

HB

246

ALASKA STATE LEGISLATURE

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House Judiciary Committee Sponsor Statement HB 246

"An Act requiring a member to opt into a class action; and amending Rule 23(c),
Alaska Rules of Civil Procedure."

A class action is a lawsuit filed by one or more people on behalf of themselves and a larger group of people "who are similarly situated." Rule 23, Alaska Rules of Civil Procedure, provides the procedure for class actions in the state. The Rule sets out the prerequisites that must be met and the factors that must be weighed by the court before determining whether the class action should be maintained. If the class action is maintained, the court must then direct notice to the class.

Rule 23 currently requires that the court use the best notice practicable to all members that can be identified through reasonable effort to tell members when to "opt out" of participation as a class member, that any judgment will affect all class members who do not "opt out" and that any member not "opting out" may enter an appearance through counsel. Under this system, many people are unfortunately made a part of a class action without being aware of it. An unknowing class member can get swept into massive litigation, affecting their personal and professional lives, without ever consenting to it. They can also be left without recourse if they learn of the suit after a judgment is made and are unsatisfied with the award.

HB 246 recognizes the value and importance of class action lawsuits in our legal system and does not make any changes to the prerequisites used to determine if a class action is appropriate and in the best interests of the members of the class. It simply changes the notice provision of Rule 23(c) to require that a member "opt in" to the class in order to become part of the action. Common sense and fairness in our legal system dictate that a person should take some affirmative action before becoming part of a lawsuit, whatever the circumstances or outcome may be. This is especially true in a large rural state such as Alaska with a sizeable transient population where notice, and therefore the opportunity to "opt out," may not reach many potential class members.

LEGAL SERVICES

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LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
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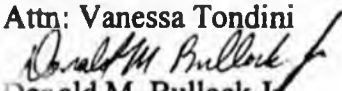
State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

April 8, 2005

SUBJECT: Class action and collective action (HB 246)

TO: Representative Lesil McGuire
Attn: Vanessa Tondini

FROM: 
Donald M. Bullock Jr.
Legislative Counsel

You asked for the list of states that use "opt-in" versus "opt-out" for determining participants in a class action lawsuit. You also wanted a description of the procedure for a class action lawsuit under Rule 23, Alaska Rules of Civil Procedure.

Under the "opt-out" procedure, a member in the class is part of the class litigation unless the member opts out; under the "opt-in" procedure, a member of the class is not part of the litigation unless the member affirmatively opts in to participate. To find out if any state uses the "opt-in" rather than the "opt-out" procedure for determining class participation, I searched the Lexis database that includes all state statutes and court rules. I could not find a state that uses "opt-in" for class participation. As you may already know, Rule 23 of the Federal Rules of Civil Procedure uses "opt-out."

However, there are two federal statutes that provide for opting in to participate in a class action. In the "opt-in" situation, the action is referred to as a "collective action" rather than a class action. The two federal statutes that provide for opting into an action are 29 U.S.C. 216(b) of the Fair Labor Standards Act¹ and 29 U.S.C. 626(b) of the Age Discrimination in Employment Act.²

¹ **Damages; right of action; attorney's fees and costs; termination of right of action**
Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215 (a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215 (a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees

Rule 23, Alaska Rules of Civil Procedure, provides the procedure for class actions in the state. The prerequisites to a class action are listed in subsection (a) of the rule as follows:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and
- (4) the representative parties will fairly and adequately protect the interests of the class.

In the list above, (2) and (3) are directed to the similarities among the class members in the litigation, that they have common factual circumstances and legal issues. The first prerequisite is directed at the number of members of the class, and the fourth requires that the class will be adequately represented by the representatives initiating and pursuing the litigation.

After the prerequisites in (a) are met, Rule 23(b) imposes additional requirements that weigh the benefits of a class action against numerous actions by individual class members. Among the considerations are whether there is the risk of inconsistent or varying adjudications, the risk that an individual's adjudication may be dispositive of or impair the interests of other members of the class, whether the party opposing the class has acted or refuses to act on grounds generally applicable to the members of the class, whether the questions of law or fact common to the class predominate over any questions affecting some individual members, and whether a class action is superior to other methods for the fair and efficient adjudication of the controversy.

similarly situated. *No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.* The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which

(1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or

(2) legal or equitable relief is sought as a result of alleged violations of section 215 (a)(3) of this title. [Emphasis added.]

² Sec. 626(b) directs that the enforcement of the Age Discrimination in Employment Act use the procedures in 29 U.S.C. 216, which requires the affirmative consent by an individual to participate in the litigation.

Representative Lesil McGuire

April 8, 2005

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Rule 23(c), that would be amended by HB 246, provides the procedures to be followed by the court. First, the issue of whether to proceed as a class action should be decided "as soon as practicable after the commencement of an action brought as a class action" Next, after finding that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy", the court uses the best practicable notice to all members to tell the members when to opt out of participation as a class member, that any judgment will affect all class members who do not opt out, and that any member not opting out may enter an appearance through counsel. A judgment in a class action must describe those found by the judge to be members of the class, and, if notice of the opportunity to opt out was provided, those to whom the notice was directed and who did not opt out of the class. Other provisions in Rule 23(c) allow for a limitation on the issues to be included in the class action and the division of a class into subclasses that may each be treated as a class.

Rule 23(d) and (e) describe procedures for orders in the conduct of class actions and the dismissal or compromise of the class action.

In general, Rule 23 requires a court to look at the efficiency of litigation by combining potential litigants who have common issues of law and fact, but also consider whether a class action will adequately represent the individuals fitting within the parameters of a class member. Members who do not opt out are subject to the outcome of the litigation, but those who do may litigate their claims separately.

If I may be of further assistance, please advise.

DMB:med
05-244.med

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB 246
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
 Title Require Opt-In for Class Actions BRU Alaska Court System
 Component Trial Courts
 Sponsor House Judiciary Committee
 Requester _____ Component No. 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.
 Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)
 The court system does not anticipate any fiscal impact from the passage of HB 246.

Prepared by: Douglas Wooliver, Administrative Attorney Phone 463-4750
 Division: Alaska Court System Date/Time 4/8/05 7:23 AM
 Approved by: Doug Wooliver for Stephanie Cole, Administrative Director Date 4/8/2005
 Agency: Alaska Court System

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: _____
 Bill Version: HB246-LAW-C&FB-4-9-C
 () Publish Date: _____

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title: "An Act requiring a member to opt into a class action; and amending Rule 23(c)..." RDU: CIVIL
 Component: Commercial & Fair Business
 Sponsor: House Judiciary
 Requester: House Judiciary Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
-----------------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other - Regulatory Cost Charge						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill amends Alaska Civil Rule 23(c) to require that members of a potential class be notified of their ability to "opt-in" to the class before a class action can be maintained under Rule 23(b)(3). Currently, the rule requires notice to class members with an "opt-out" requirement.

Passage of this legislation will not have a fiscal impact on the Department of Law.

Prepared by: Kathryn Daughhete, Director
 Division: Administrative Services Division
 Approved by: Kathryn Daughhete for David Márquez, Attorney General
 Agency: Department of Law

Phone 465-3673
 Date/Time 4/9/05 2:31 PM
 Date 4/9/2005

Friday, February 18, 2005

President Bush Signs Class-Action Fairness Act of 2005 Into Law

THE PRESIDENT: Thank you all. Thanks for coming. (Applause.) Please be seated. Thank you for coming. Thanks for the warm welcome. Welcome to the people's house. Glad you're here for the first bill signing ceremony of 2005. (Applause.)

The bill I'm about to sign is a model of effective, bipartisan legislation. By working together over several years, we have agreed on a practical way to begin restoring common sense and balance to America's legal system. The Class-Action Fairness Act of 2005 marks a critical step toward ending the lawsuit culture in our country. The bill will ease the needless burden of litigation on every American worker, business, and family. By beginning the important work of legal reform, we are meeting our duty to solve problems now, and not to pass them on to future generations.

I appreciate so very much the leadership that Senator Frist and Senator McConnell have shown on this bill in the United States Senate. I want to thank Senator Chris Dodo and Senator Tom Carper and Senator Craig Thomas, as well for working in a bipartisan fashion to get this good bill to my desk.

I appreciate Congressman Jim Sensenbrenner, as well as Congressman Lamar Smith, joining us today. I particularly want to pay tribute to the bill sponsors -- Senator Grassley and Senator Kohl, as well as Congressman Bob Goodlatte and Congressman Rick Boucher, who are with us here today.

Congress showed what is possible when we set aside partisan differences and focus on what's doing right for Congress, and you all are to be -- I mean, for the country -- and you're to be credited for your good work. Thank you very much. (Applause.)

I welcome our new Attorney General -- oh, right there. (Laughter.) How quickly they forget in Washington. (Laughter.) Al Gonzales. Proud you're up here, Al. Hector Barreto, the SBA. Thank you, all the business leaders, community leaders, consumer groups who care about this issue. Thanks for your hard work. Thanks for being patient. Thanks for not becoming discouraged. And thanks for witnessing the fruits of your labor as I sign this bill.

Class-actions can serve a valuable purpose in our legal system. They allow numerous victims of the same wrong-doing to merge their claims into a single lawsuit. When used properly, class-actions make the legal system more efficient and help guarantee that injured people receive proper compensation. That is an important principle of justice. So the bill I sign today maintains every victim's right to seek justice, and ensures that wrong-doers are held to account.

Class-actions can also be manipulated for personal gain. Lawyers who represent plaintiffs from multiple states can shop around for the state court where they expect to win the most money. A few weeks ago, I visited Madison County, Illinois, where juries have earned a reputation for awarding large verdicts. The number of class-actions filed in Madison County has gone from two in 1998 to 82 in 2004 -- even though the vast majority of the defendants named in those suits are not from Madison County. Trial lawyers have already filed 24 class-actions in Madison County this year. We're in February. (Laughter.) Including 20 in the past week -- after Congress made it clear their chance to exploit the class-action system would soon be gone.

Before today, trial lawyers were able to drag defendants from all over the country into sympathetic local courts, even if those businesses have done nothing wrong. Many businesses decided it was cheaper to settle the lawsuits, rather than risk a massive jury award. In many cases, lawyers went

home with huge pay-outs, while the plaintiffs ended up with coupons worth only a few dollars. By the time the settlement in at least one case was finished, plaintiffs actually owed their lawyers money.

A newspaper editorial called the class-action system "an extortion racket that only Congress can fix." This bill helps fix the system. Congress has done its duty, and I'm proud to sign it into law.

Over the past few years I've met people from all over the country who know the importance of class-action reform firsthand, and three of them are with us today. Marylou Rigat lives in Connecticut, yet a class-action involving her faulty roof was resolved by a judge in Alabama. The award covered only a fraction of the cost of new shingles, but that wasn't Marylou's biggest problem. She had no idea she was part of the class-action in the first place, and no one contacted her about her award. She only learned by accident when she called the company about her warranty. And then she found out there was nothing more she could do.

Hilda Bankston is with us. And her late husband used to own a drugstore in Fayette, Mississippi. Their business was doing well, until the store got swept up in massive litigation just because it dispensed prescription drugs for a certain drug -- prescriptions for a certain drug. She had to sell the pharmacy six years ago. But she's still getting dragged into court, again and again. Here's what she said: "My husband and I lived the American Dream until we were caught up in what has become an American nightmare."

Alita Ditkowsky is with us. She was part of a class-action against a company that made faulty televisions. When the case was settled in Madison County, Illinois, Alita's lawyer took home a big check while she got a \$50 rebate on another TV, built by the same company that had ruined the first TV. (Laughter.) Here's what she said: "I'm still left with a broken TV." (Laughter.) "He got \$22 million. Where's the justice in this?"

I want to thank you all for letting me use your stories, not only here, but during different events we've had in highlighting the need for class-action reform, because this act will help ensure justice by making two essential reforms. First, it moves most large, interstate class-actions into federal courts. This will prevent trial lawyers from shopping around for friendly local venues. The bill will keep out-of-state businesses, workers, and shareholders from being dragged before unfriendly local juries, or forced into unfair settlements. And that's good for our system, and it's good for our economy.

Second, the bill provides new safeguards to ensure that plaintiffs and class-action lawsuits are treated fairly. The bill requires judges to consider the real monetary value of coupons and discounts, so that victims can count on true compensation for their injuries. It demands settlements and rulings to be explained in plain English, so that class members understand their full rights.

These are needed reforms. It's an important piece of legislation. It shows we're making important progress toward a better legal system.

There's more to do. Small business owners across America fear that one junk lawsuit could force them to close their doors for good. Medical liability lawsuits are driving up the cost for doctors and patients and entrepreneurs around the country. Asbestos litigation alone has led to the bankruptcy of dozens of companies and cost tens of thousands of jobs, even though many asbestos claims are filed on behalf of people who aren't actually sick.

Overall, junk lawsuits have driven the total cost of America's tort system to more than \$240 billion a year, greater than any other major industrialized nation. It creates a needless disadvantage for America's workers and businesses in a global economy, imposes unfair costs on job creators, and

raises prices to consumers.

We have a responsibility to confront frivolous litigation head on. I will continue working with Congress to pass meaningful legal reforms, starting with reform in our asbestos and medical liability systems.

Once again, I want to thank you all for the hard work on this important legislation. Class-action reform will help keep America the best place in the world to do business. It will help ensure justice for our citizens, and I'm confident that this bill will be the first of many bipartisan achievements in the year 2005.

And now it is my honor to sign the Class-Action Fairness law. (Applause.)

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Rule 23, Federal Rules of Civil Procedure

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

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

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without

the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Rule 23.1 Derivative Actions by Shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Rule 23.2 Actions Relating to Unincorporated Associations.

An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action the court may make appropriate orders corresponding with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e)

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How a Class Action Proceeds in Court

The following flow chart describes the typical procedures followed in class action litigation. The sequence of events described may vary from case; however, generally, a class action will involve all of the steps noted.

Step 1: The first step is the drafting and filing of a complaint against the defendants. This document is then filed in court and delivered or "served" on the defendants by the U.S. mail or a process server.

Step 2: After the complaint is filed, the defendants will usually file an answer denying the allegations. Alternatively, they may elect to challenge the complaint by filing certain motions challenging the lawsuit. If motions are filed, an answer will be required after the judge rules on the motions unless the case is dismissed.

Step 3: After the answers are filed and any motions ruled on, a period of "discovery" will usually take place. Discovery involves the lawyers demanding documents from the other side, asking written questions, and taking depositions. Often courts will hold a conference with the lawyers and set a timetable for preliminary discovery needed for certification to be completed.

Step 4: During the discovery phase, the defendants may file motions to challenge the legal sufficiency or underlying factual basis for the action. These are usually called motions for summary judgment. If a defendant wins, some or all of the claims of plaintiffs may be dismissed.

Step 5: After all preliminary discovery is completed, the plaintiff will file motion to certify a class action. The defendants will file objections to certification. The Court will have a hearing. If plaintiffs win, the case proceeds to be certified.

Step 6: Notice. If the lawsuit is one for money, the court will order notice go to the class. Notice is published in the newspaper or sent through the mail. This notice advises class members of their rights, and sets deadlines for objecting, "opting out," or entering an appearance through a lawyer.

Step 7: Trial or Settlement. After final certification is granted, additional discovery may be needed before the case is tried. After that discovery is completed, the case is set for trial unless it settles. The trial of a class action procedurally is the same as for any other civil lawsuit.

Summary of Typical Procedures in a Class Action:

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Frequently Asked Questions about Class Actions

This page contains answers to common questions asked about class action litigation. For more detailed information, links to other sites are provided. Further, detailed information about some aspects of class action litigation may be found in the Federal Class Action Manual - Internet Edition on this website.

- What is a class action?
- How do corporations improperly avoid class action litigation in consumer transactions?
- What types of class actions may be filed?
- Can I be bound by a judgment or settlement of a class action?
- How do I join a class action?
- If I have a claim, should I file my own lawsuit?
- Who pays the lawyers in a class action lawsuit?
- What are the signs of an unfair settlement or improper representation?
- How do I find more information on any legal issue regarding a class action?

What is a Class Action?

A class action is a representative action wherein one or more plaintiffs actually named in the complaint, along with their counsel pursue a case for themselves and the defined class against one or more defendants. The claims of the "class representatives" must arise from facts or law common to the class members. Most class actions are called "plaintiff class actions;" however, in limited circumstances a class action can be filed against one or more defendants representing a group of defendants, i.e., a "defendant class" action.

In federal court, the procedures for certifying a class and the requisite elements for certification are governed by Rule 23, Federal Rules of Civil Procedure. For general information about federal courts and how they are structured, you may want to try "Understanding the Federal Courts." Another website with useful information on the federal court system and its procedures is the Federal Judiciary Homepage at www.uscourts.gov Also, a flow chart indicating the normal manner in which a typical class action proceeds through the courts is available on this site: [Class Action Flow Chart](#).

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How do corporations improperly avoid class actions in consumer litigation?

In the early 1900's congress passed a law called the "Federal Arbitration Act." This law which was intended to apply only to merchants engaged in interstate commerce at the time it was passed, is now in the 1990's being used as a weapon against consumers. Arbitration was

intended to be a process whereby equally sophisticated businessmen could negotiate an agreement with each other to submit any dispute they might have to an independent third party for resolution instead of a court. The theory was that as to businessmen, the law should permit an alternative method for them to quickly resolve their differences outside of court. The fact is that most businesses engaged in such transactions have lawyers on retainer or on staff to negotiate such agreements, they fully understand the ramifications of arbitration, and the terms of the arbitration are agreed to by parties of equal bargaining strength.

Corporations are now using the same law to abuse the American consumer. Contracts with arbitration clauses involving credit, banking, insurance, and even home construction projects are now appearing with increasing frequency. An arbitration clause is particularly insidious when included in contracts of adhesion, i.e., contracts between businesses and consumers offered solely on a take-it-or-leave-it basis. Why are such arbitration clauses bad for consumers?

(1) An arbitration clause generally prohibits a consumer from filing any lawsuit in a court of law. In a lawsuit people have much broader procedural protections and rights than they have in arbitration. After a lawsuit is filed in court, a lawyer can force a defendant to submit his employees for deposition, to answer questions under oath in writing, and to allow an inspection of documents. If a defendant or its lawyers are caught concealing information or lying, severe penalties can be imposed by a judge. If a defendant refuses to produce documents or is evasive in answering questions, they can be forced by a court to fully answer, or in extreme cases a defendant can be found liable without a trial.

In an arbitration proceeding, these rights may not exist, or may be severely curtailed. Since a plaintiff likely will never be able to obtain full discovery, many frauds, lies and deceptions may go totally undiscovered. Even if a consumer, for instance finds an intentional pattern of fraud by a defendant to cheat thousands of people out of money in the same manner the consumer in arbitration was cheated, there is little that can be done to provide a remedy for those other people. Why?

(2) Because arbitration clauses generally prohibit the resolution of any dispute as a class action. Since no claims can be arbitrated as a class action, the most the defendant could ever be held accountable for is the claim of the individual who filed a demand for arbitration. So as long as the corporate crooks only cheats that consumer out of two or three hundred dollars, they probably have a license to steal. Even if the consumer gets mad, in the absence of a right to pursue a class action, he would never find a lawyer willing to take a case that involves only a couple hundred dollars. Therefore, the consumer would probably have to represent himself in an arbitration. If the consumer does try to represent himself, the filing fee to demand arbitration could be as much as a hundred dollars or more. If the consumer pays the filing fee and attempts to represent himself, he won't likely get the "discovery" that he needs to prove his claim. Finally, when the claim comes up for hearing, the corporate crooks send in three

high-powered shark defense lawyers to eat his lunch. Does this sound lop-sided? Now you know why corporations like arbitration clauses.

As a general rule, if any business wants you to agree to settle your differences out of court, you should find a different place to do business. Any arbitration agreement included in a contract involving any transaction where you don't have a lawyer representing you, and where you are not actively negotiating the "contract as a whole" is almost invariably bad news for the consumer. Any company that is engaged in consumer transactions and feels it needs protection from lawsuits is probably engaged in questionable business practices. In fact, including an arbitration clause in any consumer contract is itself a questionable business practice. For further information try: <http://www.thecre.com/fedlaw/legal89.htm>

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What types of class actions may be filed?

Most class actions are filed for compensatory (money) damages. Class actions may also be filed to resolve disputes over a "limited fund," where the money available is inadequate to fully compensate all class members. Occasionally, class actions are filed to seek a declaratory judgment. Finally, a class action may seek injunctive relief. For example, a class action may be filed to request the court order the police or authorities to discontinue an unconstitutional practice.

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Can I be bound by a settlement or judgment of a class action?

Yes. If the constitutional and procedural protections required for fairness are met in the underlying action, all absent class members are bound to the judgment or settlement of the case. However, if the action is primarily for compensatory damages, absent class members are entitled to notice and an opportunity to "opt-out" (exclude themselves) from the proceedings. If a person opts-out, he is not bound by any judgment or settlement of the class action. In the event a class action is for declaratory or injunctive relief, notice is not required to bind absent class members and the court may not allow your to opt-out.

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How do I join a class action?

A. Generally, before a court certifies a class action, it must conclude that there are too many class members for them all to be named as parties in the lawsuit. Technically, class members do not "join" into the litigation, but decide to participate by not "opting-out." It is only in rare instances when a suit is filed as an "opt-in" class action. In those rare instances, a claim form or

request to join form may be necessary. Ordinarily, the notice issued to class members in the usual suit for compensatory damages will tell the class if they need to take any action to participate. In a suit for compensatory damages, any class member who does not "opt-out" may be bound by the results of the litigation if it proceeds as a class action. If a class member should determine, however, that he wants to participate in the suit as a named party, he may hire his own lawyer and seek to intervene (participate) in the lawsuit.

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If I have a claim, should I file my own lawsuit?

A. The answer depends on the nature of the suit and individual circumstances. Some class actions seek recovery for a large group of people; however, individual damages may be small. For instance, if a mortgage company was improperly charging interest, and as a result every class member paid \$100 more than should have been charged, it may not be practical because of the cost of litigation to pursue such a case individually. On the other hand, if a person has substantial damages and a serious claim, a lawyer should be consulted to assist in making the decision. In cases where the damages involved do not amount to several thousand dollars, litigation involving complex issues, due to the cost involved, may result in no recovery after those expenses and costs are deducted.

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Who pays the lawyers in a class action lawsuit?

A. In a class action for money damages, lawyers who represent the class are generally paid out of the recovery, i.e., "common fund" they create for the plaintiff class. In class actions involving declaratory judgments or injunctive relief, lawyers may be paid by the plaintiffs that hired them, or in some cases, by the defendants if the plaintiffs win.

Attorney fee awards are subject to court review and approval. Ordinarily, if an award is made in a common fund case, it will be awarded as a percentage of the fund created for the class. A benchmark award generally accepted by the courts is approximately 25% to 35% although the award may be adjusted higher or lower depending on the specific facts of a case.

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What are the signs of an unfair settlement or improper representation?

A. There has been a great deal of criticism of class action litigation in the news in recent years. Much of the criticism is unjustified. A good deal of the criticism focuses on the fees that lawyers receive for representing a class in such litigation. The most vocal opponents of class action litigation are insurers who are required to pay covered claims as a result of the

litigation, or the wrongdoers involved in the underlying misconduct.

The truth of the matter is that the lawyers who represent a class will often recover in fees an award many times greater than the compensation received by any given class member; however, the total collective allocations to the class in a proper settlement are invariably many times the fee awarded to lawyers. Without a means to sue wrongdoers for cheating people out of small sums, we would all be at the mercy of small time cheats. No one person cheated out of a hundred dollars can find a lawyer to represent him. Several thousand people cheated out of a hundred dollars each, however, have a powerful collective wrong that attracts qualified legal representation to put a stop to the practice.

Notwithstanding the frequent unjustified criticism cast on lawyers handling class action litigation, there have been instances where representation of a class has been found by courts to be less than optimal, and proposed settlements have been found unfair. Although the presence of one or more of the following circumstances does not invariably mean a settlement is unfair, the following are examples of hypothetical circumstances which may justify heightened scrutiny of any proposed settlement of litigation.

(1) The proposed settlement fails to create a substantial return for the class in terms of collective benefit to the absent class members. For example, in a case alleging a defect in particular product, the proposed settlement provides only that class members are to receive a nontransferable coupon good for a limited time on the purchase of a new product by the same manufacturer. Thus, the class members only receive a benefit if they spend their own money in the process. Such an arrangement is of questionable value. It is likely that if the class purchased a defective product in the first instance, they might not be interested in repeating the mistake again with the same manufacturer. Moreover, it could be argued that the settlement is of more value to the defendant as a marketing scheme than to the class as compensation for damages. On the other hand, such a "coupon settlement" could be of substantial value if the coupon may be used on a product in great demand, offers substantial savings to the class, provides a reasonable period of time in which it may be used, and is transferable.

(2) A class action was filed as an action for compensatory damages; however, the settlement provides the class is to receive no compensatory award. Further, the attorney fee (which is purportedly based on a common fund theory) is for several million dollars and is based on purported "nontangible" benefits the class will purportedly receive. For example, in a case involving a vehicle subject to rollovers, class counsel negotiates a settlement whereby the class receives only an inspection of the vehicle to determine if it has been modified since the date of manufacturer, a warning sticker for the visor saying "watch out," and a toll free number they can call for a free tow if their vehicle rolls over. At the end of the proposed settlement, the class is still left with a dangerous, unmodified vehicle and provided no compensation for the defect. Yet, the class counsel contends the settlement is fair and worth millions in fees.

On the other hand, in some instances, nontangible benefits can be substantial. For example, in a pollution case, a defendant might be sued for both compensatory damages and injunctive relief in an effort to stop continued pollution. Under some circumstances, the injunctive relief could provide true substantial benefits to the class even in the absence of compensatory damages. If the pollution is stopped, the quality of life for those in the area of the polluter could very well be improved, potential illness and risk to children from the pollution eliminated, and any further damages to the class from continuing pollution stopped. In such a situation, a class counsel might make a conscious and intelligent decision that it is more important to the class to stop the pollution now by settlement than to continue it indefinitely by litigation. In such a situation, a substantial fee may be appropriate even if no direct compensation is paid to individual class members.

(3) Any settlement where the release being demanded as a condition of the settlement is extremely overbroad and encompasses claims that were neither pursued in the class complaint nor subject to true adversarial litigation prior to the settlement. For instance, a bank is improperly charging a "fax fee" when a person pays off a mortgage issued by the bank. Assume such a practice violates state loan charge disclosure statutes or the Truth in Lending Act and the fifteen dollar fee charged for a fax is improper.

Assume further that same bank is also improperly calculating interest due on a loan closing date and is overcharging some customers several hundred dollars in interest at the time a loan is paid off. A lawyer finds out about and sues over the improper fax fee, but never discovers the bank is improperly charging interest. It is possible that under some circumstances a bank could even lie about the interest charges and preclude the class attorney from discovering the lie by formal process. The bank agrees to settle the fax claim, but knowing it may soon be sued for the interest claim attempts to subvert the suit by insisting the release in the fax claim case encompass "every and all claims relating to loans, known or unknown" arising from any loan. If a demand by a defendant is made for a ridiculously overbroad release of claims, they may very well have something to hide.

(4) The virtual nonexistence of discovery by the class counsel who proposes a settlement. In order for an attorney to assert to a court that a settlement is fair, reasonable and adequate, he must be familiar with the underlying facts of the case. In class litigation there often is a committee of counsel. Although each and every attorney need not be familiar in depth with all underlying facts, that knowledge should be present among the group representing the class.

(5) The failure of the class counsel to notify the class in either general or specific terms the amount of the attorney fee that will sought as part of the settlement. If an attorney earns a fee, he should not be concerned about disclosing the amount. If a fee will be sought as a percentage of a common fund, the class should be informed of the maximum fee that may be requested. Such a disclosure could be made either by disclosing the maximum percentage that may be sought, or the amount in dollars. The failure to disclose the intended fee often occurs when

the fee would be deemed excessive by many people.

(6) In a settlement class, the amount of attorney fees to be requested appears facially excessive, the fees were negotiated with the defendant, and the defendant had agreed not to object to the fee request as part of the settlement. This type of arrangement is known as a "clear sailing" agreement. The majority view on such clear sailing agreements is that they create an appearance of class counsel putting his interest ahead of the class. On the other hand, a clear sailing agreement might not be improper if the fee is reasonable, the fact the defendant will not be objecting is disclosed, the class is given an opportunity to object to the fee, and the court provides oversight on ultimate approval of the amount awarded.

As previously stated, the presence of one or more of the above situations does not invariably lead to the conclusion that a settlement is unfair or that the class has been poorly represented. However, if several of these elements are present in the same case, additional scrutiny may be necessary if the interests of the class are to be protected. In reviewing the fairness of a proposed settlement, the following are possible elements the court overseeing the action might consider:

- Whether the settlement was the product of fraud or collusion.
- The complexity, expense and likely duration of the litigation if the case were tried.
- The stage of the proceedings and the amount of discovery completed prior to settlement.
- The factual and legal obstacles to prevailing on the merits.
- The possible range of recovery and the certainty of damages.
- The ability of the defendant to pay claims if individual litigations were pursued.
- Whether other litigation involving the same claims has been filed against the defendant and the results in those cases.
- The respective opinions of the participants, including class counsel, class representatives, and absent class members.

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How can I obtain more information on any legal issue regarding a class action?

If you have a question about class action litigation, or are concerned you may be adversely affected by a pending case, you should consult a lawyer. Numerous notices regarding pending class action litigation are published in leading newspapers such as USA Today or the Wall Street Journal. You will also find information regarding pending or settled litigation on the Legal Notices page of this website and the links therefrom.

If you have an interest in obtaining more general information about class actions, or the law

generally, the American Association of Law Libraries has published an on-line guide for laymen, "How to Research a Legal Problem."

The staff of the Saint Louis University Law Library also has authored a research guide.

The Library of Congress has an on-line guide

Professor Smith's Guide to Legal research.

Marquette has published a guide about finding court cases.

Also, see the Legal Research Guides.

Another easy to use tool for legal research is the Internet Legal Resource Guide. If you are a novice to the web, try www.northernwebs.com/bc.

Finally, tips on legal research techniques may be found [here](#).

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