

# Class Actions

*Contributing editors*

Joel S Feldman and Joshua E Anderson



2016

GETTING THE  
DEAL THROUGH 

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# Class Actions 2016

*Contributing editors*

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## CONTENTS

<b>Argentina</b>	<b>5</b>	<b>Finland</b>	<b>37</b>
Gastón Dell’Oca and Federico Sánchez Cortina Forino – Sprovieri – Dell’oca – Aiello Abogados		Tanja Jussila and Mats Forsius Waselius & Wist	
<b>Australia</b>	<b>8</b>	<b>France</b>	<b>41</b>
Colin Loveday and Andrew Morrison Clayton Utz		Céline Lustin-Le Core EBA Endrös-Baum Associés	
<b>Austria</b>	<b>12</b>	<b>Italy</b>	<b>47</b>
Alexander Klauser Brauneis Klauser Prändl Rechtsanwälte GmbH		Michela Turra and Alessandra Chimienti Gianni, Origoni, Grippo, Cappelli & Partners	
<b>Belgium</b>	<b>15</b>	<b>Japan</b>	<b>50</b>
Joost Verlinden and Pieter Van Mulders Linklaters LLP		Tomoo Nishikawa, Takahiro Nonaka and Jun Kashio Sidley Austin Nishikawa Foreign Law Joint Enterprise	
<b>Brazil</b>	<b>19</b>	<b>Mexico</b>	<b>55</b>
Felipe Evaristo dos Santos Galea and Rebeca García BMA – Barbosa Müssnich Aragão		Luis Felipe Aguilar Rico, Patricia Arratibel Siles, Hugo Oliverio Hidalgo Arroyo and Daniela Romero Garduño Aguilar & Loera, SC	
<b>Canada</b>	<b>23</b>	<b>Portugal</b>	<b>59</b>
Glenn Zakaib and Emily Larose Cassels Brock & Blackwell LLP		Nuno Libano Monteiro and António Pedro Pinto Monteiro PLMJ Law Firm	
Jean Saint-Onge and Myriam Brixi Lavery, de Billy		<b>Russia</b>	<b>62</b>
<b>Denmark</b>	<b>29</b>	Sergei Volfson and Mikhail Ivannikov Jones Day	
Martin Christian Kruhl and Henrik Puggaard Lett Law Firm		<b>United States</b>	<b>65</b>
<b>England &amp; Wales</b>	<b>32</b>	Joel S Feldman and Joshua E Anderson Sidley Austin LLP	
Simon Fawell, Steven Pitt, Frances Macduff and James Russell Stoneham Sidley Austin LLP			

# Preface

## Class Actions 2016

First edition

**Getting the Deal Through** is delighted to publish the first edition of *Class Actions*, which is available in print, as an e-book and online.

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

**Getting the Deal Through** titles are published annually in print and online. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Joel S Feldman and Joshua E Anderson of Sidley Austin LLP, for their assistance in devising and editing this volume

GETTING THE  
DEAL THROUGH

London  
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# United States

Joel S Feldman and Joshua E Anderson

Sidley Austin LLP

## 1 Outline the organisation of your court system as it relates to collective actions. In which courts may class actions be brought?

The United States has a federal court system and more than 50 state or territorial court systems. The federal court system comprises three tiers: district courts (trial courts), thirteen circuit courts of appeals and the US Supreme Court. There are federal district courts in each of the 50 states, as well as for the District of Columbia and several US territories. In some larger states, the district courts are further subdivided geographically, for example the Northern, Eastern, Central, and Southern Districts of California. In federal court, class actions are filed and litigated in the United States district courts. Class action decisions of the district courts, including with respect to class certification, may be reviewed by the circuit courts of appeals, and (in rare instances) class action decisions of the circuit courts of appeals may be reviewed by the United States Supreme Court.

The organisation is essentially the same for state courts, although some state court systems do not have intermediate appellate courts. States have different names for the tiers of their court systems, but class actions are filed and litigated in the trial courts (sometimes called superior courts, district courts, or county courts), and then class action decisions of the trial courts may be reviewed by intermediate appellate courts or the state's highest court (usually called the supreme court), or both.

## 2 How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

Class actions are exceedingly common in the United States, with numerous filings each day in state and federal courts around the country. Lawmakers' and judges' attitudes towards class actions vary significantly, from those who view class actions as a critical tool for achieving justice and combating corporate wrongdoing, to those who believe class actions should be restricted because they too often lead to extortionate settlements that benefit primarily plaintiffs' attorneys, to those who hold every view between those extremes.

In 2005, the US Congress passed the Class Action Fairness Act. The purpose of the Class Action Fairness Act was, in part, to require that more class actions be filed in or removed to the United States federal courts, and thereby to eliminate the forum shopping created by plaintiffs' attorneys filing class actions in favourable state courts. The Class Action Fairness Act has led to a greater percentage of class actions being litigated in federal court, and, as a result, greater uniformity in class action decisions and results.

## 3 What is the legal basis for class actions? Is it derived from statute or case law?

In federal court, class actions are authorised and governed by rule 23 of the Federal Rules of Civil Procedure (rule 23). In state court, the legal basis for class actions varies. (In most states, class actions are authorised and governed by procedural rules analogous to rule 23, see, eg, Ark R Civ P 23, but in other states the legal basis is statutory, see, eg, Cal Civ Proc Code section 382 and Cal Civ Code section 1781, and in still other states the legal basis is a combination of statutes and procedural rules, see, eg, Mass R Civ P 23; Mass Gen L c 93A, sections 9 and 11.)

## 4 What types of claims may be filed as class actions?

There are no substantive limitations on the types of claims that may be brought as class actions. Class action complaints cover a wide array of subject areas, including consumer claims, environmental claims, anti-trust, accounting, securities fraud, common law fraud, insurance, product liability and state consumer fraud act claims, among others. More recently, courts have been ruling that product liability claims can be difficult to certify.

## 5 What relief may be sought in class proceedings?

There are no limitations on the types of relief that may be sought through a class action. Class actions therefore often seek various forms of relief, including monetary damages, punitive damages, restitution, injunctive relief, and declaratory relief.

## 6 Is there a process for consolidating multiple class action filings?

Yes. In federal court, if multiple class actions are filed in the same district court, they can be (and often are) consolidated, usually before the judge presiding over the earliest filed case. This can be accomplished through a notice of related cases or through a formal motion for consolidation.

In addition, if multiple class actions involving the same issues or parties are filed in different district courts, they may also be consolidated. Under 28 USC section 1407(a), civil actions (including class actions) pending in different district courts may be transferred to a single district court and coordinated or consolidated for pretrial proceedings if there are 'one or more common questions of fact' and consolidation 'will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.' Proceedings for the transfer and coordination or consolidation of actions under section 1407(a) are initiated either by the judicial panel on multidistrict litigation (JPML) – a panel of seven federal judges from around the country – or, more frequently, through a motion filed by one of the parties to one of the actions sought to be transferred and consolidated. The judicial panel on multidistrict litigation decides such motions. If the motion is granted, related class actions may be transferred for coordination or consolidation to one of the district court judges who was presiding over one of the related cases or to any other district court judge who is willing and able to preside over such a proceeding. The coordinated or consolidated proceeding created by a transfer under section 1407(a) is known as a multi-district litigation (MDL). The decisions of the judicial panel on multidistrict litigation are subject to only limited appellate review.

Many state courts also have similar procedures available for consolidating multiple class actions filed in a single state court, or in different courts within the same state court system.

While there are no databases of pending class actions, parties and courts may identify related class actions by searching court dockets and articles in the popular and legal press, many of which are available through online sources.

## 7 How is a class action initiated?

A class action is initiated by the filing of a complaint that alleges the rule 23 requirements for a class action filed in federal court, or the state law requirements for a class action if filed in state court. As a matter of federal law, a plaintiff is not required to provide a defendant with notice and an

opportunity to cure prior to filing a class action complaint. However, many state substantive laws require such notice and opportunity to cure be provided prior to asserting certain types of claims or seeking certain types of relief through a class action, whether that action is filed in federal or state court. For example, the California Consumer Legal Remedies Act requires a plaintiff to provide notice and opportunity to cure before seeking money damages (as opposed to injunctive relief) under that statute through a class action. See Cal Civ Code section 1782.

## 8 What are the standing requirements for a class action?

To have standing, essentially, a class action plaintiff must be able to assert the same claims as the proposed class and have suffered the same alleged injury as the proposed class. There are no per se limitations on the types of individuals or entities that may serve as a plaintiff in a class action. However, given the standing requirements, most class actions are brought by private individuals or entities or public interest associations. Public officials, often state attorneys general, may in certain circumstances bring actions similar to class actions – *parens patriae* actions – on behalf of certain citizens of their state. However, such actions are not class actions and are subject to their own unique procedural and substantive requirements.

## 9 Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

Class members are not notified when a class action has been commenced on their behalf. However, in a monetary relief damages class action, class members are notified when a class has been ‘certified’, namely when a court has determined that the requirements for proceeding as a class action have been established. In that circumstance, class members are provided written notice concerning the class action. The notice will typically describe class actions in general, the nature of the claims and defences being litigated in that particular class action, the type or types of relief being sought, and the class members’ rights with respect to the class action, including the right to participate in the class action. In addition, if the class was certified as part of a settlement, the notice will provide information regarding the settlement, including the relief that will be provided and information about how the class member may object to the settlement.

In some cases where notice is provided, class members must be given the opportunity to decide whether to be a part of the class. This is generally the rule in class actions seeking monetary relief. The opportunity to decide whether to be a part of the class is usually provided through an ‘opt-out’ mechanism whereby class members are deemed to be part of the class unless they affirmatively state the contrary. However, this opportunity is also sometimes provided through an ‘opt-in’ mechanism whereby class members are deemed not to be part of the class unless they affirmatively state they want to be included.

With class actions seeking only injunctive relief, there is no requirement that class members be allowed the opportunity to opt out or opt in.

## 10 What are the requirements for a case to be filed as a class action?

For a case to proceed as a class action, the plaintiff must first allege and then prove that the four threshold requirements of rule 23(a) are met:

- numerosity – that the class is so numerous that joinder of all members is impracticable (numerosity generally requires more than 40 class members);
- commonality – that there are questions of law or fact common to the class;
- typicality – that the claims or defences of the representative parties are typical of the claims or defences of the class; and
- adequacy – that the representative parties will fairly and adequately protect the interests of the class.

Many courts also apply an ‘ascertainability’ requirement, meaning that the members of the class, as defined, must be capable of being identified through objective means.

In addition to the threshold requirements of numerosity, commonality, typicality, adequacy and ascertainability, a plaintiff must also allege and prove satisfaction of the requirements for at least one of three types of class actions identified in rule 23(b).

- risk of inconsistent adjudications and limited fund, or ‘(b)(1)’ class actions, which require allegations and proof that ‘prosecuting separate actions by or against individual class members would create a risk of:

inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests’ (rule 23(b)(1));

- injunctive relief, or ‘(b)(2)’ class actions, which require allegations and proof that ‘the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole’ (rule 23(b)(2)); and
- monetary relief, or ‘(b)(3)’ class actions, which require allegations and proof that ‘questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy’ (rule 23(b)(3)). These are the so-called ‘predominance’ and ‘superiority’ requirements.

Most class actions are brought under (b)(2), (b)(3), or both, and (b)(1) is only rarely used.

The class certification requirements are generally similar in state courts, largely because most states have adopted analogous rules to rule 23.

## 11 How does a court determine whether the case qualifies for a collective or class action?

Courts typically determine whether a case qualifies as a class action in the context of a motion for class certification. In a motion for class certification, the plaintiff bears the burden of demonstrating that the four (or five, if ascertainability is included) threshold requirements for class treatment are satisfied under rule 23(a), and that the requirements for one of the three types of authorised class actions are also met under rule 23(b). This showing must be based on evidence; allegations do not suffice. The plaintiff bears the burden of proving that all the requirements are met. The burden of proof is a preponderance of evidence, namely more probable than not.

There is no set time frame for the court to decide class certification. The rules require only that the determination be made at ‘an early practicable time’ (rule 23(c)(1)(A)). In practice, while class certification can theoretically be resolved a few months after the filing of the class action complaint, it usually takes two or more years after the filing of the class action complaint. Discovery must first occur, which involves the exchange of documents, the answering of written interrogatories and the taking of depositions (putting witnesses under oath and asking substantive questions). Expert witness discovery often occurs after the completion of fact discovery, and before the briefing on class certification.

The court will generally hold a hearing regarding class certification, which usually consists of argument from lawyers but may also involve the taking of live testimony from witnesses.

The court will usually issue a written decision or order regarding class certification, and, if class certification is granted, the order must define the certified class and appoint class counsel (rule 23(c)(1)(B)).

The procedures and timing respecting the determination of whether a case qualifies for class treatment are generally the same in state courts.

## 12 How does discovery work in class actions?

Discovery in class actions is much the same as it is in non-class civil actions. The parties may obtain discovery through requests for documents, interrogatories, requests for admissions and depositions. Discovery has become more important in class actions over the past decade because the US Supreme Court has concluded that a plaintiff must establish the requirements for class treatment through evidence (obtained through discovery), rather than through allegations.

Quite often, by agreement of the parties or order of the court, discovery is bifurcated between discovery as to issues relevant to class certification and discovery as to issues related to the merits, with class certification discovery proceeding first. Since the US Supreme Court has determined that merits evidence material to class certification issues must be considered in deciding whether to certify a class, bifurcation now means that discovery prior to class certification is limited to evidence (class or merits) material to class certification.



**Update and trends**

The US Supreme Court will soon decide whether a class action defendant can render moot a class action by offering to provide complete relief to the named plaintiff before a class is certified. The case, titled *Campbell-Ewald Company v Gomez*, was argued on 14 October 2015, and the court likely will issue its decision in the fourth quarter of 2015 or the first quarter of 2016.

**13 Describe the process and requirements for approval of a class-action settlement.**

After the parties enter into a class action settlement, they must obtain preliminary approval from the court. The court will provide such approval so long as the proposed settlement satisfies the legal standard of being 'fair, reasonable, and adequate'. Then, the parties must provide 'notice in a reasonable manner' to all class members who would be bound by the proposed settlement (rule 23(e)(1)). The parties must also provide notice to the relevant state and federal regulators, often state attorneys general and any regulatory body responsible for overseeing the conduct of the defendant that is at issue in the case (28 USC section 1715). After the required notice is provided, there will be a period for class members to object to, opt out of or make claims under the settlement. Afterwards, the parties will file a motion for final approval of the settlement, and class counsel will file a motion for approval of their attorneys' fees.

The court must hold a hearing, called a fairness hearing, to determine whether the proposed settlement is 'fair, reasonable, and adequate' (rule 23(e)(2)). If it is, the court will approve it. At the same time, the court will also generally decide whether to approve class counsel's request for attorneys' fees and in what amount. After a court approves a class action settlement, there is a short period for a party or objecting class member to seek appellate review of that order (rule 23(f)). If appellate review is not sought or granted, or if the order approving the class action settlement is affirmed on appeal, the settlement is final and the settlement proceeds are distributed to the class and class counsel.

**14 May class members object to a settlement? How?**

Yes. After receiving notice of a class action settlement (which notice will provide the specific procedures and timing for objecting to the proposed settlement), a class member may object to the settlement. A class member typically does so by filing written objections with the court, which are served on the parties, or appearing at the fairness hearing, or both. Class members may object on their own or through counsel.

**15 What is the preclusive effect of a final judgment in a class action?**

A final judgment in a certified class action binds the entire class and has preclusive effect with respect to any claims that were raised or could have been raised in that action (res judicata or claim preclusion), as well as any issues that were actually litigated and decided in that action (collateral estoppel or issue preclusion). A final judgment in an uncertified class

action binds only the named plaintiff or plaintiffs and has preclusive effect only as to those parties.

**16 What type of appellate review is available with respect to class action decisions?**

Class action decisions are reviewable as a matter of right following the final judgment. In addition, in federal court a party may petition for interlocutory appellate review of a class action decision. See rule 23(f). Such review is permissive, however, and is only granted where the class certification decision would be the 'death knell' for the litigation, either because the individual claim is too small for the plaintiff to proceed or the potential exposure is so great that the defendant will be forced to settle on a basis that does not properly reflect the merits of the case; the legal issue raised in the class certification decision is one that is important for that case and other cases; or the trial court committed a manifest error in its decision.

**17 What role do regulators play in connection with class actions?**

Regulators can have an impact on class actions in several respects. Plaintiff's counsel often files class actions as a result of prior or pending regulatory action. In a typical scenario, a federal or state regulator announces an investigation of – or regulatory action against – a particular company or industry based on certain conduct. Such announcements frequently spur class action plaintiffs' attorneys to seek to identify individuals harmed by the alleged conduct and to file class actions with such individuals as named plaintiffs and class representatives.

Regulators can also become involved in class actions at the time of settlement. After preliminary approval of a federal class action settlement, the parties are required to provide notice of the settlement to appropriate federal and state regulators (28 USC section 1715). Such notices can sometimes cause a regulator to intervene in the proceeding or object to the settlement, but this is not common. But when regulators do intervene, it can lead to modifications to the proposed settlement or additional benefits being provided to class members.

While a class action settlement generally does not preclude pending or future regulatory action (because the regulator or government entity is generally not a member of the class and, therefore, not bound by the judgment), a class action settlement could affect pending or future regulatory action. For example, if a regulator is seeking, among other relief, restitution or other benefits for injured parties, a class action settlement providing such relief may limit the relief the regulator seeks or obtains, or persuade the regulator not to file an action. Similarly, if a class action settlement results in an order enjoining certain conduct, the regulator would not need to seek the same relief.

**18 What role does arbitration play in class actions? Can arbitration clauses lawfully contain class-action waivers?**

Arbitration plays an important role with respect to certain types of class actions, principally class actions against financial services providers, for example banks and credit card companies, that have contractual agreements with their customers that increasingly include arbitration provisions. In recent years, the US Supreme Court has repeatedly upheld

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arbitration provisions in the class action context. In particular, the Supreme Court has ruled that arbitration clauses may include class action waivers and that state laws prohibiting such waivers are pre-empted by the Federal Arbitration Act. If a federal court upholds the arbitration provision with a class action waiver, then the plaintiff can file only an individual action in arbitration. In these situations, in order to avoid this result, plaintiff's counsel typically argues that the arbitration provision should be voided as unconscionable. However, well drafted arbitration clauses with class action waivers are usually enforced by federal courts.

**19 What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?**

Contingency fee agreements are allowed for plaintiffs' lawyers in a class action. As a general matter, so long as the agreement is in writing and appropriate disclosures are made, such arrangements are allowed in class actions. As a result, most class actions in the US are prosecuted by plaintiffs' lawyers operating under contingency fee agreements.

**20 What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?**

With certain exceptions, namely when authorised by the contract at issue or the statute under which the action is brought, the losing party in a class action generally need not be required to pay the prevailing party's attorneys' fees. This is particularly true where the losing party is the plaintiff. However, the prevailing party may typically recover certain of its litigation cash costs from the losing party, such as travel expenses, copying cost, and payments for deposition transcripts (Fed R Civ P 54(d)).

In the settlement context, regardless of whether they are authorised by statute or contract, nearly all class action settlements provide for the payment of class counsel's attorneys' fees.

**21 Is third-party funding of class actions permitted?**

Yes. In general, third-party funding of litigation, including class actions, is permitted in the US. In some states, however, courts have concluded that common law principles of champerty, maintenance and barratry prohibit or limit such arrangements in certain circumstances.

**22 Can plaintiffs sell their claim to another party?**

Yes. Class action plaintiffs or class members can sell or assign their claim to another individual or entity. In the US, there are also now companies whose business it is to purchase class member claims and then obtain the recovery on those claims through settlement or judgment.

**23 If distribution of compensation to class members is problematic, what happens to the award?**

In instances where distribution to class members is problematic, the class action settlement agreement will generally dictate the disposition of any remaining settlement proceeds. In some instances, the settlement agreement will provide that any unclaimed settlement proceeds revert to the defendant. More commonly, remaining settlement proceeds are distributed among the class members that submitted an approved claim, or to charitable or public interest organisations under the doctrine of cy-pres. Courts review cy-pres provisions in class action settlement agreements to ensure that the selected organisations are related to the conduct at issue in the case such that class members might benefit from the funds, and are not improperly related to the plaintiffs, defendants or their counsel.



## Getting the Deal Through

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