

Class Actions

Contributing editors

Joel S Feldman and Joshua E Anderson



2018

GETTING THE
DEAL THROUGH

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Class Actions 2018

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Mexico

Adrián Magallanes Pérez

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1 Outline the organisation of your court system as it relates to collective actions. In which courts may class actions be brought?

According to the Mexican Federal Code of Civil Procedure (hereinafter, the Code of Civil Procedure) and the Mexican Constitution, the federal courts are charged with the defence and protection of collective interests. Specifically, federal district courts are competent to handle the first instance, while the second instance is processed by single-judge circuit courts.

2 How common are class actions in your jurisdiction? What has been the recent attitude of lawmakers and the judiciary to class actions?

Regardless of being incorporated to the Code of Civil Procedure since 2011, class actions are still not that common. Of the subject matters on which a class action can be exercised, consumer and environmental claims tend to be the most commonly used. For example, according to the Federal Consumer Protection Agency, the only government agency with legal standing for filing collective actions on behalf of groups of consumers, only six class actions were initiated by it in 2016. This is without taking into consideration the class actions that private individuals could have started regarding this subject matter.

Due to the limited number of cases, there has not been a lot of judicial criteria developed regarding class actions. Ever since class actions were properly regulated in the Federal Code of Civil Procedures back in August 2011, only eighteen theses (criteria issued by the federal judiciary) have been issued by the Mexican judiciary; most of them revolving around the requirements provided for by law in order to have legal standing.

At the moment, it is not possible to determine or give an opinion with regard to the attitude of lawmakers and the judiciary regarding class actions. This is because there have not been many decisions in this regard. For example, as of today, only one class action dispute has been decided with regard to its merits (see 'Update and trends').

3 What is the legal basis for class actions? Is it derived from statute or case law?

The rules that govern class actions, as well as the list of those with legal standing for submitting them, can be found in the Fifth Book of the Code of Civil Procedure. Nonetheless, those with legal standing for submitting class actions can also be found in the applicable law of the subject matter on which the class actions will be based. For example, the Federal Consumer Protection Law provides for the submission of class actions related to consumer products, but at the same time refers to the Code of Civil Procedure regarding the procedure in itself. This is because before being defined in the Code of Civil Procedure, class actions could only be found in the specific bodies of law of each subject matter.

4 What types of claims may be filed as class actions?

Pursuant to the Code of Civil Procedure, only class actions concerning the protection of collective interests or rights of the following subject matters can be filed: public and private relationships of consumer products or of provision of services; and environmental matters.

In this regard, matters related to antitrust issues, financial services or consumer redress and product liability are all considered included within the scope of the consumer relationships established under Mexican law.

Nonetheless, in order to file a collective action alleging damages caused to consumers due to monopolistic practices or unlawful acquisitions, there must first be a final ruling issued by the Federal Antitrust Commission declaring the existence of said practice or acquisition. Due to this additional requirement, collective actions related to antitrust law are fairly uncommon.

5 What relief may be sought in class proceedings?

These can consist of monetary damages, the restitution of status prior to the damage or – in case this is not possible – the substitute compliance according to the harm caused to the rights and interests, and in specific performance.

The remedies available depend on the type of class action that is to be filed. There are three types of collective actions:

- Diffuse actions: they are not divisible claims brought to protect diffuse rights or interests belonging to an undetermined community. Their purpose is to obtain from the defendant the repair of the damage caused. Such repair can consist of the restitution of status prior to the damage or, in case this is not possible, the substitute compliance according to the harm caused to the rights and interests of the community. The existence of a legal relationship between the community and the defendant is not necessary.
- Collective actions in the strict sense: they are not divisible claims brought to protect common rights or interests belonging to a determined or determinable community or group based on common circumstances. Their purpose is to obtain from the respondent the remedy of the damage (usually through the performance or abstention of certain activities), as well as the compensation for damages for each member of the group. It is required for the members of the group to have a legal relationship with the respondent; the relationship must be established in statutory law.
- Individual homogenous actions: they are divisible claims brought to protect individual rights or interests that have a collective impact, belonging to individuals in common circumstances. Their purpose is to obtain from the defendant the specific performance of a contract or its termination, along with the applicable legal effects and consequences.

6 Is there a process for consolidating multiple class action filings?

Under the Code of Civil Procedure, the judge has the obligation of consolidating disputes that were filed simultaneously on the basis of the same facts. While the Code of Civil Procedure does not provide for a definition of when a class action is considered to have been filed simultaneously with regard to another class action, it does list the general requirements applicable for the accumulation of every type of civil litigation. In this regard, different proceedings must be consolidated when the decision to be made in each proceeding requires the confirmation, constitution or modification of legal relationships arising, partially or in their entirety, from the same facts and when they deal with claims between the parties that are inextricably connected between

each other, making it necessary for these disputes to be solved by a single decision, in order to avoid contradictory determinations.

When the proceedings at hand are being handled in the same court, the judge can consolidate them *ex officio*. However, when this is not the case, the defendant must request the consolidation.

Regarding class actions, there is an express prohibition in the Code of Civil Procedure stating that individual proceedings and collective proceedings cannot be consolidated under any circumstance. In addition, only diffuse class actions and a class action in the strict sense may be consolidated.

In the case of the existence of a collective procedure concerning the same cause and grounds for the claim made in an individual procedure, the defendant in both cases must inform both judges. Once informed, the judge in the individual procedure must inform the plaintiff of the existence of the collective procedure, in order for the plaintiff to decide if he or she wants to pursue the claim individually, or adhere to the collective claim. If the latter option is chosen, the plaintiff must withdraw from the individual procedure.

The Code of Civil Procedure allows those individuals that tried to exercise individual homogeneous actions to make their claims in an individual procedure, in case the class action is declared inadmissible by the judge.

At a federal level, the Mexican judiciary has at its disposal the Comprehensive File Tracking System (SISE), which allows courts to find out about other types of actions or procedures that might be correlated to a case that is being currently handled. Nevertheless, if the existence of this other procedure is not being handled within the same court, the defendant must be the one who brings this situation to the attention of the competent judges. This system is available to the public in a more limited manner, providing that blacking out the names of the parties and other specific information is carried out.

7 How is a class action initiated?

In order to initiate a collective action, a formal claim must be filed before a federal district court. The claim must meet certain formal requirements, such as: stating the name of the representative and its standing; the list of members of the group or community that will act as plaintiff; the determination of the right considered affected; the type of action filed; the reliefs sought; the facts on which the claim is based; and its legal basis. Those requirements vary depending on the type of action filed.

The Code of Civil Procedure does not provide for the requirement of giving notice with opportunity to cure the alleged damage or violation of a right to the future respondent, prior to filing the complaint.

8 What are the standing requirements for a class action?

According to the Code of Civil Procedure, only the following individuals or entities have right to exercise a class action (legal standing):

- a common representative acting on behalf of a class composed of at least 30 members;
- non-profit associations duly incorporated at least a year prior to the submission of the claim, whose stated purpose includes the promotion or defence of the interests involved in the action, and properly registered before the Federal Judiciary Council;
- the Attorney General's Office; and
- the Federal Consumer Protection Agency, the National Commission for the Protection and Defence of Financial Service Users, the Federal Attorney's Office for Environmental Protection and the Federal Antitrust Commission. These agencies can only bring actions in relation to consumer's rights, financial service user's rights, environment protection and antitrust protection, respectively.

Additionally, the Code of Civil Procedure lists a number of specific requirements of standing to allege cause that must be fulfilled by the plaintiff and which he or she must prove when filing the claim. These are:

- there must be a harm or damage suffered by consumers, by users of a public or private service, by the environment, or by consumers caused by monopolistic practices or unlawful acquisitions that were previously confirmed by the Federal Antitrust Commission;
- the dispute must revolve around facts or law issues common among the relevant community;

- the community that files the claim must have at least 30 members when dealing with collective actions in the strict sense or individual homogeneous actions. Additionally, recent judicial criteria have determined that this requirement will also apply regarding diffuse class actions, regardless of whether this requirement is not expressly mentioned in the Code of Civil Procedure. However, the judiciary has also found an exception for this rule when dealing with environmental class actions, pursuant to a specific provision (article 28) of the Federal Environmental Liability Law that states that any private individual that forms part of a community that suffers an environmental harm is entitled to claim damages before the federal civil courts. This law does not specifically say that this claim can be filed through a class action. Environmental class actions are not regulated by this statute, but by a different law called the General Law of Ecological Balance and Environmental Protection;
- there must be a clear relationship between the claim and the damage allegedly suffered;
- the must not be an action that was previously resolved on the basis of the same claims, as these proceedings are barred by *res judicata*; and
- the statute of limitations must not have elapsed.

9 Do members of a class have to opt in or opt out of the action? Are class members notified that an action has been commenced on their behalf and, if so, how?

The Mexican legal system adopted the opt-in mechanism, whereby the intent of a member of a class or community to join the class action must be expressly declared. Said member can join a class action during any stage of the proceedings or up to 18 months after the judgment rendered is considered final. In order to join the class, members of the group or community have to submit an express communication, through any means, to the common representative or legal representative of the plaintiffs, who will be obliged to file the request to the judge. The judge will then analyse the request and issue the corresponding ruling.

In order to make sure that all members of the community or group are informed that a class action has been admitted, the judge can order its notification to said members through those means he or she deems appropriate, taking into consideration the size, location and other relevant characteristics of the group or community. This notice has to be economic, efficient and extensive, and must take into consideration the circumstances of each case.

In case a person requests to be excluded from the class action in any stage of the proceedings, the Code of Civil Procedure states that this must be understood as an individual waiver of his or her right to make the claim under a class action. Therefore, said person will not be able to participate in any other collective proceeding related to the same facts and claims.

The Mexican Congress expressly declined to enact an opt-out class action mechanism. When the Federal Code of Civil Procedure was being amended to regulate class actions in Mexico, a proposed bill and congressional declaration of purpose were submitted to the Senate that included an opt-out mechanism for class formation purposes. This bill provided that in order for the judgment rendered in a class action procedure not to have effects on a member of the community or group that filed a class action, said member had to expressly request exclusion regarding said particular collective proceeding. The request had to be made in writing to the judge and at any stage of the proceedings up until before the issuance of the judgment.

The reasoning behind this bill was that an opt-out mechanism would be able to give full force and effect to class actions, because otherwise - by adopting the opt-in mechanism - the proceeding could resemble a procedural figure known in Mexico as active joint litigation, thereby obstructing the mandate of the Constitutional reform of July 2010 and June 2011.

However, once the Senate studied this bill, it determined not to adopt the opt-out mechanism and to implement an opt-in mechanism instead.

10 What are the requirements for a case to be filed as a class action?

The claimant party must comply with certain requirements that are reviewed by the federal judge during a period known as 'certification'

(see question 11). These consist of the requirements of standing to allege cause previously mentioned in question 8, and in not falling in of the causes for dismissal listed in the Code of Civil Procedure. The latter consists of the following:

- that, when dealing with class actions in a strict sense and individual homogenous class actions, the members of the plaintiff class have not granted their consent regarding the filing of the claim;
- that the acts against which the claim is filed derive from administrative proceedings followed in the form of a trial or judicial proceedings;
- that the representation of the plaintiff does not meet the requirements established by law;
- that the collectivity in class actions in a strict sense and individual homogenous class actions cannot be determined or are not determinable with regard to the harm suffered by its members and the common factual or legal circumstances of said harm;
- that the class action is not the ideal procedure for making the claim;
- that there is already another class action regarding the same claim, which would lead to a consolidation on the terms previously explained in question 6; and
- that the civil association of individuals that pretends to file the claim does not fulfil the requirements previously mentioned in question 8.

The existence of one of these impediments can lead to the dismissal of the class action regardless of the current stage of the procedure. Furthermore, the judge can determine this dismissal *ex officio*.

11 How does a court determine whether the case qualifies for a collective or class action?

Once a class action has been filed, the judge will give notice to the defendant and provide him or her with the opportunity to submit commentaries, within the following five business days, on whether the requirements of standing to allege cause (see question 8) have been fulfilled by the plaintiffs or not. After that period, the judge has 10 days to certify that the formal requirements of the claim are met, as well as to analyse the right of action or standing requirements. This procedural stage is known as the certification of the class action.

If the judge considers that one of the requirements is not met, he or she must dismiss the claim. In this case, the members of the group retain their rights to individually file an ordinary action.

On the other hand, if the judge considers that all of the requirements have been fulfilled, the class action must be admitted. Regardless of this, the Code of Civil Procedure states that this determination issued during the certification can be modified at any stage of the procedure, if there are justified reasons for it. The law is not clear if this modification can be made *ex officio*.

12 How does discovery work in class actions?

As a general rule, the production of documents is considerably more limited in Mexico than in other countries, such as the United States. Instead of requesting all documents concerning a specific moment and subject matter, the Mexican legal system only allows for the production of specific documents; for example, 'the public offer made by the defendant on 6 March 2016, concerning the sale of the product that is now the subject matter of the present dispute'.

In this regard, the parties can file a pretrial action known as 'preparatory means to trial', where they can request a judge to order the submission of specific documents that they deem necessary for preparing their claim. Mexican law does not distinguish between using the document sought for proving that the case can proceed as a class action and using the document sought for the merits of the dispute (as may occur in proceedings in the US).

Furthermore, in the specific case of class action procedures, the judge has the power to request from the parties, or even third parties, any object, document or information he or she deems relevant, as long as they have a direct connection with the disputed facts. This means that the judge can request *ex officio* any document in possession of a party, in order to get a better understanding of the facts of the case.

13 Describe the process and requirements for approval of a class-action settlement.

Once the judge has certified the claim and admitted it as a class action, he or she must determine the date in which a conciliation hearing is to take place. In this hearing, the judge acts as a conciliator and proposes possible solutions to the dispute, encouraging to the parties to settle it. In addition, the judge can make use of expert opinions he or she deems appropriate.

The parties can agree to settle the dispute, whether partially or whole, at any time during the proceedings, up until the judgment is considered *res judicata*. The Code of Civil Procedure does not provide for a minimum of members of the community that have to approve the settlement negotiated with the defendant.

The judge has the duty to verify that the settlement reached between the parties is in accordance with the law and that it effectively protects the interest of the community. In this regard, the opinion of the Federal Consumer Protection Agency, the National Commission for the Protection and Defence of Financial Service Users, the Federal Attorney's Office for Environmental Protection or the Federal Antitrust Commission (depending on the subject matter of the dispute) and the members of the community, regarding the settlement, shall be heard. After said opinions have been heard, the judge will be able to approve the settlement, putting an end to the procedure and the dispute. This approval shall be considered *res judicata*.

14 May class members object to a settlement? How?

Besides the opportunity of being heard of the members of the community, prior to the approval of the settlement by the judge, there is no other mechanism for said members to object to said agreement. In this regard, a problematic situation could arise where the legal representative of the community in the proceedings settles a dispute with the defendant under terms that are not satisfactory for some of the members of the community.

15 What is the preclusive effect of a final judgment in a class action?

Once a judgment or settlement is considered final or *res judicata*: it will no longer be possible to settle the dispute; and new plaintiffs that did not form part of the community in the previous class action will be precluded from filing a new class action regarding the same facts and claims; however, this shall not constitute an impediment for them to make their claim in an individual manner.

As mentioned in question 9, members of the relevant community that still have not joined the class action will be able to do so even after the judgment or settlement becomes *res judicata*, but only have 18 months to do so. Nevertheless, they would still need to prove before the judge the damage they suffered due to the acts of the defendant.

16 What type of appellate review is available with respect to class action decisions?

Prior to the issuance of the final judgment, only the decision regarding the admission or dismissal of the claim can be appealed. However, other rulings that may cause irreparable damage and that could constitute violations to fundamental rights may be challenged through an indirect *amparo* action, which is a constitutional action alleging the violation of rights committed by the governmental authority (including courts of law) and which can be filed before federal district courts.

The final judgment issued in a collective action can also be challenged with an appeal. This appeal procedure is decided by a single-judge circuit court. Parties can file a direct *amparo* action before a collegiate circuit court against the judgment issued in the appeal.

The judgments rendered in this direct *amparo* can also be reviewed by the Supreme Court of Justice; however, this is reserved only to extraordinary cases and limited to constitutional issues.

17 What role do regulators play in connection with class actions?

There has been no regulatory determinations regarding class actions, ever since they were included in the Code of Civil Procedure. Their implementation has been done so far only by the legislative power and the federal judiciary.

Update and trends

On October 2015, an initiative for including class actions in administrative proceedings was dismissed. If approved, plaintiffs, acting through an appointed common legal representatives, would have been able to challenge factual and law-related determinations of government authorities that affect the legal interests of two or more persons.

Current judicial criteria, aside from those that were previously explained, have stated the following:

- In April 2016, a collegiate circuit court determined that, while the Code of Civil Procedure states that before granting interim measures in a class action procedure the judge has to request the expert opinion of the relevant government authority of the subject matter in dispute, regarding the possible impact of the interim measure requested, an interim measure granted provisionally during the beginning of the procedure can be upheld without the need to receiving said opinions. This is controversial in the sense that the Code of Civil Procedure does not provide for the possibility of even granting a provisional interim measure, different from the definitive one to be ordered after hearing the opinion of the expert governmental authorities.
- In July 2017, a collegiate circuit court determined that those procedural violations occurring during the conduction of a class action procedure that could constitute violations to fundamental rights may be challenged through an indirect *amparo* action; that is, even before a final judgment is rendered. This is different from what happens in normal civil procedures, where procedural violations can only be challenged after the final judgment has been issued, through a direct *amparo* action. While the criteria does not state if this possibility is available to both plaintiffs and defendants, from the reasoning behind it, it can be understood that this is only available to the plaintiff community. Under said reasoning it is stated that as class actions seek to protect collective fundamental constitutional rights of a social nature, certain procedural violations can be considered of a substantive nature.

As for recent renowned cases, in May 2017 the First Court of the Mexican Supreme Court issued a ruling that, for the first time, put an end to a class action procedure by taking into consideration the merits of a dispute and not on the basis of procedural matters. In said case, a community filed an individual homogenous action against the commercial group in charge of providing public transportation services to the people of a city. The claim consisted of forcing the buses to install better security measures and to charge their fares fairly. Said claim was made having an accident as background, where some passengers sustained heavy injuries, allegedly due to the lack of security measures, in spite of the high fares that the passengers were paying.

During the appeal of the first instance judgment, a single-judge circuit court determined that the bus company should pay not only

compensation to the community for the poor service that was being provided to them, but that it should also comply with its service contract in accordance with the applicable transportation law of the city by complying with the security and hygiene measure therein. In addition, the single-judge court extended the reach of the first instance judgment, allowing all individuals that did not participate in the collective proceedings, but that suffered damages on the basis of common circumstances to those of the class action claim, to appear in court and to claim compensation for the damages they were able to prove. The court declared that this was not only allowed under the express provision of the Civil Code of Procedure, but that it was also in accordance with one of the objectives of class actions consisting in serving as a way to avoid possible future violations or damages.

After a direct *amparo* was filed against said decision, the First Chamber of the Supreme Court assumed jurisdiction over the dispute due to the importance and relevance of the case. In its decision, the Supreme Court confirmed the challenged judgment and the reasoning of the single-judge circuit court.

In addition, in July of 2017 a class action was filed by the Federal Consumer Protection Agency against a low-cost Mexican airline for alleged violations to rights of passengers. This class action is not only relevant due to amounts claimed by the plaintiff party, but also because of the fact that a recent reform to the Federal Aviation Law that came into force in October seeks to protect this type of right of passengers, as well as recognising additional rights, which directly affects the business models of low-cost carriers in Mexico. Said provisions are currently being disputed through *amparo* actions. If the case was to be decided in favour of the plaintiff community, a legal precedent could remain that leaves said carriers with no other option than complying with the provisions of the legal reform in such a harmful way that could lead to the extinction of low-cost carriers in Mexico.

A class action regarding the implementation of genetically modified corn in Mexico is also currently being conducted. In said proceedings, interim measures had been granted since 2013 that prohibit the cultivation and sale of the seeds of said transgenic in Mexico, under the argument that there is a tangible risk that its introduction to the environment could cause the extinction of several species of corn.

These days, news is circling the Mexican media encouraging the filing of class actions against the different real estate service providers that were in charge of building and giving maintenance to the buildings that fell during the recent earthquake in Mexico that occurred in September of 2017. The basis of said claim would consist of arguing that said buildings did not comply with the requirements that were implemented after the heavy damages suffered during the past earthquake of 1985. According to the media, the Federal Consumer Protection Agency has already started preparing these claims, encouraging possible claimants to approach them.

18 What role does arbitration play in class actions? Can arbitration clauses lawfully contain class-action waivers?

The legal statutes do not state whether arbitration is allowed regarding subject matters that can be claimed through class actions. However, a recent judicial criteria of the First Chamber of the Mexican Supreme Court (2015) stated that arbitral agreements regarding disputes that can be claimed through class actions can be disregarded, in favour of the collective procedure. The reasoning behind this is that class actions seek to protect constitutional rights that are non-renounceable, and not mere commercial rights.

While this criteria is not yet binding to other courts of the federal system, it does serve as an important guideline for them, as it was determined by the Supreme Court itself.

19 What are the rules regarding contingency fee agreements for plaintiffs' lawyers in a class action?

According to the Code of Civil Procedure, each party shall assume their own legal costs that derive from the class action, including the legal fees of the representatives.

In this regard, these fees have a cap determined by the amount of the dispute:

- a cap of 20 per cent when the liquidated amount of the dispute does not exceed 200,000 times the minimum wage of Mexico City (currently around 160.08 million Mexican pesos);
- when the liquidated amount of the dispute exceeds 200,000 times but is less than 2 million times the minimum wage of Mexico City

(as above), the cap shall be of 20 per cent up until the first 200 times of the minimum wage and up to 10 per cent regarding the surplus; and

- if the liquidated amount of the dispute exceeds 2 million times the minimum wage of Mexico City, the cap shall be of 11 per cent regarding the first 2 million and of 3 per cent regarding the surplus.

If the parties settle the dispute before the final ruling, the legal costs must be contemplated as a part of the negotiations of the settlement. The legal fees shall still be subject to the cap previously mentioned even in this scenario.

20 What are the rules regarding a losing party's obligation to pay the prevailing party's attorneys' fees and litigation costs in a class action?

Each party shall assume their own legal costs that derive from the class action, including the legal fees of the representatives.

21 Is third-party funding of class actions permitted?

Mexican law does not prohibit nor expressly allow third-party funding. The judicial criteria is also currently silent on the matter.

Institutional third-party funding is still uncommon in Mexico and we do not know of a collective or class action being funded by the companies in this business.

22 Can plaintiffs sell their claim to another party?

Mexican law does not prohibit nor expressly allow the sale of claims to a third party. The judicial criteria is also currently silent on the matter.

23 If distribution of compensation to class members is problematic, what happens to the award?

The terms of how the amounts to be paid to the members of the community will be distributed shall be determined by the judge within the final judgment. This distribution shall never be through the common legal representative, but directly to the members of the community instead.

The Code of Civil Procedure does not provide a solution in case the distribution of the compensation turns out to be too problematic. Nor does it state that the amount that does not end up being distributed shall be returned to the defendant or forfeited to a charity group or to a specific consumer group.

However, the Code of Civil Procedure has established a mechanism when dealing with diffuse class actions with aims to avoid any possible problem regarding the costs incurred during the conduction of the proceedings. A fund will be created by the Federal Judiciary Council, the administrative section of the Mexican judiciary, using the resources emanating from the final judgment, different from the amounts destined to the compensation of the members of the class action. This fund shall be used exclusively for the payment of the costs that arise from the collective proceedings, the payment of the legal fees of the common legal representative of the plaintiff, the costs incurred by the notifications made to the members of the community (including the final judgment), and the preparation of those proofs that require it so. In addition, the Federal Judicial Council can also determine to use these resources for promoting investigations related to class actions and collective rights.

The Federal Judicial Council must disclose on a yearly basis the source, use and destination of said resources.



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