



International Chamber of Commerce

The world business organization

Policy Statement

Class action litigation

Prepared by the Commission on Commercial Law and Practice

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Class action litigation

This policy statement outlines world business views on the issue of class action litigation¹.

ICC believes that implementing class action systems has adverse consequences for business and consumers that outweigh the perceived benefit to society. The spread of class action lawsuits risks an increase in speculative lawsuits needlessly costing global business time, resources and exposure to “legal blackmail”. Such litigation results in higher costs for companies and ultimately higher prices for consumers. Regulators have a number of other policy options that could attain the desired benefits without these adverse effects including for example joinder of claims and the use of pilot cases. Since some countries currently consider the adoption of class action systems based on that of the United States, ICC is of the view that both the costs and desired benefits of multi-party disputes should be examined.

¹ Class action litigation is a legal procedure used to handle a lawsuit in which a large number of people have been affected by the same act or acts of a defendant. One plaintiff, representing not only itself, but also everybody else having a common interest in law or fact (“the Class”), is allowed to initiate litigation against one or more defendants.

The desired benefits of class actions

Business acknowledges that enabling people that have suffered from wrongdoing to get fair compensation for their damages is a fundamental principle in any civilized society and that wrongdoers should be prevented from being able to escape justice when doing small amounts of harm to many and thereby minimizing the risk that anybody will hold them accountable for their illegal conduct. Business also recognizes that legislators are seeking to achieve the above-mentioned goals in the most efficient manner. It is equally fundamental, however, that the process is just and efficient for both plaintiff(s) and defendant(s), with respect to the allocation of cost and time.

The potential misuse and abuse of class actions can easily undermine this balance.

Business concerns about class actions

- Class actions bring with it a major risk of “legal blackmail”. Major class actions against a company can lead to negative media coverage that damages the company’s business and reputation. This means that in many cases, companies are under pressure to settle the claim not because of the merit of the claim but to avoid the consequences of bad press.
- Getting class action lawsuits dismissed at an early stage of the litigation before any expensive and time consuming discovery begins can be difficult. In effect this means that even if the defendants ultimately win the case – and even if the case is won without having to go to trial – the defendants will suffer significant costs.
- Far-reaching discovery rules such as those in the US in very early stages of a proceeding means that practically anything "relevant" to the parties' claims is discoverable; this poses unreasonable burdens on the defendants.
- Current systems do not always allow a successful defendant to recoup its costs from the plaintiffs. For example, in the US, as opposed to other common law jurisdictions, each party pays its own costs of litigation.
- The central problem in all class actions, whether in civil law or common law jurisdictions, is the fact that it is impossible to try numerous claims in a single case without sacrificing the right of defense. In order to create "economy of scale" in a class action, courts are always asked to decide questions "common" to all the claims in the class and to narrow, defer or otherwise avoid "individual" questions not common to all the members of the class. The system creates great pressure to over-simplify the individual differences between members of the class in order to make the common issues as broad as possible.
- Class actions can lead to excessive fees to the plaintiffs’ lawyers even if their work results in small awards for each of the individual plaintiffs. This creates an unhealthy incentive structure. Moreover, contingent fee arrangements and legislation allowing a prevailing plaintiff to recover “reasonable” attorneys’ fees from the defendant have led to a “production line” approach from lawyers soliciting clients while bearing no financial risk.
- In some current systems a group of defendants has joint and several liability for the damages awarded. There are no rules in place allowing for contributions among the defendants. This, in combination with far-reaching discovery rules and with the significant amounts often dealt with in a class action, creates strong incentives for defendants to settle instead of litigating and vindicating their position. Defendants are encouraged to settle not due to the merit of the pending case but because of the consequences of an unlikely worst-case scenario.

- In many countries, the court system is already lacking resources. It is a concern that introducing class action systems would only contribute to worsen this situation and could lead to even longer waiting times at the courts. Class actions require a great deal more work than the average civil case. Judges who are busy and overburdened are likely to find it difficult to handle the extensive factual investigation class action demands and to constantly monitor the conduct of plaintiff and defense counsel for potential harm to absent class members.
- Experience shows that the introduction of class actions tends to increase litigation, which in turn affects investments negatively.
- The situation where an individual is bound by a judgment without having been active at all, having to opt out in order to avoid the judgment, seems to conflict with legal traditions in the vast majority of jurisdictions and should be avoided. Opt-out mechanisms would probably also be a breach of constitutional rights in many countries and might also be in conflict with Article 6 of the European Convention.

Recommendations

Some countries are currently considering introducing systems similar to the US class action institute. There is no need for the introduction of class actions as existing procedural rules on joinder of claims and pilot cases can handle mass litigation. The EU Commission is currently considering the benefits of private actions with respect to competition law infringements. ICC wishes to point out that no problems have been demonstrated that need to be solved by introducing class actions. This is particularly the case where, in Europe, there is a tradition of strong consumer protection through legislation, insurance systems and supervisory authorities taking into account consumers' interests. ICC therefore recommends that before any further actions are taken to introduce class actions in any jurisdiction, a careful need assessment should be carried out to identify whether there are any problems that need solving and whether these problems could be dealt with in other ways to avoid the adverse consequences outlined in this statement.

In jurisdictions that already have class action systems, ICC recommends the following points:

- measures to limit plaintiffs' ability to file law suits based solely on speculation and vague grounds;
- introduction of a "loser pays" system or other measures to shift some financial risk of loss to the plaintiffs. Contingency fees contribute to a litigation culture in more than one way. Firstly, as set out in this statement, the availability of contingency fees tempts plaintiffs into speculative claims knowing that they could receive substantial compensation from litigation conducted on a risk free basis. In addition, the significant fees recouped by plaintiffs' lawyers (sometimes 50% or more of the damages awarded against the defendant) can in themselves provide the financial resources for yet further speculative class actions in previously non-litigated areas. A shift of the financial risk to a "loser pays" system would indeed act as a welcome deterrent to these purely speculative plaintiffs' claims;
- contingent fee arrangements lead to excessive fees to the plaintiff's lawyers even in cases where their work only results in small awards for each of the individual plaintiffs. This creates an unhealthy incentive structure with lawyer driven litigations and "ambulance chasing" for example on the Internet and through advertisements. Contingent fee arrangements should not be allowed and limits on attorney fees should be put in place, presumably by a maximum percentage of any recovery

About ICC

ICC is the world business organization. Grouping together thousands of member companies and associations from over 130 countries, it is a representative body that speaks with authority on behalf of enterprises of all sizes and sectors in every part of the world. This ICC policy statement is prepared by the ICC Commission on Commercial Law and Practice, a specialized ICC working body that develops some of the world's most successful trade tools, examines and builds consensus on major international commercial law issues.

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