the lawsuit and the relief the plaintiff seeks. Some states permit a plaintiff to commence a suit by requesting issuance of a summons without filing a complaint, although even in those jurisdictions a complaint must be filed after the summons is issued.

The summons and a copy of the complaint must then be served on the defendant. The period for service varies by jurisdiction but is typically between 30 and 90 days after the complaint was filed. Proof of service must be filed with the court (usually the person who served the document would sign an affidavit) unless the defendant waives such service requirements. Absent a good reason, the court will dismiss the action if the summons is not served on the defendant within the applicable timeframe.

There is generally no requirement in United States courts that a plaintiff provides pre-suit notice or that parties must attempt to resolve their dispute before an action is filed. Defendants have the right to file a motion to dismiss the complaint on various procedural grounds, including lack of personal jurisdiction over the defendant, lack of subject matter jurisdiction by the court, improper service or venue, or failure to state a valid legal claim. Timeframes for filing such motions vary among jurisdictions but are typically between 21 and 60 days.

If no motion to dismiss is filed or if the court denies the motion, the defendant must file an answer to the complaint (typically within 14 to 30 days depending on the jurisdiction). In the answer, the defendants may assert affirmative defenses and counterclaims against the plaintiff, allege cross-claims against another defendant, or join additional parties. Once an answer is filed, parties typically begin the discovery process.

Timeframes for discovery vary greatly depending on the complexity of the case and the case management preferences of the assigned judge and may range from a few months for simple matters to a year or more for complex ones.

Once discovery is completed, any party may file a motion for summary judgment, asking the court to enter judgment in that party's favor based on the undisputed facts of record or a legal question that is dispositive of the case. If no motion for summary judgment is filed or if the court denies the motion, the case is scheduled for trial. Notably, many courts will strongly encourage or order the parties to participate in some form of alternative dispute resolution (for example, mediation) at some point prior to trial.

Cases typically proceed from filing to trial in two to three years, though longer timeframes may be granted for complex matters.

Disclosure and discovery

Civil discovery tools are similar across federal and state courts in the United States. Discovery is broad in scope and designed to allow parties to a lawsuit to obtain virtually all of the information related to any claim or defense in the litigation from each other and third parties. It is not necessary that the requested information be admissible at trial (though there are limited exceptions for certain privileged information, such as communications between a party and its attorney, and requests that are deemed unduly burdensome). As a result, the scope of discovery is significantly broader than the scope of evidence that may ultimately be presented at trial. The court is not typically involved in the discovery process but may be asked to resolve a discovery dispute between the parties.

Discovery typically consists of a combination of the following

- **Initial disclosures**: Parties are usually required to exchange certain fundamental information early in the case without a request from the other side. Such disclosures include a list of key witnesses, relevant documents, damage calculations, and identification of any insurance available to cover any part of a party's liability;
- **Requests for production**: Parties may serve requests for production of another party's documents, records, emails, electronically stored information (referred to as "ESI"), and other data related to the case. This is often a costly process in complex litigation, particularly when there are a large number of electronic documents, in part because the producing party and the requesting party each generally seek to review all of the documents at issue;
- **Requests for inspection**: If particular premises in one party's control are relevant to the case, any other party may request to inspect those premises. For example, such requests might be used to obtain access to a manufacturing plant where an allegedly defective product was manufactured;
- **Interrogatories**: Parties may serve written questions, to which the other party is required to provide written responses verified under oath;
- **Physical and mental examinations**: If a party claims a physical or mental injury as the basis for a claim, other parties may request that the individual submits to examination by an independently retained physician or another medical practitioner;
- **Requests for admission**: Parties may serve requests asking another party to admit certain specified facts contained in the request;
- **Expert reports**: A party may retain an expert witness—a person who has specialized knowledge of a particular field and who can use this expertise to help the judge or jury understand complex issues (for example, the science underlying a medical procedure or the appropriate definition of a product market). If a party retains an expert witness, that witness must prepare a report summarizing the expert's opinions and conclusions, which must be provided to all other parties;
- **Depositions on written questions**: An individual may be placed under oath outside the presence of a judge for the purpose of responding orally to written questions prepared by one of the parties; and
- **Depositions on oral examination**: An individual may be placed under oath outside the presence of a judge for the purpose of responding to questions posed by an adversary's attorney. Most attorneys prefer depositions on oral examination to those on written questions, as the latter do not provide the ability for counsel to ask follow-up questions of a witness and do give a witness time to reflect and revise what might otherwise be more candid testimony. Depositions may be taken of witnesses of fact and, in many jurisdictions, of expert witnesses. Corporate parties can be compelled to produce a designated individual with authority to respond to questions on the corporation's behalf.

Discovery may also be obtained from third parties. However, such discovery is typically limited to production of documents, inspection of premises, and depositions, and to information that cannot be obtained from any of the parties to the litigation.

As noted above, discovery in the United States is often very broad. Nevertheless, any party may seek entry of a protective order to limit the scope of discovery to ensure that it remains proportionate to the complexity and significance of the case, or to preclude discovery that would impose an undue burden on the party or violate some privilege recognized by the law.

Default judgment

A plaintiff can apply for default judgment in proceedings where a defendant does not respond to the plaintiff's complaint within the specified timeframe after the complaint has been served. To do so, the plaintiff typically must submit evidence that it served the complaint. A defendant subject to a default judgment has the option to ask the court to later re-open the case and vacate the judgment, though doing so usually requires the defendant to establish good cause for its failure to respond earlier.

Appeals

In the federal judicial system, U.S. District Courts and federal agencies' administrative courts are typically the first courts to adjudicate disputes. Those courts' final judgments can be appealed once as a matter of right to the appropriate U.S. Court of Appeals by any party unsatisfied with the lower court's decision. Rules of appellate procedure in each jurisdiction set out the requirements and timing for appeals. Appeals must typically be commenced within 30 days following entry of the underlying judgment.

In the federal courts, appeals generally may only be taken from final judgments and not from intermediate decisions made by the lower court. But an immediate right of appeal may be taken from orders granting or denying injunctions, rejecting certain affirmative defenses,

establishing receiverships, or adjudicating rights and liabilities in admiralty proceedings. A party may also be able to petition the U.S. Court of Appeals to hear a pre-judgment appeal if the decision at issue poses a particularly significant and unsettled legal question, though in practice such appeals are rarely allowed.

If a party is unhappy with the decision reached by the U.S. Courts of Appeals, it can seek review by the U.S. Supreme Court, although the U.S. Supreme Court has discretion as to which cases it accepts and only hears a small fraction of the cases it is asked to review each year.

Most states follow a similar three-level structure for their court systems, although some smaller states do not have an intermediate appellate court, with all appeals being taken directly to the state supreme court. The same general prohibition on pre-judgment appeals applies, with each state having its own particular exceptions.

Notable State Variations

- **California**: There is no right of immediate interlocutory appeal; however, a party may petition an appellate court for a writ of mandamus to permit an appeal on a particularly significant issue. This procedure is often used to challenge an order denying a petition to quash a complaint for lack of personal jurisdiction over the defendant;
- **Illinois**: Certain contempt orders are immediately appealable if they impose a monetary fine or other penalty;
- **New York**: New York is significantly more generous in its allowance of interlocutory appeals than other states or the federal system. With few exceptions, interlocutory appeals may be taken from any order that involves some part of the merits of a case or affects a litigant's substantial rights. *Ex parte* orders are not eligible for interlocutory appeal; and
- **Texas**: Orders granting or denying class certification or denying summary judgment based on a finding of immunity are immediately appealable as of right.

Interim relief proceedings

State and federal courts have wide discretion to grant interim relief in the form of injunctive orders. These orders may require a party to do, or refrain from doing, a particular act. Injunctive orders are equitable in nature, and such relief therefore does not typically include an order requiring the payment of money. It is not possible, for instance, to obtain an interim money judgment against a defendant. Interim injunctive orders take one of two forms:

- temporary restraining orders, which are usually reserved for emergency situations, may be issued without notice to other parties or a hearing in as little as a few hours but expire after a limited period of time (usually 14 days); and
- preliminary injunctions, which are typically sought in non-emergency situations, remain in place for the duration of the litigation and require notice and a hearing with the opposing party. Individuals may be represented by an attorney or elect to represent themselves in these proceedings. Corporate parties must typically be represented by an attorney.

Courts are typically reluctant to issue preliminary injunctions, and even more reluctant to issue temporary restraining orders, particularly if the enjoined party has not had an opportunity to present its position. To obtain interim injunctive relief, a party must file a motion accompanied by evidence (for example, affidavits and relevant documents) establishing that the party is entitled to relief. The court may also order a hearing at which testimony on the motion will be presented. Courts generally look at four factors when assessing a party's request for interim injunctive relief:

- whether the requesting party is likely to succeed on the merits of its case;
- whether an award of money damages would not be sufficient to cure the alleged injury;
- whether, on balance, equity favors the issuance of the injunction; and
- whether the public interest favors the injunction.

Courts consider similar factors when assessing requests for permanent injunctive relief, which can be awarded as part of a judgment on the merits. In federal court and in some states, an immediate appeal is permitted from an order granting or denying injunctive relief.

Prejudgment attachments and freezing orders

No common law right to prejudgment attachment exists in the United States. Attachment may be available as a prejudgment remedy under state statutes addressing the subject. Federal courts may attach property to the extent permitted by the law of the state in which they sit.

A request for a prejudgment attachment or freezing order must be requested from the applicable trial court. A request for attachment or a freezing order may be made at the time the complaint is filed but cannot be requested prior to a suit being commenced. When prejudgment attachment is authorized, courts typically have discretion to issue prejudgment writs of attachment that prevent a defendant from disposing of or hiding tangible or intangible assets that may be used to satisfy any judgment the plaintiff ultimately obtains. A plaintiff seeking prejudgment attachment may be required to post a bond to cover any damage caused to the defendant's property in the event that the plaintiff does not succeed on its claims.

The criteria for the issue of a prejudgment writ of attachment are similar to the ordinary principles for granting injunctive relief, although courts have recognized that attachment is a severe remedy that is appropriate only if the plaintiff produces evidence showing an appreciable risk of being unable to enforce a future judgment. Relief may not be sought without notice to the other parties. Because the procedure seeks to attach assets prior to a judgment being entered, a court is likely to require a high burden of proof showing that the plaintiff will be entitled to relief once the litigation concludes.

Broadly and generally, a request for prejudgment attachment is assessed across four factors, similar to those used when considering requests for injunctive relief:

- whether the applicant is likely to prevail on the merits of its case;
- whether the refusal of a writ of attachment will give rise to a real risk that the plaintiff will be unable to enforce any judgment rendered in its favor;
- whether the balance of the equities favor the attachment; and
- whether the public interest favors the attachment, meaning that attachment must further an important interest beyond the claims in the litigation itself.

Notable State Variations

- **California**: By statute, only property located in California is subject to attachment. Property outside the state may not be attached by a California court;
- **Delaware**: The banking and insurance industries are exempt from prejudgment attachment, both as to deposits held in Delaware as well as any asset owned by an entity that qualifies as a bank; and
- **Illinois**: By statute, Illinois requires that a plaintiff requesting a writ of attachment post a bond equal to double the value of the property to be attached.

Costs

Applicable procedural rules in most state and federal courts provide for costs (not attorneys' fees) to be awarded to the prevailing party following entry of final judgment. Costs eligible for recovery, which usually range from a few hundred to a few thousand dollars, include:

- court filing fees;
- fees for serving process;
- witness fees and transportation expenses;
- transcript preparation fees;
- copying fees; and
- compensation for court-appointed experts and interpreters.

As a general rule, the United States does not have a loser-pays system; instead, each party typically bears its attorney's fees, regardless of whether it prevails in the dispute. There are limited exceptions where attorney's fees and other costs (for example, expert witness fees) are recoverable. For instance, fees may be expressly authorized by the statute under which a particular claim is being litigated, or a contract between the parties may authorize the court to award them.

When fees are authorized, a request for fees is typically made to the judge presiding over the dispute, supported by evidence of the time spent on the matter. The amount of fees awarded varies depending on the claim at issue and the complexity of the case, with the presiding judge having broad discretion to decide what award is reasonable and appropriate. In simple cases, a fee award may be limited to a few thousand dollars. In highly complex litigation, courts have awarded fees ranging into the tens - and in some circumstances involving large, highly complex litigation, hundreds of millions of dollars.

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Class actions

A putative class action proceeding may be commenced by a named plaintiff as a representative of unnamed parties who have the same interest in the proceeding. Any class action in which total exposure exceeds USD5 million may be brought in federal court if the defendant and at least one of the class members are citizens of different states.

The named plaintiff (or class representative) must seek leave of the court to certify the class and proceed as a class action. To obtain class certification, the class representative must produce evidence of a sufficiently numerous class and demonstrate that common legal issues are shared on a class-wide basis, such that resolution of those issues would materially advance all members' claims. Class members are not required to demonstrate identical claims or damages but must show sufficient commonality across the class that individual issues will not make a class proceeding unwieldy. Typically, a motion to certify a class is made following a period of discovery devoted to class issues, such as identification of the class members, common issues, and shared damages theories. An appeal of a class certification decision may be taken if permitted by the appellate court.

As a practical matter, most class actions in the United States are brought with the expectation of settlement. Common claims for class treatment include consumer protection, antitrust, securities actions, mass tort, and civil rights matters, in which individual damages are typically small (perhaps as little as a few dollars) but, in the aggregate, create significant liability exposure. Moreover, while individual class members may recover only small amounts, class counsel may end up recovering a large award of attorney's fees. In any event, class actions typically proceed up until the class certification stage, at which point they are often dismissed or settled.

Once a class is certified, all individuals who satisfy the class definition become members of the class. Those individuals must be notified of their status as class members and given the opportunity to opt out of the class proceedings, or to object to any settlement. All class members who do not opt out will be bound by the judgment of the court or by any approved settlement.

Notable State Variations

- **California**: A denial of class certification is immediately appealable as a matter of right; and
- **Texas**: Orders granting or denying class certification are immediately appealable as a matter of right.

Key contacts

Ilana H. Eisenstein
Partner
DLA Piper LLP (US)
ilana.eisenstein@dlapiper.com
T: +1 215 656 3351

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