



# The Value of Consumer Surveys in Class Action Cases

Featuring Bruce Isaacson, DBA, Senior Managing Director, Litigation Surveys & Consumer Science

As savvy plaintiffs and defendants know, the viability of class actions relies on evidence—and surveys are the best way to generate evidence about consumer behaviors or opinions. In class actions, surveys provide evidence to support or oppose class certification by establishing the basics, like what the proposed class has in common. Surveys can also help establish an appropriate amount of class-wide damages, which can minimize defendants' risk or maximize the payout for plaintiffs. And, as with all legal disputes, surveys assist parties in generating evidence for or against the underlying claims, such as evidence about how consumers understand an advertising claim.

Of course, to be reliable—and admitted by the court—consumer surveys must be well-designed and properly conducted. The specialized Litigation Surveys & Consumer Science team at IMS Legal Strategies has designed and conducted thousands of litigation surveys, many of which have been admitted as evidence by federal and state courts, regulatory bodies, and private forums. This article draws on that experience to explain how surveys can help parties in class actions make strong cases.

## Class Action Basics

In a class action lawsuit, many plaintiffs join together to sue the same defendant for the same reason—for example, many people who purchased the same defective product may file a class action together. Class actions are used when many people's cases have enough in common to make a class action a practical way to resolve the dispute, or when pursuing separate actions would have inconsistent results or put some people's claims at risk.

Class actions can be filed about nearly anything that could be the subject of a lawsuit with a single plaintiff, and most of the same rules apply to either type of case. However, in class actions, the court must certify the class, meaning that it must agree that the proposed class of plaintiffs meets the requirements for class certification under Rule 23(a) of the Federal Rules of Civil Procedure. Those requirements are as follows.

1. **Numerosity:** The class is large enough that it is difficult or inconvenient to join all the class members.
2. **Commonality:** All members of the class have something in common that is relevant to the allegations. (In some cases, class actions bring together multiple subclasses of plaintiffs. In the defective product example mentioned above, if the product had been sold in multiple states, there might be subclasses for each state, each of which would sue under the laws of that state.)
3. **Typicality:** The plaintiffs named in the court papers (the “named plaintiffs” or “lead plaintiffs”) are making claims that are typical of the claims made by anyone in the class.
4. **Adequacy:** The named plaintiffs will fairly and adequately represent the interests of the class.
5. In addition to these requirements, courts also generally require that the class be ascertainable, meaning that it is possible to determine who is a member of the class using objective criteria. The plaintiffs have the burden of proving that they meet these requirements.

Because losing a class-action lawsuit can be very expensive, defendants in class actions often try to stop the lawsuit at the class certification stage by arguing that the plaintiffs cannot meet one or more requirements of a class action. For example, they may argue that the class members do not have enough in common to form a class because the issues underlying their claims are too different. If the court does not certify the class, the plaintiffs can still sue as individuals, but they may not do so if their individual claims are not large enough to justify the expense and hassle of litigation.

If the class is certified and it eventually shows that the defendants are liable, the parties will have to deal with another issue specific to class actions: class-wide financial damages. This is the amount of money paid to redress the plaintiffs’ injuries. Damages must be based on some type of evidence, such as the cost of the defective product or the price premium paid for a falsely advertised product. Often, expert witnesses in economics use this type of evidence to provide an estimate of damages.



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Damages are an issue in most lawsuits, but they are especially difficult in class actions, where it may be impractical to get evidence about each class member's experiences. Although a court cannot grant damages until after the class is certified, defendants may be able to stop the class from being certified by showing that damages cannot be measured class-wide, and thus, class members do not have enough in common.

## How Consumer Surveys Inform Class Actions

### Class Certification

Because class certification can make or break a case, both sides of a class action have a strong incentive to provide evidence supporting their positions on class certification. At this stage of the case, surveys frequently focus on the commonality, or lack of commonality, among members of the proposed class. This kind of survey might ask directly about the thing respondents have in common: "Did you buy this product?"

But often, a survey at the class certification stage focuses on the underlying theory of liability in the case. For example, did a majority of consumers even notice the advertising claim that the plaintiffs allege is false? If not, the defendants may be able to argue that the allegedly false claim was not material to consumer purchasing decisions. This could show that the defendants do not have an injury in common, defeating class certification.



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Our experts conducted this kind of survey for the plaintiffs in *Dang v. San Francisco Forty Niners et al*, a proposed antitrust class action. A California consumer who purchased clothing branded with NFL team names argued that consumers were harmed by an allegedly anticompetitive agreement among teams to grant a license to make that clothing to one manufacturer, Reebok. They argued that this artificially increased prices, so consumers were paying "anti-competitive overcharges."

The plaintiff retained MMR Strategy Group President Bruce Isaacson, DBA (now Senior Managing Director of Litigation Surveys & Consumer Science at IMS), to measure consumers' reasons for purchasing NFL-branded attire. The survey interviewed California consumers who had purchased NFL-branded merchandise, living in both cities that had football teams and cities that did not. The survey measured respondents' reasons for buying a specific item, what they considered purchasing instead, and their responses to hypothetical price increases. This was intended to provide evidence that the proposed class had met commonality requirements—in this case, by showing that they were all part of the same market for the purposes of antitrust law. The matter was settled prior to a court ruling on class certification, but our expert survey evidence was a focus of the parties' briefs on class certification.

## Damages Calculations

Like class certification, damages can be a pivotal issue in a class action case. If the plaintiffs cannot show any injury using evidence that applies to the entire class, the class cannot be certified. If successful, this argument lets defendants end the litigation early on.



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If a class is certified and the plaintiffs successfully prove their case against the defendant, then damages are likely to be an important issue in the case. A favorable damages calculation for plaintiffs maximizes their payout, while a favorable calculation for defendants minimizes their financial exposure. Surveys can be valuable in determining damages by measuring how many times respondents bought a product, what they paid for the product, how important a disputed issue was in their decision to buy the product, or some other factor. Surveys can also help when the damages are complex, such as when a class argues that it paid extra for a product feature that the product allegedly does not contain. Surveys are often used in class actions to calculate this type of price premium.

One example of this came in *MacDougall v. American Honda Motor Co.*, a case in which our experts were not involved. The proposed class in this case alleged that Honda failed to disclose a flaw in the transmission of its Odyssey minivan. An economic expert for the plaintiffs conducted a survey that measured what relevant consumers would pay for the product with and without the alleged flaw, creating an estimate of that feature's value.

The survey expert in *MacDougall* provided estimates of the Odyssey's value to consumers, with and without the alleged defect in the transmission. This allowed the plaintiffs to submit an estimate of damages based on survey science. Without this kind of evidence, plaintiffs may see their cases dismissed well before trial.

## Underlying Legal Questions

Of course, class actions can be (and frequently are) filed about the exact same issues that arise in individual lawsuits. Common underlying claims in class actions include deceptive or false advertising, materiality, unfair business practices, and consumer privacy.

Parties in class actions can use surveys on the underlying legal issues in a manner similar to how they would be used in other types of lawsuits: to generate evidence showing how consumers behave, what they think, or how they respond to something. This kind of survey may be useful as evidence for or against class certification, but it can also be used to prove or disprove the case itself.

## Types of Surveys Used in Class Actions

Different types of consumer surveys may be useful in different class actions, but our team has seen some common themes through decades of experience and thousands of surveys. This section discusses the typical types of surveys we have conducted in class action cases.

### Consumer Behavior Surveys

Parties use consumer behavior surveys as evidence of whether or how consumers purchase or use certain products or product features. This can support arguments for or against class certification or arguments central to the case itself. In a case we supported, purchasers of the BMW i3 electric vehicle with the optional Range Extender feature filed a proposed class-action complaint in California. The lawsuit argued that the vehicle had a safety defect: it slowed down abruptly when the Range Extender kicked in. The models with the Range Extender were sold for \$4,000 more than other models, which operated solely on lithium batteries.

BMW, the defendant, retained Dr. Isaacson to measure how consumers used their vehicles with the Range Extender. The survey asked BMW i3 drivers how many miles they drove between charges, how often they used the Range Extender or charged their vehicles, why they chose the Range Extender, and how they learned about the Range Extender. The client used the survey's data to argue that the class should not be certified because individual issues, not common issues, predominated. BMW ultimately succeeded in its motion to dismiss the case at the summary judgment stage.

### False Advertising Surveys

In a country where products are sold nationwide to thousands of consumers, false advertising class actions are common. A false advertising (or advertising communications) survey shows consumers an ad under dispute and asks questions to measure how many people take away an allegedly false impression. Our team has designed and conducted numerous advertising communications surveys and handled rebuttals to opposing expert witnesses in false advertising cases.



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One such matter we supported was *McCrary v. The Elations Company*, a class-action case in which consumers sued a maker of an over-the-counter arthritis pain supplement for (among other things) a claim on its label that it was “clinically proven.” The plaintiffs hired an expert to design and conduct a survey measuring responses to the label from consumers of over-the-counter arthritis pain or joint discomfort medications. The defendant engaged Dr. Isaacson to rebut that survey.

In his report, Dr. Isaacson identified multiple problems with the opposing expert's survey, including its failure to include any survey control and the fact that it interviewed people who did not qualify for the lawsuit's proposed class. His rebuttal report also detailed other issues with the survey, such as its use of packaging images that did not match the real packaging and were illegible in any case. His report concluded that the opposing expert's report was too flawed to be reliable as evidence. The court declined to decide the case in favor of the plaintiffs on the strength of the opposing expert's survey.

## Materiality Surveys

In false advertising class actions, plaintiffs often must present evidence that an ad or marketing statement affected their buying decisions, meaning that it was material. A materiality survey can show whether the disputed communication influenced the buying decisions of a substantial proportion of consumers.

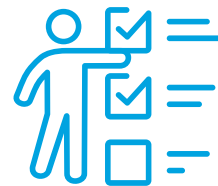
There are several approaches to designing a materiality survey, depending on the specific product, the industry, the allegations, and the proper population. Our team has conducted surveys that use both direct and indirect methods of measuring materiality.

## Conjoint Surveys

Lawsuits are designed to compensate the injured parties, but arriving at the right dollar amount can be complex—especially in a class-action case with many plaintiffs. To generate a damages request based on evidence, parties sometimes use choice-based conjoint surveys. This type of survey measures consumer preferences for product features by presenting respondents with hypothetical products for sale, represented by sets of product features offered at certain prices.

Respondents are asked to select among hypothetical products with different features. This requires them to make trade-offs when deciding among the various combinations of attributes and levels presented to them. For example, would they be willing to accept a product without certain features if it were offered at a deep discount?

Once respondents have made choices among enough of these "choice sets," the researchers use that data to compute the average price premium: the amount of extra money the consumer is willing to pay for the product feature of interest. An economic damages expert may then use this information to calculate damages for the class.



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## Securing Best-in-Class Consumer Surveys

When you are using surveys to build your class action case, retaining trusted consumer survey experts gives you the best chance of success. IMS Legal Strategies provides reliable custom surveys and supporting expert testimony, backed by decades of experience. Our surveys have been accepted as evidence by federal and state courts, the NAD, and regulatory venues. If you require a consumer survey for a class action matter, contact our team today to get started.

**IMS Legal Strategies** serves trusted law firms and corporations worldwide to elevate strategies and protect reputations. IMS provides comprehensive solutions for complex legal and business matters, including specialized advisory and analytical support, global expert witness services, data-driven litigation consulting, powerful visual advocacy, and flawless presentation technology. As a strategic partner for the full case lifecycle, we work collaboratively with clients to uncover and analyze core arguments, develop a strong story around key themes, and deliver compelling presentations that reinforce the narrative.

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