

**The Preclusive Effect of Judgments in Collective Actions:  
Implications for Jurisdiction and Appropriate Forum  
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**1. Background**

No special rules needed for:

- collective actions between named parties
- persons who submit
- representative parties
- absent parties subject to class action legislation

Special rules needed only for crossborder effect of “class proceedings” decisions on “absent class members”

**2. International jurisdiction follows recognition**

Jurisdiction to bind absent class members is a product of willingness of other courts to grant preclusive effect to judgment purporting to bind them

Jurisdiction not dependent on residence of claimant but on willingness of another court to which the claimant might have access to turn the claimant away (this may or may not be the court of the plaintiff’s residence)

**3. When should preclusive effect be granted?**

Need to distinguish between claims seeking “divisible” and “indivisible” results (claims that seek to promote access to justice and those that seek to promote responsible behaviour)

**a) When the result is as good as could reasonably be expected, or**

Why is the claimant seeking to relitigate?

Does the divisible result provide reasonable compensation in view of what otherwise could reasonably be achieved through the means of compensation available in the forum?

Does the invisible result create an adequate incentive to avoid continuation or recurrence of the harm caused in the forum?

**b) When the claimant has been adequately represented, and**

Did the process leading to the result provide a reasonable opportunity for the claimant to participate or for the claimant’s interests to be taken into account in determining the result?

**c) The claimant was given adequate notice and an opportunity to opt out**

Tests for adequacy of notice now being developed (will need to take into account standards of fora in which preclusive effect is sought)

**4. Jurisdictional implications**

Courts should tailor purported assumptions of jurisdiction to assessments of the potential for preclusive effect

Court should engage potential representatives or experts to determine likely preclusive effect in other courts, or seek other means (registries, court-to-court communications, etc)

Courts should seek to exercise jurisdiction over largest class that could reasonably be expected to be subject to preclusive effect

**5. Forum implications**

Courts should defer the claims of all or part of the class to another court where it would be in a better position to determine the claim or permit participation of the claimants