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Global Legal Group



# The International Comparative Legal Guide to: Class & Group Actions 2012

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

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# The International Comparative Legal Guide to: Class & Group Actions 2012

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# USA



Holly Pauling Smith



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### 1 Class/Group Actions

#### 1.1 Do you have a specific procedure for handling a series or group of related claims? If so, please outline this.

Class actions pending in federal courts are governed by Federal Rule of Civil Procedure (“FRCP”) 23, which classifies class actions by the type of relief sought. One or more plaintiffs may file a complaint requesting class certification, but to obtain certification they bear the burden of proving that their case satisfies each of the requirements of FRCP 23. Courts generally allow discovery before the parties brief the issue of class certification, and the court must conduct “a rigorous analysis” to determine whether the case should be certified. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

All FRCP 23 class actions must satisfy the prerequisites found in subsection 23(a), which include “numerosity” (showing that a sufficient number of claims exists), “commonality” (showing that one or more common questions of law or fact exist), “typicality” (showing that the claims of the named plaintiffs are sufficiently aligned with those of the putative class members), and “adequacy” (showing that both the named plaintiffs and their counsel will represent the proposed class without conflict). In addition, most courts recognise another prerequisite, namely that the proposed class be sufficiently defined to ensure both that the putative class members can be ascertained and that the proposed class is neither over- nor under-inclusive.

Next, the plaintiff must satisfy one of the subsections of 23(b), depending on the type of certification requested. Most commonly, plaintiffs seek money damages on behalf of the proposed case, in which case 23(b)(3) generally applies and mandates that common questions of law or fact predominate over issues affecting only individual members of the class and that class litigation be superior to other means of adjudicating the controversy. If a 23(b)(3) class is certified, notice will be sent to absent class members who may elect to opt-out of the litigation. If the primary relief requested in a class complaint is injunctive, then 23(b)(2) applies, which requires a showing that the defendant has acted or refused to act on grounds that apply to the proposed class such that class-wide injunctive or declaratory relief is appropriate. Plaintiffs less frequently seek certification under 23(b)(1), which requires a finding that the prosecution of separate actions would create a risk of inconsistent adjudications with respect to individual class members imposing incompatible standards of conduct on the defendant, or would otherwise dispose of rights of other persons. The most common 23(b)(1) classes involve a “limited fund” situation, in which numerous claimants seek recovery from a defendant with a finite ability to pay all claims.

States have their own class action procedural rules that often track the language in the federal class action rule, although state courts are generally viewed as more liberal in their interpretation of whether the plaintiff has satisfied the procedural prerequisites for class certification. This perception, along with the interstate impact of a large class action verdict, led Congress to enact the Class Action Fairness Act of 2005 (“CAFA”). 28 U.S.C. §1332(d). CAFA relaxes the jurisdictional requirements so that substantially more class actions may be removed to federal court than prior to 2005. CAFA contains several exceptions aimed at keeping truly local controversies in state court.

In addition, a given statute may provide a procedural device for aggregating claims. Most notable is the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, *et seq.*, which allows for “collective actions” that are akin to an opt-in Rule 23(b)(3) class action. FLSA collective actions generally seek damages in the form of back-pay from an employer.

In the event of multiple, related lawsuits (class actions or individual lawsuits), one or both parties may seek to consolidate the litigation in a multi-district litigation (“MDL”). The federal MDL rule is found at 28 U.S.C. § 1407, and a few states have a similar MDL procedure. A federal MDL judge will attempt to coordinate any state litigation that cannot be removed to federal court, although the extent of coordination depends on the state court’s willingness to cooperate.

Even absent an MDL, the parties or a court may coordinate or consolidate related cases. For instance, a district court may assign a single judge all related cases pending in that district. FRCP 20 also allows “permissive joinder”, which allows parties to add the claims of other individuals if they satisfy certain criteria. FRCP 23’s “numerosity” requirement asks whether joinder is impractical due to the number of plaintiffs.

#### 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.

The federal rules for class actions, MDLs, coordination, consolidation, and joinder do not have subject matter limitations. Federal or state regulations also may exist that provide an additional mechanism for aggregate litigation, such as the FLSA’s collective action provision mentioned above. Shareholder derivative actions are governed by both FRCP 23 and 23.1, the latter rule imposing heightened pleading requirements on a plaintiff pursuing a shareholder class action.

**1.3 Does the procedure provide for the management of claims by means of class action (whether determination of one claim leads to the determination of the class) or by means of a group action where related claims are managed together, but the decision in one claim does not automatically create a binding precedent for the others in the group?**

Class actions allow the findings of the class representative's claims to be extended to the claims of absent class members. Some courts, in deciding whether to certify a given litigation as a class action, may try "bellwether" or "test" cases to gain insights as to the nature of relevant evidence, but these outcomes do not directly impact other plaintiffs unless the requirements for *res judicata* or collateral estoppel can be satisfied.

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

FRCP 23(b)(1) and (b)(2) class actions are "mandatory" class actions that do not permit class members to opt out of the litigation. In contrast, if a 23(b)(3) class action is certified, absent class members will receive notice of the certification and be provided an opportunity to opt-out of the litigation. A failure to opt-out will preclude subsequent litigation. FLSA actions, in contrast, are opt-in in nature and require class members to affirmatively elect to participate in future class proceedings.

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

FRCP 23(a)(1) requires that the number of claimants be so numerous as to make joinder impracticable. There is no magic number, however, and as few as 40 claims may satisfy the numerosity requirement.

**1.6 How similar must the claims be? For example, in what circumstances will a class action be certified or a group litigation order made?**

This is the million dollar question that will be the focus of the class certification briefs. As a technical matter, FRCP 23(a)'s commonality, typicality and adequacy requirement must be satisfied, along with 23(b)(2)'s cohesiveness requirement or 23(b)(3)'s predominance requirement. A class action is a procedural device that cannot expand, abridge or otherwise alter the substantive rights of class members, so composite proof should not be permitted in lieu of an adequate class representative. 28 U.S.C. § 2072(b); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011); *Broussard v. Meinke*, 155 F.3d 331, 344-45 (4th Cir. 1998) (stating that a class action defendant must not be "forced to defend against a fictional composite without the benefit of deposing or cross-examining the disparate individuals behind the composite creation").

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

There is no restriction on who may file a class action. The named plaintiffs must only allege that their claims are representative of the putative class claims.

**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?**

Once a court certifies an FRCP 23(b)(3) class action, the absent class must be notified. In addition, if the parties reach a settlement, FRCP 23(e)(1) requires class notice. Class notice must be written in easily understood language and describe the claims at issue and the procedure for objecting to and opting out of the class action. Generally, the court will order the parties to work together to craft the class notice, which the court must then approve. In terms of how the notice is sent, there is no one required way but it must be reasonably calculated to reach class members. Direct mailings, newspaper advertisements, radio or television commercials, or a combination of these may be used.

In cases that do not include a right to opt-out, the court has discretion whether to order notice.

Before class certification is ruled upon, the rules are different. Ethical restrictions prevent plaintiffs' counsel from contacting potential class members directly, although they may run general advertisements about the litigation or hold public meetings for interested individuals that may lead to an attorney-client relationship. The ability of a defendant to contact putative class members pre-certification often involves jurisdictional nuances, although the American Bar Association maintains that pre-certification contacts are not *per se* unethical.

**1.9 How many group/class actions are commonly brought each year and in what areas of law e.g. have group/class action procedures been used in the fields of: Product liability; Securities/financial services/shareholder claims; Competition; Consumer fraud; Mass tort claims, e.g. disaster litigation; Environmental; Intellectual property; or Employment law?**

When a plaintiff files a federal case, he must designate one of 95 descriptions for the nature of the suit, any one of which might support a request for class certification. Thus, to accurately report the number of federal class actions filings, 95 searches would be required, and a similar process would need to be conducted for each of the 50 states. Given this, there are few reports on the number of total class actions pending at a given time. In 2008, the Federal Judicial Center published a study on federal class actions that reported almost 2,400 federal class actions had been filed in the prior six months. This figure excludes state court filings and is not broken down by case type. Most often, however, class actions assert contract, products liability, environmental, employment, securities, or antitrust claims.

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

There are no restrictions on the types of damages that may be recovered in a class action. As noted above, however, the various subsections of FRCP 23 apply based on the nature of the relief requested. Most class actions seek either money damages pursuant to 23(b)(3) or injunctive relief pursuant to (b)(2).

## 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?

The U.S. legal system recognises “associational standing” whereby an entity that purports to represent the interests of its members may file suit to protect those interests. *See, e.g., United Food & Commercial Workers Union Local 751 v. Brown Group*, 517 U.S. 544, 556-58 (1996). These types of claims tend to focus on protecting non-monetary interests, and not all associational plaintiffs style their case as a proposed class action.

Governmental officials may be statutorily authorised to bring actions on behalf of the public in their jurisdictions. The right to pursue such claims arises under the concept of *parens patriae* standing, which allows a state to sue to protect the health and welfare of its citizens. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007).

### 2.2 Who is permitted to bring such claims e.g. public authorities, state appointed ombudsmen or consumer associations? Must the organisation be approved by the state?

Public interest organisations, such as environmental groups, can pursue cases based on associational standing. A state attorney is usually the one who pursues a *parens patriae* action.

### 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?

The ability of a governmental official to pursue a case on behalf of the citizens of the state is generally defined by statute.

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

Actions brought by governmental entities may seek injunctive relief and/or monetary damages, while associational cases usually involve a request for injunctive or declaratory relief.

## 3 Court Procedures

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

The right to a jury trial depends on the nature of the claim asserted, the relief sought, and the defendant sued. In federal court, the Seventh Amendment provides a right to a jury trial when the claim asserted arises from the common law or from a statute setting forth a tort-like duty. *See Curtis v. Loether*, 415 U.S. 189, 195 (1974). Statutes may also provide a right to a jury trial. But when only equitable relief is at issue, there is no right to a jury trial in federal court. *See Reese v. CNH Am. LLC*, 574 F.3d 315, 327 (6th Cir. 2009). It also should be noted that there is no right to a jury trial when the defendant is the United States or a quasi-governmental body, except to the extent the government has consented. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981).

### 3.2 How are the proceedings managed e.g. are they dealt with by specialist courts/judges? Is a specialist judge appointed to manage the procedural aspects and/or hear the case?

All federal judges may preside over class action litigation. In state court, a special judicial division may be designated to handle class litigation. For instance, in Cook County (Chicago), class actions seeking injunctive relief will be assigned to the Chancery Division while commercial class actions may be handled by the Law Division. In some instances, courts have established special dockets to more efficiently manage related cases.

### 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?’

When a court certifies a class action, it will enter an order containing a class definition that describes the members of the class. In FRCP 23(b)(3) class actions, which require notice to the class and permits class members to opt-out of the class action, the notice will set a date by which opt-out requests must be submitted. In FLSA collective actions, which are opt-in class actions, the class notice will set a deadline for opting into the litigation.

### 3.4 Do the courts commonly select ‘test’ or ‘model’ cases and try all issues of law and fact in those cases, or do they determine generic or preliminary issues of law or fact, or are both approaches available? If the court can order preliminary issues do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

In a class action, the class representative will try his or her own cases, and however it turns out will resolve the rights of all class members. In other words, liability rises or falls solely on the evidence presented by the class representative.

Courts presiding over multiple, related cases that have not been certified as a class action (e.g., an MDL or consolidated litigation) may use “test” or “bellwether” trials. Extrapolating these findings to other plaintiffs, however, presents due process concerns. As such, these mechanisms, when used, provide the court and parties with insight on how the litigation should evolve rather than as a final determination of the remaining plaintiffs’ claims.

As for who resolves issues of law and fact, see question 3.1 above.

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

FRCP 23(c) provides judges with tools for managing class litigation, including a means by which to divide the class into subclasses, each with its own representative(s), and a means by which to bifurcate—or separate out—particular issues in the class proceeding.

### 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?

Expert evidence is frequently offered in support of and in opposition to class certification. In the past decade, most federal appellate courts have confirmed that the “rigorous analysis”

required by Rule 23 includes the weighing of conflicting expert reports at the class certification stage. *E.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 352 F.3d 305 (3rd Cir. 2008). In some instances, courts have appointed experts of their own to provide insight on the issues raised by the request for class certification. In 2011, the United States Supreme Court considered expert evidence offered in support of class certification in concluding that class certification was not appropriate in that case. *Dukes*, 131 S.Ct. At 2554. In so doing, it noted in passing that it did not necessarily agree with the lower appellate court, which had held that a stringent *Daubert* examination of expert submissions was not required. *Id.*; see also *Daubert v. Merrell Dow Pharm., Inc.*, 113 S. Ct. 2786 (1993) (outlining the evidentiary standard for expert evidence at trial).

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

Federal rules require the parties to disclose their witnesses and exchange expert reports, after which the opposing party may take depositions. Each state has its own discovery rules, and state expert disclosure rules in particular vary by jurisdiction.

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

Some statutes require pre-litigation notice to the defendant before a case can be filed asserting a violation of that statute.

Once litigation commences, Federal Rules of Civil Procedure 26-37 govern discovery in federal court, and state courts have their own rules of civil procedure.

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

Not every case filed as a class action will be tried as a class action. In fact, class action trials are relatively rare. If a case is certified as a class action there is a fair probability that it will settle. With this in mind, it is not uncommon for it to take several years before a certified class action is tried on the merits. *E.g.*, *Cook v. Rockwell Int'l Corp.*, No. 08-1224, 2010 WL 3449065, \*2 (10th Cir. Sept. 3, 2010) (explaining that the parties had litigated for over 15 years in the district court before having a four-month, class action trial, after which the appellate court reversed the class certification decision). This is because, at the outset of the case, the judge will enter a scheduling order that may bifurcate “class” discovery from “merits” discovery so that merits discovery only ensues if the proposed class is certified. The court has wide discretion to determine the length of time afforded for discovery and will take into account the complexity of the litigation and the claims asserted. Once class discovery has occurred, the parties will brief the issue of class certification, after which the court may hear oral argument on the issue before reaching its decision. It is rare to have a decision on class certification in less than a year from the filing date of the case. If the court certifies the class, additional discovery will likely occur before the case is tried.

### 3.10 What appeal options are available?

FRCP 23(f) provides appellate courts with discretion to permit an interlocutory appeal from an order granting or denying class certification. This is a newer amendment to the FRCP enacted in

recognition of the settlement pressure a certified class action placed on a defendant and the cost and time associated with class action trials. Not all states have provisions allowing for interlocutory appeals of class certification decisions.

## 4 Time Limits

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

Time limits for bringing a class action depend on the applicable statutes of limitations.

### 4.2 If so, please explain what these are. Does the age or condition of the claimant affect the calculation of any time limits and does the court have a discretion to disapply time limits?

Statutes of limitations vary widely depending on the claim asserted, but most provide between two and five years to file suit. Periods of limitations may be tolled under certain circumstances, such as the minority or mental disability of the plaintiff. In addition, a “discovery rule” may afford a plaintiff an extension of the statute of limitations until the time the injury manifests.

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

If a defendant is found to have induced the plaintiff through concealment or fraud to not proceed with a claim, and the claim is time-barred, the defendant will be equitably estopped from invoking a statute of limitations defence. *See, e.g.*, *Haydon v. First Neighbor Bank*, 610 F.3d 382, 385 (7th Cir. 2010).

## 5 Remedies

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

Class actions most frequently seek compensation for economic loss, statutory penalties, property damage, and/or injunctive relief. Cases involving personal injury or emotional factors are now widely recognised as involving too many plaintiff-specific issues for class treatment. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 594-95 (1997); *Castano v. The Am. Tobacco Co.*, 84 F.3d 737,744 (5th Cir. 1996).

### 5.2 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where a product has not yet malfunctioned and caused injury, but it may do so in future?

Medical monitoring laws vary from state to state. Not all states permit medical monitoring, and those that do differ in whether they view medical monitoring as a form of damages or as a cause of action with specific elements of proof. Medical monitoring class actions are rarely certified because, like personal injury class actions, they involve plaintiff-specific medical considerations. *See, e.g.*, *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459-60 (E.D. La. 2006).

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

The underlying legal claim determines whether punitive damages are recoverable. If they are, then they may be pursued in a class action.

### 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 not.

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

There is no single method by which damages awarded in a class action must be dispersed among class members. In requesting class certification, plaintiffs frequently argue that varying amounts of damages should not preclude certification and propose using an administrative judge to process claims following a finding of class-wide liability. Defendants, in contrast, argue that variations in the entitlement to damages necessitates individualised inquiries defeating any efficiency perceivably gained by class treatment. Ultimately, if a class is certified, the trial court will determine how to handle individual damages awards.

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

Class action settlements require court approval to ensure they are fair, adequate, and reasonable. See FRCP 23(e). The court will not approve a settlement resulting from collusion between the class representative and the defendant. Class members will be given an opportunity to file objections to the settlement with the court.

## 6 Costs

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

There is no "loser pays" rule in the United States. Prevailing parties in federal and state court often recover at least some litigation expenses. Some statutes, such as state consumer fraud statutes, may provide a basis for recovering attorney's fees if a plaintiff prevails. In addition, the parties may be subject to a contract that provides for a basis for recovering costs and fees. But absent sanctionable conduct by the plaintiff or a contractual agreement with the plaintiff, a defendant generally will not recover fees.

### 6.2 How are the costs of litigation shared amongst the members of the group/class? How are the costs common to all claims involved in the action ('common costs') and the costs attributable to each individual claim ('individual costs') allocated?

Plaintiffs' counsel frequently advance litigation expenses in exchange for an agreement that they may obtain reimbursement from any recovery.

### 6.3 What are the costs consequences, if any, where a member of the group/class discontinues their claim before the conclusion of the group/class action?

In federal court, a class representative may voluntarily dismiss his claim without prejudicing the rights of putative class members, so long as the court has not yet ruled on class certification. Once the court has certified a class, the judge must approve any settlement. FRCP 23(e). State procedures may differ and require notice of the settlement be given to the putative class even if the case has not been certified. Cal. R. Ct. 3.770; *see also* 735 ILCS 5/2-806.

### 6.4 Do the courts manage the costs incurred by the parties e.g. by limiting the amount of costs recoverable or by imposing a 'cap' on costs? Are costs assessed by the court during and/or at the end of the proceedings?

Courts do not manage or supervise the costs incurred by parties during the course of litigation. Some statutes allow a prevailing party to recover costs, in which case the court will review and rule upon a request for costs.

## 7 Funding

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

There is no right to public funding for class litigation. Legal aid organisations, private interest groups, or individual attorneys may offer legal services on a pro bono basis. Generally speaking, however, class litigation is viewed as potentially lucrative, so it is most often pursued on a contingency fee basis.

### 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?

Most often, a plaintiff pursuing a class action will enter into a contingency fee agreement with his attorney that will provide a basis for the attorney to be compensated if the case is resolved on an individual basis (e.g., before a ruling on class certification or following a denial of class certification). Once a class is certified, however, the court will determine class counsel's compensation. Class counsel files a formal request seeking compensation, the reasonableness of which the court will assess and rule upon. In the event of a "coupon" class settlement, CAFA provides specific directions regarding attorney fee awards. 28 U.S.C. § 1712.

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

Rules against champerty prohibit third parties from overtly funding litigation. An attorney or legal aid group may offer to pursue a class action on a *pro bono* basis. But ethical rules prohibit attorneys from financially assisting their clients, apart from possibly advancing fees and costs.

## 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.

There is no such common practice in U.S. class actions, likely because an assigned claim would no longer be typical of the proposed class' claims and because the new plaintiff would unlikely be viewed as an adequate representative of the proposed class.

### 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.

There is no formal procedural by which this occurs, and it is unlikely such an attempt would meet with success.

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

Criminal proceedings and governmental investigations often foreshadow or parallel class litigation pursued by citizens in the civil system, but they are not intended to serve as a substitute for civil litigation. For example, some state consumer fraud statutes provide for fines that only the attorney general, not a civil litigant, may recover. These fines seek to deter conduct and are not generally passed on to injured civilians. Instead, an injured citizen may bring an action under the same statute (possibly even as a class action) to recover damages.

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

Ombudspersons are not used to resolve class litigation in the United States. The parties may agree to mediate a class action, and mediation is frequently pursued when the parties are interested in settling a class action.

As for arbitration, the parties again may contractually agree to arbitration either pre- or post-litigation. The enforceability of a class arbitration provision depends on the facts of the case and the

law of the jurisdiction. See, e.g., *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007). The U.S. Supreme Court recently ruled that, when an arbitration agreement is silent as to class actions, the arbitrator cannot unilaterally decide that class actions must be arbitrated. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. -- (2010), available at <http://www.supremecourt.gov/opinions/09pdf/08-1198.pdf>.

The United States Supreme Court has further held that an arbitration clause that mandates arbitration and also prohibits class status in the arbitration can be valid. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751-53 (2011).

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

Some statutes provide a basis for recovering punitive damages, civil fines, or attorney's fees to incentivise litigation of a wrong that results in only slight monetary injury.

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

The parties, in electing to mediate or arbitrate, may agree to the scope of potential recoveries. So long as a limitation of remedies is not unconscionable, it will likely be enforced.

## 9 Other Matters

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

Venue and personal jurisdiction rules that are not specific to class actions establish the parameters for which cases can proceed in a given jurisdiction. One of the express goals of CAFA was to eliminate forum shopping that favoured keeping class actions in state courts.

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

Congress is not currently considering any major textual changes to FRCP 23.





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In 2010, *The American Lawyer* named SHB a finalist in its Product Liability Litigation Department of the Year competition. This followed the firm's 2008 recognition as winner in the Product Liability category. Many SHB attorneys are regularly honoured for their individual outstanding professional skills and abilities.

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