



UNLOCKED

How do class action lawsuits work?

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on Media, Politics and Public Policy

TRANSCRIPT

Nancy Gibbs:

Hi, I am Nancy Gibbs, the director of the Shorenstein Center on Media Politics and Public Policy at Harvard's Kennedy School. And this is Unlocked. Today we are exploring class action suits, how they work, what they mean for the shaping of law and policy. And my guest is Harvard Law professor William Rubenstein, who's an expert in representative, has litigated and consulted and served as an expert witness in class action lawsuits.

Professor Rubenstein, we often see class action suits in the news around things like product liability, for instance, but really it hit the headlines in what felt like a particularly critical way when the Supreme Court ruled this summer on birthright citizenship, and justices said that universal injunctions when a single district judge could temporarily prevent a government policy from being enacted everywhere in the country, that those were generally impermissible, except the work around seemed to be class action suits. So let's start there. What is a class action lawsuit and what kinds of cases typically become class actions?

William Rubenstein:

Yeah, thank you, Nancy. Thank you for having me. I'm honored to be here and happy to help. What your opening question points out that's so helpful is that there are different types of class action lawsuits. You mentioned that we're familiar with them from the consumer realm. I think a lot of people, you get emails like, hey, you're a part of a class action lawsuit. And then all of a sudden with sending immigrants from Venezuela to El Salvador, all of a sudden we're talking about class action lawsuits in that setting, I think some people also remember, think about class action lawsuits in terms of Brown versus Board of Education and the desegregation of public schools in the United States.

So I think a good starting point is to say there are all kinds of different types of class actions, and your question is what do they have in common? What's the core idea? And the core idea is kind of the exact opposite of what most people think. When I teach class actions to my students, I tell them to put their pens down and tell them a story from my first day of college in which I was standing in my college quadrangle, not knowing anyone and hoping someone would talk to me.

And a fellow was getting people together and walking across the quad, gathering a group, gathering a group, gathering a group, finally came to me and said, "Would you like to join our group for pizza?" And so we all went down to the pizza parlor together, 100 of us. And I think that's what people think a class action lawsuit is. We're going to get a group together and we're going to go down to the courthouse en masse and sue. And we think that because class actions involve a lot of people.

And here's the key important thing about a class action lawsuit, it's the exact opposite of that. What it is is a form of representative litigation. And what I mean by that is one person or two or three people who are referred to as the class representatives, they go down to the courthouse and they litigate the case

on behalf of all the other people who we refer to as absent class members. So it's a fascinating idea. Normally when you go down to the courthouse, you're litigating your own case. But what a class action does is it enables you to litigate the cases on behalf of a whole group of people.

Nancy Gibbs:

And do those people even need to know that someone is litigating on their behalf in order to benefit a ruling that would go in their favor?

William Rubenstein:

Yes and no. So the only way you get to do this is if court will ultimately certify your case to be a class action. And there are a series of hurdles you have to jump through. And one of them is not that you've told everyone in the class you're going down to the courthouse for them. But if the case is certified as a class action, the court will then send notice to the absent class members saying, "Hey, you're part of this group and we're litigating your claims here." And this is the key thing about the class action. Not only do we litigate your claims, if you don't opt out, you can't later come down to the courthouse. Because your claim has been engulfed in this class action and it's settled by the class action.

In my pizza parlor analogy, I explain to my students that if you don't opt out of the group, but don't have pizza, but later go down to the pizza parlor, they'll say, "No pizza for you. Your class representative was here and took their pizza with it." So we give notice to the class members. In some types of cases, they can opt out of the class. And typically, and generally, it's only money damage cases that they can opt out of. In civil rights cases, like we were talking about, are non-opt out classes.

And let me say two things to explain that a little better. In the monetary setting, the reason we allow one person to litigate a group's cases is only when the claims are of such small value, \$10 claims, \$100 claims that no one would litigate them on their own because they're too costly. But if you allow someone to litigate a million of them, the lawyers can then invest in that and be paid a portion of the recovery, and it enables litigation that would otherwise not happen. So one thing the class action does is it creates a mechanism for people with small claims to be able to sue by putting their claims together.

I think the other thing to remember in the civil rights context is it's a little different. If you take *Brown versus Board of Education*, in theory, every Black school child should have been part of that litigation, but you can't actually sign them all up. And so we enlist one person to do it on their behalf. But you also can't allow students to opt out because if *Brown* wins and the ruling is we have to desegregate the schools, everyone's going to be involved in that outcome. And there's nowhere to opt out to. So there are two different types of cases, the non-opt out and the opt out. And we give notice to the class more often in the opt out that you can do something. Notice is a little different in the non-opt out because you can't do anything anyway. But sometimes we give you notice so you can come in and give your views to the court since your claims are on the table.

Nancy Gibbs:

So what criteria have to be met for a class to be certified, and who decides?

William Rubenstein:

Good. The judge decides, the court decides. And they're basically, really at the end of the day, there are three criteria. Number one, there have to be a lot of people. Number two, they have to have similar claims. And there's a complicated formula for that, but that's the bottom line. And number three, the representative has to be adequate to represent the class.

One of the things I love most, and I love many things about class action lawsuits, but one of them I love the most is if you go back to where I started, it's a form of representative litigation. One person goes down to the courthouse and represents the group. The amazing thing about it is the representative appoints herself to be the class representative. And so the court has to approve that, and say, oh, she actually is a good representative for the class.

But I love that because there's no other area of life where we would allow someone to appoint themselves to represent a group of people. I tell my students, if I had gone to Washington last January during inauguration day and climbed up on the podium and said, "I've appointed myself to be president of the United States," I'd probably be in El Salvador right now myself. And so normally we elect representatives. With a class action, they appoint themselves. And again, the reason is the claims are so small, no one's going to step forward to do it. So if someone does, we generally will deem them adequate.

Nancy Gibbs:

In the case of the birthright citizenship case, which seems more in the civil rights context than the small monetary claims one, are there potential drawbacks to using class action suits to challenge something like an executive order in that case?

William Rubenstein:

Yeah, let me walk through this. There are three steps here that are important for everyone to understand. Before anyone was talking about class actions, people were challenging President Trump's policies in a variety of different ways, and courts were striking them down all over the country. And normally if a federal district judge says that policy's unconstitutional, the government will follow that ruling and abide by it, not only as to the parties in that case, but probably as to everyone in the country. And so step one is it used to be that you could go into court, get an injunction on behalf of your clients against the federal government or the state government or anyone, saying what you're doing is unconstitutional. And usually the defendant would say, you know what? We should just pause the whole policy until this works its way through the court. And most government officials did that.

Step two in the Trump administration, the big thing is they won't do that. And so you strike down a policy for Nancy as the plaintiff, and they go into court and say, "That's fine, but that only applies to Nancy. We can keep deporting everybody else who was not a plaintiff in the case itself." And so the Supreme Court in a case this year, siding with the Trump administration, basically said the government has no obligation to follow the ruling of a federal court with regard to anyone except the people in front of the court at that time. And they kind of blessed this. I'm not sure they were technically wrong, but it was just up until that point in history, most federal government executives would follow the law.

But now the Trump administration's reading as narrowly as possible, we only have to follow the law with respect to Nancy according to this order so we won't follow... So that's what the Supreme Court held. Once they held that, what that means is if you're bringing a case for yourself, but you wanted to apply it across the board, now you need to bring everyone else into the case. And the way to do that is to be a class representative and bring a class action. So the class action solves the problem of a government reading a decision as narrowly as possible and not respecting the decision outside of the narrow plaintiffs in the case itself because it brings everyone else's claims into the case.

Nancy Gibbs:

So immediately in the case of the birthright citizenship ruling, class action suits were filed, where does that stand and what do you expect? How do you expect to see that unfold?

William Rubenstein:

Yeah, so two things. Given everything I just said, the plaintiffs challenging the Trump administration, and birthright citizenship's one example, turn to using class action lawsuits. It turns out to get a class action certified, to meet the requirements that I mentioned, it takes a little while. You have to go through a few steps. And the current Supreme Court has made those steps very high. They don't like class action lawsuits.

And so so far what has happened is the cases that were out there have now become class action lawsuits or are in the process of becoming class action lawsuits, but we're going to have to wait until those go up on appeal to see if the appellate courts will respect the fact that they're class action lawsuits, or will find reasons to say the court didn't do the class action part properly. That's kind of going to be the next battle over all this.

Nancy Gibbs:

So as you see either these current big cases in the headlines or coverage of class action suits more generally, are there common misconceptions you run into, other than the pizza analogy, that it is not everyone getting together and going down to the courthouse as a big group. Are there other things that you think people commonly misunderstand about how class action suits work?

William Rubenstein:

Yeah. Two things I would say. One is on the money side, the number one common misperception, and I tell my students I'll fail if they say this, is that the lawyers make all the money and I only got \$10. So if you have a class action lawsuit, and you have a million people who get \$10, you've now returned \$10 million to the class. The lawyers do probably get a quarter of that. So they get \$2.5 million. So you're sitting there with your \$10 check saying I got \$10 and they got \$2.5 million. It seems unfair. But remember all the class members got \$7.5 million and the lawyers only got \$2.5 million for doing it.

So it's often easy to look at the class action and feel like the lawyers are the only ones who are making out with the class action. But on the money damage side, where they're small claims, if there weren't class action as a deterrent, a utility company or a bank could rip everyone off \$5 every month and there's nothing you can ever do about it. And so even though the lawyers do make a lot of money, and they make a lot of money, they're providing a public function that's very valuable. So that's another misconception I think about the class actions.

On the civil rights side, I think the hardest thing to wrap your mind around is the non-opt-out nature of it. And so it puts the group, the civil rights group, all on the same page. And unfortunately, I spent the early part of my career representing groups in court. I did a lot of HIV and AIDS discrimination work in the '80s and LGBT work. And I would stand up in court and say, "I'm here on behalf of the gay community," or, "I'm here on behalf of people with AIDS." And then the court would say, "What do they want?" And I would pretend that I had a simple answer to that question.

And representing civil rights groups isn't always that simple. They have different wants and different needs and different ideas. And if they can't opt out of the class, you're kind of cramming down top-down ideas about what they want. So it's an interesting, more theoretical, but interesting in a case like Brown versus Board of Education, thank God for the class action lawsuit. When we were doing same-sex marriage cases, there were members of the gay community that were like we don't really want marriage as our goal. You don't represent us. You don't speak for us. That's not what we're after. So sometimes the class action on the civil rights side can get into some very interesting intra-community disputes.

Nancy Gibbs:

Just one last question. For reporters who may suddenly find themselves covering class action cases, what are the important questions they need to ask, facts they need to be sure that they have at their hand?

William Rubenstein:

Yeah, very good question. And it's hard to simplify because the class action's pretty complicated. I would keep my eye on a couple of things. Number one, a case can be filed as a class action, but it doesn't get to proceed as a class action unless a court certifies it to do so. So if I were a reporter, I could see that a class action has been filed, but I would make a point to distinguish in my mind, okay, but has the court allowed it to go forward as a class action? Where is it in this? And I should ask the lawyers, how far along are you? Are going to get this certified to be a class action and proceed in that way?

The second thing I keep my eye on is a lot of class actions settle. Not the birthright citizenship case. That's not going to settle. But when they do, you kind of want to probe what exactly are each individual class member getting, is each individual class member getting, and what are the lawyers getting? So I proposed to my scholarship that we should have something like the food label that's on the side of the food. When it first came out in the '70s or whatever, no one knew what it was, but now we all glance at it in one second. We could say to ourselves, oh, I don't want to eat that.

And I feel like a class action settlement, I proposed a very similar sticker. So you could look at it and you can see, oh, I'm getting this. The lawyers are getting this. If I had gone to trial, I could have gotten this instead of settling. So it's hard. It's important to keep your eye on, well, what's anyone actually getting out of this in the money damage class action?

And finally, I think on the injunctive relief side, like the birthright citizenship case, one thing would be interesting to write about are who are the class representatives? Why are they the people that step forward on behalf of the class? Did the ACLU pick them to be the class representatives? How did the ACLU find them? Is their situation the same as everybody else in the class? Because if it's not, it's going to be much harder to get it to be a class action. And there's a lot of good human interest stories focusing on their class representatives and their capacity to represent the class.

Nancy Gibbs:

That's a great idea. You'd make a great assigning editor.

William Rubenstein:

Good.

Nancy Gibbs:

Professor William Rubenstein, thank you very much for unlocking how class action suits actually work.

William Rubenstein:

Thank you for having me.