

CLASS ACTION REBUTTAL ACROSS BORDERS

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I. Class Actions in the United States, Canada, The UK, and Europe

A. Class Actions in the United States

In American courts, lawsuits are usually filed by specific individuals or entities; however, class actions are an exception to this rule. A class action is a civil lawsuit initiated on behalf of a large group of people or organizations who claim to have suffered similar harm from the same defendant. The main idea behind class actions is to allow those affected to join forces, especially when individual claims might be too small or too costly to pursue alone. In these cases, only a few class representatives are listed by name, but they act for the benefit of everyone in the class. After the court certifies the class, all its members are generally subject to the resulting judgment, even if they are not directly involved in the proceedings.

Class action suits frequently cover issues such as employment discrimination, product liability involving vehicles, parts, pharmaceuticals, chemicals, machinery, electronics, consumer goods, and cases of securities or financial fraud.

Depending on the specifics of the case and the class, class actions in the United States may be handled in federal district court or state court, with each jurisdiction applying different standards. For simplicity, this paper will focus on the requirements for class actions in federal courts under Rule 23 of the Federal Rules of Civil Procedure and the Class Action Fairness Act (CAFA).

1. Rule 23 Class Certification Requirements

While class actions started with English common law, federal class actions today follow Rule 23 of the Federal Rules of Civil Procedure. Originally adopted in 1937, Rule 23 underwent major revisions in 1966.

Before a lawsuit can proceed as a class action, the district court must decide if it satisfies the class certification requirements outlined in Rules 23(a) and (b). The responsibility falls on the party requesting class certification to demonstrate that these criteria are met. Court decisions interpreting Rule 23 have emphasized that judges must conduct a "rigorous analysis" before granting class certification.

Rule 23(a) specifies four essential requirements for any class action:

Numerosity. The class must be so large that it is impractical to join all members in one lawsuit. Courts do not set a specific number for numerosity.

Commonality. For a class to be certified, there must be "questions of law or fact common to the class." Commonality often drives the initial rule 23 inquiry. A common question is one that is likely to produce common answers applicable to the class.

Typicality. Class certification requires that the "claims or defenses of the representative parties" be "typical of the claims or defenses of the class." Typicality is satisfied if the class

members' claims are fairly encompassed by the named plaintiffs' claims. The requirement of typicality ensures that the claims of the class representatives are aligned with those of the class members.

Adequacy of Representation. The last of the 23(a) requirements is that the named parties must show that "the representative parties will fairly and adequately protect the interests of the class. Class counsel must be competent, qualified, experienced, and not have any conflicts of interest. Also there must not be any conflicts of interest between the named litigants and the class they hope to represent.

In addition to Rule 23(a)'s prerequisites, the proposed class must also meet at least one of the three requirements expressed Rule 23(b):

Rule 23(b)(1)(A) Classes. Rule 23(b)(1)(A) permits class certification when individual lawsuits brought by or against class members could result in inconsistent or conflicting judgments, potentially requiring the opposing party to follow incompatible standards of conduct. Additionally, Rule 23(b)(1)(B) allows certification if separate actions would, in practice, determine the interests of absent class members or significantly hinder their ability to safeguard those interests.

Rule 23(b)(2) Classes. Rule 23(b)(2) permits class actions for injunctive or declaratory relief when the opposing party's actions affect the entire class, making such relief suitable for all members.

Rule 23(b)(3) Classes. Rule 23(b)(3) permits class certification when the main legal or factual issues are shared among all class members, outweighing any matters that concern only individuals. Additionally, the class action must be deemed the best way to resolve the dispute both fairly and efficiently compared to other options. This type of class, known as a 23(b)(3) class, is the most commonly used in cases seeking monetary compensation.

Once a class is certified, notice must be provided to all class members. Rule 23 affords flexibility in determining what notice is suitable for that particular class.

All members of a certified class are bound by any verdict or settlement in the action unless they explicitly opt out, except, however, that no opt out is available for Rule 23(b)(2) classes. Rule 23(b)(2) classes are mandatory.

2. Class Action Fairness Act Requirements

Congress passed CAFA in 2005 to broaden federal courts' authority over certain class actions previously limited to state court. The law allows federal jurisdiction when the class exceeds 100 members, parties are minimally diverse, and the total claims exceed \$5 million (28 U.S.C. § 1332(d)(2), (d)(5)(B)), counting all class members' claims together. CAFA also amended diversity rules so that class actions meeting these criteria can be filed or removed to federal court.

The “home-state” and “local-controversy” exceptions, found in 28 U.S.C. § 1332(d)(4), mean that a court must refuse to take jurisdiction if more than two-thirds of all the proposed plaintiffs are citizens of the state where the case was filed, or if at least two-thirds of both the plaintiffs and main defendants are from that state. Additionally, at least one defendant from the original state must be accused of conduct that is central to the claims, and the plaintiffs must be seeking significant relief from that defendant as stated in § 1332(d)(4)(A)(i)(II).

3. Class Action Settlements

Most class action lawsuits are resolved through settlement rather than going to trial. Although such settlements can bind absent class members, Rule 23(e) requires court approval for any class action settlement. Before the parties can finalize a binding agreement, the court must conduct a hearing to decide if the settlement is "fair, reasonable, and adequate."

B. Class Actions in Canada

All Canadian provinces have enacted class proceedings legislation which permits claims to be aggregated into the form of a class action. In order for an action to proceed as a class action, it must be certified by the court. Generally, the test for certification (or “authorization”, as it is called in the province of Quebec, which is a civil law jurisdiction) of a class action in the nine common law provinces comprises five elements, all of which the plaintiff must establish in order for a proposed class action to be certified:

1. the Statement of Claim (the Canadian equivalent of a “Complaint” in U.S. legal proceedings) discloses a legally cognizable cause of action;
2. there is an identifiable class of two or more persons;
3. the claims of the class members raise one or more issues that are common among all class members;
4. there is no other procedure preferable to a class proceeding for the resolution of the common issues; and
5. the representative plaintiff will fairly represent the interests of the class.

The legal threshold to be met by the plaintiff for the first element of the test is the same as that applicable to a motion to strike a pleading—i.e., no evidence is admissible for the assessment of this element, and the court is to assess whether the claim as pleaded, assuming all of the allegations pleaded in the claim are true, states a legally viable cause of action.

By contrast, elements #2 – 5 require evidence, albeit not much. Specifically, the plaintiff is required to adduce evidence which establishes “some basis in fact” that each of those elements has been met. Canadian courts have never provided a precise definition of the “some basis in fact” standard, other than to note that it is substantially lower than the usual evidentiary standard in civil litigation of a balance of probabilities. The rationale for this low evidentiary threshold at the certification motion is that certification is a procedural stage which does not intended to involve an assessment of the merits of the claim, and occurs before the plaintiff has had the benefit of any discovery procedures.

In Quebec, the requirements for authorization of a class action are as follows:

1. the recourses (i.e., claims) of the members raise identical, similar or related questions of law or fact;
2. the facts alleged seem to justify the conclusions sought;
3. the class proceeding would be the preferable procedure for the resolution of the common issues; and
4. a representative who can represent the members adequately.

In most class actions in Canada, the primary battleground in a certification motion revolves around element #3 (common issues) and element #4 (preferable procedure). With respect to the common issues, Canadian courts require the plaintiff to establish, with evidence to the “some basis in fact” standard, that (a) each proposed common issue actually exists, and (b) each proposed common issue can be determined on a class-wide basis. A major difference between the test for certification under Federal Rule 23 (see above) and the test for certification in Canada (with the exception of class actions issued in the province of Ontario since October 1, 2020--see below), is that predominance is not a requirement for certification in Canada. Common issues do not have to predominate over individual issues. Rather, the plaintiff need only establish a basis in fact that there is one or more common issues, the determination of which will materially advance the adjudication of the claims of all of the class members.

The determination of the preferable procedure element essentially involves a consideration of whether, and the extent to which, a proposed class action would achieve the three objectives of class actions:

- judicial economy;
- behaviour modification; and
- access to justice.

As a result of amendments to the *Class Proceedings Act* of Ontario effective October 1, 2020, the test for assessing whether a proposed class action is a preferable procedure also requires that the common issues must predominate over the individual issues. To date there has been little case law providing extensive guidance about the effect of this higher threshold test on certification motions in Ontario. In part that is because following the amendment to the Ontario certification test, many plaintiffs’ lawyers in Ontario ceased filing their proposed national class actions in Ontario (particularly product liability class actions) and instead they have been filing such class actions in other provinces, primarily British Columbia.

Following certification of a class action, notice of the certification order is disseminated/published through various means. In addition to the mode of dissemination of notice, the court’s “notice order” will also specify the manner in which any people who fall within the definition of the class may exercise a right to “opt out” of the class action, and the deadline date by which that must be done. In all but two provinces—New Brunswick and Newfoundland & Labrador-- class membership is based on an “opt-out” system—i.e., every person who falls within the definition of the class is deemed to be in the class action unless he/she opts out. (By comparison, determination of class membership in New Brunswick and

Newfoundland & Labrador is bifurcated between an opt-out system for residents of the province and an opt-in system for persons residing elsewhere in Canada.) Individuals, who fall within the definition of the class and who do not opt out, are deemed to be members of the class and are bound by the result of the common issues trial or a court-approved settlement agreement made by the representative plaintiff.

After an action has been certified to proceed as a class action, and the notice and opt out procedures have been completed, the action proceeds to the next stage -- the trial of the common issues. In that regard, the action follows the same litigation process as applies to any civil action in Canada – e.g., production of documents, oral examination for discovery (the Canadian term for what is known as “depositions” in U.S. legal proceedings), exchange of experts’ reports, etc. leading up to a trial of the common issues.

If the common issues trial is determined in favour of the plaintiff class, then the proceeding moves to the final stage – determination of individual issues. Canadian class proceedings legislation does not prescribe a specific mode of resolving the individual issues in a class action. Rather, that is left to be determined by the judge and the parties following the common issues trial determination, and it will vary depending on the nature, number, and complexity of the individual issues.

C. Collective Actions in the UK and Europe

1. UK Collective Actions

Collective or class action claims in the United Kingdom may proceed on either an "opt-in" or "opt-out" basis, depending on the subject matter. The majority of such actions are conducted on an "opt-in" basis, whereby individuals must proactively participate in the proceedings or authorize representation for a claim on their behalf. These "opt-in" actions are known as Representative Proceedings. In these cases, a procedural mechanism called a Group Litigation Order (GLO) is employed to consolidate claimants who share common or related issues of fact or law.

By contrast, "opt-out" actions – similar to class actions in the United States – are brought on a representative basis; however, they are restricted to competition claims under the Competition Act 1998 and the Consumer Rights Act 2015. Furthermore, such actions can only be initiated before the Competition Appeal Tribunal (CAT).

2. Collective Actions in the EU

In November 2020, the European Parliament mandated that each EU country set up at least one process by 2023 for “qualified entities” to bring representative actions for consumers. While some states like Belgium, Italy, and the Netherlands already had such procedures, all member states now have, or are developing, a mix of opt-in and opt-out collective action systems. Most countries prefer opt-in approaches to avoid US-style class actions and address constitutional concerns.

II. Expert Methodologies in Defending Class Actions

A. Leveraging Data Analytics to Defend Class Actions

Modern class action litigation increasingly relies on data-driven insights to address questions of liability and damages. Data analysis applies broadly across false advertising, product defects, TCPA, environmental claims, antitrust, labor, and securities cases. Experts use analytics to determine, for example, commonality among class members, assess consumer understanding and consent, evaluate materiality of representations and omissions, and estimate harm such as overpayment or property value loss.

For example, in false advertising cases, analytical tools empower experts to evaluate whether allegedly misleading claims are noticed by consumers, whether those claims lead consumers to certain understanding of the product, whether and to what degree those claims are material to consumer choice.

B. Core Analytical Approaches

1. **Market Data Analysis:** Regression models and predictive techniques estimate price effects and simulate “but-for” scenarios. Natural experiments and difference-in-differences leverage real-world changes—such as labeling updates or policy shifts—to infer causality.
2. **Hedonic Analysis:** Regression isolates the contribution of individual product attributes to price, widely used in housing and consumer goods cases.
3. **Content Analysis:** Traditional coding and machine learning assess communications, sentiment, and topics across marketing materials, social media, and consumer complaints, revealing patterns in perception and awareness.
4. **Surveys and Experiments:** Controlled studies measure consumer understanding, purchase drivers, and materiality. Conjoint analysis can estimate willingness to pay, though such surveys require careful design to avoid bias and careful interpretation (e.g., willingness to pay is not the same as price premium).

C. Strengths and Limitations

Each method offers unique advantages: experiments provide causal inference, while market data reflects real-world behavior. However, limitations include data availability, modeling sensitivity, and the gap between stated and actual marketplace behavior.

D. Illustrative Example

In *Vlacich v. Del Monte Foods*, choice experiment surveys tested whether “No MSG Added” claims influenced consumer choice. Results showed no material impact, challenging plaintiffs’ assertions. Proposed conjoint analysis faced criticism for unrealistic marketplace representation, upward bias in willingness-to-pay estimates, and conflating willingness to pay with price premium.