

The International Comparative Legal Guide to:  
**Class and Group Actions 2009**

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



Published by Global Legal Group with contributions from:

A&L Goodbody	Cleary Gottlieb Steen & Hamilton LLP	Law offices of Klavins & Slaidins LAWIN
Allen & Overy LLP	Cliffe Dekker Hofmeyr Inc.	Lideika, Petrauskas, Valiunas ir partneriai LAWIN
Arntzen de Besche Advokatfirma AS	CMS Cameron McKenna	Lovells
Arnold & Porter LLP	Davies Arnold Cooper LLP	Marval, O'Farrell & Mairal
Bär & Karrer AG	De Brauw Blackstone Westbroek	Roschier, Attorneys Ltd.
Blake, Cassels & Graydon LLP	Dechert LLP	Sidley Austin LLP
Bufete Zamora-Pierce	Fischer Behar Chen Well Orion & Co.	Stibbe
Čechová & Partners	Hunton & Williams LLP	Uría Menéndez
Clayton Utz	Kromann Reumert	Wolf Theiss Attorneys at Law
	Lepik & Luhaäär LAWIN	

# USA - Illinois

Michael W. Davis



Stephen C. Carlson



## Sidley Austin LLP

### 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.

No suit can become a class action in Illinois until a class is certified by the court. Until such certification, a purported class action is merely an individual action in which the plaintiff or plaintiffs purport to sue on behalf of a class. 735 ILCS 5/2-802(a) provides that:

As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it may be so maintained and describe those whom the court finds to be members of the class. This order may be conditional and may be amended before a decision on the merits.

735 ILCS 5/2-802(a) (West 2008). A court should hold a certification hearing as soon as is practicable after the commencement of an action.

Unless the plaintiff has a valid individual cause of action, there can be no valid class action. See *Katz v. Belmont Nat'l Bank*, 491 N.E.2d 1157, 1158 (Ill. 1986). Thus, a motion to dismiss the allegations of the plaintiff's cause of action may be heard prior to the issue of class certification. *Wheatley v. Bd. of Educ.*, 459 N.E.2d 1364, 1367 (Ill. 1984). The proponent of certification bears the burden of assuring that a certification hearing is held. See *Waukegan Cmty. Unit Sch. Dist. v. City of Waukegan*, 447 N.E.2d 345, 353 (Ill. 1983). A failure to file a motion for certification results in a waiver of that issue. *Carillo v. Jam Prods. Ltd.*, 454 N.E.2d 649, 651-52 (Ill. 1983).

735 ILCS 5/2-801 sets out the four basic requirements that must be met if a case is to proceed on behalf of or against a class:

1. the class must be "so numerous that joinder of all members is impracticable";
2. there must be "questions of fact or law common to the class, which . . . predominate over any questions affecting only individual members";
3. the representative parties must be able to "fairly and adequately protect the interests of the class"; and
4. the class action must be an "appropriate" method for the fair and efficient adjudication of the controversy.

735 ILCS 5/2-801 (West 2008).

Because Illinois is a fact-pleading jurisdiction, a class action complaint must plead the four statutory requirements of 5/2-801 with specificity or else the complaint will be subject to dismissal at the pleading stage. *Bruemmer v. Compaq Computer Corp.*, 768

N.E.2d 276, 284-85 (Ill. App. Ct. 1st Dist. 2002). In moving for class certification, a proponent of certification must meet a higher standard showing that the prerequisites are met. See *Weiss v. Waterhouse Secs. Inc.*, 804 N.E.2d 536 (Ill. 2004). The burden of establishing that each of the four prerequisites is satisfied lies with the proponent of the class, though the decision on whether the prerequisites are satisfied lies in the sound discretion of the trial court. *Wheatley v. Bd. of Educ.*, 459 N.E.2d 1364, 1367 (Ill. 1984).

The numerosity and predominance requirements are discussed in further detail below in response to questions 1.5 and 1.6, respectively.

#### 1. Adequacy of Representation

The purpose of the adequate representation requirement is "to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim." *Gordon v. Boden*, 586 N.E.2d 461, 466 (Ill. App. Ct. 1st Dist. 1991). The test used to determine the adequacy of representation is whether the interests of those who are parties are the same as those of class members who are not before the court and whether the representative parties fairly represent absent class members. *Miner v. Gillette Co.*, 428 N.E.2d 478, 482 (Ill. 1981). This determination essentially examines whether the absent members are so represented by others before the court "that their interests will receive actual and efficient protection." *Brooks v. Midas-Int'l Corp.*, 361 N.E.2d 815, 820 (Ill. App. Ct. 1st Dist. 1977). Judicial evaluation of the quality of representation is within the sound discretion of the trial court. See 735 ILCS 5/2-801 (West 2008).

The case must not be friendly, meaning that there must be no collusion between the representative and the defendant. *Miner v. Gillette Co.*, 428 N.E.2d 478, 482 (Ill. 1981). Further, there must be no adverse interest between the representative and any unnamed member of the class. The interests of the representative and the absent class members must be the same, even if their claims are not identical.

#### 2. Class Action Appropriate Method

The Illinois statute requires that the trial court find that a class action is an "appropriate" method of litigating the controversy. See 735 ILCS 5/2-801 (West 2008). In applying this requirement, the court will consider whether proceeding as a class action will best secure economies of time, effort, and expense, as well as promote uniformity of decision. *P.J.'s Concrete Pumping Serv. v. Nextel W. Corp.*, 803 N.E.2d 1020, 1031 (Ill. App. Ct. 2d Dist. 2004). Courts often find that a class action is an "appropriate" method when it is the only practical means for class members to obtain relief, particularly when the individual class members' claims are small. See *Hess v. I.R.E. Real Estate Inv. Income Fund*, 629 N.E.2d 520 (Ill. App. Ct. 1st Dist. 1993).

- 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.**

Class actions are available across the spectrum of the law. *Gutansky v. Advance Mortgage Corp.*, 430 N.E.2d 122, 124-25 (Ill. App. Ct. 1st Dist. 1981). A class action may even be brought for recovery of a statutory penalty if the prerequisites for a class action are satisfied. *Id.*

- 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?**

If a case is properly brought as a class action, then absent class members will be bound by any settlement or final judgment entered by the court, except for those class members that have properly elected to be excluded from the class. See 735 ILCS 5/2-801 (West 2008).

In *Miner v. Gillette Co.*, the Illinois Supreme Court held that a class consisting of residents from all fifty states was not outside the jurisdictional power of the Illinois courts as long as the due process requirements of proper notice and adequate representation were satisfied. 428 N.E.2d 478, 485 (Ill. 1981). In *Phillips Petroleum Co. v. Shutts*, the United States Supreme Court held that when a plaintiff class is seeking money damages, there are three requirements that must be satisfied before a state court can assert jurisdiction over the claims of members of a class who are not personally subject to that state court's jurisdiction:

1. the best practicable notice under the circumstances must be given to class members, and that notice must describe the action and the plaintiffs' rights in it, and provide an opportunity for each class member to be heard and participate in person or through counsel;
2. the class members must be informed of an opportunity to opt out of the class and the form requesting exclusion must be sent with the notice to the class members; and
3. the interests of all class members must be adequately represented.

472 U.S. 797, 812 (1985). Thus, Illinois courts have the power to bind non-resident class members so long as the above requirements are met.

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

Both exclusion and intervention are permitted by statute in class actions under Illinois law. 735 ILCS 5/2-804(b) governs exclusion and provides:

Any class member seeking to be excluded from a class action may request such exclusion and any judgment entered in the action shall not apply to persons who properly request to be excluded.

735 ILCS 5/2-804(b) (West 2008).

735 ILCS 5/2-804(a) governs intervention in class actions and provides:

Any class member seeking to intervene or otherwise appear in the action may do so with leave of court and such leave shall be liberally granted except when the court finds that such intervention will disrupt the conduct of the action or otherwise prejudice the rights of the parties or the class.

735 ILCS 5/2-804(a) (West 2008).

The procedure for intervention in class actions follows the normal intervention procedure in Illinois courts, which is governed by 735 ILCS 5/2-408. The decision to allow or deny intervention, whether permissively or as of right, is a matter of sound judicial discretion that will not be reversed absent an abuse of that discretion. *Rosen v. Ingersoll-Rand Co.*, 865 N.E.2d 451, 458 (Ill. App. Ct. 1st Dist. 2007).

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

Illinois trial courts have broad discretion in determining whether a class should be certified. Illinois courts often look to federal case law in applying the impracticability of joinder requirement. *Wood River Area Dev. Corp. v. Germania Fed. Sav. & Loan Ass'n*, 555 N.E.2d 1150, 1153 (Ill. App. Ct. 5th Dist. 1990). Generally, federal courts have not allowed purported class actions if the class members number fewer than 20, have generally permitted class actions if the alleged class consists of numbers in excess of 40, and the decisions are mixed for alleged classes with between 20 and 40 members. See *id.* Determining the impracticability of joinder, however, is not a simple numerical proposition. Illinois courts have certified relatively small classes when the other prerequisites for class certification have been met. See *Kulins v. Malco, A Microdot Co.*, 459 N.E.2d 1038 (Ill. App. Ct. 1st Dist. 1984) (finding that a class of 19 members was sufficiently numerous). On the other hand, some Illinois courts have found that proposed classes of much greater numbers were insufficiently large to meet the impracticability of joinder requirement. Both federal and Illinois courts have found that when the potential class members can be easily identified and are located in the same geographical area, joinder is less burdensome than when they are widely scattered. See *In re Roswell*, 603 N.E.2d 681 (Ill. App. Ct. 1st Dist. 1992) (finding that a potential class of 35-40 members was insufficiently large when the class consisted of property tax payers in a small section of a tax district). Economic considerations, such as the amount of the plaintiffs' claims, their ability to bring suit on their own behalf, and the likelihood that they might do so also figure importantly into the determination of whether joinder is feasible. See *Steinberg v. Chi. Med. Sch.*, 371 N.E.2d 634 (Ill. 1977).

- 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?**

The predominance requirement is often the most crucial determination in class certification proceedings. Prior to 1997, Illinois had required that all members of a class have a "community of interest" in both the subject matter and the remedy of the class action. *Steinberg v. Chi. Med. Sch.*, 371 N.E.2d 634, 643 (Ill. 1977). Under the statutory framework adopted in 1997, however, that standard was relaxed. Under the statute, some issues that may be particular to individual members of a class are not always fatal to a class action. Rather, "[s]o long as there are questions of fact or law common to the class and these predominate over questions affecting only individual members of such class, the statutory requisite is met." *Id.* The test for evaluating the predominance of common questions is whether "successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members." *Scott v. Ambassador Ins. Co.*, 426 N.E.2d 952, 954 (Ill. App. Ct. 1st Dist. 1981). When individual class members' prima facie cases are not controlled by one common predominant issue, class certification is usually denied, and each class member's right to recovery is often predicated on separate

transactions. Separate transactions will only satisfy the predominance requirement if they are substantially identical in all relevant respects. See *Charles Hester Enters. v. Ill. Founders Ins. Co.*, 484 N.E.2d 349 (Ill. App. Ct. 5th Dist. 1985).

---

**1.7 Who can bring the class/group proceedings, e.g., individuals, groups, and/or representative bodies?**

---

A party may sue or be sued as a representative party in a class action. See 735 ILCS 5/2-801 (West 2008). In other words, under Illinois law a party may be required to defend as and on behalf of a defendant class. See *id.* Whereas one who initiates a plaintiff class normally does so voluntarily in the hopes of obtaining a benefit, a representative of a defendant class normally becomes involved in litigation involuntarily, and yet must bear the expense of defending the class members. Because of this distinction, Illinois courts have not frequently certified classes in cases involving potential defendant classes. See *Cardinal Sav. & Loan Ass'n v. Kramer*, 459 N.E.2d 929, 934 (Ill. 1984).

---

**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?**

---

Notice to class members is related to due process concerns and may be required at two stages of the litigation: at certification and prior to approval of a settlement or dismissal. Some form of notice reasonably calculated to inform the class members of the litigation is required, though the exact form of that notice will depend upon the unique circumstances of each case. *Fox v. N.W. Ins. Brokers, Inc.*, 446 N.E.2d 1260, 1262 (Ill. App. Ct. 1st Dist. 1983). Illinois courts have held that due process does not require personal notice in all cases. *Carrao v. Health Care Serv. Corp.*, 454 N.E.2d 781, 791 (Ill. App. Ct. 1st Dist. 1983). Personal notice is required, however, when the identities and addresses of the class members are readily available and when questions as to the adequacy of the representation exist. *Miner v. Gillette Co.*, 428 N.E.2d 478, 482-83 (Ill. 1981). Further, the United States Supreme Court has held that notice and the opportunity to opt out are constitutionally required to be given to all known plaintiff class members in multistate class actions in which a monetary recovery is the primary relief sought. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

Notice to class members also is required when a class action is to be settled or dismissed. 735 ILCS 5/2-806 (West 2008). The type of notice required will vary with the circumstances of the case. Generally, the notice must be the best notice reasonable under the circumstances. At a minimum, the notice should fairly and accurately describe the nature of the proposed settlement or dismissal as well as the options available to the class members. See *Waters v. City of Chicago*, 420 N.E.2d 599 (Ill. App. Ct. 1st Dist. 1981).

Assuming proper notice can be given to class members, the court must determine whether the proposed settlement is fair, reasonable, and in the best interests of the class. See 735 ILCS 5/2-806 (West 2008); *Waters v. City of Chicago*, 420 N.E.2d 599, 603 (Ill. App. Ct. 1st Dist. 1981). This evaluation rests in the discretion of the trial court. *Id.*

---

**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: Products liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims e.g. disaster litigation; Environmental; Intellectual property; or Employment law.**

---

Illinois courts, like their federal counterparts, have traditionally been reluctant to certify classes in mass tort claims because of concerns about individual proof problems. See *Smith v. Ill. Cent. R.R.*, 860 N.E.2d 332, 337 (Ill. 2006); see also Fed. R. Civ. P. 23 advisory committee's note (b)(3) (1966). Thus, certification in mass tort cases is highly unusual. *Id.*

---

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

---

Illinois courts have permitted class actions where the remedies sought included money damages, injunctive relief, or declaratory judgments. See, e.g., *AG Farms v. Am. Premier Underwriters*, 695 N.E.2d 882, 890 (Ill. App. Ct. 4th Dist. 1998) ("There is no doubt that in a proper case declaratory relief is available in a class action lawsuit").

---

## 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?**

---

A representative body or organisation may only bring an action on behalf of a class if it meets the requirements of standing. "The doctrine of standing seeks to ensure that the courts are deciding actual, specific controversies, and not abstract questions or moot issues." *Nolan v. Hillard*, 722 N.E.2d 736, 744 (Ill. App. Ct. 1st Dist. 1999). "The standing doctrine requires that a party, either in an individual or representative capacity, possesses a real interest in the cause of action and in its outcome." *Id.* "To satisfy the standing requirement, a party must suffer some injury in fact to a legally cognisable interest." *Id.* For an organisation or representative body to satisfy the standing requirement, "it must have a recognisable interest in the dispute peculiar to itself and capable of being affected." *Id.* In other words, "an association does not have standing to sue on behalf of its members, even those members allegedly affected by the challenged action, unless it has been or will be directly injured and therefore has a personal claim related to its own property, or that it has suffered or will suffer injury to a substantive legally protected interest in its individual capacity." *Id.*

---

**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?**

---

The Illinois Consumer Fraud and Deceptive Business Practices Act provides that either the Illinois Attorney General or a State's Attorney "may bring an action in the name of the People of the State" when he or she "has reason to believe that any person is using, has used, or is about to use any method, act or practice" declared unlawful under the act. 815 ILCS 505/7 (West 2000).

**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?**

See response to question 2.1, above.

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

See responses to questions 2.1 and 1.10, above.

### 3 Court Procedures

**3.1 Is the trial by a judge or jury?**

The determination of class certification is a question of law to be decided by the court. Class action trials, however, can be either jury trials or bench trials. “The class action is a procedural device intended to advance judicial economy by trying claims together that lend themselves to collective treatment. It is not meant to alter the parties’ burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort.” *Smith v. Ill. Cent. R.R.*, 860 N.E.2d 332, 338 (Ill. 2006).

**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?**

No, Illinois does not use specialist judges to handle class actions. In the Circuit Court of Cook County, Illinois, class actions arguably should be initially assigned to a Chancery Division judge. *Gen. Orders of Cir. Ct. of Cook County, Ill.* 1.2, § 2.1(b)(1) (2008).

**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?**

See responses to questions 1.6 and 1.8, above.

**3.4 Do the courts commonly select “test” or “model” cases and try all issues of law and facts 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 a trial by jury, by whom are preliminary issues decided?**

The main preliminary issue to be decided in a purported class action is whether to certify the class. See response to question 1.1, above. Although courts have discretion to manage their calendars, the use of “test” or “model” cases is not common. *See Ill. Sup. Ct. R. 218.*

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

In cases where individual claims are small and classes are large, or where notice to all class members is not possible, distribution of damage awards to all individual class members may not be feasible. In such cases, some Illinois courts have permitted the use of “fluid recovery.” *Gordon v. Boden*, 586 N.E.2d 461, 468 (Ill. App. Ct. 1st Dist. 1991). The mechanism for fluid recovery in Illinois is as

follows: (1) the amount of damages incurred by the class as a whole is determined in a single adjudication, creating a damage fund; (2) individual member claimants capable of proving valid claims obtain their share of the fund; and (3) the unclaimed portion of the fund is applied to the class’ benefit. *Id.* at 467. “The third procedural step is the actual fluid recovery, which commonly assumes one of two forms. The remainder of the fund is: (1) distributed through the market, usually in the form of reduced charges; or (2) used to fund a project which will likely benefit class members.” *Id.* The Illinois Supreme Court has not decided the propriety of this mechanism of recovery.

Under the cy pres doctrine, if a trust fund’s original purpose fails, then the court is to determine the next best use for the fund and distribute the fund accordingly. *See In re Petition of Mt. Prospect*, 522 N.E.2d 122, 126 (Ill. App. Ct. 1st Dist. 1988). Courts occasionally have applied this principle in class actions to distribute any funds remaining after distribution to the class to charitable, educational, and legal organisations. *See, e.g., Liebman v. J.W. Petersen Coal & Oil Co.*, 63 F.R.D. 684 (N.D. Ill. 1974).

**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?**

In order to approve a settlement, the court must find that the proposed settlement is reasonable and fair to all classes and subclasses involved. *See Waters v. City of Chicago*, 420 N.E.2d 599, 603 (Ill. App. Ct. 1st Dist. 1981). In some complex cases, the court may appoint an expert to provide and evaluate technical or economic data, and the expert generally will be the court’s witness at the settlement hearing. *See Manual for Complex Litigation, Fourth*, §21.632, p. 321 (2004).

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

Illinois Supreme Court Rules 202-212 address depositions. The Illinois rules distinguish between discovery and evidence depositions. *See Ill. Sup. Ct. R. 202.* Discovery depositions are taken primarily to gather information, to commit witnesses to specific stories, and to obtain admissions from opposing parties. Evidence depositions are taken to obtain testimony which will be admissible at trial if the deponent cannot be called as a witness. *See Ill. Sup. Ct. R. 212.* A notice for a deposition in an Illinois state court must specify which type of deposition will be taken. *Ill. Sup. Ct. R. 202.* If the notice does not provide that specification, then the deposition will be considered a discovery deposition. *Id.*

Named class plaintiffs are subject to all discovery, including depositions. It is also important to note that Illinois Supreme Court Rule 206(d) limits the length of a discovery deposition to three hours, except by stipulation of the parties or by order of the court upon a showing that good cause requires a longer examination of the witness. *Ill. Sup. Ct. R. 206(d).* An evidence deposition is not so limited.

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

Illinois Supreme Court Rule 214 permits a party to serve on his opponent requests for the production of documents during the discovery phase of the litigation. *Ill. Sup. Ct. R. 214.* The request is to specify a reasonable time, but not less than 28 days, and a place and manner for the production. *Id.* The responding party must then

either produce the requested documents in the manner in which they are kept in the ordinary course of business or make written objections on the grounds that the requests are improper in whole or part. *Id.*

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

The length of time to get to trial will depend on a variety of factors including, but not limited to, the complexity of the case, the availability of the court, counsel, and witnesses, and the amount of discovery required.

### 3.10 What appeal options are available?

An order certifying or refusing certification of a proposed class action is not a final and appealable order, but is an interlocutory order. *Moncada v. Ill. Commerce Comm'n*, 518 N.E.2d 349, 352 (Ill. App. Ct. 1st Dist. 1987). A party may petition for leave to appeal the trial court's order denying or granting class certification. *Ill. Sup. Ct. R. 306(a)(8)*. The question of class certification is not properly brought before a reviewing court when no motion for certification was made or ruled on in the trial court. *Carillo v. Jam Prods.*, 454 N.E.2d 649, 652 (Ill. 1983). The standard of review is whether the trial court abused its discretion in denying or granting class certification. *Schlenz v. Castle*, 417 N.E.2d 1336, 1339 (Ill. 1981). Similarly, a reviewing court will only reverse a trial court's approval of a class action settlement upon a showing that the trial court abused its discretion in approving the settlement because the settlement, taken as a whole, appears so unfair as to preclude judicial approval. *GMAC Mortgage Corp. v. Stapleton*, 603 N.E.2d 767, 773 (Ill. App. Ct. 1st Dist. 1992).

## 4 Time Limits

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

Yes. See response to question 4.2, below.

### 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?

As in any other lawsuit, a purported class action claim must be filed within the applicable statute of limitations period. The filing of a class action in an Illinois state court may toll the running of the statute of limitations for absent class members who make timely motions to intervene, or who file their own individual suits in Illinois state court after the court has found the suit inappropriate for class action status. *Portwood v. Ford Motor Co.*, 701 N.E.2d 1102, 1104 (Ill. 1998). However, the Illinois statute of limitations is not tolled during the pendency of a class action filed in federal court. *Id.* at 1105.

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

If a person liable to an action fraudulently conceals the cause of such action from the person entitled to bring the lawsuit, then the lawsuit may be commenced within five years after the person entitled to bring the lawsuit discovers that he or she has a cause of action. 735 ILCS 5/13-215 (West 2008).

## 5 Remedies

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

All such damages are generally recoverable, depending on the particular cause of action and class certification. See response to question 1.1, above.

### 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 the future?

Possible future damages for medical monitoring may be recoverable in Illinois, though only if they are "reasonably certain to occur." *Morrissy v. Eli Lilly & Co.*, 394 N.E.2d 1369, 1376 (Ill. App. Ct. 1st Dist. 1979).

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

Yes, punitive damages are recoverable in class actions. "Punitive damages are intended to punish the wrongdoer and to deter that party, and others, from participating in similar future acts." *Deal v. Byford*, 537 N.E.2d 267, 272 (Ill. 1989). In deciding whether to permit a plaintiff to bring a claim for punitive damages, the trial court should first determine whether the law under which the plaintiff brings his cause of action permits punitive damages. See *Gelb v. Air Con Refrigeration & Heating, Inc.*, 826 N.E.2d 391, 403 (Ill. App. Ct. 1st Dist. 2005). In constructing the punitive damages award, the trial court will assess the specific conduct involved, the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant. See *id.*

### 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 there is no maximum limit.

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

The specifics regarding distribution of damages to class members are often worked out in the parties' settlement agreement, which must receive judicial approval. See response to question 1.8, above.

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

Yes. See response to question 1.8, above.

## 6 Costs

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

Under the "American Rule," an adverse party cannot be required to

pay his opponent's attorney's fees in the absence of explicit statutory authority. *Alyesaka Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Occasionally, however, the terms of a settlement will call for the defendant to pay the fees of the attorney for the class. As discussed supra in response to question 1.8, the court must approve any settlement in a class action. The right to a court awarded attorney fee is well established when there is a fund that has been obtained for the class by the class action. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). This right stems from the legal principle that "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Id.* In the absence of such a fund, Illinois courts have generally denied awards of attorney fees to the attorneys for the successful class litigants. See *Hamer v. Kirk*, 356 N.E.2d 524 (Ill. 1976).

**6.2 How are the costs of litigation shared among 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?**

Under the "common fund doctrine," legal fees are spread out among the class members who benefited from the named plaintiff's or the named plaintiff's lawyer's work. "The [common fund doctrine] permits a party who creates, preserves, or increases the value of a fund in which others have an ownership interest to be reimbursed from that fund for litigation expenses incurred, including counsel fees." *Morris B. Chapman & Assocs. v. Kitzman*, 739 N.E.2d 1263, 1271 (Ill. 2000). This doctrine has been applied to many types of cases in Illinois, including class actions.

**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?**

Because the common fund doctrine only applies after an attorney wins a settlement or judgment, there are no cost consequences.

**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?**

Illinois courts often follow a two-step procedure to determine an appropriate attorney's fee. The court first must determine the appropriate charge based on the number of hours spent working on the case and must apply an appropriate hourly rate to those hours. This is commonly known as the "lodestar" determination. This process involves calculating all hours spent on the case, as well as determining who worked those hours and the specific tasks involved. The court then subtracts from that figure those hours that the court determines did not benefit the class, which are duplicative, which represent inefficiency, or which are excessive for the tasks performed. *Fiorito v. Jones*, 377 N.E.2d 1019, 1026 (Ill. 1978). The remaining hours are then multiplied by an hourly rate determined by the court for each individual attorney, taking into account the skill and qualifications of each attorney, the nature of the functions being performed, the complexity of the undertaking, and the hourly fee charged for similar services by attorneys with similar skills and qualifications. *Id.*

The lodestar computation can be adjusted to account for the contingent nature of the attorney's work as well as the benefits to the class. *Id.* at 1027. If the court determines that an amount above the lodestar computation is warranted, it may increase that figure by

applying a weighted multiplier equal to the value that the court gives the two above qualitative factors. *Id.* This weighted multiplier should reflect the probability of success at the outset, the extent to which the entire claims of the case were obtained, and any non-economic benefit to the class and to the public. *Id.* If the court uses a multiplier of greater than one, then the court must state on the record the multiplier used and the reasons for its election. *Id.* A factor of greater than three should rarely be used, and the court should not hesitate to employ a lesser one or a fraction thereof. *Id.* If the court decreases the lodestar figure, it must also clearly state its reasons for doing so on the record. See *id.*

## 7 Funding

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

No this is not available.

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

Not applicable.

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

"Although class action attorney's fees are contingent upon success, a class action is not a typical contingent-fee case because the amount of the fee is not the result of a voluntary agreement between the client and his attorney. Rather, the fee is an amount taken, by order of the court, from money that belongs to others, and the amount is dependent upon the exercise of the court's sound discretion." *Brundidge v. Glendale Fed. Bank*, 659 N.E.2d 909, 912 (Ill. 1995). The effect of the contingency nature of class actions on legal fees is discussed in further detail in response to question 6.4, above.

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

No third party funding is not available.

## 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 response to question 2.1, above.

**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.**

See response to question 2.1, above.

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

No they cannot.

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

Mandatory arbitration clauses have become increasingly common in many industries. Illinois courts treat mandatory arbitration provisions as issues of contract law, and normally will enforce such provisions, including in class actions, unless the provisions are found to be either procedurally or substantively unconscionable. See *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250 (Ill. 2006); *Razor v. Hyundai Motor Am.*, 854 N.E.2d 607 (Ill. 2006).

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

No they are not.

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

The same remedies as any class action that proceeds to a bench or jury trial.

## 9 Other Matters

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

The Illinois Supreme Court has made clear that putative class actions brought under the Illinois Consumer Fraud Act must have a substantial nexus to Illinois. In *Avery v. State Farm Mutual*

*Automobile Insurance Company*, the Illinois Supreme Court held that a non-resident plaintiff may pursue a claim in Illinois courts under the Illinois Consumer Fraud and Deceptive Business Practices Act only if “the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois.” 835 N.E.2d 801, 854 (Ill. 2005) (reversing a \$1.2 billion judgment in favour of the class, finding that the commonality and predominance requirements for class certification were not met). See also *Gridley v. State Farm Mut. Auto. Ins. Co.*, 840 N.E.2d 269 (Ill. 2005) (holding that a Louisiana plaintiff who complained of actions that occurred in Louisiana could not maintain a nationwide class action under the Illinois Consumer Fraud Act).

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

Our research has uncovered no such proposed changes. In fact, it is possible that the number of class actions in Illinois could decrease in the coming years. In 2005, Congress passed the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d). The purpose of the Act was to curb the number of class actions filed in state courts by federalising multistate class actions where certain conditions are met. The Act applies to any civil action commenced on or after February 18, 2005. The Act established two new basic requirements for federal jurisdiction over class actions. Federal courts now have jurisdiction over a class action if (1) minimal diversity exists between members of the class and the defendants, and (2) the aggregate amount in controversy is \$5 million or more. 28 U.S.C. § 1332(d)(2).

### Acknowledgment

The authors would like to acknowledge the assistance of their colleague, Frank J. Favia, Jr., in the preparation of this chapter.

**Michael W. Davis**

Sidley Austin LLP  
One South Dearborn  
Chicago, Illinois 60603  
USA

Tel: +1 312 853 7731  
Fax: +1 312 853 7036  
Email: [mdavis@sidley.com](mailto:mdavis@sidley.com)  
URL: [www.sidley.com](http://www.sidley.com)

**MICHAEL W. DAVIS** is head of Sidley Austin LLP's product liability and mass torts practice and is chair of the DRI's Drug and Medical Device Committee. Resident in the firm's Chicago office, Mr. Davis is extensively engaged in the nationwide defense of product liability claims involving pharmaceuticals, chemicals, consumer products, and food products. His practice also emphasizes complex multiparty and class action litigation. Mr. Davis has served as national coordinating counsel in pharmaceutical and chemical litigation. He has been selected as a leading lawyer in product liability matters by the American Research Corporation, *Chambers USA: America's Leading Lawyers for Business-The Client's Guide*, *The International Who's Who Legal of Business Lawyers*, *The Legal 500*, and the *PLC Cross-Border Life Sciences Handbook*.

**Stephen C. Carlson**

Sidley Austin LLP  
One South Dearborn  
Chicago, Illinois 60603  
USA

Tel: +1 312 853 7717  
Fax: +1 312 853 7036  
Email: [scarlson@sidley.com](mailto:scarlson@sidley.com)  
URL: [www.sidley.com](http://www.sidley.com)

**STEPHEN C. CARLSON** is a partner in the Chicago office of Sidley Austin LLP, where he engages in civil trial practice and litigation. He is a member of the American Bar Association (Litigation, Tort and Insurance Practice, and Intellectual Property Sections), American Bar Foundation, Seventh Circuit Bar Association, Illinois State Bar Association, and the Chicago Bar Association (CBA). Mr. Carlson is also a member of the Lawyers Club of Chicago (for which he has served as president and vice president), Yale Law School Association Executive Committee, Yale Law School Association of Chicago, and the Defense Research Institute. He co-chairs Sidley's CLE committee, has taught trial practice to the firm's beginning trial lawyers, and has spoken on a variety of topics for groups including the Illinois CPA Society and the CBA. Mr. Carlson received his A.B. from Princeton University and his J.D. from Yale Law School.

SIDLEY AUSTIN LLP  
**SIDLEY**

Sidley Austin LLP, with more than 1800 lawyers in 16 offices, is one of the world's largest law firms. Sidley's Products Liability lawyers have more than three decades of experience in representing automotive, chemical, food, medical device, pharmaceutical and numerous other companies in other industries in trials, appeals and MDL proceedings in mass tort and consumer fraud litigation. Every year since 2003, Sidley has been named to *Legal Business' Global Elite*, its designation for the 18 firms "that define the pinnacle of the legal profession." BTI, a Boston-based consulting and research firm, has named Sidley to their Client Service Hall of Fame as one of only two law firms to rank in the Client Service Top 10 for seven years in a row. Sidley has also been recognized as the single most recommended law firm and the single most mentioned firm on clients' short lists among clients in the pharmaceuticals industry in the 2008 *BTI Industry Power Rankings*.

*Sidley Austin LLP, a Delaware limited liability partnership which operates at the firm's offices other than Chicago, London, Hong Kong, and Sydney, is affiliated with other partnerships, including Sidley Austin LLP, an Illinois limited liability partnership (Chicago); Sidley Austin LLP, a separate Delaware limited liability partnership (London); Sidley Austin, a New York general partnership (Hong Kong); Sidley Austin, a Delaware general partnership of registered foreign lawyers restricted to practicing foreign law (Sydney); and Sidley Austin Nishikawa Foreign Law Joint Enterprise (Tokyo). The affiliated partnerships are referred to herein collectively as Sidley Austin, Sidley, or the firm.*

*This article has been prepared by Sidley Austin LLP for information purposes only and does not constitute legal advice. This information is not intended to create, and the receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.*