



Class actions and collective defendant legal situations

Fredie Didier Jr.

Professor of Civil Procedure at the Federal University of Bahia (UFBA), Brazil.

Member of the Brazilian and the Ibero-American Institutes of Procedural Law.

Practicing Lawyer. www.frediedidier.com.br

Summary: The purpose of this essay is to propose a concept of defendant class actions, based on the analysis of the contents of their object, comprised of the affirmation of the existence of a collective defendant legal situation, this being a category the dogmatic development of which is necessary.

Keywords: Collective jurisdictional protection. Plaintiff and defendant legal situations. Defendant class actions. Class actions.

1. Introductory note.

Defendant class actions are one of the least examined subjects in the studies on collective jurisdictional protection. Such studies habitually concentrate on the definition of collective *plaintiff* legal situations (diffuse rights, collective rights and homogenous individual rights).¹

This essay aims to contribute to the theoretical development of this question: the definition of the object of litigation of the defendant class action. Emphasis is therefore given to the investigation of which essential legal situations are the object of defendant class actions. Once the concept of the category of “*defendant legal situations*” has been developed, it will be

¹ As per the systematization provided for under Brazilian law (article 81, paragraph 1 of the Brazilian Consumer Protection Code).



easier to understand the purpose and the utility of defendant class actions, so that procedural legislation can be prepared to deal with this phenomenon.

2. Plaintiff class actions and collective plaintiff legal situations.

The plaintiff class action is a lawsuit through which the existence of a group right is affirmed (a collective plaintiff legal situation) and through which the certification, enforcement or protection of this right is sought.

Group rights are divided into: diffuse rights, collective rights and homogenous individual rights. There would be *essentially* collective rights/interests (diffuse and collective) and *accidentally* collective rights (homogenous individual rights).²

Diffuse rights are considered to be transindividual (metaindividual, supraindividual) rights, of an indivisible nature (they can only be considered as a whole), belonging to a collectivity comprised of indeterminate people (i.e., indeterminability of the subjects, there being no individuation) linked by factual circumstances. Thus, for example, diffuse rights are the right to environmental protection, the right to publicity that is not misleading, the right to the preservation of administrative morality etc.

Collective rights are transindividual rights, of an indivisible nature, that belong to a group, category or class of indeterminate, but determinable, people, linked to each other, or to the adversary party, by a standard legal relationship. This standard legal relationship can exist between the members of the “*affectio societatis*” group or through their links with the “adversary party”. In the first case we have, *e.g.*, lawyers who are members of the Law Society (or any professional association); whereas in the second case we have those who pay a given tax. The former are linked to the class organization, and constitute a “class of people” (lawyers); the latter are linked to the state body responsible for taxation, and constitute a “group of persons” (tax payers). It must be emphasised that the *standard legal relationship* must exist prior to the injury. The *standard legal relationship* is formed between the members of a given association, the shareholders of a company or lawyers, as members of a class, when united with each other

² MOREIRA, José Carlos Barbosa. “Tutela jurisdiccional dos interesses coletivos ou difusos”. *Temas de Direito Processual Civil*. São Paulo: Saraiva, 1984, 3ª série, p. 195-197.



(*affectio societatis*, a subjective element that unites them in search of common objectives); or, by the legal tie that links them to the adversary party, *e.g.*, those who pay the same tax, those who study at the same school, those who take out the same kind of insurance etc. In the case of misleading publicity, the “link” with the adversary party also occurs, but because of the injury and not because of a prior link, which makes it a diffuse right and not a collective right (as such).

Individual homogenous rights are those individual rights arising from a common origin,³ that is to say, the rights that a consequence of the injury itself or the threat of injury, in which the legal relation between the parties is *post factum* (injurious fact). It is not necessary, however, for the fact to occur in one single place or time in history, but rather that the fact gives rise to the homogeneity between the rights of the diverse people with individual points of claim. What these rights have in common is where they stem from, their genesis in the comissive or omissive conduct of the adversary party, issues of law or issues of fact⁴ that confer characteristics of homogeneity on them, thus revealing the prevalence of common issues and the superiority of collective protection. Individual homogenous rights are a legal fiction, “created by Brazilian statutory law with the sole and exclusive aim of enabling collective (molecular) protection of individual rights in a collective dimension (*en masse*). Without this express legal provision, the possibility of the collective defence of individual rights would be forbidden”.⁵ The fact of it being possible to determine the victims individually does not alter the possibility or the pertinence of the class action. The distinctive trait remains: the molecular treatment, in class actions, in relation to the fragmentation of protection (atomized treatment) in individual actions. The advantage of the unitary treatment of the points of claim together is evident, in order to obtain a generic preventive measure⁶.

It should be noted that a remarkable characteristic of collective rights in a broad sense is their ownership: they belong to a collectivity, to a group. They are rights that have collective holders⁷. It is

³. “A homogeneidade decorre da circunstância de serem os direitos individuais provenientes de uma origem comum. Isso possibilita, na prática, a defesa coletiva de direitos individuais, porque as peculiaridades inerentes a cada caso concreto são irrelevantes juridicamente, já que as lides individuais, no que diz respeito às questões de direito, são muito semelhantes e, em tese, a decisão deveria ser a mesma em todos e em cada um dos casos.” (GIDI, Antonio. *Coisa julgada e litispendência em ações coletivas*. São Paulo: Saraiva, 1995, p. 30-31).

⁴. GIDI, Antonio. *A class action como instrumento de tutela coletiva dos direitos*. São Paulo: RT, 2007,,p. 71-88.

⁵ GIDI, Antonio. *Coisa julgada e litispendência em ações coletivas*, p. 20.

⁶ For a description in English of diffuse, collective, and homonegeous individual rights, see Antonio Gidi, *Class Actions in Brazil*, *American Journal of Comparative Law*, vol. 51, p. 344-363, 2003.



very appropriate here to mention article 1, paragraph 1 of the Brazilian Antitrust Act (Federal Act n. 8,884/1994), which regulates protection against the abuse of competition: “The collectivity is the owner of the legal property protected by this Law”.

This is the conceptual panorama of the collective plaintiff legal situations which are the object of plaintiff class actions. We need now to see the panorama of the collective defendant legal situations which are the object of defendant class actions.

3. Concept and classification of defendant class actions. The collective defendant legal situations.

A defendant class action exists when a group of human beings is placed as the defendant in a legal relationship affirmed in the complaint. A claim is formulated *against* a group of people as a whole.

The rights affirmed by the plaintiff of the collective complaint can be individual or group rights — in the latter hypothesis, there is a bilateral class action, since the conflict of interests involves two different groups of people⁸.

Following the legal system for all class actions, in order for the defendant class action to be admitted it is required that the complaint be brought *against* an “adequate representative” (person extraordinarily having the legal capacity to defend a collective legal situation). In this aspect, therefore, there is nothing peculiar about the defendant class action.

What makes the defendant class action worthy of differentiated treatment is the circumstance of the legal situation held by the group being a defendant legal situation. The action is brought *against a collectivity*, which is the subject of a defendant legal situation (a duty or a state of subjection, for example).

⁷ DIDIER Jr., Fredie., ZANETI Jr., Hermes. *Curso de direito processual civil*. 4ª ed. Salvador: Editora Jus Podivm, 2009, v. 4, p. 82-83.

⁸ DINAMARCO, Pedro. “Las acciones colectivas pasivas en el Código Modelo de procesos colectivos para Iberoamérica”. *La tutela de los derechos difusos, colectivos e individuales homogéneos – hacia un Código Modelo para Iberoamérica*. Antonio Gidi and Eduardo Ferrer MacGregor (coord.). Mexico: Porrúa, 2003, p. 133; MENDES, Aluísio. “O Anteprojeto de Código Modelo de Processos Coletivos para os Países Ibero-Americanos e a legislação brasileira”. *Revista de Direito Processual Civil*. Curitiba: Gênesis, 2004, n. 31, p. 11.



In the same way as the collectivity can be a holder of rights (a plaintiff legal situation as examined in the preceding item), it can also be the bearer of a duty or a state of subjection (defendant legal situations). The category of the *collective defendant legal situations: collective duties and state of subjection* needs to be developed dogmatically.

The concept of these legal situations has to be extracted from the concept of “rights”, applied conversely: *indivisible duties and states of subjection and homogenous individual duties and states of subjection (indivisible for the purposes of protection, but capable of being individualized in the jurisdiction of execution or fulfilment)*.

There are, therefore, both plaintiff and defendant collective legal situations. These situations relate with each other and with the individual situations.

A collective right can be related to an individual defendant situation (e.g.: the collective right to require a given company to correct its advertising). An individual right can be related to a collective defendant legal situation (e.g.: the right of a patent holder to prevent it from being repeatedly infringed by a group of companies⁹). A collective right can also be related to a collective legal situation (e.g.: the right of a category of workers to require that a certain category of employers gives them a pay rise in line with the cost of living).

A defendant class action will exist, therefore, in any claim in which a collective defendant situation is being discussed, whether it relates to an individual right or to a collective right.

This is not, however, sufficient to define the subject.

A defendant class action can be classified as *original* or *derivative*¹⁰.

An *original* defendant class action is one which begins a class suit, without any connection to a previous suit. A *derivative* defendant class action is one that results from a previous “plaintiff” class suit and is brought by the defendant of that action, as the action for the rescission of the collective judgment and the preliminary measures incidental to a class

⁹ GIDI, Antonio. *A class action como instrumento de tutela coletiva dos direitos*, cit., p. 390-391.

¹⁰ Proposed classification accepted by the Draft Brazilian Code of Class Actions, formulated by the Brazilian Institute of Procedural Law (chapter III). Diogo Maia also uses this classification, although with another designation: independent class actions and derivative or incident class actions (MAIA, Diogo. *Fundamentos da ação coletiva passiva*. Master’s thesis. Universidade do Estado do Rio de Janeiro: Rio de Janeiro, 2006, p. 71.)



action. This classification is important, since in derivative defendant class actions there will be no problem with the identification of the “adequate representative”, who will be the same person who brought the class action whence it originated.

In fact, one of the principal problems of the defendant class action is the identification of the “adequate representative”, which has lead Antonio Gidi to defend that “in order to guarantee the adequate representation of all the interests involved, it would be recommendable for the defendant class action to be brought against the largest possible number of known associations that are part of the defendant group. In the case of associations excluded from the action, they should be notified and could intervene as joint witnesses”¹¹. In theory, any of those with the legal capacity for collective protection can also have the extraordinary legal capacity to be sued. In particular the jurisdictional control of “adequate representation” is imperative, as already defended elsewhere by the author of this article¹².

With regard to this aspect, Antonio Gidi’s proposed Code for class actions in civil law countries (CM-GIDI) is worthy of consideration. It restricts, partially, the collective legal capacity to be sued to associations. This is the text of Gidi’s proposal: “28. The class action may be brought against the members of a group of people, represented by an association that unites them”¹³. In a defendant class action derived from a class action brought by the Public Attorney’s Office, the defendant will be the Public Attorney’s Office itself. The best solution is to maintain the roll of those who in theory have the legal capacity for the protection of collective legal situations and leave to the jurisdictional body the control *in concreto* of the adequacy of the representation¹⁴.

4. Examples of defendant class actions

¹¹ GIDI, Antonio. *A class action como instrumento de tutela coletiva dos direitos*. São Paulo: RT, 2007, p. 415.

¹² DIDIER Jr., Fredie., ZANETI Jr., Hermes. *Curso de direito processual civil*. 4ª ed. Salvador: Editora Jus Podivm, 2009, v. 4, p. 204-209.

¹³ GIDI, Antonio. “The Class Action Code: A Model for Civil Law Countries”. *Arizona Journal of International and Comparative Law*, p. 37, 2005.

¹⁴ In Gidi’s draft there is also provision for an individual to have the legal capacity to be the collective defendant: “28.2 If there is no association that unites the members of the defendant group, the defendant class action may be brought against one or some of its members, who will act as representatives of the group”.



Some examples may be helpful in understanding the matter.

Employment class actions are the object of bilateral collective proceedings: on each side, lead by the trade association/trade union of the professional categories (employer and employee), collective legal situations are discussed. Under Brazilian law, furthermore, they can be considered to be the first examples of defendant class actions¹⁵.

Several examples of defendant class actions have arisen in the Brazilian courts.

In 2004, because of the national federal police strike, the Federal Government brought a judicial claim against the National Federation of Federal Policemen and the Federal Policemen's Union in the Federal District¹⁶, requesting them to resume their activities. Undoubtedly this is a defendant class action, since the category of "federal policemen" was the defendant in the legal relationship pleaded in court: it was affirmed that the category had the collective duty to return to work. Ever since, whenever there is a strike, an employer that feels it is suffering damages and considers the strike to be illegal can go to court litigating for the category of workers to return to work.

There has also been a class action brought against the gasoline resalers' trade association, asking for gasoline prices to be set according to maximum profit limits, as a means of protecting competition and consumers¹⁷.

In 2008, students at the University of Brasília stormed and occupied the Chancellor's office demanding the resignation of the Chancellor, who was being accused of irregularities. The University went to court, asking for the protection of the ownership of its property. This

¹⁵ MAIA, Diogo Campos Medina. "A ação coletiva passiva: o retrospecto histórico de uma necessidade presente". *Direito processual coletivo e o anteprojeto de Código Brasileiro de Processos Coletivos*. Ada Pellegrini Grinover, Aluísio Gonçalves de Castro Mendes and Kazuo Watanabe (coord.). São Paulo: RT, 2007, p. 329. The Consolidation of the Labour Laws, Executive Law No. 5,452/1943, already provided for doubly collective proceedings (article 856 ff.): collective labour agreements. In addition, article 1 of Brazilian Federal Law No. 8,984/1995 states: "It is of the jurisdiction of the Labour Court to conciliate and judge collective agreements that have their origin in collective labour conventions or collective labour agreements, even when they occur between trade unions or between employee and employer associations". Even though they may serve as an example, part of the doctrine does not consider collective labour agreements to be collective proceedings. Collective labour agreements can take place through class actions themselves, such as public civil actions and collective writs of mandamus, in these cases they will effectively be collective proceedings.

¹⁶ The progress of this case can be accompanied on the Federal Court of Appeals' website (1st Region, Brazil): www.trf1.gov.br. The case number is 2004.34.00.010685-2.

¹⁷ VIOLIN, Jordão. *Ação Coletiva Passiva: fundamentos e perfis*. Salvador: Editora Jus Podivm, 2008, p. 79-80.



was a defendant class action because the claim is brought against a group of people undertaking an illegal act. The University affirms that it has individual rights against every one of those who are occupying the building, who in turn would therefore have *homogenous individual duties*. Instead of filing a possessory action against each student, it “collectivized” the conflict, bringing together the diverse “duties” in a single defendant class action. The claim was brought against the student representative body (the Students’ Union), considered, correctly, to be the group’s “adequate representative”¹⁸. In this case this is a petition formulated *against* homogenous individual duties: the illegal behaviour that all those involved are accused of has a common origin. Instead of a *collectivity of victims*, as the holders of homogenous individual rights are usually referred to, in this case we have a *collectivity of perpetrators of an illegal act*.

Antonio Gidi provides other examples:

“...a defendant action can be used when all the students of a city or a State have a claim against all the schools, and both of the groups are represented by an association. Similarly, class actions can be brought against shops, public notaries’ offices, public bodies, healthcare plans, prisons, factories, municipalities etc., in benefit of consumers, prisoners, employees, taxpayers, or even in benefit of the environment”¹⁹.

Pedro Dinamarco provides examples of declaratory defendant class actions: a) a declaratory action, filed by a company, to recognize the environmental regularity of its project: on the one hand, if it were to win, it would avoid a future class action against it, on the other hand, if it were to lose, it would desist from implanting the project, saving money and not harming the environment; b) a declaratory action, filed by a company that avails itself of an adhesion contract, with the aim of recognizing the lawfulness of its contractual clauses²⁰.

¹⁸ The follow up of this case can be accompanied on the Federal Court of Appeals’ website (1st Region, Brazil: www.trf1.gov.br). The case number is 2008.34.00.010500-5.

¹⁹ GIDI, Antonio. *A class action como instrumento de tutela coletiva dos direitos*, cit., p. 392. See also on this matter, GIDI, Antonio “Notas críticas al anteproyecto de Código Modelo de Procesos Colectivos del Instituto Iberoamericano de Derecho Procesal”. *La tutela de los derechos difusos, colectivos e individuales homogéneos – hacia un Código Modelo para Iberoamérica*. Antonio Gidi and Eduardo Ferrer MacGregor (coord.). Mexico: Porrúa, 2003, p. 411; *Coisa julgada e litispendência nas ações coletivas*. São Paulo: Saraiva, 1995, p. 51-52, note 128.



Although it is possible to imagine negative declaratory collective defendant lawsuits (e.g. declaring the inexistence of a *collective duty*), this is not what Pedro Dinamarco's examples deal with²¹.

In the cases mentioned by Pedro Dinamarco, we have a plaintiff class action in reverse. A declaration is being sought that states that *a collective plaintiff legal situation does not exist (the inexistence of a right owing to the absence of environmental pollution, for example)*. The existence of a *collective plaintiff legal situation* is not affirmed, as happens in positive declaratory, constitutive or condemnatory defendant class actions. It is not enough to say, as Antonio Gidi did in a pioneer manner, that such actions are inadmissible because of the lack of interest in acting or the difficulty in identifying the person with the legal capacity to be sued, although the lesson is correct. We need to go further: strictly speaking, *they are not defendant class actions*²². In order for there to be a defendant class action, as already mentioned, a collective defendant legal situation must be affirmed, and this is not the case in these examples. Furthermore: as in any class action, a potential advantage for the public interest needs to be recognized, without which the points of claim become merely individual (what legitimates the legal fiction of "homogenous individual rights" is the particular circumstance of

²⁰ DINAMARCO, Pedro. "Las acciones colectivas pasivas en el Código Modelo de procesos colectivos para Iberoamérica". *La tutela de los derechos difusos, colectivos e individuales homogéneos – hacia un Código Modelo para Iberoamérica*. Antonio Gidi and Eduardo Ferrer MacGregor (coord.). Mexico: Porrúa, 2003, p. 134. (GIDI, Antonio. "Notas críticas al anteproyecto de Código Modelo de Procesos Colectivos del Instituto Iberoamericano de Derecho Procesal". *La tutela de los derechos difusos, colectivos e individuales homogéneos – hacia un Código Modelo para Iberoamérica*. Antonio Gidi and Eduardo Ferrer MacGregor (coord.). Mexico: Porrúa, 2003, p. 411.)

²¹ "In principle, the defendant class action cannot be understood simply as an inverted class action. Therefore it should not be used by a potential defendant (in a plaintiff class action for the indemnification of individual damages) to obtain a declaratory judgement that its product has not caused damages to the members of the group (negative declaratory judgement of responsibility for damages). It would appear that there is no procedural interest in filing this collective lawsuit. Nor would it be possible to find an adequate representative for it. If an affected group wanted to take out a collective lawsuit, it would do so at the appropriate time: it would not be appropriate for the defendant to act before the group itself acts". (GIDI, Antonio. "Notas críticas al anteproyecto de Código Modelo de Procesos Colectivos del Instituto Iberoamericano de Derecho Procesal". *La tutela de los derechos difusos, colectivos e individuales homogéneos – hacia un Código Modelo para Iberoamérica*. Antonio Gidi and Eduardo Ferrer MacGregor (coord.). Mexico: Porrúa, 2003, p. 411.)

²² On this point, the author of this essay alters his understanding as expressed in DIDIER Jr., Fredie. *Pressupostos processuais e condições da ação*. São Paulo: Saraiva, 2005, p. 271-272; DIDIER Jr., Fredie, ZANETI Jr., Hermes. *Curso de direito processual civil*. 3ª ed. Salvador: Editora Jus Podivm, 2008, v. 4, p. 218-219. It must be recorded that this change of understanding resulted from a series of debates with Antonio Gidi, who years ago, as can be seen, criticized examples of negative declaratory actions as kinds of defendant class actions. Without this debate the ideas exposed here would certainly not have existed.



the presence of the public interest in their protection, which would be prejudiced in the case of fragmented and individual protection).

This does not mean that a declaratory plaintiff class action does not exist. In the realm of labour law, for example, one can imagine a declaratory action to certify the correct interpretation of a collective agreement, in which the plaintiff and defendant collective legal situations are set forth.

There is also the possibility of using the defendant class action to put into effect the so-called *anonymous* or *collective responsibility*, “in which it is permitted to hold a group responsible if the act that generated the injury was occasioned by the union of people, and it is impossible to identify a specific individual or specific individuals responsible for it”²³. In the example of the occupation of the University building, apart from the action for repossession, it would be possible to file an action against the group for compensation of damages, if it were not possible to identify the individuals who caused the damages. In the claim, the plaintiff would affirm the existence of a *duty to compensate*, whereby the defendant is the *group*.

Diogo Maia mentions the example of a class action taken out against shopkeepers of a town, accused of unduly using pavements to display their products²⁴. This is a clear example of *homogenous individual offences, which generate homogenous individual duties*.

It is also possible to conceive of a class action taken out against an indigenous community which, for example, is being accused of preventing access to a given public space. The tribe is the bearer of the *diffuse duty* not to prevent access to the public space. The indigenous community, furthermore, is the party with the legal capacity to defend the accusation in court. It is not a legal entity. It is a human group. This is a rare and perhaps unique case of ordinary collective legitimacy, because the holder of the collective legal situation is, also, the party with the legal capacity to defend it in court²⁵. With regard to the object of the

²³ MAIA, Diogo Campos Medina. “A ação coletiva passiva: o retrospecto histórico de uma necessidade presente”, cit., p. 338. Sobre a responsabilidade civil do grupo, CRUZ, Giselda Sampaio da. *O problema do nexo causal na responsabilidade civil*. Rio de Janeiro: Renovar, 2005, p. 267-312.

²⁴ MAIA, Diogo Campos Medina. “A ação coletiva passiva: o retrospecto histórico de uma necessidade presente”, cit., p. 339. In this text the author quotes various other examples.

²⁵ Article 232 of the Constitution of the Federative Republic of Brazil, for example, states that: “The Indians, their communities and organizations are legitimate parties to take legal action in defence of their rights and interests,



action, the Judiciary must analyse whether it is a legitimate political, pacific and organized demonstration, or an illegal act that generates homogenous individual duties. In this case it makes a great deal of sense to insist on the need to certify whether the lawsuit is a class action, as the judge may reject at the outset claims that are not based on collective duties.

5. Final consideration

In Brazil, one of the principal arguments against the defendant class action is the inexistence of express statutory authorization.

However, that the permission for the defendant class action results from the constitutional principle of access to justice (no claim can be denied the appreciation of the Judiciary Body). Failure to admit the defendant class action is to deny the fundamental right to legal proceedings to a person who wishes to exercise a right against a group: in this case this person would be guaranteed the constitutional right of defence, but could not file a suit. To deny the possibility of the defendant class action is, moreover, to ignore reality: conflicts of interests may involve individual-individual, individual-group and group-group. In the mass societies, there are conflicts *of* masses and conflicts *between* masses.

The inexistence of statutory law that confers collective defendant legal capacity does not appear to be an insurmountable obstacle. The attribution of extraordinary *legitimatio ad causam* does not need to be stated in an express statutory text. Given that it is not prohibited for the defendant of a plaintiff class action to file an action for rescission, a precautionary incidental action or any other action of rejection, it is implicitly admitted that someone will answer on behalf of the collectivity, that is to say, the defendant class action is admitted.

and the Public Attorney's Office shall intervene in all the acts of the process". There is also the rule contained in article 37 of Brazilian Federal Law No. 6,001/1973 (Statute of the Indians): "The tribal groups or indigenous communities are legitimate parties to defend their rights in court, and in this case that shall receive the aid of the Federal Public Attorney's Office or the Indian protection body".