



How to know a potential class action when you see one

Some class actions are obvious, but others require a trained eye. Here's a primer for your first class case

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Recently there have been some major man-made disasters occurring around the country, with one right in our back yard. After worries of whether people were safe and sheltered, the next thought to cross one's mind is usually "shouldn't there be a class action?" The idea being that since there are all these people who have been harmed by a raging fire caused by a gas company's supply-line, the issue must be ripe for class determination. However, as we will see, it takes more than solely mass harm for a case to be appropriate for class treatment. By using a touch of class action history, we will provide some shortcuts to more easily identify when to use the class action.

Background of the class action

The first point we can use in identifying a class action is the reason the class action came into being. In America it was originally an interpretation of the "Bill of Peace," a common law concept of group litigation used in England from medieval times until the nineteenth century. (Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (RAND Corporation 2000) p. 10.) In this process, groups of plaintiffs would be represented by a smaller group to remedy communal issues such as merchants manipulating the marketplace, or church officials disturbing religious peace. (*Ibid.*)

These types of legal issues may sound familiar, because they are not that different from modern legal issues

affecting plaintiffs today. A majority of class actions that are certified are based on merchants (businesses) manipulating the market (harming their customers). (Administrative Office of the Courts, Office of Court Research, *Second Interim Report from the Study of California Class Action Litigation* at p. 14 (Feb. 2010) available at <http://www.courtinfo.ca.gov/reference/documents/classaction-certification.pdf>.) In the same way that a merchant controlling the price of a commodity coming in and out of the market in a small village harms everyone in the village similarly, when a bank has an unfair practice of manipulating withdrawals to maximize overdraft fees, it has the same impact over a large swath of the community. See, e.g., *Gutierrez v. Wells Fargo Bank, N.A.*, ___ F. Supp. 2d ___ [2010 WL 3155934] (N.D. Cal.



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2010). It is more difficult to draw a parallel to a class action based on a disturbance of the religious peace, but it is not difficult to compare it to a gross polluter who is destroying the environment for a community. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S.Ct. 2605 (2008) (certifying class of fisherman based on economic losses to stock of fish and diminishment of fish prices).

Therefore, consumer actions, civil rights actions, labor actions, and environmental actions are the most common. (Hensler, et al., *supra*, at p. 17.) It is these varied uses that have shaped the policies behind class actions, which are best described in the comments accompanying the creation of the present day Rule 23. (See *Amendments to Rules of Civil Procedure* (1966) 39 F.R.D. 69, 102-103.)

The second point we can use to identify a class action are the following purposes expounded by the authors of the federal class action rule. First, the rule avoids conflicting or varying adjudications against a person or entity that had common duties to numerous persons. (*Id.* at 100.) Second, it avoids individual judgments that would technically bind a class without the class being represented in the action, as in a limited fund or injunctive relief. (*Id.* at 100-102.) Third, it grants declaratory relief to a class whose members are incapable of specific enumeration, as in civil rights violations. (*Id.* at 102.) Finally, it can be used to adjudicate actions where questions common to a class predominate over questions affecting individuals, and the class action is a superior method to try the case. (*Id.* at 103.) For example, a violation of a statute or law that uniformly applies to a group of people. This final explanation of the rule is clarified by providing the example that a court may choose to maintain a class because the amount at stake for individuals may be small enough that separate suits would be impractical.

A brief, easy to remember, civil rights hypothetical helps to illustrate a situation that would satisfy all the purposes of the rule. A fictional municipality had both a policy to strip-search people arrested for drug or weapons charges, and a policy to strip-search those people arrested for drunk driving. However, according to the United States Supreme Court, case law confirmed that a strip-search is only warranted for specific drug and weapons arrests. This means that every person strip-searched for drunk driving was a potential violation of United States law. In fact, it would be the same violation for each person. Since there are identical violations for each potential class member, ruling for all of them would avoid conflicting adjudications, avoid binding the class without having representation, grant declaratory relief to the entire class, and would be a superior method to try the municipality once.

Since the class action is a strong tool against injustice, it is worthwhile to know how best to employ it. However, it must be noted that class actions are complex, difficult, and expensive actions to litigate. It is for this reason that one should be sure of the strength of the class allegations, as well as work with attorneys knowledgeable in this area of law.

When to use the class action

The prerequisites required for a class action under Rule 23 are numerosity, typicality, common questions, and a named plaintiff that adequately represents the position of the class. Further, a class must meet the maintenance requirements of Rule 23, which are equitable balancing factors on which a judge must base a decision to certify. (See Fed. Rules Civ. Proc., rule 23(b), 28 U.S.C.) These factors seem to be present at all times, begging the question: when should a class action be filed? We will

analyze this question through the lens of two hypothetical situations.

We will start with a fact pattern which is taken from *Ticconi v. Blue Shield of California Life & Health Insurance Company* (2008) 160 Cal.App.4th 528, a suit brought under the unlawful prong of Business and Professions Code section 17200, *et seq.* for violation of Insurance Code sections 10113 & 10381.5.

A potential client comes to your door with a copy of an application for health insurance and a copy of the actual policy. The potential client explains that upon her filing claims with the insurance company, the company rescinded her policy, resulting in her personal payment of \$1250 in medical bills that would have been covered by the policy. She then shows you a letter she received from the company that stated her policy was rescinded due to misrepresentations she had made on the application. Further, after denying that misrepresentations were made, the potential client points out that the application is not referred to in the policy or a part of the actual policy. After your meeting, you agree to represent the client. However, there is one thing that you may have missed. Since the potential client's policy looked like a standard form, there may be similar problems faced by a group of people who have received the same policy.

After the potential client leaves, you do some quick research to see if the company is violating the Insurance Code. What you find is that Insurance Code section 10831.5 governs that an insurer cannot bind an insured to anything said on the application unless it is part of the policy when it was issued. Further, Insurance Code section 10113 states that an application must be specifically attached or endorsed to the policy in order to become part of the policy. After realizing that a Business and Professions section 17200 claim can



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be brought for the company's violation of the insurance code, you do a cursory search online to find that there is a community of people who have had their policies rescinded for alleged misrepresentations by the insureds. Now it becomes clear that a class action is needed, because every potential class member has been wronged by the same violation of the insurance code as explained below.

First, the prerequisites of the class action must be satisfied. Here, since you found a Web site of people complaining about the rescission of their policies, it is likely that with some discovery you will find many people who have had the same issue as your client, thus satisfying the numerosity prerequisite of a class action. Second, since the potential client had a standard policy and application, it is most likely that the potential client's injury is typical of the group of people who owned the same policy and whose policies were rescinded. (See *Ticconi v. Blue Shield*, *supra*, 160 Cal.App.4th at p. 547) Third, since the policies were standard forms and the group of people had their policies rescinded for alleged misrepresentation, the violation of the insurance code is a common question of law among the group, satisfying the common question prerequisite. (See *id.* at p. 543.) Finally, since the potential client does not have any complicating factors that would force unfair or inadequate protection of the class's interests, the final prerequisite for a class action is met. (See *id.* at p. 548.)

With all of the prerequisites for a class met, it is a good idea to argue that the class can be maintained under each subsection of rule 23(b). However, this will most likely fall under 23(b)(3), because common questions of law and fact predominate over individual issues. Rule 23(b)(3) classes require predominance and superiority of a class action over individual actions. The Supreme Court and many

commentators note that the predominance and common question factors go hand in hand; in other words, if one is satisfied, so is the other. Further, the only difference between class members would be in damages, but this will not hamper a predominance finding as discussed *infra*. Next, superiority of the class action will likely be found here because a ruling on the policy will affect everyone else who owned the same policy. Additionally, if multiple class members were to litigate this issue separately, there would be a waste of judicial resources in the repetitive trying of the same issue. Thus, superiority is likely to be found. Now, this may seem like an easy burden to meet, but let us look at another hypothetical that could look like it would satisfy the class action requirements but is usually found not to be by the courts.

A new potential client comes in your door, having been injured by a gas line explosion near the downtown area of a small municipality that destroyed 13 homes, damaged many others and closed down two businesses. The potential client tells you that some of his neighbors lost their houses, some lost pets, others lost their lives, and several businesses were burned. The potential client then shows you his left hand, which is badly burned and immobile. He then tells you that he wants to sue the private gas company for \$2 million for the loss of the use of his hand. At first blush, this potential case may look like a good candidate for class-action treatment. However, there are material differences between this potential case and the previous one, as personal injury claims present large challenges that are not usually appropriate for class treatment.

While some of the prerequisites of a class action may be met, we would not encourage the filing of a class action based on personal-injury claims (other attorneys may disagree). Below, we will

illustrate that there are difficulties with satisfying the requirements of class certification. One could argue that there are common questions of fact between potential class members because everyone involved was affected by the explosion. However, each person may have had a different set of facts lead to his or her injury. For example, each person or person's property would have been at different distances from the explosion, causing different types of injury at each distance. If one could not argue for common questions of fact, one could argue that there would be common questions of law because the group would be bringing negligence claims against the gas company. However, since there is not a common violation of a law, there will be issues with separate causes of action for each potential class member because one neighbor would claim a personal injury claim, while another pursued an interference with business claim, and yet another would bring a nuisance or trespass claim. Thus, it is doubtful that a court would find common issues of law or fact within the potential class.

Next, we would have to analyze whether the potential client's claims are typical to the entire group. This argument is even weaker than the commonality because there are a wide variety of different causes of action or injuries that could exist for each neighbor, such as emotional distress, property claims, and even wrongful death, all of which would direct a court to find against typicality. (See *General Telephone Co. of Southwest v. Falcon* (1982) 457 U.S. 147, 158 n.13 [noting that commonality and typicality will be found when the "named plaintiff's claim and the class claims are so interrelated that the interests of class members will be fairly and adequately protected in their absence".])

Without findings of typicality and commonality, it is unlikely that a court would find the potential client be an



adequate representative of the class to fairly and adequately protect its interests. (See *General Telephone v. Falcon*, *supra*, 457 U.S. at 158 n.13 [“Those requirements tend to merge with the adequacy-of-representation requirement”].) Further, the potential client’s demands are more than enough to show that he would not fairly represent others because a desire for such a high recovery would undermine the recovery of those who lost a life and overshadow those who were only economically damaged.

If this class were to meet the prerequisites for a class action, it would most likely fail to meet the rule 23(b) requirements to maintain that class. First, the adjudication of one personal injury claim would not preclude another class member from filing a separate claim for his or her injuries. It is possible that a ruling that the gas company was not negligent could preclude all claims from moving forward. However, one must take into consideration the claims for each neighbor, as the Rules Advisory Committee noted, “a ‘mass accident’ resulting in injuries to numerous persons is *ordinarily not appropriate* for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways.” (*Amendments to Rules of Civil Procedure*, *supra*, 39 F.R.D. at 108 [emphasis added].) A neighbor recovering damages for a broken leg would not preclude another from recovering for the loss of a building. (See *Rice v. Crow* (2000) Cal.App.4th 725, 735 [explaining that the doctrines of claim and issue preclusion].) Second, personal injury claims do not usually request injunctive relief. (See *In re N. Dist. of California, Dalkon Shield IUD Products*

Litigation (1982) 693 F.2d 847, 852 [abrogated on separate grounds] [noting the inherent obstacles to personal injury class actions].) Finally, it would be difficult to argue that the questions of law or fact common to the class predominate over questions affecting individual members. Here, it is the question of an individual’s injury and how it was caused that would predominate in such an accident. (See *id.* at 852-53 [citing multiple accident cases where certification of a class was denied on the grounds that different types of claims would be brought by each plaintiff].) Since the damages, claims and recovery for each neighbor are so different, one cannot say that the common questions predominate. Thus, this may not be a good hypothetical situation in which to attempt a class action.

As we have shown in the examples above, it is much easier to certify a class of plaintiffs that have been injured financially, either through uniform misrepresentation or an unfair policy. As the drafters of rule 23 and the California Supreme Court have noted, mass-tort actions based in personal injury are not often appropriate for certification because the major elements of a personal injury claim (liability, causation, and damages) may vary widely from claim to claim. (*Jolly v. Eli Lilly & Co.* (1998) 44 Cal.3d 1103, 1123.) Further, the addition of personal injury claims to an economic class may bar certification because courts have found that it is not economical for plaintiffs injured both financially and personally to file a separate action for their personal injury after being compensated as a class member for their financial injury. (*Akkerman v. Mecta Corp., Inc.* (2007) 152 Cal.App.4th 1094, 1103-1104.)

Conclusion

In conclusion, one should keep the class action in mind when approaching consumer fraud actions, employment actions, civil rights actions, and other actions where there is a uniform violation of the law against a group of people. It is an extremely powerful tool to help not only your original client, but society as a whole. Without sufficient government regulation, plaintiffs’ attorneys are the last line of defense with which corporations must contend and it is important that we maintain the public’s right to sue for corporate wrongs.

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Endnotes

¹ (*Id.* at 104.) The committee also created a derivative action that can be used for corporate executives to satisfy their duties to the corporation. (*Amendments to Rules of Civil Procedure, supra*, 39 F.R.D. at 108.) Although this article focuses on the federal class action, the states also began recognizing class actions at the same time, and a majority have adopted Rule 23 as their class action statute. (Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*

(2008) 156 U. Pa. L. Rev. 1439, Appx. Tbl. 1.) Indeed, California adopted its own class action statute in 1872 and has been cited as part of the basis for Rule 23. (*Ibid.*)

² (Fed. Rules Civ. Proc., rule 23(a), 28 U.S.C.; Cal. Code Civ. Proc. § 382; *Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 654 n.5.)

³ (See *Ticconi, supra*, 160 Cal. App. 4th at p. 536 [noting that 207 policies were rescinded for alleged misrepresentations]; see also *In re Syncor ERISA Litigation* (C.D. Cal. 2005) 227 F.R.D. 338, 343-44. [finding 39 class members to meet the numerosity requirement].)

⁴ (Grande, *Class Actions in State Courts – A Tool for the Trial Advocate* (2000) 23 Am. J. Trial Advoc. 491, 506.)

⁵ It should be noted that class certification should not be denied solely if damages are varied between class members. (*Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 732; *Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 706, 713, 715-716; *Employment Development Dept. v. Superior Court* (1981) 30 Cal.3d 256, 266; *Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 397.)

