

Class Action Basics -- USA

May 5, 2007

Consulegis International Litigation and Arbitration Specialist Group
Prague

Jeffery J. Daar
Daar & Newman
Los Angeles

- Class action lawsuits in the United States significantly affect business and consumers around the world.
- The use of class actions can be a tremendous tool both for plaintiffs and defendants in administering justice.
- Class actions are frequently utilized in numerous areas, including securities, unfair business practices, mass tort litigation, products liability, holocaust litigation, and wage disputes.

What is a Class Action?

- A class action lawsuit is a representative action where one or more plaintiffs named in the complaint bring a case for themselves and for a defined Class against one or more defendants.
- Class actions are a procedural innovation that provide a means whereby a large number of claimants may have their claims adjudicated in a single court proceeding.
- A class action allows one or more plaintiffs to bring a lawsuit on behalf of themselves as well as all other persons similarly situated.
- Often class actions are the only practical means to address individual claims that are on their own insufficient to justify the expense of bringing separate lawsuits.

- Class action lawsuits also permit business and entire industries to settle numerous and potentially annihilating claims in a manner that resolves and ends costly litigation.
- The class action lawsuit eliminates the possibility of repetitious litigation and provides finality.
- Ordinary principals of res judicata and collateral estoppel apply in the class action context to bar subsequent re-litigation of claims.
- Mass tort defendants, for example, are more frequently not opposing class actions but instead welcoming them.

Elements of a Class Action

- In order for a lawsuit to be maintained as a class action in the United States, the action must first generally meet four prerequisites.
 - (1) the Class is so numerous that joinder of all members is impracticable (numerosity);
 - (2) there are questions of law or fact common to the Class (commonality);
 - (3) the claims or defenses of the representative parties are typical of the claims or defenses of the Class (typicality); and
 - (4) the representative parties will fairly and adequately protect the interests of all members of the Class (adequacy of representation).

Numerosity

- Numerosity requires a Class that makes it impracticable for all of the parties to be joined individually by name.
- Courts have not set any cut-off number for the determination of numerosity.
- The specific facts of each case must be examined.

Commonality

- Commonality is satisfied when there are underlying facts or legal theories common throughout the Class.
- Commonality exists even if the common facts support different legal theories or common legal theories rest on different facts.
- A common nucleus of operative fact is usually enough to satisfy the commonality requirement.

Typicality

- Typicality requires that named plaintiffs have claims that are reasonably coextensive with the claims of the absent Class members.
- The claims of the plaintiffs have to be typical of those members of the Class not individually joined as parties.
- A plaintiff's claim is typical if it arises from the same event, practice, or course of conduct that gives rise to the claims of the other Class members.
- The claims do not have to be substantially identical to each other.

Adequacy of representation

- Adequacy of representation exists when the attorney representing the Class is qualified and competent, the Class representative does not have interests antagonistic to the rest of the Class, and the Class representative has a sufficient interest in the outcome of the lawsuit to ensure vigorous advocacy.
- The Class representative must be part of the Class and possess the same similar interest and suffer the same similar type of injury as the Class members.

Other Factors

- Generally, the class action may be maintained if, in addition to the above prerequisites, the lawsuit presents questions of law or fact common to the members of the Class that predominate over any questions affecting only individual members, and that the class action is superior to other available methods for the fair and efficient adjudication of the claims in dispute.
- The mere need to calculate individualized damages does not by itself make a class action unmanageable.

Other Factors

- A class action may be maintained when:
 - the defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or declaratory relief with respect to the Class as a whole.
 - when the lawsuit presents a risk that prosecution of the case by or against members of the Class would result in inconsistent adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for the defendant.
 - if adjudications with respect to individual members of the Class would as a practical matter be dispositive of the interests of the other members not parties or substantially impair or impede their ability to protect their interests.

Class Certification

- When a lawsuit presents all of the conditions necessary for a class action, the court will certify a Class that is specifically defined as to the members of the Class.
- The definition of the Class is important since if the action is the subject of a judgment or a settlement, only members of the Class will be bound by the judgment or settlement.

- Depending on the type of class action, due process considerations for the absent members of the Class may require that notice of the pendency of the class action or a settlement of the action be given.
- Notice may be required and is generally given by mail, but also can be provided by different means, including publication in newspapers or on the Internet.
- The members of the Class may also be provided with the opportunity to exclude themselves from the Class depending on the type of class action. If a member excludes himself or herself that person can then file their own lawsuit and will not be bound by the outcome of the class action. On the other hand all of the members of the Class that do not opt-out of the Class will be bound by the outcome of the class action lawsuit.

Concept of Fluid Recovery

- Often the distribution of a judgment or settlement cannot be completely done since not all Class members may be located to receive their pro rata share. The undistributed residue can then either revert to the defendant or be subject to a cy pres distribution.
- Under the concept of fluid recovery, the portion of the fund that cannot be directly distributed to individual Class members is awarded in a manner that will put the residue to its next best use and produce benefits for as many Class members as possible. This procedure insures that the defendant will disgorge any wrongful profits and pay all damages.
- Possible recovery procedures include price rollbacks, general or earmarked escheat, the establishment of an equitable trust fund, or donation directly to an appropriate nonprofit organization.
- Courts must approve any cy pres distribution.

Settlement of a Class Action

- Courts carefully oversee class actions to prevent abuse of absent Class members.
- Settlement of a class action also requires court approval and generally notice of settlement is provided to the absent members of the Class.
- Class members are then provided the opportunity to object to the settlement and/or opt out of the settlement.

Conclusion

- The use of class actions as a weapon or a shield should be carefully considered for major litigation presenting numerous parties.
- When properly utilized class actions provide for an amazing way to obtain justice on a mass scale that would otherwise never occur.
- Class actions also provide a mechanism for a defendant possibly to obtain a final, global solution to all liability claims in one proceeding in order to avoid potentially annihilating and endless litigation.