



ICLG

The International Comparative Legal Guide to:

Class & Group Actions 2013

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A practical cross-border insight into class and group actions work

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USA



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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.

Class actions may be brought in either state or federal courts. In federal courts, Federal Rule of Civil Procedure (FRCP) 23 governs class action procedures. Under FRCP 23, one or more plaintiffs file a complaint requesting class certification. At an “early practicable time” after the complaint is filed, the plaintiffs will move to certify the class. The plaintiffs bear the burden to prove that all FRCP 23 requirements are met, and the court must conduct a rigorous analysis in evaluating the appropriateness of class treatment. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). Courts generally allow at least limited discovery before this certification motion.

FRCP 23 outlines the prerequisites for class treatment. Preliminarily, most courts require the plaintiffs’ proposed class be sufficiently defined, so that class members can be identified and the class does not include too many plaintiffs who may not have a claim against the defendant(s). Next, every federal class action must satisfy all four FRCP 23(a) requirements – the class must be sufficiently numerous; the class must be based on a common issue; the named plaintiffs’ claims must be typical of the proposed class; and the named plaintiff and the plaintiffs’ counsel must be adequate representatives for the class. These requirements are set in place to protect the interests of the non-named plaintiffs.

After sufficiently defining the proposed class, and satisfying all FRCP 23(a) requirements, plaintiffs must meet one of FRCP 23(b)’s subsections. FRCP 23(b) can be satisfied in one of three ways. Under FRCP 23(b)(1), a class can be certified if the prosecution of separate actions would create the risk of inconsistent adjudications with respect to individual class members, would impose incompatible standards of conduct for the defendant, or would otherwise dispose of the rights of non-joined claimants. This is most often employed in “limited fund” situations where the defendant has a finite ability to pay out all the potential claims.

Plaintiffs may also pursue a FRCP 23(b)(2) class, whereby plaintiffs have to show that the defendant acted on grounds generally applying to the entire class, so that some injunctive or declaratory relief is appropriate for the class as a whole. Here, any monetary relief sought must be incidental to the true pursuit of the class – injunctive relief. There is no need for an opt-out provision here.

Lastly, Plaintiffs can seek a FRCP 23(b)(3) class, arguably the most common choice. Here, plaintiffs must show that common questions of law or fact predominate over individualized issues, and that a

class litigation is superior to a claim-by-claim adjudication of the controversy. Plaintiffs may opt-out of this class if they wish to preserve their individual claim.

Each state has its own class action procedure. Many states’ procedures track the federal rule, but some states do not. State courts are generally viewed as more liberal in permitting certification. In 2005, Congress enacted the Class Action Fairness Act (CAFA), which expanded federal jurisdiction over class actions. 28 U.S.C. § 1332(d). However, CAFA has exceptions that keep controversies that are truly local in state courts.

In addition to class actions, plaintiffs’ claims may be aggregated in a “collective action.” The most common collective action setting is the Fair Labor Standards Act (FLSA), which is similar to FRCP 23(b)(3), but has a procedure for an opt-in class, as opposed to an opt-out class. 29 U.S.C. § 201 *et seq.*

Claims may also be consolidated. Multi-district litigation (MDL) may be coordinated either through state or federal courts, 28 U.S.C. § 1407, and either or both parties may seek this consolidation. Even outside MDL’s, the parties or the court may coordinate or consolidate related cases on a number of bases, including “mass actions”. FRCP 20 allows for permissive joinder of other claimants, but at some point (no specific threshold, but generally viewed as somewhere around 25-40 claimants), joinder becomes impractical and the action must be brought as a class.

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.

These rules are not limited to a specific subject matter. Some specific regulations may provide additional vehicles for aggregate litigation, such as an FLSA collective action. Also, some specific subject matters will have heightened pleading requirements, such as fraud claims or shareholder derivative actions.

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?

Class actions permit the adjudication of the claims to be extended to the absent class members. Those class members are permitted to opt-out if the class is brought as an FRCP 23(b)(3) class.

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

If the plaintiff brings an FRCP 23(b)(1) or (b)(2) class, absent class members cannot opt-out, while 23(b)(3) classes do permit potential class members to opt-out. FLSA collective actions are opt-in, requiring class members to affirmatively elect to participate in the litigation.

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

FRCP 23(a)(1)'s numerosity requirement demands the number of claimants be so numerous as to make joinder impractical. There is no set threshold, however, and classes have been certified with less than 40 class members. If the lawsuit is governed by CAFA, 28 U.S.C. § 1332(d) requires 100 plaintiffs or more.

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?

This issue will often be the focus of dispute in class certification proceedings. Constitutional considerations require the class be sufficiently cohesive, so that it does not expand, abridge, or otherwise alter the substantive rights of class members. The Supreme Court recently clarified that to satisfy the commonality requirement, claimants must not only be arguing a common issue of law or fact, but that those claimants must also have suffered "the same injury." *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 2551 (2011).

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

There are no restrictions on who can file a class action complaint, as long as the plaintiffs allege their claims are representative of the putative class.

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?

Before a class is certified, there are ethical restrictions on plaintiffs' counsel preventing them from contacting potential class members directly. Yet, plaintiffs' counsel may run general advertisements about the litigation. Defendants' counsel has even less flexibility here, but the American Bar Association maintains precertification contacts by defendants are not, *per se*, unethical.

Once certified, FRCP 23(b)(3) classes require the absent class members be notified of their potential class status. Additionally, FRCP 23(e)(1) requires class notification if the parties reach settlement, to allow opting-out.

Notice must be provided in plain language, describing the claims at issue and the procedure to object and opt-out of the class. Generally, the court will review a jointly-drafted class notice for approval. Once approved, notice must be given in a way reasonably calculated to reach class members. This is often achieved via some combination of direct mailings, electronic mailings, and newspaper, radio, or television advertisements.

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?

Class actions are brought in essentially every subject area, but are most common in securities or antitrust litigation, products liability, employment, or environmental issues. Recently, class actions involving claims of false advertising and violations of consumer protection laws have risen dramatically. Providing any more specificity is difficult, as plaintiffs have 95 separate choices to select when they are filing the suit. Thus, to be any more precise, 95 separate searches would have to be conducted for each state and district. Given these hurdles, few reports are available regarding the number of pending class actions. As of 2008, class actions were being filed at a rate of approximately 4,800 per year, and anecdotal evidence suggests that this figure is rising.

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

There are no restrictions on what relief is available. Based on what plaintiffs seek, different FRCP 23(b) classes are pursued.

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?

Courts recognize associational standing, or the ability of an entity, purporting to represent the interests of its members, to sue on their behalf. *United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 556-58 (1996). These suits are more commonly focused on non-monetary interests.

In addition, government officials may be statutorily authorized to bring actions on behalf of their constituents, most frequently under the *parens patriae* doctrine. This doctrine permits standing for a state to sue to protect the health and welfare of its citizens. *Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007).

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?

Public interest organizations of all types can pursue cases via associational standing. *Parens patriae* actions are usually brought by state attorneys-general.

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?

As a general rule, government officials' ability to bring representative actions is governed by statute.

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

Government officials bring actions for injunctive or monetary relief, while associational cases are usually for injunctive or declaratory relief.

3 Court Procedures

3.1 Is the trial by a judge or a jury?

The right to a jury trial depends on claims, parties, and relief sought. The Seventh Amendment guarantees the right to a jury when the claims arise from common law or a statute setting forth a tort-like duty. *Curtis v. Loether*, 415 U.S. 189, 195 (1974). Certain statutes may also provide the right to a jury.

However, when there is only equitable relief at issue, there is no right to a jury in federal court. *Reese v. CNH Am. LLC*, 574 F.3d 315, 327 (6th Cir. 2009). There is also no right to a jury when the United States, or another quasi-governmental body, is the defendant, unless the government consents. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981).

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?

Any federal judge may preside over a class action. Some districts also utilize magistrate judges, where, if both parties consent, the magistrate may oversee the litigation.

Some state courts have specific judicial divisions for complex litigation. Some of these courts have established special dockets to manage related cases more efficiently.

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?

Upon a court's certification of the class, an order is entered containing the precise class definition. If the plaintiffs proposed an FRCP 23(b)(3) class requiring notice be sent, that notice will have a date by which class members must opt-out if they so wish. Similarly, in an FLSA collective action, the notice will have a deadline for opting in to the class.

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?

In a class action, the named plaintiff tries their own case, and the results apply to all class members. In consolidated litigation, such as an MDL, courts may use "test" cases (often called "bellwether cases"). The results from the bellwether trial, while not binding on the other pending cases, do lend important insights into how the litigation should evolve and can assist the parties' resolution of the cases.

Regarding determination of the factual issues, see response to question 3.1.

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

Judges may employ sub-classes and other techniques for managing class actions, such as bifurcating issues in the litigation. See FRCP 23(c).

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?

The court may elect to appoint its own experts to assist in the disposition of the case. This is not typical, however. The parties are usually the ones to present expert evidence, from experts of their own choosing. Expert evidence is frequently offered both in support of and in opposition to class certification, as well as on the merits of the case. Courts must rigorously analyze expert reports, including the weighing of conflicting expert testimony, at the class certification stage. See, e.g., *In re Hydrogen Peroxide*, 352 F.3d 305 (3d Cir. 2008). However, courts are not clear on whether experts are subject to a *Daubert* admissibility analysis at certification stage. *Wal-Mart v. Dukes*, 131 S.Ct. 2541, 2553-54 (2011) (doubting the lower court's conclusion that *Daubert* did not apply at the certification stage); *Daubert v. Merrell Dow Pharm. Inc.*, 113 S.Ct. 2786 (1993) (outlining the standards imposed on admitting expert evidence at trial).

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?

The federal rules require the disclosure of both witness lists and expert reports. After this exchange, the opposing party may take depositions within federal discovery guidelines. Each state has its own discovery rules, including expert disclosure regulations.

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

Once litigation begins, FRCP 26–37 govern discovery in federal court. State courts each have their own rules of civil procedure governing discovery. Generally, requested documents that are responsive and not privileged will have to be produced to opposing parties.

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

Trials in class action cases are rare – if a class does get certified, it is likely to settle. See, e.g., *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 745 (7th Cir. 2008). If the case does not settle, it can take years to get to a trial on the merits. Courts have wide discretion to manage class action litigation, and that can include bifurcating certification discovery from merits discovery, flexibility in determining the length of time discovery will be open, and when briefing on certification will occur. After certification, it is quite possible additional discovery will take place on the merits of the certified claims, including merits experts and dispositive motion practice.

3.10 What appeal options are available?

FRCP 23(f) permits an interlocutory appeal of the certification decision by either plaintiff (appealing the denial of certification) or defendant (appealing the granting of certification). This subsection recognizes the importance of the certification decision, but not all states have similar provisions allowing for interlocutory review.

4 Time Limits

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

The claims being asserted will dictate the time limits, as those claims will have particular statutes of limitation which govern the time by which they must be brought.

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 a discretion to disapply time limits?

Statutes of limitation vary widely claim-to-claim. The age of the claimant can toll the statute of limitation until they reach the age of majority. Mental disability can also toll the statute of limitation. If the class action is based upon a latent injury, claimants often do not have to bring their case until their injury is discovered.

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

Statutes of limitation operate as an affirmative defense. If a defendant induced a plaintiff not to bring a claim via concealment or fraud, and that claim is now time-barred, a defendant is equitably estopped from invoking such a defense. *Haydon v. First Neighbor Bank*, 610 F.3d 382, 385 (7th Cir. 2010).

5 Remedies

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

All types of damages are available, but cases involving highly individualized issues such as emotional damages or personal physical injury will likely be too plaintiff-specific to satisfy FRCP 23. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594 (1997); *Castano v. The Am. Tobacco Co.*, 84 F.3d 737, 744 (5th Cir. 1996).

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?

Because personal injury cases are so rarely certified, medical monitoring cases are rare. *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006). Further, medical monitoring laws vary from state to state. However, there is nothing specifically precluding recovery of these costs. Class action subclasses have been certified where claimants have not yet suffered injury. *See, e.g., Glazer v. Whirlpool Corp.*, 678 F.3d 409 (6th Cir. 2012).

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

If the underlying claims permit punitive damages, they may be pursued on a class-wide basis. Punitive damages may require individualized determinations. However, individualized damages determinations do not always preclude certification.

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?

No. But, if the defendant has limited resources, plaintiffs may wish to pursue an FRCP 23(b)(1) class.

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

The district court determines how to disperse damages, but this quantification depends on the nature of the claims brought. Often, the named plaintiff(s) in a class action will receive an award substantially larger than the members of the class who did not actively participate in its prosecution.

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

Yes, class action settlements require court approval to ensure they are fair to absent class members and do not result from collusion between the defendant and the representative plaintiff. FRCP 23(e). Class members may file objections to the settlement.

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?

The "American Rule", that parties pay their own costs and attorneys' fees, is the default rule. Some statutes, such as consumer fraud or civil rights statutes, may provide a fee-shifting mechanism if the plaintiff prevails. Absent sanctionable conduct by the plaintiff, however, a defendant will not recover its fees paid in defending the action, even if it prevails.

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?

Plaintiffs' counsel frequently advance the costs of the litigation to be taken out of any recovery.

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?

If the court has not yet ruled on certification, the class representative may voluntarily dismiss their claims without prejudicing the putative class members. Once the court has certified a class, however, the court must approve any settlement. FRCP 23(e).

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?

Courts do not manage the costs incurred by the parties, and any costs assessed would not be until the end of the proceedings if available via statute or contractual agreement.

7 Funding

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

No. Certain organizations or attorneys provide *pro bono* legal services, but that is less common in class action litigation.

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

This is not applicable in the USA.

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

The most common fee arrangement for plaintiffs is a contingency fee with their counsel. This governs the recovery for the attorneys if the case is settled individually, but if the case is adjudicated class-wide, the court must determine counsel's compensation. CAFA will provide some guidance as well, in the instance of certain settlements. 28 U.S.C. § 1712.

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

Ethical rules prohibit attorneys from financially assisting their clients, and rules against champerty prohibit third parties from funding litigation. Attorneys and legal aid groups may provide *pro bono* services, though.

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.

No, there is no such formal mechanism.

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

No, there is no such formal mechanism.

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

Criminal proceedings, while sometimes foreshadowing civil litigation, are not supposed to be intended as a means of pursuing civil damages. Citizens injured by criminal conduct may bring

actions under related civil causes of action for relief, but often this must wait until after criminal proceedings have ended due to Fifth Amendment concerns.

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

Alternative dispute resolution is employed, but not by an ombudsperson. Mediation is frequently pursued as a means of resolution. Also, the parties may agree to arbitration. Whether a class arbitration provision is enforceable will depend on the facts of the case, but an arbitration clause that mandates arbitration and prohibits class status in the arbitration has been found valid and precludes class actions. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1751-53 (2011).

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

Some statutes provide punitive damages, attorneys' fees, or specified damages to incentivize the litigation of an otherwise nominal amount (i.e. civil rights violations or consumer fraud).

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

All forms of recovery are available, although the parties may set parameters on that recovery before agreeing to arbitration or mediation.

9 Other Matters

9.1 Can claims be brought by residents from other jurisdictions? Are there rules to restrict 'forum shopping'?

Claims may be brought by out of state residents, but those actions will be subject to venue and personal jurisdiction rules. Multi-state class actions raise difficult problems of what law to apply to each claim and each plaintiff. Forum shopping is less prevalent post-CAFA, as that legislation eased restrictions on removal to federal courts.

9.2 Are there any changes in the law proposed to promote class/group actions in the USA?

No. However, decisions from the Supreme Court and Circuit Courts inevitably will impact on class action practice and procedure in the coming year.

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Michael Best & Friedrich LLP has earned a reputation as a leading law firm in the Midwest because of our long commitment to delivering results for our clients. By guiding businesses through complex legal problems in diverse economic environments, we possess a solid foundation for understanding the constantly evolving business environments facing our clients.

As a broad-based business law firm, with approximately 220 attorneys in several offices, Michael Best is uniquely able to match attorneys with deep industry experience to our clients' specific business and legal challenges.

Michael Best's Class Action, Collective Action and Multidistrict Litigation Team has the experience, tenacity and resources available to successfully handle local, regional and national cases in state and federal court. We have represented clients in class action and multi-district litigation involving a wide variety of claims and industries, including: employment; financial services; insurance; manufacturing; products liability; real estate; restaurant; retail; and securities.

Other titles in the ICLG series include:

- Aviation Law
- Business Crime
- Cartels & Leniency
- Commodities and Trade Law
- Competition Litigation
- Corporate Governance
- Corporate Recovery & Insolvency
- Corporate Tax
- Dominance
- Employment & Labour Law
- Enforcement of Competition Law
- Environment & Climate Change Law
- Insurance & Reinsurance
- International Arbitration
- Investment Funds
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining
- Oil & Gas Regulation
- Patents
- PFI / PPP Projects
- Pharmaceutical Advertising
- Private Client
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Telecoms, Media & Internet
- Trade Marks



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