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CLASS ACTION: A COMMON FORM OF REPRESENTATIVE LITIGATION IN THE UNITED STATES OF AMERICA
Special reference to the validity of class action waivers and class actions regulation under Spanish law

ENRIQUE FERNÁNDEZ FERNÁNDEZ

Law Degree-University of A Coruna

Abstract: This paper is an introduction to the U.S. class action lawsuits under the Rule 23 of the Federal Rules of Civil Procedure. Class actions lawsuits have been an integral part of the U.S. judicial system for many decades. This paper outlines both the benefits of this remedy and the main criticisms of it. It pays special attention to pre-default, contractual mandatory arbitration clauses and the validity of class action waivers. All this is viewed from a practical perspective based on real cases that illustrate the actual trends of the American Courts of Justice. Finally, it includes a brief analysis of the Spanish class actions to provide the reader with a general overview of this procedural device both under US and EU law perspective.

Keywords: class action lawsuit; litigation; lawsuit settlement; arbitration clauses; class action waivers.

Resumen*:* El presente artículo es una introducción a las demandas colectivas de los EE. UU. bajo la Regla 23 de las Reglas Federales de Procedimiento Civil. Las demandas colectivas han sido una parte integral del sistema judicial de los EE. UU. durante décadas. Este artículo describe tanto los beneficios de este recurso como las principales

críticas al mismo. Se presta especial atención a las cláusulas de arbitraje preceptivo preestablecidas y a la validez de las renuncias a ejercitar demandas colectivas. Todo ello es analizado desde una perspectiva práctica basada en casos reales que ilustran las tendencias reales de los Tribunales de Justicia estadounidenses. Finalmente, incluye un breve análisis de las demandas colectivas en España para proporcionar al lector una visión general de este recurso procesal, tanto bajo la perspectiva de la legislación de los Estados Unidos como de la UE.

Palabras clave: demanda colectiva; litigio; acuerdo extraprocesal; cláusulas de arbitraje; renuncia a demanda colectiva.

I. INTRODUCTION[1]

A class action can be defined as a lawsuit in which a small number of representative parties proceed on behalf of a much larger, unnamed group of individuals who share common claims[2].

In Professor Redish words[3], "the modern class action may appropriately be analogized to an iceberg. Just as only a small percentage of an iceberg appears above the sea level,

[1] Trabajo de Fin de Máster presentado al Dual Degree Program: Master en Asesoramiento Jurídico empresarial (Universidad de A Coruña)- LLM Master of Laws in Corporate Law and Finance (Widener University-Delaware Law School).

[2] *Class Actions and Other Multi-Party Litigations on a Nutshell*, 4th ed., Prof. Robert Klonoff (West Nutshell Series, October 3, 2012) page 9.

[3] *Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit* Prof. Martin H. Redish (Standford University Press, 2009) page 1.

so too are most of those whose legal rights are determined in a class action proceeding largely invisible to the naked eye." One or a few class representatives take an active role in pursuing the class action on behalf of the entire class. Absent class members do not actively participate in the litigation, though they are bound by its resolution.

The class action serves as an exception to the due process principle of general application in Anglo-American jurisprudence - that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process (*Hansberry v. Lee*[4]*).* Nonetheless, absent class members, if they are to be bound, must in fact have been adequately represented by parties who are present.

The leitmotif of a class action is precisely the procedural efficiency that it achieves by aggregating pretrial and trial proceedings for a large number (and, in some cases, geographically dispersed) members of a class which share a common issue and which otherwise would have to obtain individual treatment of their claims.[5] Indeed, one state Supreme Court observed that class action "is a procedural device that was adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims."[6] In this sense, the U.S. Supreme Court also has stated that Rule 23 Federal Rule of Civil Procedure is "designated to further procedural fairness and efficiency."[7]

The United States legal system is an integral part of the federal system of government. Each of the fifty states has its own court system while federal government maintains a national court system with its own trial courts in every state. Each of the states as well as the federal legal system has its own procedural law. Thus, both the class action procedure and the substantive law applicable to the case may vary from state to state, and the federal class action procedures may vary from state law procedures. This paper will focus only on federal class actions practice governed by Rule 23 of the Federal Rules of Civil Procedure (FRCP).

II. CLASS CERTIFICATION REQUIREMENTS: RULE 23(a) FRCP

According to section 23 of the FRCP "*one or more members of a class may sue or be sued as representative parties on behalf of all members only if:*

(1) the class is so numerous that joinder of all members is practicable;

(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 interest of the class.*"

[4] Hansberry v. Lee 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940)
[5] See FRCP 23 (a) (1).
[6] In re West Virginia Rezulin Litigation, 214 W. Va. 52, 585 S. E. 2d 52,62, Prod. Liab. Rep. (CCH) P 16682 (2003).
[7] Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1440, 176 L. Ed. 2d 311, 76 Fed. R. Sev. 3d 397 (2010).

FRCP 23(a) sets out the four required characteristics of a class action commonly known as numerosity, commonality, typicality and adequacy of representation. The first two prerequisites – numerosity and commonality- focus on the absent or represented class while the latter two tests – typicality and adequacy - address the desired qualifications of the class representative.[8]

To be "certified" as a potential class action, the proposed representatives of the class must satisfy these requirement, including one of the numerosity requirements set forth in Rule 23(b) which are discussed in the following section of this paper.

The plaintiff has the burden of establishing all of the prerequisites for class certification. According to the Supreme Court´s seminal decision in *General Telephone Co. of the Southwest v. Falcon*[9], the trial court must undertake a "rigorous analysis" of whether plaintiff has sustained his burden.

Due to the lack of a precise definition of each of those requirements in the 23 FRCP, courts have made an effort to establish clear and consistent criteria about how these requirements should be interpreted in order for a case to be certified as a class.

2.1 Numerosity

The numerosity standard requires that the joinder of all members of the class is impracticable, not impossible. The Supreme Court has stated that "the numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations."[10]

Rule 23 does not impose a minimum number of claimants to bring a class action. Thus, numerosity must be evaluated on a case-by-case basis. Cases can be found certifying classes with fewer than twenty known members some of whom could not practicably be joined, whereas other cases hold that numerosity is not satisfied with respected to classes with more than 300 members.[11] Numerosity is commonly assumed once there are 40 class members[12] although several courts have stated that focusing on numbers alone is improper. Those cases state that all relevant factual circumstances must be examined, including the geographical dispersion of the class, the financial resources of those members and the ability or inability of the members to file individual suits.

For example, in *Osgood v. Harrah´s Entertainment, Inc.*[13] in which the class representative alleged that a casino´s Equal Employment Business Opportunity Plan constituted race discrimination, the Caucasian casino employee´s allegations regarding the number of Caucasians employed at the casino and the number of casino positions filled by minorities were sufficient to satisfy the numerosity requirements for class

[8] See Newberg on Class Actions, Introduction, §1:2. Rule 23 (a) "Fundamental characteristics and prerequisites of class actions".
[9] General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 160 (1982)
[10] General Tel. Co. of the Northwest, Inc. v. Equal Employment Opportunity Commision, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319, 22 Fair Empl. Prac. Cas. (BNA) 1196, 22 Empl. Prac. Dec. (CCH) P 30861, 29 Fed. R. Serv. 2d 925 (1980).
[11] See *Class Actions and Other Multi-Party Litigations on a Nutshell*, 4th ed., Prof. Robert Klonoff (West Nutshell Series, October 3, 2012) page 39.
[12] See Rubenstein, 1 Newberg on Class Action § 3:12 (5th ed.).
[13] Osgood v. Harrah´s Entertainment, Inc., 202 F.R.D. 115, 122, 81 (2001)

action certification rule. By contrast, in *Vega v. T-Mobile USA, Inc.*[14], a class action concerning only employees in Florida, a finding of numerosity was reversed by the Court of Appeals because, while the plaintiffs alleged that the company had thousands of employees nationwide, it produced no evidence of the number of alleged aggrieved T-Mobile employees in Florida. The court rejected the lower court's numerosity finding as "sheer speculation."

As just discussed, mere speculation as to the number of parties involved is not sufficient to satisfy Rule 23(a)(1). However, as mentioned in McLaughin on Class Actions, "a party seeking class certification is not required to prove the identity of each class member or pinpoint the exact number of class members needed, as long as a good faith estimate is provided. It is permissible, however, for the court to rely on reasonable interferences drawn from available facts to ascertain numerosity".[15] A judge therefore has reasonable discretion in determining whether Rule 23(a)(1) has been satisfied.

In relation to the above, it is worth mentioning the Class Action Fairness Act of 2005 (CAFA) created special procedural rules for a "mass action." A "mass action" is a civil action (other than one that falls within CAFA's definition for a traditional class action) that involves at least 100 persons whose claims are proposed to be tried jointly on the ground that their claims involve common questions of law or fact.[16] A mass action must satisfy additional requirements as, for example, that the claims of the class have more than $5 million in controversy.[17]

2.2 Commonality

Rule 23 (a) (2) states that a class action may not be certified unless the case presents "questions of law or fact common to the class".

The Supreme Court´s decision in *Wal-Mart Stores, Inc. v. Dukes*[18] is crucial to the analysis of the commonality requirement. This case held that a lack of commonality barred class action certification.[19] Before *Wal-Mart v. Dukes* most actions brought as potential class actions satisfied the commonality requirement without further ado.

In *Wal-Mart v. Dukes*, a small group of women who alleged systematic discrimination on the basis of their gender filed a class action against Wal-Mart, the U.S.' largest private employer. The plaintiffs alleged that the company engaged in "corporate culture" of discrimination in pay and promotion against female employees in violation of Title VII of the Civil Rights Act of 1964. The class certification was approved by the U.S. District Court for the Northern District of California which considered that the plaintiffs fulfilled the statutory requirements of Rule 23(a)(2). The certified class comprised more than 1.5 million class members, including all women employed by Wal-Mart nationwide at any time after December 26, 1998 on the basis that the

[14] Vega v. T-Mobile USA, Inc., 564 F.3d 1256 (11th Cir. 2009)
[15] See McLaughlin on Class Actions, Prerequisites to Class Certification, §4:5. Numerosity – Impracticability of joinder of all members.
[16] 28 U.S.C.A. § 1332 (d) (5) (B).
[17] 28 U.S.C.A. § 1332 (d) (2).
[18] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011)
[19] See Newberg on Class Actions, Rule 23 (a) Prerequisites for Class Certification, §3:18. Introduction to Rule 23 (a) (2) commonality.

company´s policies resulted in nationwide discrimination thereby making every woman at the company the victim of one common discriminatory practice.

The Supreme Court reversed the lower court's certification of the class (by a 5-4 vote) on the ground that the commonality requirement was not met and providing a definitive interpretation of commonality requirement and formulating a definition that is nowadays predominance test:

"Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law (…) Their claims must depend upon a common contention –for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention (…) must be of such a nature that it is capable of class wide resolution –which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims on one stroke."

The Court found no evidence that Wal-Mart "operated under a general policy of discrimination", and no evidence that all of the company´s managers exercised their discretion in a common way such that each class member suffered from injury[20]. In its decision, authored by Justice Scalia, the Supreme Court stated:

"Here, proof of commonality necessarily overlaps with respondents´ merits contention that Wal-Mart engages in a pattern or practice of discrimination (…). Without some glue holding together the alleged reasons for those decisions, it will be impossible to say that examination of all the class members´ claims will produce a common answer to the crucial discrimination question."

Finally, despite the use of the plural ("questions") in Rule 23 (a) (2) only a single issue comon to all class members is required as stated by the Supreme Court in *Dukes*[21].

Such common element may be one of a fact or a law and need not to be one of each; either a question of law or a question of fact will suffice.[22]

2.3 Typicality

The typicality requirement first appeared in the 1966 amendments to Rule 23. Some courts interpreted typicality as synonymous with the commonality requirement. Others have held that it is the same as the requirement of adequacy of representation.[23]

[20] See *Class Actions and Other Multi-Party Litigations on a Nutshell, supra,* page 47.
[21] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 112 Fair Empl. Cas. (BNA) 769, 94 Empl. Prac. Dec. (CCH) P 44193, 161 Lab. Cas. (CCH) P 35919 (2011) ("We quite agree that for purposes of Rule 23 (a) (2) even a single [common] question will do.")
[22] See Newberg on Class Actions, Rule 23 (a) Prerequisites for Class Certification, §3:21. Commonality standard – No need for common questions of both law and fact.
[23] See Singer v. AT & T Corp., 185 F.R.D. 681, 689 (S.D. Fla. 1998). ("The typicality requirement of Rule 23(a)(3) has been observed to be a redundant criterion and some courts have expressed doubt as to its utility. While some courts consider typicality synonymous with the commonality requirement, other courts equate typicality with adequacy of representation. Alfus v. Pyramid Technology Corp., 764 F.Supp. 598, 606 (N.D.Cal.1991).
The Eleventh Circuit Court of Appeals has indicated that its understanding of the role of Rule 23(a)(3) is as follows:

Although the typicality requirement overlaps with the commonality and adequacy of representation requirements, it is not rendered meaningless. Rather most courts that have given independent significance to the typicality requirement and have invoked Rule 23(a)(3) as a reason to deny class certification.

The purpose of the typicality requirement, in these courts' view, is to ensure that the interests of the class representative align with those of the class, so that by prosecuting his own case he simultaneously advances the interests of the absent class members.[24] In other words, the typicality requirement ensures that the class representatives are sufficiently similar to the rest of the class in terms of their legal claims, factual circumstances, and stake in the litigation so that certifying those individuals to represent the class will be fair to the rest of the proposed class.[25]

However, Rule 23(a)(3) does not require that the class representatives' claims and the other class members' claims are identical. Most courts have held that a sufficient nexus is established where the claims of the class and the representative arise from the same event or conduct and proceed on the same legal theory.[26] Some courts have held, to the contrary, that materially dissimilar facts giving rise to the claims prevents class certification. For example, in *Broussard v. Meineke Discount Muffler Shops, Inc.* [27], the court concluded that typicality was not satisfied where ten owners of Meineke Discount Mufflers franchises sought to certify a class alleging tort and statutory unfair trade practices claims against the franchisor Meineke and related entities relating to alleged breaches of Franchise and Trademark Agreements with every franchisee. The court held that because the agreements on which the claims were based contained materially varied terms and conditions, "the contract claims of plaintiffs are not typical of claims of franchisees who entered into [agreements] containing different language."[28]

> Although the considerations of subsections a(2), a(3), and a(4) tend to overlap, see De La Fuente v. Stokely–Van Camp. Inc., 713 F.2d 225 (7th Cir.1983); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1764 (1972), "subsection a(3) primarily directs the district court to focus on whether named representatives' claims have the same essential characteristics as the claims of the class at large." 713 F.2d at 232. Moreover, "[t]he typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members." Id.; Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1189 (10th Cir.1975). Thus, courts have found that a strong similarity of legal theories will satisfy the typicality requirement despite substantial factual differences.
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> Appleyard v. Wallace, 754 F.2d 955, 958 (11th Cir.1985).")

[24] See McLaughlin on Class Actions, Prerequisites to Class Certification, § 4:16.Typicality—Purported representative's claim or defenses must be typical of those of class.

[25] In re Schering Plough Corp. ERISA Litigation, 589 F.3d 585, 597, 48 Employee Benefits Cas. (BNA) 1385 (3d Cir. 2009)

[26] See Deiter v. Microsoft Corp., 436 F.3d 461, 466, 2006-1 Trade Cas. (CCH) ¶ 75116 (4th Cir. 2006); James v. City of Dallas, Tex., 254 F.3d 551, 571, 50 Fed. R. Serv. 3d 157 (5th Cir. 2001)

[27] Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 340, 41 Fed. R. Serv. 3d 1151 (4th Cir. 1998)

[28] See McLaughlin on Class Actions, Prerequisites to Class Certification, § 4:17.Typicality—Factual variations between claims of purported representative and class members.

2.4 Adequacy of representation

Because a class action is a form of representative litigation by which the representative's pursuit of the class's claims binds all the other class members to the outcome of that case regardless of their lack of participation in the same, due process requires that the class be "adequately" represented.[29]

The representative must fairly and adequately advance and protect the legal rights of absent class members to satisfy the adequacy of representation requirement in Rule 23 (a)(4) seeks that.

To determine whether the named plaintiff representatives will adequately represent a class, Courts must resolve two questions, as stated in *Ellis v. Costco Wholesale Corp.*[30]: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? (quoting Hanlon v. Chrysler Corp.[31]). Adequate representation depends on, among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees (citation and internal quotation marks omitted)."

Thus, the court must first determine whether the representative plaintiffs and their counsel have any conflicts of interest with other class members, i.e., their interests with respect to the case are aligned. For example, in *Amchem Products v. Windsor*[32], the Supreme Court held that a group of plaintiffs who had suffered present injury from their exposure to asbestos could not adequately represent a class that included members who were not yet injured but who might develop exposure-related injuries in the future. Although all the class members have asbestos exposure in common, the Court concluded that there was not adequate representation of absent class members. The interests of the presently injured plaintiffs conflicted with exposure-only class members because, in negotiating a settlement with the defendant, the former sought present (not future) payments, which conflicted with those class members that were not yet entitled to payment.

Second, the court must satisfy itself that the representative plaintiffs and their counsel understand that they are acting in a representative capacity and will prosecute the action throughout its duration fairly, vigorously, and competently on behalf of the class. This means, for example, that the representative must be committed to the claim, must believe in its merit, will prosecute the case in a timely manner, and will supervise the conduct of the class counsel.[33]

In addition, it is fundamental for the representatives to be "adequate" that they are a member of the class they seek to represent and that they have at least some knowledge of the facts, parties and basic issues in the case as well as being in contact with the counsel.

[29] See Newberg on Class Actions, Rule 23(a) Prerequisites for Class Certification § 3:50.Introduction to Rule 23(a)(4)—Adequacy of representation.
[30] Ellis v. Costco Wholesale Corp., 657 F.3d 970, 985, 80 Fed. R. Serv. 3d 832 (9th Cir. 2011).
[31] Hanlon v. Chrysler Corp. 150 F.3d 1011, 98 Daily Journal D.A.R. 8001
[32] Amchem Products, Inc. v. Windsor, 521 U.S. 591, 625–27, 117 S. Ct. 2231, 138 L. Ed. 2d 689, 37 Fed. R. Serv. 3d 1017, 28 Envtl. L. Rep. 20173 (1997).
[33] See Class Actions and Other Multi-Party Litigations on a Nutshell, supra, page 60.

In a class action, absent class members have little role in choosing the attorneys who will represent them or in monitoring counsel's activities as the action moves forward. Therefore, courts have extended the Rule 23(a)(4) adequacy of representation requirement not just to the representatives of the class but also to their lawyer.

"An essential concomitant of adequate representation is that the party's attorney be qualified, experienced and generally able to conduct the proposed litigation"[34] to which can be additionally compounded that the class's counsel must vigorously prosecute the interests of the class. These standards are easily met, with members of the bar in good standing typically deemed qualified and competent to represent a class absent evidence to the contrary.

Because adequacy of counsel is generally presumed, challenges focus on negative factors that might rebut the presumption of adequacy. The most common of these are lack of knowledge or experience with class actions or the relevant substantive law; limited resources to devote to the case; conflicts caused by multiple representations; the quality of briefing and argumentation; class counsel's seeking to serve as class representative; prior ethical violations or questionable conduct; and class representatives attempting to appear pro se.[35]

III. CLASS CERTIFICATION: RULE 23 (b) and 23 (c) FRCP

3.1 Class action categories under Rule 23(b)

In order to be certified as a class action, a case must not only meet the four requirements of Rule 23(a) but it also must fit into at least one of the three categories of Rule 23(b)[36].

[34] Eisen v. Carlisle and Jacquelin, 391 F.2d 555, 562, 11 Fed. R. Serv. 2d 604 (2d Cir. 1968)

[35] See Newberg on Class Actions, Rule 23(a) Prerequisites for Class Certification § 3:72.Adequacy of class counsel under Rule 23(a)(4).

[36] Rule 23 (b) FRCP. Types of Class Actions.

"A class action may be maintained if Rule 23(a) is satisfied and if:

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

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action."

The Fifth Circuit in *Allison v. Citgo Petroleum Corp.*[37] categorized the different types of class actions according to the nature or effect of the relief being sought:

"The (b)(1) class action encompasses cases in which the defendant is obliged to treat class members alike or where class members are making claims against a fund insufficient to satisfy all of the claims. The (b)(2) class action, on the other hand, was intended to focus on cases where broad, class-wide injunctive or declaratory relief is necessary. Finally, the (b)(3) class action was intended to dispose of all other cases in which a class action would be "convenient and desirable," including those involving large-scale, complex litigation for money damages. Limiting the different categories of class actions to specific kinds of relief clearly reflects a concern for how the interests of class members will vary, depending upon the nature of the class injury alleged and the nature of the relief sought." (internal citations omitted)

Section 23(b)(1) class actions can be further divided into two types.

The (b)(1)(A) class action is often referred to as an "incompatible standards" suit. It refers to the use of a class action in a situation where the prosecution of "separate actions by or against individual members of the class would create a risk of incompatible standards of conduct for the adverse party due to inconsistent or varying adjudications with respect to individual members of the class."

The category focuses on situations in which multiple plaintiffs sue a single defendant seeking different forms of relief. The Advisory Committee explained the types of cases it assigned to this category with the following examples: "Separate actions by individuals against a municipality to declare a bond issue invalid or condition or limit it, to prevent or limit the making of a particular appropriation or to compel or invalidate an assessment, might create a risk of inconsistent or varying determinations. In the same way, individual litigations of the rights and duties of riparian owners, or of landowners' rights and duties respecting a claimed nuisance, could create a possibility of incompatible adjudications. Actions by or against a class provide a ready and fair means of achieving unitary adjudication."[38]

The (b)(1)(B) class action is often referred to as a "limited fund" class action. The purpose of this provision is to protect plaintiffs in situations where separate lawsuits might exhaust a defendant's resources, such that earlier plaintiffs might recover to the prejudice or exclusion of later plaintiffs. This occurs, for example, when many plaintiffs are likely individually to sue a single defendant whose funds are so limited that they are incapable of satisfying all the potential claimants. A class action in these circumstances assures fairness by providing an equitable, pro rata distribution of funds among all claimants.

The Advisory Committee Note to Rule 23 states that "classic examples of such actions include actions by shareholders to declare a dividend or otherwise to declare their rights and actions charging a breach of trust by an indenture trustee or other fiduciary that requires an accounting or similar procedure to restore the subject of the trust."[39]

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[37] Allison v. Citgo Petroleum Corp., 151 F.3d 402, 412, 81 Fair Empl. Prac. Cas. (BNA) 501, 73 Empl. Prac. Dec. (CCH) P 45426 (5th Cir. 1998)

[38] Rules Advisory Committee's Note to Amended Rule 23, 39 F.R.D. 69, 100 (1966).

[39] In re Telectronics Pacing Systems, Inc., 221 F.3d 870, 877, 47 Fed. R. Serv. 3d 407, 2000 FED App. 0236P (6th Cir. 2000). (quoted on McLaughlin on Class Actions, Three Categories of Class Actions Maintainable § 5:8.Rule 23(b)(1)(B)—Overview)

The (b)(2) class action is often referred to as an "injunctive" class suit or, because of its frequent use in the field, as a "civil rights" class action. Under Rule 23(b)(2) a class action may be certified when the party opposing the class – generally the defendant - has taken or refused to take action with respect to a class, and "final injunctive relief or corresponding declaratory relief is appropriate with respect to the class as a whole." This category is typically employed in cases seeking a class-wide injunctive or declaratory relief necessary to redress a group-wide injury; however (b)(2) is generally not available in class actions seeking monetary relief.

The U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*[40] has ruled that "the key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted -the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." (quoting Nagareda, 84 N.Y.U.L.Rev., at 132). In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgement against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an invidualized award of monetary damages."

Therefore, because (b)(2) classes generally challenge systematic polices or practices of the defendant with uniform application, a class member under (b)(2) is regarded as having no individual right to particular relief independent of any other class member.[41] Besides, the Advisory Committee Note to Rule 23(b)(2) provides that a class may be certified under that provision even if the defendant´s action or inaction "has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class".[42]

Finally, subdivision (b)(3) - commonly referred to as the "money damage" class action - permits a class action certification which do not fall under (b)(1) or (b)(2) but may be nevertheless convenient and desirable. Rule 23(b)(3) was the most adventuresome innovation of the 1966 Amendments to the FRCP, allowing judgments for money that would bind all class members save those who opt out. To gain certification under this category, a class must meet prerequisites of Rule 23(a) and satisfy two additional criteria: (1) that questions of law or fact common to members of the class predominate over any questions affecting only individual members and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.[43]

[40] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011). In this case the Supreme Court unanimously held that plaintiffs´ claims for backpay were improperly certified under Rule 23(b)(2) because it applies only when a single injunction or declaratory judgment would provide relief to each member to the class.

[41] McLaughlin on Class Actions, Three Categories of Class Actions Maintainable § 5:15.Rule 23(b)(2)—Claims for injunctive relief.

[42] Fed. R. Civ. P. 23(b)(2) Advisory Committee Note, 1966 Amendment.

[43] See Newberg on Class Actions, Rule 23(b) Types of class actions § 4:1. Overview of Rule 23 (b) Types of class suits.

In *Amchem Products, Inc. v. Windsor*[44], the Supreme Court summarized the key components to a Rule 23(b)(3) certification:

"Rule 23(b)(3) includes a nonexhaustive list of factors pertinent to a court´s "close look" at the predominance and superiority criteria: "(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 in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

Most class actions are certified under rule 23(b)(3) for money damage cases, especially small claims class actions. Certifications under rule 23(b)(2) are also common. Less likely are class action certified under rule 23(b)(1) subsections (A) and (B).[45]

3.2 Notice and right to opt out

As a class action necessarily implicates the rights of parties not present at the court proceedings themselves, the court needs to keep those absent parties—whose rights will be extinguished through the litigation—apprised of the case's progress. For that purpose, the class members are sent notices at different stages of the process. Those are the four distinct types of notice in class suits:

- "Certification notice"—notice that a class action has been certified;
- "Settlement notice"—notice that a class action has been settled;
- "Fee notice"—notice that class counsel has petitioned a court for attorney's fees; and
- "Discretionary notice"—notice sent for other reasons, within the discretion of the court.

Rule 23(c) requires that class members be given notice[46] of the certification of a money damage class action brought under Rule 23(b)(3) and the right to opt out of such a case; Rule 23(b)(1) and (b)(2) class actions, by contrast, permit, but do not require, a court to

[44] Amchem Products, Inc. v. Windsor, 521 U.S., 591, 615-616, 117 S. Ct. 2231, 138 L.Ed. 2d 689, 37 Fed. R. Serv. 3d 1017, 28 Envtl. L. Rep. 20173 (1997) (quoting Rule 23(b)(3) Advisory Committee´s Note).

[45] See Class Actions and Other Multi-Party Litigations on a Nutshell, supra, page 74.

[46] Rule 23(c)(2) requires that the class receive "the best notice practicable under the circumstances." When individual class members can be identified through reasonable effort, they must receive individual notice (usually by mail). Otherwise, "the best notice practicable" may include newspaper, television and radio advertisements, product package inserts, billing inserts, internet web sites and other methods likely to reach the members. The Rule requires the notice to inform class members that the action is pending, that they have the right to elect not to be part of the class (to "opt out" the class), and if they do not opt out, to enter an appearance by counsel if they wish. They must also be informed that if they do not opt out, they will be included in the class. This means that any judgment, whether favorable or unfavorable to the class, will bind them and they will not be able to bring suit on their own later. In Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, July 21-22, 2000.

give notice to class members of the certification of such a case, nor do they require that the court provide the class members with an opportunity to opt out.[47]

While absent class members do not necessarily receive notice of the certification decision in (b)(1) and (b)(2) class suits, but they must receive notice of any proposed settlement or attorney's fees petition. Thus, notice is not treated differently in different types of class suits except with respect to certification notice in (b)(1) and (b)(2) cases.[48]

Regarding the availability of opt out rights, Rule 23 does not explicitly provide the same in (b)(1) and (b)(2) cases. In these actions, class members may be bound by a proceeding or settlement against they will and will have no right to bring individual actions. However, courts deny opt out rights in (b)(1) and (b)(2) actions because such rights may destroy the benefits of unitary adjudication where no monetary relief, such as compensatory damages, is involved.[49]

As stated by the Supreme Court in *Phillips Petroleum Co. v. Shutts*[50]:

"If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The notice must be the best practicable, "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (quoting Mullane, 339 U.S., at 314–315, 70 S.Ct., at 657; cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 174–175, 94 S.Ct. 2140, 2151, 40 L.Ed.2d 732 (1974)). The notice should describe the action and the plaintiffs' rights in it.

Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. (quoting Hansberry, 311 U.S., at 42–43, 45, 61 S.Ct., at 118–119, 120)."

3.3 Class certification

Rule 23(c) directs the court to determine "as soon as practicable" after the case is filed whether it may be maintained as a class action. If so, the judge, based on briefs and oral arguments of the parties, decides the certification of the class. The certification decision is crucial for the case. Although the decision whether to certify a class is not supposed to involve a determination of the merits of the claim, as a practical matter this decision often determines the continuity of the claim. If the claim is not certified, the plaintiff may continue his individual case, but not represent a class. This usually means the death of the lawsuit because claims are usually too small that do not justify the cost of

[47] Newberg on Class Actions, *op. cit.*
[48] See Newberg on Class Actions, supra, § 8:1.Four forms of notice—Certification notice, settlement notice, fee notice, discretionary notice.
[49] STEVEN T.0. COTTREAU, The due process right to opt out of class actions, New York Law Review.
[50] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 813 (1985).

litigation. On the contrary, if the class is certified the pressure is on defendant to settle in order to avoid the cost of discovery and trial.

See a sample of an Order Certifying Class as Annex I to this paper.

IV. COMMON TYPES OF CASES BROUGHT AS CLASS ACTIONS

Although the FRCP do not prescribe class action for specific dispute's resolutions, certain types of cases better lend themselves to class action treatment as listed below.

4.1 Consumer Actions

Consumer class actions affect to virtually every industry and cover a wide range of products and business practices, from defective products to false misrepresentations. For such a reason, the consumer actions are a major part of the class action litigations. As discussed below, the most frequent types of claims in consumer cases are those related to fraud and negligent misrepresentations; breach of contract; breach of warranty; defective design of products and violation of state consumer protection statutes.

4.1.1 Fraud

In fraud actions a plaintiff must prove to the Court that the defendant made the alleged misrepresentation and he or she relied on it. In this context, satisfying the required commonality element is often a major issue for the certification of the class because of the divergence that may be among the alleged class members on matters such as (1) the specific representations given to each one and (2) the extent to which reliance on such statements may be shown in each case.[51]

Along these lines, the Eighth Circuit *In re St. Jude Medical, Inc.*[52] held that:

"In a typical common-law fraud case, a plaintiff must show that he or she received the defendant's alleged misrepresentation and relied on it. (citation omitted). Because proof often varies among individuals concerning what representations were received, and the degree to which individual persons relied on the representations, fraud cases often are unsuitable for class treatment. See Fed.R.Civ.P. 23 advisory committee's note (discussing the 1966 Amendment to subdivision (b)(3): "[A]lthough having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed."); Darms v. McCulloch Oil Corp., 720 F.2d 490, 493 (8th Cir.1983) (district court did not abuse discretion in refusing class certification where transactions were separate, and involved different representations

[51] See PETER H. MASON, JOSHUA D. LICHTMAN and ERIC A. HERZOG "Consumer actions and fraud/reliance-based torts in MARCY HOGAN GREER "A practitioner's guide to class actions", American Bar Association, 2010 page 399.
[52] In re St. Jude Medical, Inc., 522 F.3d 836, 838 (8th Cir. 2008)

and degrees of reliance); Castano v. Am. Tobacco Co., 84 F.3d 734, 745 (5th Cir.1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue.")."

This does not mean, however, that for the certification of the class all the members must have suffered the exact same injury derived from the representations. In *Astiana v. Kashi Co.*53 California consumers who had purchased cereal and snack products labeled as "all natural" or containing "nothing artificial," but which allegedly contained artificial or synthetic ingredients, filed putative class action against seller alleging violation of California's Unfair Competition Law (UCL), violation of California's False Advertising Law (FAL), violation of California's Consumer Legal Remedies Act (CLRA), breach of express warranty, and quasi-contract. The Ninth Circuit found that "standing is satisfied [under the UCL and FAL] if at least one named plaintiff meets the requirements.... Thus, we consider only whether at least one named plaintiff satisfies the standing requirements." (citation omitted). Here, the Court relied on Plaintiff Larsen contends that she was induced to purchase Defendant's products at least in part because of Defendant's representations, and that otherwise she would have paid less or purchased other products, quoting In re Google AdWords Litig.[54] "The requirement of concrete injury is satisfied when the Plaintiffs and class members in UCL and FAL actions suffer an economic loss caused by the defendant, namely the purchase of defendant's product containing misrepresentations."

4.1.2 Product liability

Product liability is the area of the law dealing with claims of personal injury, property damage, or economic harm arising from the design, manufacture, distribution, or sale of a product.

In *Hewlett-Packard Co. v. Superior Court*55, the Court of Appeals affirmed the trial court´s class action certification in relation to a product liability customers´ claim. The plaintiffs alleged that certain HP notebook computers contained types of inverters that HP knew would likely fail and cause the screens to dim and darken at some time before the end of the notebook´s "useful life". Based on these allegations, plaintiffs asserted claims for breach of express warranty, unjust enrichment, and violations of California´s UCL and Consumer Legal Remedies Act (CLRA).

The Court interestingly concluded that "[t]he issue of whether the inverters were defective is appropriate for a join trial with common proof. For example, if the jury finds that the inverters were defective, then each plaintiff would not need to separately prove that his or her inverter was defective, only that he or she had a computer that contained that type of inverter.

[53] Astiana v. Kashi Co., United States District Court, S.D. California. July 30, 2013 291 F.R.D. 493
[54] In re Google AdWords Litig., No. 5:08–CV–3369, 2012 WL 28068, at *10 (N.D.Cal. Jan. 5, 2012)
[55] Hewlett-Packard Co. v. Superior Court, 167 Cal.App.4th 87, 83 Cal.Rptr.3d 836, 08 Cal. Daily Op. Serv. 12,752, 2008 Daily Journal D.A.R. 15,112

4.2 Employment

Labor and employment class actions are the largest in number of all types of class actions. According to a study of the Federal Judicial Center regarding the impact of the Class Fairness Act of 2005, labor class actions constituted almost one quarter (24.6 %) of all class actions identified in the period July–December 2001 and almost a half (46.9%) of all class actions in January–June 2007[56]. Most of the class actions in this category are opt-in collective actions brought under the Fair Labor Standards Act (FLSA) and not, with a few exceptions, Rule 23 class actions[57]. Although they are fewer in number, due to the nature of this work, we will focus on the second ones.

Discrimination based in race, color, religion, sex, national origin or disability are typical examples of claims that can be brought as class actions. In those cases, the key question for class certification is whether an act of discrimination is part of a larger pattern of similar conduct, i.e. whether the employer has a uniform policy that is uniformly applied.

In *Butler v. Home Depot, Inc., the* United States District Court for the Northern District of California certified a class action based on the claim brought by female employees and applicants for store positions with Home Depot's Western Region. The case was subsequently settled for $87.5 million and extensive injunctive relief including a seven year compliance period in which Home Depot made significant changes to its personnel practices nationwide to ensure equal employment opportunities for all employees and to increase the number of women in sales and management positions[58].

4.3 Antitrust

As stated by the Court of Appeals in *State of Alabama v. Blue Bird Body, Co. Inc.*[59] "there are no hard and fast rules which have developed regarding the suitability of a particular type of antitrust case for class certification treatment. The unique facts of each case will generally be determining factor governing certification."

However courts have found that some types of cases (such as horizontal price-fixing) are more susceptible to class certification than others.[60] The predominance analysis in a horizontal price-fixing claim usually flows from the three elements plaintiffs must prove

[56] EMERY G LEE III & THOMAS E. WILLGING, "The impact of the Class Action Fairness Act of 2005 on the Federal Courts", Fourth interim report 3-4 (Federal Judicial Center, 2008), available at http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf.

[57] The certification processes and standards for collective actions and class actions differ. For more information see William C. Jhaveri-Weeks & Austin Webbert "Class Actions Under Rule 23 and Collective Actions Under the Fair Labor Standards Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws" Georgetown Journal on Poverty Law and Policy Volume XXIII, Number 2,Winter 2016, available at http://gbdhlegal.com/wp-content/uploads/article/Georgetown-Journal-Article-Rule-23-v-FLSA.pdf

[58] Information available on http://gbdhlegal.com/cases/butler-v-home-depot/

[59] State of Alabama v. Blue Bird Body, Co. Inc., 573 .2d 309, 327 (5th Cir. 1978).

[60] See LAYNE KRUSE and DAN PIROLO "Antitrust" in MARCY HOGAN GREER "A practitioner's guide to class actions", American Bar Association, 2010 page 424.

to prevail on a claim of price-fixing in violation of the section 1 of the Sherman Act[61]: (1) a conspiracy to fix prices in violation of the antitrust laws; (2) the fact of damage or the impact of defendants´ unlawful activity; and (3) damages sustained as a result of the antitrust violation.[62]

As one court stated in finding common impact in an alleged price-fixing case, despite individual negotiations, varied purchase methods and different amount and types of products purchased:

"As long as the existence of a conspiracy is the overriding question, then the class has met its predominance requirements… To prove injury, plaintiffs need only to demonstrate they have suffered some damage from the unlawful conspiracy... Such a showing may be made on a class basis if the evidence demonstrates that the conspiracy succeeded in increasing prices above the competitive level."[63]

In the case of vertical restraints, those involving agreements between actors at different levels of the distribution chain to set the resale price of a specific product, plaintiffs are required to provide sufficient evidence to demonstrate a supplier-imposed price restriction to get the class certified. For example, in *Transamerican Refining Corp. v. Dravo Corp.*[64] a class action was certified on the plaintiffs´ allegations about a vertical conspiracy to inflate steel piping material prices because establishing the existence of the conspiracy by direct testimony, internal documents relating to over-charging, and expert testimony would be susceptible to generalized proof. In the absent of such evidence, courts are much more likely to deny class certification. The court in In re *Coordinated Pretrial Proceeding in Petroleum Products Antitrust Litigation*[65] denied class certification of a sub-class of consumers alleging vertical conspiracies between petroleum sellers and retailers to raise their prices, because plaintiffs could not demonstrate common evidence such as contracts showing the oil companies controlled retailers´ prices.

4.4 Securities frauds

Investors who bought or sold a company's securities within a specified time period (known as a "class period") and suffered economic injury as a result of violations of the

[61] The Sherman Antitrust Act or "Sherman Act" is a federal statute, codified in 15 U.S.C. §§ 1-7, prohibiting individuals or business entities from entering into contracts, combinations or conspiracies that restrain interstate or foreign trade. The Sherman Act also prohibits a person or entity from engaging in monopolization or attempting to monopolize any part of interstate commerce by anti-competitive means. It does not prohibit natural monopolies or monopolies created through effective competition. The Sherman Act is enforced by the Department of Justice. Private individuals and state attorneys general on behalf of their state residents may also bring actions for damages.

[62] McLaughlin on Class Actions, Three Categories of Class Actions Maintainable § 5:33.Rule 23(b)(3)—Application of predominance requirements to particular cases –Antitrust- Price fixing.

[63] In re Lorazepam & Clorazepate Antitrust Litigation, 202 F.R.D. 12, 30, 2001-2 Trade Cas. (CCH) 73344 (D.D.C. 2001) (quoting In re Workers´ Compensation, 130 F.R.D. 99, 109, 1990-1 Trade Cas. (CCH) 68975 (D. Minn. 1990)).

[64] Transamerican Refining Corp. v. Dravo Corp., 130 F.R.D. 70, 74-76, 1990-1 Trade Cas. (CCH) 68919, 16 Fed. R. Serv. 3d 1517 (S.D. Tex. 1990).

[65] In re Coordinated Pretrial Proceeding in Petroleum Products Antitrust Litigation, 691 F. 2d 1335, 1343, 1982-83 Trade Cas. (CCH) 65028, 35 Fed. R. Serv. 2d 881 (9th Cir. 1982).

securities laws (namely the Securities Act of 1933 or the Securities Exchange Act of 1934) can also bring a federal class action.

As accurately noted by Hirshman and Bennet,[66] neither the '33 Act nor the '34 Act mention class actions. On one hand, the '33 Act provides a remedy for a purchaser in Section 11 if there has been a material misstatement in the offering materials for a security. Section 10 (b) of the '34 Act, on the other hand, prohibits the use of deceptive devices in selling securities. Most securities fraud class actions seek damages based upon those sections and are brought under Rule 23 (b) (3) of the FRCP.

The main issue in securities fraud class action certification is the reliance upon a misrepresentation or omission in relation to a material fact[67] as required in claims under section 10. Because reliance is specific to each individual courts often find that individual issues predominate over common issues, therefore rendering a class action unsuitable under Rule 23 (b) (3).

Reliance is essential and provides the crucial link between defendant's misrepresentation or omission and a plaintiff's decision.[68] Sometimes, however, reliance in securities fraud can be presumed[69] and since the presumption applies to the entire class, common questions predominate.

Thus, certification in securities fraud class actions involving misstatements often comes down to whether a presumption —called the fraud-on-the-market presumption[70]— applies. If it does, predominance is satisfied, and these securities fraud class actions tend to easily satisfy the other class certification requirements. Whether the presumption applies, in turn, depends on whether the security involved in the alleged fraud traded on a so-called efficient market."[71]

Halliburton Co. v. Erica P. John Fund, Inc., a securities fraud class action case against Halliburton Co. and its CEO David Lesar was settled for $100 million after multiple rulings of the District Court and the Fifth Circuit Court of Appeals, as well as two rulings from the Supreme Court of the United States.[72] The complaint originally filed in 2002 alleged that, between June 3, 1999 and December 7, 2001, Halliburton made a series of misrepresentations — downplaying asbestos liabilities, overstating revenues from construction contracts, and overstating the benefits of a merger — in an attempt to inflate its stock price.

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[66] HAROLD C. HIRSHMAN and CAMILLE E. BENNET "Securities" in MARCY HOGAN GREER "A practitioner's guide to class actions", American Bar Association, 2010 page 474.

[67] A fact is material if there is a substantial likelihood that its disclosure would be viewed by a reasonable investor as having significantly altered the total mix of information available in the market about a particular security. (Basic, Inc. v. Levinson, 485 U.S. 224, 231-32 (1988).)

[68] See Class Actions and Other Multi-Party Litigations on a Nutshell, supra, page 359.

[69] See Affiliated Ute Citizens v. United States, 406 U.S. 128, 152–54 (1972) (approving presumption based on material omissions).

[70] The fraud-on-the-market presumption is based on the economic theory that, in an efficient market, all public information is incorporated into the price of a security. Thus, anyone who bought at the market price relied on all the public statements made about the security.

71 See THOMAS KAYES "Jury certification of federal securities fraud class actions", Northwestern University Law Review Vol. 107, No. 4

[72] See press release of the Company available at:
http://www.halliburton.com/public/news/pubsdata/press_release/2016/halliburton-reaches-settlement-in-securities-class-action-lawsuit.html

V. CLASS ACTION SETTLEMENTS AND ATTORNEYS' FEES

5.1 Class action settlements

The reality in most American class action ligation is that cases settle before going to trial. In this sense, substantial jurisprudence and academic literature support the conclusion that that a court´s class action certification decision is the seminal event in the class action litigation process because the court´s affirmative decision to certify a class places considerable pressure on defendants to settle the action.[73] Thus a court may certify a class for settlement purposes only, in order to encourage the lawyers on both sides of the litigation to negotiate a settlement prior to an actual contested certification process. In certifying a class for settlement purposes only, the court is not saying that the case is suitable for final class certification under Rule 23 standards. In the words of the Supreme Court in *Amchem Products, Inc. v. Windsor*[74]:

"Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. See Rule 23(c), (d)."

In contrast with non-class litigation, where court approval of a settlement is not required, rule 23(e)(1)(A) of the FRCP provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court´s approval."

The parties file extensive briefs of the fairness of the settlement, and the court holds a hearing on the issue. To determine whether a proposed settlement is fair, reasonable and adequate (as mandated in Rule 23 (e)(1)(C) of the FRCP) the court must examine whether the interests of the class are better served by the settlement than by further litigation. According to the Manual for Complex Litigation of the Federal Judicial Center[75], some of the factors that should be considered on settlement´s review are:

1. The advantages of the proposed settlement versus the probable out-come of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

2. The probable time, duration, and cost of trial;

3. The probability that the class claims, issues, or defenses could be maintained through trial on a class basis;

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[73] LINDA S. MULLENIX, "Settlements" in MARCY HOGAN GREER "A practitioner's guide to class actions", American Bar Association, 2010 page 171.

[74] Amchem Products, Inc. v. Windsor 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689, 65 USLW 4635, 37 Fed.R.Serv.3d 1017, 28 Envtl. L. Rep. 20,173, 97 Cal. Daily Op. Serv. 4894, 97 Daily Journal D.A.R. 8025, 97 CJ C.A.R. 1314, 11 Fla. L. Weekly Fed. S 128

[75] FEDERAL JUDICIAL CENTER. (2004). *Manual for complex litigation, fourth*. Available at https://public.resource.org/scribd/8763868.pdf.

4. The maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other factors that bear on the probable outcome of a trial on the merits;

5. The extent of participation in the settlement negotiations by class members or class representatives, and by a judge, a magistrate judge, or a special master;

6. The number and force of objections by class members;

7. The probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under above paragraph 1 or 4;

8. The effect of the settlement on other pending actions;

9. Similar claims by other classes and subclasses and their probable outcome;

10. The comparison of the results achieved for individual class or sub-class members by the settlement or compromise and the results achieved or likely to be achieved for other claimants pressing similar claims;

11. Whether class or subclass members have the right to request exclusion from the settlement, and, if so, the number exercising that right;

12. The reasonableness of any provisions for attorney fees, including agreements on the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

13. The fairness and reasonableness of the procedure for processing individual claims under the settlement;

14. Whether another court has rejected a substantially similar settlement for a similar class; and

15. The apparent intrinsic fairness of the settlement terms.

Based on the above and other factors the court may deem appropriate, the judge often suggests some changes on the proposed settlement in order to protect the interests of the class that sometime may not coincide with the particular economic interests of the class´s counsel. After the settlement is finally approved, someone is normally appointed to administer the claims process, i.e. to take care of the administrative details related to the recovery for each claimant. Court approval is also required for disbursement of funds.

See a sample of an Order Approving Settlement as Annex II to this paper[76].

In addition to court approval of a settlement, Rule 23(a)(5) states that any class member may lodge objections to a proposed settlement pursuant to Rule 23(a). These include not only the class representatives but also the absent class members[77]. Besides, Rule 23(e)(4) provides that in a case previously certified under Rule 23(b)(3), "the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion

[76] Both samples of an Order Certifying Class and of an Order Approving Settlement attached as Annex I and Annex II to this note have been taken from the Manual for complex litigation, fourth of the FEDERAL JUDICIAL CENTER (2004) op. cit.

[77] See Supreme Court decision in Devlin v. Scardelletti, 536 U.S. 1 (2002).

to individual class members who had an earlier opportunity to request exclusion but did not do so."

The most common type of settlement provides for a certain amount as total recovery for the entire class. In this case, the agreed amount is divided pro rata among claimants depending on the number of claims filed. In other cases, the total recovery amount can be divided among claimants up to the value of the individual loss. In such a case, not all members will receive the same amount, but instead recoveries will be calculated based on the actual losses of each member of the class. A third method is to specify what each claimant will received so the total amount of the settlement depends on the number of claims filed.

Although cash is the most common type of recovery in class action settlements, non-monetary settlements are also common. In these cases, class members are entitled to receive coupons, free merchandise or discounts on future purchases. One famous coupon settlement (which was not approved by the court) would have given purchasers of General Motors (GM) pick-up trucks sold with defective (exploding) gas tanks a coupon worth $500 toward the purchase of another GM truck.[78]

Defendants usually like coupon settlements because they do not have to pay cash out-of-pocket, and because class members must buy more of the defendant's products in order to obtain their share of the class recovery. The settlement may even wind up turning a profit for the defendant. Some plaintiffs' lawyers also like coupon settlements because they often result in relatively high attorney's fees. The settlement agreement usually specifies that the lawyers' fee will be paid in cash. Experts hired by the plaintiffs' lawyers testify to the court on the value of the non-monetary settlement. Often these experts make very optimistic estimates of the number of class members who will redeem the coupons and the value of the coupons to the class. Thus, the plaintiffs' lawyers can receive fees based on an inflated value of the settlement, and the defendant does not have to pay cash to the class. These settlements contain obvious possibilities for abuse and collusion between the plaintiffs' lawyers and the defendants, to the disadvantage of the class, being strongly criticized for such a reason.[79]

5.2 Attorneys´ fees

Commonly in the U.S. each party bears its own costs and attorneys´ fees. This rule, applicable also in case of a class action litigation or settlement, raises some issues in class actions because the fee agreement, if it exists, is only between the class counsel and the class representatives. The class members never sign a fee agreement with class counsel and thus, in principle, have no contractual obligation to pay the fees and costs incurred in bringing the class action.

As an alternative to the U.S.A. rule, other countries apply the "loser-pays" rule, under which the losing party must pay both its own costs and those of the winning side. The possibility of applying "loser-pays" rule to class actions has been strongly criticized because the plaintiffs themselves could almost never afford to become representative

[78] In re General Motors Corp. Pick-Up Truck Fuel Tank Litig., 55 F.3d 768 (3d Cir. 1995). See also In re Ford Motor Co. Bronco II Prod. Liab. Litig., 1997 U.S. Dist. Lexis 104971 (E.D. La. 1997).

[79] Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, July 21-22, 2000.

plaintiffs if they had to face the possibility that they might be individually responsible for paying the expensive lawyers of the corporate defendant.

Fee agreement for class actions is usually a contingent-fee agreement, meaning that the class members will pay to the lawyer only if the lawyer handles the case successfully. In a contingent fee arrangement, the lawyer agrees to accept a fixed percentage (often one third) of the recovery, which is the amount finally paid to the client (in this case, the class).

VI. PROS AND CONS OF THE CLASS ACTION DEVICE

We will briefly discuss now both the praise and criticism that the class action procedure receives from courts, lawyers and scholars.

Among the most important benefits of the class action are the following:

1. *Judicial efficiency*. Procedural efficiency in handling large number of similar claims is the main goal of this procedural devise.[80]

2. *Enable small claims recovery*. Class actions can make it possible to litigate small claims which individually do not represent harm important enough to file a complaint but together can support the cost of the litigation. In Professor Alexander's words "[n]o matter what rights may be written in the substantive law, if there is no means by which those rights can be enforced the law might as well no exist, for it can be violated with impunity. […] By "enabling" claims, the class action device can provide appropriate incentives for corporations, assuring that they pay the true costs of their own conduct, rather than passing the costs on to consumers while retaining the benefits as a profit.[81]"

3. *Saving litigation costs*. By permitting litigation of multiple related claims, the litigation costs are shared among the class members making it more economic than pursuing the claim through individual lawsuits. This may be a particular advantage where individual monetary claims are relatively low making it unlikely plaintiffs would undergo the effort of proceeding individually[82]. Besides, if the class representatives and the class counsel agree on a contingent-fee agreement, the class members will have to pay nothing up front and even then only if the lawyer is able to settle on their behalf or wins at trial.

4. *Stronger bargaining position for plaintiffs*. The very nature of a large group of people with a similar claim provides class plaintiffs with more bargaining power than they may have as individuals. This power to negotiation as a group is also the reason why so many of these cases settle out of court.

5. *Uniformity*. Providing a single determination of merits of the claim, which binds all individuals within the class, prevents potentially inconsistent judgments for the same

[80] See In re West Virginia Rezulin Litigation, 214 W. Va. 52, 585 S. E. 2d 52,62, Prod. Liab. Rep. (CCH) P 16682 (2003) and Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1440, 176 L. Ed. 2d 311, 76 Fed. R. Sev. 3d 397 (2010). Vid supra page 2

[81] Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, July 21-22, 2000.

[82] Class Actions: Overview, Practical Law Practice Note Overview 2-529-7368 (2016).

type of claims. Besides, it also gives defendants more certainty about the payout amount established under the ruling of a single judge either approving the settlement or deciding the case.

6. *Deterrent on future violations*. This is, in our opinion, one of the most important benefits of class actions. The costs of litigating a class action as well as the high amount for indemnification in case of settlement or judicial resolution, cause that defendants make the efforts necessary to avoid future violations that may result in a new class action claim against them. In addition, it is to be considered the damage to the company´s reputation, image and brand being involved in those kinds of disputes often related to abuses of power. This objective is, in our view, hard-to-reach through any other device, including, individual claims or governmental inspections and sanctions.

The disadvantages associated with class actions include:

1. *The expenses and efforts required*.[83]

From plaintiff´s perspective, the management of a class action is both time and resources consuming. This includes identifying the class members; sending out notices to the class; and coordinating a complex litigation with multiple parties and claims.

For defendants, responding a class action complaint requires also an important effort, such as, for example, prepare required motions to block class certification and prevent plaintiffs to get the case to trial.

For those reasons, attorney´s fees in class actions can be huge. In case of a contingency-fee agreement, implying an important part of the case recovering to the detriment of the class members. Such practice has received strong criticism giving rise to the court´s power to review and potentially reduce the requested fees.[84]

2. *Lack of control*. Only the representative parties have decision-making power to settle and to make other important decisions regarding the lawsuit. Therefore, individual plaintiffs´ lack of control over the litigation, settlement or even the election of the counsel.

3. *Lengthy process*. Resolution of these types of claims typically take longer than, for example, an individual usual tort claim due to their procedural complexities.

4. *Settlement*. As mentioned above, class actions´ settlements cannot occur without notice to the class and formal court approval.

5. *Private claims waiver*. By joining the class, the members renounce to pursue their claim on individual basis. Therefore, if the class action is unsuccessful, the individual members of the class may not bring claims of their own at a later time.

[83] Interestingly, in Eisen v. Carlisle & Jacquelin, a price-fixing action under the antitrust laws, the court warned that if the amount spent on the paperwork necessary for a class action and on discovery would exceed the amount of damages recoverable so that "as a practical matter class members are not likely ever to share in an eventual judgment," then the class action should not be allowed to continue.

[84] Is to be noted that Rule 23 (e) requires court approval only for settlement of a "certified class". Therefore, prior to certification there is a serious threat that the defendant offer only the named plaintiffs and the plaintiffs´ counsel a generous settlement in order to stop the class action to the prejudice of the absent class members.

6. *Unmeritorious cases*. The cost of discovery and trial, in addition to the reputational damage and the uncertainty of the jury verdict, encourage defendants to settle these suits even when there are no legal grounds for the claim.[85] The driving force behind many of these suits is entrepreneurial trial lawyers that use "professional plaintiffs" rather than unhappy individuals.[86]

In those cases, the class counsel frequently has significantly greater interest in the litigation than individual members of the class. For example, in the VMS Realty Partnership case, a securities fraud class action was settled for less than 8 cents a dollar, which represented a significant recovery for the lawyers but a considerable undervalue for investors. Interestingly, the investors who opted out of the class action settlement and participated in the independent arbitration process frequently received 100% of their losses and haven't had to share their recovery with a lawyer "representing their interest."[87]

7. *Multiple suits*. Considering the characteristics of the federal system of government in the United States, that includes both state and federal courts of justice with authority to decide on class action cases, the possibility of multiple suits is a serious problem both for defendants and for the efficiency of the whole judicial system which allows duplication of efforts and potentially inconsistent results.

VII. SPECIAL FOCUS ON MANDATORY ARBITRATION CLAUSES: CLASS ACTION WAIVERS VALIDITY

7.1 Introduction

The current commercial and consumption trends such as the expansion of e-commerce or the latest financial products contribute to a greater number of transactions between consumers and large corporations that provide them with goods or services. Such commercial relationships are increasingly based on standard form contracts written by the trader.

In this context, it has become very common that these contracts of adhesion include mandatory arbitration and class action waivers clauses, an example of which could be the following:

[85] As Dennis W. Bakke, President and CEO of the AES Corporation testified: "Discovery is an extremely broad and formidable weapon in the hands of skilled plaintiffs´ attorneys. Our business is enormously paper intensive. Therefore, we were immediately served with document production requests that resulted in us reviewing enormous numbers of boxes of papers. Depositions for a significant amount of our staff at our plant, plus a number of executive officers were served. Worse yet, we were not the only people served with the intrusive discovery requests. Plaintiffs served notice of depositions, and incredibly broad requests for documents production, on at least four of our potential customers, various suppliers, certain of our lenders, and our largest construction contractor. I cannot begin to describe the disruption to important business relationships that this caused…" (JAMES D. COX, ROBERT W. HILLMAN and DONALD C. LANGEVOORT in "Securities Regulations: cases and materials", 7th edition, Wolters Kluwer).

[86] As William Lerach, whose firm "Milberg, Weiss, Bershad, Hynes & Lerach" is considered the nation´s largest class action law firm, told Forbes magazine: "I have the greatest practice of law in the world. I have no clients."

[87] See JAMES D. COX, ROBERT W. HILLMAN and DONALD C. LANGEVOORT in "Securities Regulations: cases and materials", 7th edition, Wolters Kluwer, page 702.

"Any dispute, controversy or claim arising out of, relating to or in connection with this contract, including the breach, termination or validity thereof, shall be finally resolved by arbitration. The tribunal shall have the power to rule on any challenge to its own jurisdiction or to the validity or enforceability of any portion of the agreement to arbitrate. The parties agree to arbitrate solely on an individual basis, and that this agreement does not permit class arbitration or any claims brought as a plaintiff or class member in any class or representative arbitration proceeding. The arbitral tribunal may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding." [88]

These kinds of clauses are, in our opinion, particularly problematic for "small recoveries" claims which do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.[89]

7.2 Criticism of class action waivers

It didn't take long for scholars, judges, attorneys, and litigants to criticize these types of clauses on the ground that they are manifestly "unfair" because businesses frequently use them to dictate particular details of potential arbitral disputes and to limit or eliminate individuals' procedural and substantive rights. As stated by Judge Richard Posner in *Carnegie v. Household Intern., Inc.* "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30".[90]

For such and some other reasons, certain courts - including state courts in California and the Ninth Circuit - have refused to enforce class action waivers, finding them unconscionable.[91] by interpreting them to operate as exculpatory clauses.

An example is the Illinois Appellate Court's decision in *Kinkel v. Cingular Wireless, LLC*[92] in which the court refused to enforce the class action waiver on the ground that it (1) would effectively prevent plaintiffs with low-value claims from bringing those

[88] Class Arbitration Waiver (US), Practical Law Standard Clauses 3-518-9047

[89] See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997)).

[90] Carnegie v. Household Intern., Inc. United States Court of Appeals, Seventh Circuit. July 16, 2004, 376 F.3d 656, RICO Bus.Disp.Guide 10,706

[91] See, e.g., Ingle v. Circuit City Stores, 328 F.3d 1165, 1176 (9th Cir. 2003) ("Under California law, provision of arbitration agreement prohibiting consolidation of employee claims and generally prohibiting class-action arbitrations was substantively unconscionable, inasmuch as provision operated solely to advantage of employer."); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002) (holding that a class action prohibition in a credit card consumer contract was both procedurally and substantively unconscionable, emphasizing the "manifest one-sidedness" of the provision and noting that the clause was intended to preclude customers with small claims from obtaining relief, thereby providing Discover with "virtual immunity" from class actions);

[92] Kinkel v. Cingular Wireless, LLC, 828 N.E.2d 812.

claims and (2) would provide defendants with virtual immunity from liability, class-wide or otherwise.[93]

In this same line of argument, the Supreme Court of California ruled in *Discover Bank v. Superior Court*[94]:

"We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." (Civ.Code, §1668.) Under these circumstances, such waivers are unconscionable under California law and should not be enforced."

7.3 The Federal Arbitration Act

The Federal Arbitration Act (FAA) (9 U.S.C. §§ 1-16, 201-208, 301-307) provides the basic legal principles applicable to arbitration in the US. Its core principle is that arbitration agreements involving interstate or foreign commerce must be considered "valid, irrevocable, and enforceable, save as upon such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. § 2). This principle is supported by provisions requiring the courts to stay proceedings before them that involve matters referable to arbitration and to issue orders requiring the arbitration of these matters (9 U.S.C. §§ 3-4).[95]

In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[96] the Supreme Court noted that "Section 2 [of the Act] is a congressional declaration of a liberal federal policy favoring arbitration, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act." 460 U.S. at 24.

The US Supreme Court also stated in *AT&T Mobility LLC v. Concepcion*[97] that:

"[t]he "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." (citation omitted). This purpose is readily apparent from the FAA's text. Section 2 makes arbitration agreements "valid, irrevocable, and enforceable" as written (subject, of course, to the saving clause); § 3 requires courts to stay litigation of arbitral claims pending arbitration of those claims "in accordance with the terms of the agreement"; and § 4 requires courts to compel arbitration "in accordance with the terms of the agreement" upon the motion of either party to the agreement (assuming that the "making of the arbitration agreement or the

[93] In Beyond unconscionability: class action waivers and mandatory arbitration agreements, J. Maria Glover, Vanderbilt Law Review, October 2006.
[94] 36 Cal.4th 148, 113 P.3d 1100, 30 Cal.Rptr.3d 76, 05 Cal. Daily Op. Serv. 5684, 05 Daily Journal D.A.R. 7782
[95] Understanding the Federal Arbitration Act by White & Case LLP.
[96] Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983)
[97] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742, (2011)

failure ... to perform the same" is not at issue). In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, (citation omitted) to arbitrate according to specific rules, (internal citation omitted), and to limit with whom a party will arbitrate its disputes, (citation omitted)."[98]

7.4 The Supreme Court's position on class action waivers

State courts have been ruling against class action waivers in consumer contracts based on Discover Bank doctrine[99] for years. The United States Supreme Court's decision in Discover Bank in *AT&T Mobility LLC v. Concepcion*[100] was a genuine "game changer."

In *AT&T Mobility v. Concepcion,* the US Supreme Court found that a California rule, which had been applied by the Ninth Circuit to find an arbitration provision waiving class arbitrations unconscionable, served as an obstacle to achieving the goals of the Federal Arbitration Act mentioned in previous section.

The underlying dispute in Concepcion centered on a cellular phone contract between Vincent and Liza Concepcion and AT&T Mobility. The Concepcions purchased cell phone service from AT&T and received two new cell phones as part of the agreement. Though the Concepcions did not have to pay for the phones themselves, AT&T charged them $30.22 in sales tax for the new devices. In response, the Concepcions brought a claim in the Southern District of California and asserted that AT&T's advertisements for "free" phones were fraudulent. The case was later consolidated with a putative class action against AT&T involving the same issues. AT&T then moved to compel arbitration pursuant to the arbitration agreement between the parties.

Yet the arbitration clause in Concepcion included additional "consumer-friendly" provisions[101] such as a $7500 payment if the arbitration award exceeded the last written settlement offer AT&T made prior to selecting an arbitrator; cost-free arbitration for non-frivolous claims; double attorneys' fees if the arbitrator awarded the customer more than AT&T's last settlement offer; and the option of conducting the arbitration in person, over the phone, or solely on the filed papers, the clause was still seen as a strategic move by AT&T to avoid state unconscionability rulings and to strengthen its position on appeal.

Both the district and circuit courts held that AT&T's class action waiver was unenforceable. Although the district court initially found that the provisions in the arbitration agreement were an "adequate substitute" for consumers seeking class

[98] The Supreme Court in *Conception* (*vid. supra*) has also stated that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution. (citation omitted)."

[99] Vid. Supra section 8.2

[100] AT&T Mobility LLC v. Concepcion 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742, 79 USLW 4279, 161 Lab.Cas. P 10,368, 11 Cal. Daily Op. Serv. 4842, 2011 Daily Journal D.A.R. 5846, 52 Communications Reg. (P&F) 1179, 22 Fla. L. Weekly Fed. S 957

[101] Such provisions were included in the agreements in an attempt to respond to the lower-court invalidations of previous class action waiver clauses.

arbitration, it ultimately concluded that it had to invalidate the waiver because of deterrence considerations.[102]

The Supreme Court in 5-4 decision written by Justice Scalia concluded that state law could not require class arbitration where the arbitration agreement otherwise precluded it, stating that "[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."

Although the US Supreme Court ruled in favor of the enforceability of arbitration clauses in some other cases such as *American Express Co. v. Italian Colors Restaurant*[103] or in *Oxford Health Plans LLC v. Sutter*[104] the decision held in *DIRECTV, Inc. v. Imburgia*[105] plays a role particularly important to the scope of our study.

In *DirecTV, Inc. v. Imburgia*, the US Supreme Court reversed a California of Appeal's decision and enforced an arbitration clause and class action waiver to consumer claims.

DirecTV entered into a service agreement with its customers that included an arbitration clause and a class arbitration waiver. Besides, DIRECTV's agreement also provided: "If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration clause] is unenforceable."

In 2008, Imburgia filed a class action complaint against DirecTV in California state court, alleging that the company had illegally charged early termination fees to its customers in violation of California's Consumers Legal Remedies Act (CLRA) and other state laws. DirecTV did not bother to enforce its arbitration clause, believing such efforts would be "futile" according to *Discover Bank* doctrine. However, while the action was pending, the Supreme Court held in *AT&T Mobility LLC v. Concepcion* that the FAA preempted Discover Bank.

On appeal, the California Court of Appeal identified two possible readings of this contractual term: either it meant "the law of your state to the extent it is not preempted by the FAA" (in which case the arbitration clause could be enforced, under Concepcion) or it meant "the law of your state without considering the preemptive effect ... of the FAA" (in which case it could not). Drawing on established principles of contract interpretation, the court settled on the latter. It applied, first, the rule under California law that "when a general and a particular provision are inconsistent, the particular and specific provision is [paramount] to the general provision." Under this rule, while the broader arbitration clause should be governed by federal law, the enforceability of the class-arbitration waiver should be governed by the law of the customer's home state. The state court also relied on the "common-law rule of contract interpretation [construing] ambiguous language" against the drafter so DirectTV should not benefit

[102] See Blechschmidt F., "All alone in arbitration: AT&T Mobility v. Concepcion and the substantive impact of class action waivers", University of Pennsylvania Law Review.

[103] In American Express Co. v. Italian Colors Restaurant 133 S.Ct. 2304 (2013) the US Supreme Court ruled that the Federal Arbitration Act does not allow courts to invalidate a contract's class arbitration waiver on the ground that the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery.

104 In Oxford Health Plans LLC v. Sutter, 133 S.Ct. 2064 (2013), the US Supreme Court unanimously upheld an arbitrator's decision to authorize class arbitration and affirmed the limited judicial review under section 10(a)(4) of the FAA.

[105] DIRECTV, Inc. v. Imburgia 136 S.Ct. 463 (2015)

from its ambiguity. Under the resultant reading, the Court concluded that the "law of your state" made the class-arbitration waiver unenforceable, under either Discover Bank or a state statute such as the CLRA.[106] On the same issue, the US Court of Appeals for the Ninth Circuit came to the opposite conclusion in *Murphy v. DirecTV, Inc.*[107] The Supreme Court granted certiorari.

The Supreme Court reversed California Court of Appeal decision, holding that the arbitration clause should be enforced. Writing for the Court, Justice Breyer[108] reminded the court that *Concepcion* was binding law that "the judges of every State must follow it." Under *Concepcion*, courts must enforce arbitration agreements just as they would any other agreement, placing them "on an equal footing with other contracts." The Supreme Court found that the state court's interpretation of DirecTV's arbitration clause was unfavorable to arbitration agreements, in contravention of the FAA. The Court concluded that the term "law of your state" could refer only to "valid state law," not "invalid ... law" that was preempted by federal statute.

7.5 Conclusion

The decision in *Imburgia* is consistent with the Court's broad reading of the FAA and provides clarity to the already existing doctrine, following *Conception*, in favor of arbitration. This is far from being a closed issue though. On January 13, 2017, the U.S. Supreme Court granted certiorari in three cases involving the lawfulness of class and collective action waivers in arbitration agreements in the context of employment agreements to examine the enforceability of class action waivers and the interaction between the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA).

Two of the cases granted review—the Seventh Circuit's *Epic Systems Corp. v. Lewis* and the Ninth Circuit's *Ernst & Young, et al. v. Morris*—favored the NLRB's position that class action waivers contained in mandatory, pre-dispute arbitration agreements between employers and NLRA employees violate the National Labor Relations Act (NLRA) by restraining employees' right to engage in concerted activity. In the third case, *NLRB v. Murphy Oil USA, Inc., et al.*, the Fifth Circuit overturned the NLRB, and held arbitration agreements must be enforced per their terms under the FAA. The Fifth Circuit reasoned that due to the conflict between the FAA and NLRA, the Court had to determine whether the NLRA, a later-enacted statute, contained a contrary congressional command to the FAA's mandate that arbitration agreements should be enforced according to their terms. And since the NLRA lacked a contrary congressional command, class action waivers must be enforced under the FAA.

The Ninth Circuit and Seventh Circuit disagreed with the Fifth Circuit and created a split. They held there is no conflict between the NLRA and the FAA due to the FAA's "savings clause", which provides arbitration agreements are "enforceable, save upon

[106]See Federal Arbitration Act--Directv, Inc. v. Imburgia, Federal Statutes and Regulations, Leading Case, The Supreme Court 2015 Term, November, 2016, Harvard Law Review, 130 Harv. L. Rev. 457.
[107] Murphy v. DirecTV, Inc. 724 F.3d 1218 (9th Cir. 2013)
[108] Interestingly, Justice Breyer wrote the principal dissent in *Concepcion*, joined by Justices Ginsburg, Sotomayor, and Kagan. See AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 357 (2011) (Breyer, J., dissenting). In *Imburgia*, however, he emphasized that "[t]he fact that Concepcion was a closely divided case, resulting in a decision from which four Justices dissented," made it no less binding. Imburgia, 136 S. Ct. at 468.

such grounds as exist at law or in equity for the revocation of any contract." Therefore, since class action waivers contained in mandatory, pre-dispute arbitration agreements are unlawful under the NLRA, they are not enforceable under the FAA.[109]

Arbitration has a number of elements that lend to its reputation for efficiency and expediency, including traditionally faster timelines and therefore lower costs for case resolution. Notwithstanding these elements, the Supreme Court stated in *Dean Witter Reynold, Inc. v. Byrd*[110]:

"[W]e . . . reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act . . . does not mandate the arbitration of all claims, but merely the enforcement—upon the motion of one of the parties—of privately negotiated arbitration agreements. The House Report accompanying the act makes clear that its purpose was to place an arbitration agreement "upon the same footing as other contracts where it belongs," and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate."

In light of the above, we consider that the use of the FAA by traders as a shield against consumers or employees' claims is beyond the scope of the Act. Therefore, the inclusion of an arbitration provision (including a class action waiver) in adhesion agreements should be, in our opinion, only protected and enforceable so long as the arbitration agreement preserves the consumer's substantive rights but not when its sole objective is to deprive the adherent party of its rights. Such behavior constitutes a clear abuse of law that shouldn't be protected by the judges.

Justice Ginsburg's dissent in *DIRECTV, Inc. v. Imburgia* is illustrative in this regard. She reasoned that the California Court interpretation was "not only reasonable, [but also] entirely right." In her view, the Court's has "disarm[ed] consumers, leaving them without effective access to justice." With the spread of "take-it-or-leave-it agreements mandating arbitration and banning class procedures," consumers now lack the incentive to pursue small-dollar claims against large businesses.[111]

The Court has made clear in contexts not involving mandatory arbitration that, even where "federal law controls the interpretation of [a] contract," courts must still be "guided by the general principles that have evolved concerning the interpretation of contractual provisions."[112] For such a reason, a class action waiver in a consumer agreement which does not include a "consumer friendly" arbitration clause is likely to be considered unconscionable. Yet the Supreme Court's interpretations of the FAA establish a strong presumption in favor of enforcing arbitration agreements.[113]

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[109] See Sean McCrory and Rob Friedman analysis available at https://www.littler.com/publication-press/publication/supreme-court-will-review-three-cases-involving-lawfulness-class-and, where they also pointed out that "none of these three cases involve agreements with "opt-out" provisions. Opt-out provisions give employees the ability to opt out of an arbitration agreement within a certain timeframe. Although the NLRB takes the position that opt-out provisions do not make an otherwise unlawful agreement lawful, the Ninth Circuit has enforced opt-out agreements, which consequently have become a crucial distinguishing factor in many cases.

[110] Dean Witter Reynold, Inc. v. Byrd , 470 U.S. 213 (1985)

[111] Justice Breyer raised the same concern in his dissent in Concepcion, pointing out: "[O]nly a lunatic or a fanatic sues for $30." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (quoting Carnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004)).

[112] United States v. Seckinger, 397 U.S. 203, 209 (1970).

[113] See FEDERAL ARBITRATION ACT--DIRECTV, INC. v. IMBURGIA, *supra*.

We conclude by making reference to "group arbitration" as a reasonable and balanced provision to be incorporated in adhesion agreements that include a class action waiver. In or opinion, group arbitration offers the main advantages of a class action suit (efficiency and uniformity of treatment to the members of the class arbitrated[114], while enabling small claims recovery and saving resources), while reducing significantly the defendant's efforts, both in time and resources, compared to those required in a class litigation.

Current system of checks and balances in the area of consumer arbitration law is, for the most part, sufficiently protective of consumers' rights. This is also the conclusion of the National Arbitration Forum concluded in a recent synopsis of independent studies and surveys concerning the benefits of pre-dispute consumer arbitration that: (i) "[s]eventy-eight percent of trial attorneys find arbitration faster than lawsuits"; (ii) "[e]ighty-six percent of trial attorneys find arbitration costs are equal to or less expensive than lawsuits"; (iii) "[s]eventy-eight percent of business attorneys find that arbitration provides faster recovery than lawsuits"; (iv) "[e]ighty-three percent of business attorneys find arbitration to be equally or more fair than lawsuits"; (v) "[i]ndividuals prevail at least slightly more often in arbitration than through lawsuits"; (vi) "[m]onetary relief for individuals is slightly higher in arbitration than in lawsuits"; (vii) "[a]rbitration is approximately 36% faster than a lawsuit"; (viii) "[i]ndividuals receive a greater percentage of the relief they ask for in arbitration versus lawsuits"; (ix) "[n]inety-three percent of consumers using arbitration find it to be fair"; (x) "[c]onsumers prevail 20% more often in arbitration than in court"; (xi) "[i]n securities actions, consumers prevail in arbitration 16% more than they do in court"; and (xii) "[s]ixty-four percent of American consumers would choose arbitration over a lawsuit for monetary damages."[115]

VIII. A BRIEF REFERENCE TO CLASS ACTIONS UNDER SPANISH LAW

8.1 Introduction

Class or "collective" actions are also available in the Spanish legal system, although with a much more limited scope to those of the United States studied above, since they are limited to consumer protection cases.[116]

The principal source of law which regulates class actions in Spain is the Act 1/2000 of 7 January on Civil Procedure ("Civil Procedure Act"). As in the United States, class actions in Spain are also an exception to the general rule that the "legitimate parties shall be those who appear and act in court as holders of the legal relationship or contested object."[117] In this sense, the Civil Procedure Act provides that without prejudice to the individual legitimacy of the injured parties, legally constituted consumer associations are also entitled to defend in court the rights and interests of their

[114] Given the confidentiality of arbitration rulings and the different approaches in various fora, decisions lacks sometimes of the uniformity required among similar cases.
[115] See Nat'l Arbitration Forum, The Case for Pre-Dispute Arbitration Agreements 12 (2004), available at www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf.
[116] See MALAGA FRANCISCO, "Spain" in *World Class Actions: A Guide to Group and Representative Actions around the Globe*, Edited by Paul G. Karlsgodt, Oxford University Press.
[117] Article 10 of the Civil Procedure Act.

associates and those of the association, as well as the general interests of consumers and users.[118]

Accordingly, one of the main characteristics of the class action procedure results from the literal interpretation of the provision, i.e. that a class action must be brought only by those entitled to do so under the Civil Procedure Act:

- *Consumers' and users' associations*. These must be legally constituted according to the Organic Act 1/2002 of 22 March on Associations and must meet the requirements laid down in the Title II of the Royal Decree 1/2007 of 16 November by which it is approved the consolidated text of the General Law for the Defense of Consumers and Users and other complementary laws (Consumers and Users Act), which includes: a) being a non-profit organization; b) being officially registered and c) having a purpose that is for the defense of consumers' and users' interests.[119]

- *Legally constituted entities*. These are defined as those legal entities which, without being consumers' associations, have a statutory purpose which may also cover the defense of consumers' rights and interests.

- *Group of consumer or users affected*. The group meeting two requirements according to article 6(1)(7º) of the Civil Procedure Act: a) be determined or easily determined and b) be constituted by the majority of those users affected.

The Spanish system of class action draws a basic distinction between (i) cases in which the members of the group of consumers are identified or easily identifiable, referred to as "collective actions" and (ii) cases seeking the protection of undefined group referred to as "representative actions". It is to be noted that representative actions can be only brought by consumer associations that, according to the law, are sufficiently representative.[120]

There are also regulations on specific fields of law that expressly entitle organisations using Article 11 of the Civil Procedure Act to bring class actions. These regulations include Article 32 of Act 3/1991 of 10 January on Unfair Competition (*Ley 3/1991, de 10 de enero, de Competencia Desleal*) (Unfair Competition Act), which can be used when the damage arises from an unfair competition act, and Chapter IV of Act 7/1998 of 13 April on General Terms and Conditions (*Ley 7/1998, de 13 de abril, de Condiciones Generales de la Contratación).*

8.2 Sphere of application

Class actions are recognized in the Civil Procedure Act to facilitate the compensation for damages suffered by consumers and users as referred to in article 15.1 of the Act. Therefore, collective damages not caused to consumers and users (i.e. as the final recipient of the good or service), such as, for example environmental damages, are excluded from this definition and outside the scope of the regulation.

[118] Article 11 of the Civil Procedure Act.
[119] See article 23 and 24 of the Consumers and Users Act.
[120] Article 24.2 of the Consumers and Users Act provides that, as far as article 11.3 of the Civil Procedure Act is concerned, only the members of the Spanish Council of Consumers may be considered sufficiently representative consumer associations, unless the conflict is limited to the territory of an autonomous community, in which case the specific legislation of such community will apply.

As some authors have pointed out, the expression "harmful fact" ("*hecho dañoso*") used in the Civil Procedure Act, must be broadly interpreted. Thus, the liability due through a class action may be contractual (e.g. amount unduly charged by a company providing telephone or electricity service) or non-contractual (e.g. damages caused by a defective product to people who did not buy it).[121]

It´s also possible, in our opinion, to exercise a class action to request compensation for damages arising from, for example, the annulment of an abuse clause or the declaration of an act of unfair competition or unfair advertising. The right to exercise a class action in those cases seems straight forward if a judicial declaration of the abusiveness of the clause, the disloyalty of the act or the unlawfulness of the publicity is obtained in a previous proceeding. However, it may be problematic to accumulate both requests in the same proceeding due to the different rules governing each request. However, to the extent that the general procedural requirements for the accumulation of shares are satisfied (see articles 71-73 of the Civil Procedure Act), we see no reason why it shouldn't be possible.

8.3 Effects of the class action

Some doubts have been raised about the effect of *res judicata* ultra-parts of class actions judgments (ie in relation to consumers and users which are not a part in the process). However, article 222. 3 of the Civil Procedure Act, provides that "*res judicata shall affect the parties to the proceedings and to their heirs and assignees, as well as to the subjects, not litigants, holders of the rights that underpin the legitimation of the parties in accordance with the provisions of article 11 of this law*." Therefore, it seems clear to us that the Civil Procedure Act grants full effect ultra-parts -and not only in utilibus- to the resulting class action judgements.

Considering the above, it is remarkable that the Civil Procedure Act does not provide an opt-out mechanism for the individual consumers or users represented in the proceedings that expressly want to renounce to be represented in the action initiated (and thus prevent the Judgment to have the effect of res judicata to them), reserving the possible exercise of their individual claim action.

According to some authors, the lack of an opt-out system could raise some doubts about the constitutionality of the class actions procedure provided for in the Civil Procedure Act. In this regard, Professor Luis Javier Mieres Mieres, in "*Acerca de la constitucionalidad de la nueva regulación de las acciones colectivas promovidas por asociaciones de consumidores y usuarios*" (Barcelona, 2000) holds that: "regulation of class actions brought by consumers' and users' associations not allowing the self-exclusion of those affected by the process, respects the essential content of the right to effective legal protection, because interested parties, even if they remain outside the process, obtain a judicial response to their claim sustained and affirmed by an appropriate representative."[122] It is to be noted that, as already pointed out, representative actions can be only brought by consumer associations that, according to the law, are sufficiently representative (Article 24.2 of the Consumers and Users Act).

[121] See "Las acciones de clase en el derecho español", J.J. Martín López, InDret, 2001.
[122] Quoted by A. Ferreres Comella in "Las acciones de clase ("class action") en la Ley de Enjuiciamiento Civil", Actualidad Jurídica Uría y Menéndez, 11-2005.

8.4 The EU approach

Some developments are expected on Spanish class actions regulation due to the "recent" actions of the European Union (EU) authorities in this field.

First, on June 11, 2013 the European Commission's Recommendation on common principles for injunctive and compensatory collective redress mechanisms,[123] with the aim of enabling citizens and companies to enforce their rights, - granted to them under EU law in fields such as consumer protection, competition, environmental protection and financial service -, where these rights have been infringed.

The recommendation suggests that all EU countries introduce collective redress mechanisms at national level, for both injunctive and compensatory relief, based on following agreed principles:

- Claimants should be able to seek court orders to cease violations of their rights granted by EU law ('injunctive relief') and to claim damages for harm caused by such violations ('compensatory relief') in a case where a large number of persons are harmed by the same illegal practice.
- Collective redress procedures must be fair, equitable, timely and not prohibitively expensive.
- Collective redress systems should be based on the 'opt-in' principle. Under this principle, potential claimants who have not directly expressed their consent are not members of the group and therefore, may not benefit directly from a favorable outcome of the collective redress proceedings.
- There should be procedural safeguards to avoid abuse of collective redress systems such as:
    - a ban on punitive (i.e. excessively high) damages and interest;
    - entities representing claimants should not be profit-making;
    - a ban on the payment of contingency fees to lawyers.
- The losing party is required to pay the winning party's legal costs.
- The judge has a key role in the collective litigation to effectively manage the case and must be vigilant against any possible abuses.
- Claimants should be able to settle the case by means of collective consensual dispute resolution mechanisms (i.e. procedures whereby parties reach consensus on a solution).

Secondly, on November 26, 2014 the European Parliament approved the Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.[124] The Directive, which "applies to all damages actions, whether individual or collective," is intended to remove

[123] See http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013H0396&from=EN

[124] See http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0104

"practical obstacles to compensation for all victims of infringements of EU antitrust law."[125]

Although the Directive finally adopted does not include any regulation of collective actions which were still in the Commission's first proposal of 2009, but finally succumbed to the resistance of the Member States, is also relevant for the scope of this note to the extent that the purpose of the Directive is to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association (art.1). As pointed out by BROKELMANN,[126] the purpose of the Directive, however, is not limited to promoting, through this "private" application of the competition rules, effective competition in the internal market - an objective already outlined by the ECJ in the famous Courage/Crehan[127] - but to ensure "equivalent protection throughout the Union for anyone who has suffered such harm. "

In this sense, the Commission itself has indicated that collective damages actions are particularly important for consumers harmed by antitrust violations. Since the Directive applies to any damages actions in the antitrust field, it also applies to collective damages actions in those Member States where they are – or will be – available. The Commission concluding that they will assess the Recommendation's implementation and, if appropriate, propose further measures by 26 July 2017.[128]

The benefits of an effective interaction between public enforcement by competition authorities and the private actions of individuals is especially relevant in the context the so-called "follow-on claims", in which those who have been injured by the anti-competitive behavior bring a legal action seeking compensation for the damages suffered once the Competition Authority has established the existence of a breach of the antitrust laws.

A paradigmatic example is the case of the "sugar cartel" (*Resolución del TDC de abril de 1999 (Expte. 426/98, Azúcar)*). In this case, following the decision of the Competition Court declaring that there was a collusive conduct consisting of fixing the selling price of sugar for industrial uses by the production companies present in the Spanish market, the Supreme Court (*Sentencias del Tribunal Supremo (Sala de lo Civil) de 8 de junio 2012 y de 7 de noviembre de 2013*) recognized an important compensation for damages to a group of companies engaged in the production of sweets and cookies and direct buyers of sugar from some of the sanctioned producers. The damages awarded amounted to almost 5 million euros, to which must be added, from the perspective of the companies sanctioned, the fine imposed by the Competition Court and confirmed later in litigation.[129]

Finally, it is worth mentioning that like all European directives, the so called "Damage Directive" provided a transposition deadline (in this case of two years, until 27 December 2016) for Member States to include in their legal systems the measures

[125] See http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html
[126] HELMUT BROKELMANN, La Directiva de daños y su transposición en España, Revista General de Derecho Europeo 37 (2015).
[127] Judgment of the Court of 20 September 2001. Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others. Case C-453/99.
[128] http://ec.europa.eu/competition/antitrust/actionsdamages/index.html
[129] See the CNMC blog https://blog.cnmc.es/2016/11/07/la-directiva-de-danos-una-gran-oportunidad-para-reforzar-el-derecho-de-la-competencia/

envisaged. To this end, in February 2015 the Spanish Ministry of Justice created a special section in the General Codification Commission with the mandate to prepare a proposal that would include the necessary legal reforms to incorporate into Spanish law the proposals of the Directive.

This Special Section, in which the Ministry of Economy and the "CNMC" collaborated, presented its proposal for the reforms required in late 2015. In order to implement the transposition of the Directive, the proposal prepared by the Section contemplated both the reform of the Antitrust Act of 2007 and the Civil Procedure Act of 2000, incorporating into these legal texts, respectively, the substantive and proceeding developments of the Directive. [130]

However, as of this writing the Directive has not been transposed to the Spanish legal system, although it should be done soon in compliance with the European requirements.

IX. GENERAL CONCLUSIONS

Class actions are a powerful legal tool to achieve judicial efficiency and protect the rights of a large number of individuals. Making use of it, people with similar claims can bring together a lawsuit in order to make corporations accountable for the damages caused. This allows American workers or consumers (usually with little bargaining power) to stand up for their rights and face much powerful corporations.

Class actions are often the only way that individuals can seek justice when they are faced with widespread corporate wrongdoing as, for example, small claims recovery. Besides, the costs and risks of being involved in a class action, usually cause corporations to make the required effort to avoid violations of the law that may result in a class action claim against them.

These objectives are, in our view, hard-to-reach through any other means, including, individual claims or governmental inspections and sanctions. The governmental agencies in charge of supervising the market and protecting individuals' rights often lack the resources to oversee corporations' activities and prosecute all the exposed malpractice. Thus, by creating a mechanism that allow collective private claims, higher standards of corporate accountability can be achieved.

In an attempt to limit their liability, corporations have incorporated class actions waivers in the arbitration clauses of their adhesion agreements. The legal principle under which "arbitration agreements are enforced according to their terms" had shield them against consumers or employees' collective claims. In our opinion, however, the inclusion of an arbitration provision - including a class action waiver - in adhesion agreements should only be protected and enforceable so long as the arbitration

[130] A draft of the proposal is publicly available on: http://www.mjusticia.gob.es/cs/Satellite/Portal/1292427769696?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadername2=Grupo&blobheadervalue1=attachment%3B+filename%3DPropuesta_de_Ley_de_la_Seccion_Especial_para_la_Trasposicion_de_la_Directiva_2014_104_UE__del_Parla.PDF&blobheadervalue2=Docs_CGC_Secciones+especializadas

agreement preserves the consumer's substantive rights. Not when its sole objective is to deprive the adherent party of its rights. Such behavior constitutes, we think, a clear abuse of the law that shouldn't be protected by judges.

Nor should be protected the abuse of the class action procedure made by some specialized law firms who, taking advantage of the high cost and reputational damages incurred by defendants in a class action, force a settlement even when there are no legal grounds for the claim. Likewise, we consider that legislative measures should also be put into place in order to prevent certain legal fee agreements which provide an important profit for the lawyers to the detriment of the class members.

In view of the above, group arbitration is, we think, a reasonable and balanced measure that includes the main advantages of a class action suit (efficiency and uniformity of treatment to the members of the class arbitrated, while enabling small claims recovery and saving resources), while significantly reducing the defendant's efforts, both in time and resources, compared to those required in a class litigation.

Regarding Spain, class actions have a much limited scope and a significant lesser presence in the judicial system than in the United States. The transposition of the "Damage Directive" would be a great opportunity for our legislators to widen the scope of this legal procedure to other areas of the law. If they were to do so, careful consideration should be given to the American regulation of class action and the decisions of the American Courts of Justice, where class actions lawsuits have been litigated for many decades.

ANNEX I.- Order Certifying Class

[caption]

Order No. _____

In accordance with the findings and conclusions contained in the Opinion [omitted] filed concurrently with this order, it is, ORDERED:

1. *Class Certification.* Civil Action No._____, styled_____ shall be maintained as a class action on behalf of the following class of plaintiffs:

[Describe class in objective terms to the extent possible. For example, "All persons and entities throughout the United States and its territories (other than widget manufacturers and entities owned or controlled by them) that, since___[date]___, have purchased widgets directly from any of the defendants or from any other widget manufacturer."]

with respect to the following cause(s) of action:

[Describe class claims as precisely as possible. For example, "Any claims for damages or injunctive relief under federal antitrust laws premised upon an alleged conspiracy among the defendants and other widget manufacturers to restrict competition in the manufacture, distribution, and sale of widgets by setting the minimum prices charged for widgets after ___[date]___ ."]

2. *Class Representative; Class Counsel*. Subject to further order of the court, [A.B.Co.] is designated as class representative and [X.Y.] is designated as counsel for the class.

3. *Notice.*

a) Class counsel shall by ___[date]___, cause to be mailed in the name of the clerk by first class mail, postage prepaid, to all class members who can be identified through reasonable efforts, a notice written in plain language and approved by the court. For illustrative examples of the form of such notices, see the Federal Judicial Center's Web site (www.fjc.gov) and go to the "Class Action Notices" page. In addition to class members identified through an examination of defendants' records, this notice will also be mailed to persons who are members of [National Widget Dealers Trade Association].

b) Class counsel shall cause to be published in the _____ by ___[date]___, a notice in substantially the same style and format as the illustrative summary notices posted on the "Class Action Notices" page of the Federal Judicial Center's Web site (www.fjc.gov).

4. *Exclusion.* The notice to class members must inform them as to how they may exclude themselves from the class.

5. *List of Class Members.* Class counsel will file with the clerk by ___[date]___, an affidavit identifying the persons to whom notice has been mailed and who have not timely requested exclusion.

Dated: _____ _____

United States District Judge

ANNEX II.- Order Approving Settlement/Claims Procedure.

[caption]

Order No. _____

In accordance with the findings and conclusions contained in the Opinion [omitted] filed concurrently, it is ORDERED:

1. *Approval of Settlement*. The settlement is, after hearing, determined to be fair, reasonable, and adequate. It is, therefore, approved.

2. *Award of Fees and Expenses*. In accordance with the findings and conclusions contained in the Opinion [omitted], [X.Y.] is awarded $_____ as compensation and $_____ as reimbursement for expenses, to be paid [from the settlement fund] [by the defendants]. [Application for an award from the settlement fund of additional fees and expenses in connection with further proceedings, including administration and distribution of the settlement fund, may be made to the court.]

3. *Administration and Distribution of Settlement Fund*

(a)*Investment.* [After payment of counsel fees and expenses as awarded by the court,] the settlement fund shall, pending distribution to class members, be held in interest-bearing investments to be approved by the court from time to time.

(b) *Allocation.* The [net] settlement fund shall be allocated among the class members in proportion to their "qualified purchase," which means the net price (after discounts and allowances) paid by them to [widget] manufacturers for [widgets] from ___[date]___, to ___[date]___.

(c) *Claims; proof of purchases*. Unless extended by the court (or the special master) class members shall have until ___[date]___, to submit claims detailing, with appropriate supporting proof, their "qualified purchases."

(d) *Special master*[131]. _____ is appointed as special master under Fed. R. Civ. P. 53 to review, tabulate, and (as appropriate) audit claims made by class members. The special master shall establish procedures to resolve disputes regarding eligibility of persons to be members of the class and regarding the amount of "qualified purchases" by such per sons. The findings and conclusions of the special master identifying the class members, their respective "qualified purchases," and their allocable shares of the settlement fund shall be reported to the court under Fed. R. Civ. P. 53(f) as soon as is practicable. Compensation and expenses of the special master

[131] This sample form contains provisions generally suitable if a special master is appointed to administer the settlement. In other cases, use of a claims committee or magistrate judge may be appropriate.

will be paid from the settlement fund in such amount as the court may determine to be fair and reasonable.

(e) *Distribution*. The net settlement fund, with interest, shall be distributed to class members as soon as practicable after the amount to which each member is entitled has been determined. Any funds remaining after distribution has been completed may be distributed as the court directs.

4. *Notice*. Class counsel shall by ___[date]___, cause to be mailed in the name of the clerk by first class mail, postage prepaid, to members of the class [who did not timely elect to be excluded from litigation] a notice in plain language and in substantially the form of the Federal Judicial Center's Illustrative Notices, which can be found on the Class Action Notices page of the Center's Web site (www.fjc.gov). [Notice of the proposed settlement (and of the rights of class members to object to or opt out of the proposed settlement) shall also be given by publication in a summary form as illustrated on the Class Action Notices page of the Center's Website.

The notice should include information about attorney fees sought by attorneys for the class.

5. *Reserved Jurisdiction of Court.* The court retains jurisdiction over the settlement of this case and may enter additional orders to effectuate the fair and orderly administration of the settlement as may from time to time be appropriate, including the determination of persons to whom payment should be made in the event of death or dissolution and the right to set aside a portion of the net settlement fund not exceeding [$] [% of the net fund] as a reserve for late claims and other contingencies and to determine the appropriate disposition of any portion of the reserve not distributed to the class members.

Dated: _____ _____

United States District Judge

X. BIBLIOGRAPHY

A. Regulations

The Constitution of the United States.

Federal Rules of Civil Procedure (eff. Dec. 1, 2016).

Act 1/2000 of 7 January on Civil Procedure.

Organic Act 1/2002 of 22 March on Associations.

Royal Decree 1/2007 of 16 November by which it is approved the consolidated text of the General Law for the Defense of Consumers and Users and other complementary laws.

Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

Act 3/1991 of 10 January on Unfair Competition .

Act 7/1998 of 13 April on General Terms and Conditions.

Act 15/2007 of 3 July on Antitrust.

B. Studies

18th Annual National Institute on Class Actions presented by the American Bar Association, Section of Litigation and Center for Professional Development (2014).

A practitioner's guide to class actions, Marcy Hogan Greer, American Bar Association, 2010.

All alone in arbitration: AT&T Mobility v. Concepcion and the substantive impact of class action waivers, Blechschmidt F., University of Pennsylvania Law Review.

An Introduction to Class Action Procedure in the United States, Janet Cooper Alexander, Presented Conference: Debates over Group Litigation in Comparative Perspective, Geneva, Switzerland, July 21-22, 2000.

Class Actions and Other Multi-Party Litigations on a Nutshell, 4th ed., Prof. Robert Klonoff (West Nutshell Series, October 3, 2012).

Class Actions Under Rule 23 and Collective Actions Under the Fair Labor Standards Act: Preventing the Conflation of Two Distinct Tools to Enforce the Wage Laws, William C. Jhaveri-Weeks & Austin Webbert , Georgetown Journal on Poverty Law and Policy Volume XXIII, Number 2,Winter 2016, available at http://gbdhlegal.com/wp-content/uploads/article/Georgetown-Journal-Article-Rule-23-v-FLSA.pdf

Class Actions: Overview, Practical Law Practice Note Overview 2-529-7368 (2016).

Class/collective actions in Spain: overview by Antonio Morales, Rosa Espín and Jaime Zarzalejos, Latham & Watkins, 2015.

Federal Arbitration Act--Directv, Inc. v. Imburgia, Federal Statutes and Regulations, Leading Case, The Supreme Court 2015 Term, November, 2016, Harvard Law Review, 130 Harv. L. Rev. 457.

Jury certification of federal securities fraud class actions, Thomas Kayes, Northwestern University Law Review Vol. 107, No. 4.

La Directiva de daños y su transposición en España, Helmut Brokelmann, Revista General de Derecho Europeo 37 (2015).

Las acciones de clase ("class action") en la Ley de Enjuiciamiento Civil, A. Ferreres Comella, Actualidad Jurídica Uría y Menéndez, 11-2005.

Las acciones de clase en el derecho español, J.J. Martín López, InDret, 2001.

Manual for complex litigation, fourth. Federal Judicial Center (2004). Available at https://public.resource.org/scribd/8763868.pdf.

McLaughlin on Class Actions, treatise available in Westlaw.

Newberg on Class Actions, treatise available in Westlaw.

Rules Advisory Committee's Note to Amended Rule 23, 39 F.R.D. 69, 100 (1966).

Securities Regulations: cases and materials, James D. Cox, Robert W. Hillman & Donald C. Langevoort, 7th edition, Wolters Kluwer.

Spain in World Class Actions: A Guide to Group and Representative Actions around the Globe, Malaga Francisco, Edited by Paul G. Karlsgodt, Oxford University Press.

The Case for Pre-Dispute Arbitration Agreements 12 (2004), National Arbitration Forum, available at www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2004EmpiricalStudies.pdf.

The Decline of Class Actions, Robert H. Klonoff, Washington University Law Review, Volume 90, 2013.

The due process right to opt out of class actions, Steven T.0. Cottreau, New York Law Review.

The impact of the Class Action Fairness Act of 2005 on the Federal Courts, Emery G Lee Iii & Thomas E. Willging, Fourth interim report 3-4 (Federal Judicial Center, 2008), available at http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf.

Wholesale Justice: Constitutional Democracy and the Problem of the Class Action Lawsuit, Prof. Martin H. Redish (Standford University Press, 2009).