



C L I F F O R D
C H A N C E

Collective Actions in
Europe



contents

Terminology	1
Overview	2
Table of current position	5
Belgium	6
France	8
Germany	10
Italy	12
The Netherlands	14
Poland	16
Spain	18
United Kingdom	20
Appendix - Class actions in the United States	22

This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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Terminology

Outlined below is a glossary of the way in which we use certain terms in this publication - it is designed to give an idea of the different concepts rather than technical legal definitions.

Heading	Text
Class action	This term is often used loosely to describe any form of legal action by groups of claimants. To avoid confusion, we use it here to describe true, US-style class actions. These class actions are lawyer-driven but allow a group of individuals or entities with similar grievances to seek compensation (or other relief) in a single action. The claimants need not be identified individually, only by class description. Class members are bound by the outcome unless they opt out. For further detail on US class actions, see the Appendix.
Collective action	We use this phrase as a neutral way of describing any form of collective legal action by or on behalf of a group of claimants.
Conditional fees	Fee agreements between lawyers and clients by which the lawyers receive an uplift on their normal fees but not a share of the damages or settlement sum if the claim is successful.
Consumers	End users of goods or services.
Contingency fees	Fee agreements between lawyers and clients by which the lawyers receive a share – sometimes up to 40% - of the settlement sum or damages if the claim is successful but usually no fee if the claim fails.
Group action	A group of claims with common or related issues, which are heard together. It differs from a class action in that claimants must be individually identified and will not be bound by the outcome unless they opt in to the action. See, for example, Group Litigation Orders in the UK section. Unlike representative actions, the claims are brought by the claimants themselves rather than a representative organization.
Multiple damages	Damages awards where the actual sum lost or compensation awarded is multiplied (say by two or three), as happens in some US contexts.
Opt-out/opt-in model	Two models for collective actions. In an opt-out model, like US, Canadian and Australian class actions, members of the defined group are bound by the outcome unless they opt out. In an opt-in model, like UK GLOs, members of the group are bound only if they opt in. Claimants that are not bound are free to bring their own, separate claims.
Professional litigation funders	Commercial organizations that fund litigation (or some of the costs involved) in return for a share of the settlement sum or damages if the case is successful.
Punitive damages	Damages designed to punish the defendant rather than compensate the claimant. They are a particular feature of US litigation.
Representative action	An action where a representative body (such as a consumer organization) brings the action on behalf of a group of claimants. It differs from a class action or group action, where the claimants bring the action themselves.

Overview

This publication looks at the rules for "class actions" in key EU jurisdictions, current proposals to develop them further and emerging trends. The separate country sections explain developments in each country in more detail, while this section provides an overview of the EU. An explanation of certain features of the US class action appears in the Appendix.

Overall, developments mean that forms of class action have found their way to Europe. They are not US-style class actions, criticised by so many for perceived excesses and inefficiencies, but a variety of different mechanisms designed to offer effective redress for mass claims.

The benefit of collective actions

Collective actions provide redress where individual claims might not be large enough to support legal action and therefore enhance access to justice for consumers. Some commentators also argue that the threat of collective action provides a form of regulation by encouraging responsible corporate behaviour.

The current scope for collective actions in the EU

The table on page 4 shows the range of collective actions already available in some major EU countries. It also identifies other legal features that tend to affect the popularity of collective actions.

- All the countries allow representative actions for injunctions across several areas of law.
- Representative actions for damages are only available in a few countries and areas of law.
- Germany, Spain, Italy and the UK allow group actions for damages.
- None of the countries currently has true US-style class actions.

Class actions: EU-level initiatives

Initiatives have been taken by the European Commission both in the field of antitrust (DG competition) and in the field of health and consumer affairs (DG Sanco).

DG Competition

After beginning a consultation in 2005, DG Competition published in April 2008 its White Paper on damages actions for breach of the EC antitrust rules. http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf. According to its terms the White Paper is aimed at ensuring that all victims of infringements of EC competition law have access to effective redress mechanism so that they can be fully compensated for the harm suffered. The purpose is to introduce a system of private enforcement to complement, but not replace or jeopardise public enforcement by the competition authorities.

The Commission suggested a combination of two complementary mechanisms of collective redress, namely:

- opt-out representative actions which are brought by qualified entities such as consumer associations, state bodies or trade associations on behalf of identified (or identifiable) victims; and
- opt-in collective actions, in which victims expressly decide to combine into one action their individual claims for harm suffered.

Later in 2009 DG Competition was due to publish a draft directive as a pre-cursor to it becoming law. The draft directive, based on the principle above was widely leaked but political concerns about, among other things, its legal foundation have meant that it has not yet been sanctioned and published by the Commission or considered by the European Parliament. The European Parliament had issued a resolution on 26 March 2009 in which general support was expressed to the White Paper, but in which nevertheless several serious concerns of the Member States were echoed. There is currently no date fixed for reconsideration of the draft directive.

Other apparent features of the White Paper include the following:

- It proposes minimum levels of disclosure possibilities to reduce information asymmetries between parties, while at the same time stating that overly broad and burdensome disclosure obligations should be avoided.
- The Commission intends to draw up a framework for quantification of damages, i.e. actual loss and loss of profit. Following up on this initiative, a group of economic consultants and lawyers produced for the Commission in December

2009 an external study on the quantification of harm suffered by victims of antitrust infringements, which intends to act as a non-binding guidance for the courts of the member states.

- Member States are urged to reflect on ways to decrease costs to commence a claim in 3 ways: fostering settlements, set court fees appropriately and introduce the possibility of cost orders that change the "loser pays" principle.

DG Sanco

DG Sanco has published proposals on consumer collective redress which were the subject of a consultation exercise. In the Green Paper dated 27 November 2008 http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf various options are left open ranging from (i) no action at all to (ii) ensuring that member states open up their redress mechanism to consumers from other member states to (iii) introducing a mix of policy instruments (such as improving mechanisms for alternative dispute resolution, extension of scope of small claims procedures, taking actions to increase consumer awareness) to (iv) the adoption of voluntary or mandatory legislation geared towards the introduction of a uniform system of judicial collective redress. In its follow up consultation paper dated 8 May 2009 these options were rephrased into five options for action being (i) no immediate EU action and further evaluation of existing EU instruments, (ii) the development of self-regulation by industry and a standard model for collective alternative dispute resolution (ADR) (iii) non-binding EU measures for the establishment of collective ADR and judicial collective redress mechanisms (iv) binding EU measures for the establishment of collective ADR and judicial collective redress mechanisms and (v) establishment of a detailed EU-wide judicial collective redress system. In this last option of a harmonised judicial redress system, preference is expressed for the so-called "test case" procedure, whereby one consumer or a consumer organization initiates an individual case, after which the effect of the judgment would be extended to all other consumers in the EU which have been harmed by the same practice and who identified themselves after the judgment. A hearing was held on 29 May 2009 during which once more a wide variety of views were expressed by the different stakeholders. Currently there is no agenda set for any legislative action to be taken by DG Sanco.

Other developments

- There is greater consumer awareness of compensation opportunities, not least as US class action lawyers have begun to trawl Europe for claimants and European businesses have increasingly been drawn into US class actions. In the UK, there is also an emerging claimants' bar among local firms.
- Institutional investors (including hedge funds and pension funds) are likely to begin taking a more aggressive lead in seeking redress in securities issues, as it happens in the US.
- Professional litigation funders have begun to enter the European market.

National initiatives

The new Belgian Bill may introduce class action with respect to mass damage for all matters of law with a court-approved opt-out mechanism. If adopted, it will be the system closest to a true US style class action in Europe.

How far will the new initiatives go?

It seems clear that European jurisdictions and the EU itself are keen not to import the most criticised features of the US class actions system, which include:

- The possibility of inflated damages awards by US juries keen to punish large companies. These provides strong fuel for US class actions (and strong incentives for defendants to pay large settlements). Europe does not have the unpredictability of juries or punitive damages - this makes risk management easier for defendants.
- An active plaintiffs' bar fed by the incentive of contingency fees. Full blown contingency fees are not available in most European countries.
- No costs shifting. In the US, the loser does not usually pay the winner's costs. This encourages speculative claims. In Europe (and particularly in the UK), the loser usually has to pay at least part of the winner's costs.
- Pre-trial witness depositions and document discovery, which are strong weapons used by US class action plaintiffs to extract settlements. Apart from the UK, document discovery is currently rare in Europe (although suggested in a more limited form in the White Paper). No EU countries use pre-trial depositions.

New national initiatives mean that mass claims are likely to become more common in some individual European jurisdictions, but the continuing consultation and reassessment on proposals at EU level could delay a decision on a new Europe-wide form of collective action for some time.

Our Class Actions Group

To keep you ahead of these developments, Clifford Chance has established a multi-jurisdictional "Class Actions Group" that includes partners and associates from across our network, all experienced at handling some of the largest commercial disputes in their respective countries. Because developments in this area are moving rapidly, the Class Actions Group has set up a web page on class actions, providing country-specific pages tracking trends in each key jurisdiction.

Please go to the following link to find out more:

http://www.cliffordchance.com/expertise/legal_services/details.aspx?contentitemid=9041

Table of current position

Type of collective action/ legal feature	Country/ area of law ¹							
	Belgium	France	Germany	Italy	Netherlands	Poland	Spain	UK
Class actions?	X	X	X	✓	X	X	X	X
Representative actions: Injunctions etc?	<ul style="list-style-type: none"> commercial practices (e.g. unlawful clauses in credit agreements) unauthorised issues of securities environmental protection human rights 	<ul style="list-style-type: none"> consumer rights contractual terms commercial practices 	<ul style="list-style-type: none"> commercial practices consumer rights competition 	<ul style="list-style-type: none"> consumer rights contractual terms unlawful act competition 	<ul style="list-style-type: none"> all areas 	<ul style="list-style-type: none"> consumer rights product liability acts in tort 	<ul style="list-style-type: none"> consumer contracts 	<ul style="list-style-type: none"> consumer contracts competition
Representative actions: Damages?	<ul style="list-style-type: none"> human rights otherwise not formally but via powers of attorney 	<ul style="list-style-type: none"> consumer rights environmental protection securities investment 	X	<ul style="list-style-type: none"> consumer rights contractual terms unlawful act competition 	<ul style="list-style-type: none"> not formally but via powers of attorney 	<ul style="list-style-type: none"> consumer rights product liability acts in tort 	<ul style="list-style-type: none"> consumer rights 	<ul style="list-style-type: none"> competition
Group actions (injunctions and/ or damages)?	X	X	<ul style="list-style-type: none"> securities investment 	X	X	X	<ul style="list-style-type: none"> consumer rights (damages only) 	<ul style="list-style-type: none"> all areas
Other collective actions?	X	X	X	✓	<ul style="list-style-type: none"> collective settlement agreements 	X	X	X
Contingency fees? ²	X	X	X	✓	X	✓	✓	X
Conditional fees?	✓	✓	✓	✓	✓	✓	✓	✓
Juries in civil cases?	X	X	X	X	X	X	X	X
Punitive damages?	X	X	X	X	X	X	X	X
Loser usually pays winner's costs? ³	✓	✓	✓	✓	✓	✓	✓	✓
General document discovery?	X	X	X	X	X	X	X	✓
Pre-trial witness depositions?	X	X	X	X	X	X	X	X

¹ This table is intended to give only a general idea of the current features of each country's system. Please see the separate country sections for further details. A tick (✓) means that the legal feature exists in the relevant country; a cross (x) means that it does not.

² Details of the fee arrangements allowed in each country vary significantly - see the separate country sections. This table provides an indication only.

³ The proportion of the winner's actual costs payable by the loser varies. See the separate country sections.

Belgium

Introduction

Up until now, Belgian law has not provided for class actions. While in the last two decades, several provisions have been introduced to allow a degree of collective action in a limited number of areas, they have not created the possibility for true class actions. However, change is on its way.

Upon request of the Ministry of Consumer Affairs, a team of university professors is now drafting a Bill intended to introduce the possibility of class actions into the Belgian legal system. In addition, separate initiatives have come from both the Flemish Bar Association and from certain Members of Parliament.

Current position

Currently, some degree of collective action is allowed in certain areas of Belgian law:

- The Commercial Practices and Consumer Credit legislation allows specific organizations to seek injunctions to stop prohibited commercial practices, such as unlawful clauses in credit agreements.
- The Law on Financial Transactions and Financial Markets allows consumer organizations to seek injunctions to stop unlawful practices, such as selling securities publicly without the prior approval of the Banking Commission. However, those consumer organizations may not claim damages.
- In the field of environmental law, environmental organizations are entitled to seek injunctions against practices that breach Belgian environmental laws.
- Human rights organizations may bring actions for violations of certain Belgian human rights laws, such as anti-discrimination.

Other features of Belgian litigation

In Belgium:

- "no win no fee" agreements are not allowed but a mark-up may be agreed for successful claims (including a percentage of the damages or settlement sum);
- there are no juries in civil cases;
- there are no punitive damages;
- the loser is required to make a contribution to the winner's costs determined in accordance with a legally fixed scale; and
- there is no general discovery, nor pre-trial witness depositions.

Future developments

Belgium has become aware of the need to allow class actions with respect to mass damage, *i.e.*, damage suffered by a high number of persons. Upon request of the Ministry of Consumer Affairs, a first draft Bill was prepared by university professors. Although the government initially only wanted to allow consumer class actions, the scope of the Bill has been widened to include all matters of law. The draft Bill aims to set up a framework enabling a representative to introduce a class action on behalf of an unidentified group of claimants who have suffered a mass damage.

The representative may choose one of two ways to introduce a class action before a court: it may either try to obtain the judge's approval of an existing class settlement, or submit a class action claim to obtain a judgment. The choice of the submission of a class action claim instead of an individual claim is subject to the court's authorisation. In either case, the class action falls within the exclusive competence of a panel of three specialised judges of the Brussels courts.

The group of claimants encompasses Belgian residents harmed by the event for which the class action is introduced, unless they opt out, and non-Belgian residents who opt in. The court – or the parties, in case of a settlement – may also decide to apply the opt-in mechanism to all parties, regardless of whether they are Belgian residents or not. In any case, the deadline for opting in or out, as the case may be, must be set between 30 days and 6 months from the date the approved settlement is published or the date the decision authorising the class action claim is recorded in a specific public register. After this deadline, all the group members will be bound by the outcome, save those who demonstrate that they could not reasonably know about the settlement or the decision authorising the claim.

The representative who brings the class action must be a non-profit entity. The draft bill requires this entity to be "sufficiently representative", but it is not required to have suffered damage itself.

A class settlement may be rejected by the court if it is manifestly unreasonable or if the publicity mechanisms it proposes are insufficient. If the settlement agreement does not provide for a procedure in the case of new damage to the group members occurring, the settlement is only binding on the parties for the damage that has already occurred.

A class action claim can only be authorised by the court if it appears more appropriate than ordinary proceedings. The class action proceedings may be suspended at any time to allow for negotiations. In the event that negotiations lead to a settlement, the procedure for a class settlement must be followed.

The Bill does not specify who bears the costs of the class action. In theory, this would result in the representative having to bear those costs. It is, however, envisaged to require the group members to contribute to a fund, which would cover the costs of the procedure. In case the group members succeed, the defendant would be obliged to indemnify them for those costs.

Other initiatives

Besides the draft government Bill described above, a separate Bill has been drafted by two Members of Parliament. The Flemish Bar Association has also drafted a proposal for the introduction of class actions under Belgian law.

The adoption procedure of the draft Bill proposed by the two Members of Parliament is now pending. Contrary to the government Bill, this one provides for a general opt-in mechanism. With regard to the costs of the procedure, the Bill provides for a system similar to the one envisaged by the drafters of the government Bill.

The current version of the Flemish Bar Association's proposal introduces a system whereby the judge can at his own discretion choose for an opt-in or an opt-out system. It also provides for a fund similar to that of the two Bills, but it allows the judge to decide whether or not the group members should pay sums into the fund.

Impact

The government Bill's current draft will, if adopted, increase the judicial system's efficiency and strengthen law enforcement by allowing many small claims to be combined into a single class action. However, the Bill does not affect the principle to the effect that judicial damages can only cover effectively suffered damage (save for a possible indemnity to cover the costs of the procedure). There are no punitive damages under Belgian law. Moreover, "no win no fee" agreements are not allowed in Belgium. As the government Bill's current draft does not yet provide for a fund to bear the costs of the procedure, the representative would have to advance the necessary sums. This would indubitably discourage many entities from starting class action proceedings.

Concerns were raised about the rights of the defence and the Bill's possible negative impact on businesses. For this reason, the Minister of Justice has appointed a counsel of Clifford Chance's litigation department as special advisor to propose amendments and advise the government on the draft Bill.

Given elections have been called for June 2010, legislative action has been suspended. It remains to be seen what initiatives will be taken after the elections, but it is likely that the two Bills mentioned above will be back on the table.

France

Introduction

A number of principles of French law, as it now stands, prohibit US-style class actions in France.

In France, the right to bring a legal action is vested in individual parties who claim enforcement of their rights; French judges cannot issue judgments binding third parties that are not part of the proceedings. Their decisions are only binding on the parties to the proceedings and claimants may only claim for their personal loss.

Other differences between the US and French judicial systems also play a role in precluding the introduction of US-style litigation in France; for instance civil juries, punitive damages, discovery, cross-examination, contingency fees or ambulance-chasing" do not exist in the French legal system.

Certain non-profit organizations may act before civil or criminal courts to protect the collective interests of consumers. They can start representative actions aimed at stopping wrongful behaviour or banning unlawful clauses in standard form contracts.

Since the 1990s, three categories of people have been entitled to seek compensation through non-profit organizations: consumers, victims of environmental risks and investors. These actions are very different from US-style class actions.

However, a reform of class actions is in the pipeline.

Current position

Consumers

Since 1992, a non-profit, government-authorised consumer organization has been able to seek compensation for damages suffered by consumers (under article L. 422-1 of the French Consumer Code). The damage must have been caused by the same person and have a common origin. This is called an *action en représentation conjointe* (joint action).

The organization may only act on behalf of consumers (at least two) who have given it a written power of attorney (*mandat*). This is a key difference from US-style class actions. Organizations may seek potential claimants through the press but they are not allowed to advertise, send mailings or make public announcements on the TV or radio.

The organizations may file their actions before civil or criminal courts and any damages awarded are paid to the affected consumers. However, very few actions of this kind have been brought before the French courts.

Consumer organizations are also entitled to seek the annulment of unfair contract terms (*clauses abusives*) or injunctions to restrain unlawful conduct (under article L. 421-6 of the French Consumer Code).

Victims of Environmental Risks

Since 1995, victims of environmental risks have been able to be represented by non-profit organizations to claim damages (under article L. 142-3 of the French Environmental Code). The rules governing commencement of such an action are similar to those governing actions on behalf of consumers.

Investors

Since 1994, securities investors have been able to act jointly through authorised, non-profit investor organizations (under article L. 452-2 of the French Financial and Monetary Code).

As in consumer cases, the organization must have a written power of attorney (*mandat*) from at least two investors. It may then seek remedies for losses suffered by these investors under a single head of claim.

The Financial Security Act (*Loi de Sécurité Financière*) of 1 August 2003 was an opportunity to introduce class action legislation in France. However, no legislative action was taken to introduce class actions at the time. The Financial Security Act simplified the procedure for the grant of government authorisation to investor organizations. It also extended the methods authorised for the purposes of locating claimants to mailings, radio, TV and advertising campaigns, as well as via the press – although these campaigns must be authorised by the court beforehand.

Future developments

On 4 January 2005, the French President Jacques Chirac asked the government to propose legislation on "collective actions". The President stated that, "today, consumers are at a disadvantage because the potential recovery for any individual claim for damages would not be large enough to cover their legal expenses".

A working group of ministers, consumer organizations, companies and lawyers was formed to prepare draft legislation for collective consumer actions (*actions de groupe*) in France. The aim of the controversial new bill was to introduce a French-style collective action for consumers while avoiding the disadvantages of US-style class actions. The bill was expected to come before Parliament at the beginning of 2007.

The contemplated reform gave rise to a lively debate. In May 2006 two bills were submitted to both chambers of Parliament – *Sénat and Assemblée Nationale* – one by socialist MPs, and the other by Luc Chatel, an MP from the majority center-right UMP party, for the introduction of a system of collective actions in the French legal system. In a press article, the President of the *Cour de Cassation* (French Supreme Court) also stated that he was in favour of the introduction of such an action.

On 6 November 2006, a bill on consumer rights, comprising some provisions on class actions brought by consumer bodies ("group actions"), was introduced by the government in the National Assembly (French Parliament). The aim of the draft legislation was to make it easier for a consumer body to bring legal proceedings on behalf of a number of consumers with a common claim.

However, the bill was withdrawn from Parliament's agenda, owing to the upcoming presidential elections.

Following the election of Nicolas Sarkozy on 6 May 2007, Mr Luc Chatel was appointed as Minister of State, attached to the Minister for the Economy, Finance and Employment, responsible for Consumer Affairs and Tourism, on 19 June 2007. Mr Chatel was one of authors of the draft bill for the introduction of French-style class actions for consumers, which was submitted to Parliament in May 2006 (see above).

Since then, the debate kept going on.

On October 2009 the *Sénat* set up a working group to analyse the opportunity and conditions of possible French class actions.

A draft bill has been filed with the *Sénat* on 9 February 2010; It has however been recently rejected.

Last but not least, Mrs Lagarde, Minister for the Economy, recently declared that she was against the introduction of class actions in France, because of the "instability" that would result from such an action, such instability being especially detrimental in the current context of economical crisis (see *Le Figaro* 15/4/2010).

Accordingly, it is likely that collective actions will not be introduced in the French legal system in the near future.

Germany

Introduction

Germany has recently adopted a law that introduces a novel process to facilitate claims by individual investors alleging false, misleading or missing information in capital markets. The Capital Investors' Model Proceeding Law (*Kapitalanleger-Musterverfahrensgesetz* or *KapMuG* – referred to as *the Model Proceeding Law* in this section), seeks to address some of the problems that have arisen in mass securities actions in German courts. The Model Proceeding Law came into force on 1 November 2005.

Current position

Securities Investors

The Model Proceeding Law allows common issues of fact or law in multiple individual securities actions to be bundled together. The law applies only to damages claims and claims for specific performance in connection with takeover offerings under the German Securities Acquisition and Takeover Act (*Wertpapiererwerbs- und Übernahmegesetz*, *WpÜG*).

The issuer's seat is the exclusive venue for all claims against domestic issuers, underwriters or board members of the issuer. In the case of a takeover bid, the venue is the seat of the domestic target. Foreign parties may be sued in German courts under the Model Proceeding Law as well.

A model proceeding may be sought in any securities or investor action. The petition must demonstrate common questions of fact or law in parallel cases which can be collectively determined. If the petition is granted by the court, a public announcement is issued on an internet-based litigation register (*Klageregister*) and the underlying action is automatically stayed.

If nine further similar petitions are filed within four months, the first court will then decide on the common questions to be carved out and transfer the case to the Higher Regional Court (*Oberlandesgericht*) for determination in a model proceeding. At this point, all other parallel actions are stayed.

The Higher Regional Court then selects a lead petitioner who, with the defendant(s), are the only parties to the model proceeding. The other claimants are permitted to join the model proceeding as third party petitioners only. The resulting judgment is binding on all claimants in the parallel cases – there is no opt-out provision. The parties to the model proceeding may agree on a settlement as long as all third party petitioners agree.

This method to determine common questions aims to avoid duplication of work and costs, such as expert evidence. Once the common questions have been decided, the individual actions are resumed. Even where the common questions have been determined in the claimants' favour in the model proceeding, the individual actions may fail for other reasons.

The decision of the Higher Regional Court (*the Musterentscheid*) may be appealed to the German Federal Supreme Court (*Bundesgerichtshof*).

Other “Collective” Remedies

Collective interests are enforceable through representative actions in a number of areas. For example, consumer protection, general commercial and competition laws give certain non-profit organizations the right to sue. These organizations may enforce collective interests and petition courts to stop a defendant conducting unlawful business practices. Generally, they may not sue for damages.

Other features of German litigation

In Germany:

- contingency or conditional fees are not allowed (with limited exceptions to be enacted shortly);
- there are no juries in civil cases;
- there are no punitive damages;
- the loser pays the winner's costs according to a statutory fee scale; and
- there is no discovery of documents or pre-trial witness depositions (however, access to investigators' or regulators' files can be obtained by plaintiffs under certain circumstances).

Future developments

The Model Proceeding Law was set to expire on 1 November 2010. The German Federal Ministry of Justice commissioned an evaluation report on the Model Proceeding Law which has been published in June 2010. The report makes a number of suggestions to amend the Model Proceeding Law and to extend its scope to other fields of law such as product liability. Since such amendments require a detailed discussion process, the law has been provisionally extended until 31 October 2012.

The Model Proceeding Law diverts securities litigation cases from their traditional Frankfurt centre to German provincial courts.

The exclusive venue for claims against German domestic issuers may mean that securities judgments of non-EU courts against German issuers are no longer recognised and enforced in Germany. This rule is aimed at curbing US securities class actions against German issuers.

However, there are some concerns about model proceedings.

- Unlike a US class action, the model proceeding has no opt-out for claimants unless they withdraw their individual actions entirely. Whether or not claimants take an active part in the model proceeding (as third party petitioners), they will be bound by its outcome.
- Due to the statute of limitations, investors cannot avoid filing their claims early on and being drawn into a model proceeding. The proposed cost regime may not be entirely successful in encouraging small investors to bring claims as it still requires advance payment of court fees and the statutory scheme for lawyer compensation is inadequate.
- The model procedure appears to be slow and cumbersome. So far, only one case has been decided, and only one other action has reached the trial stage.

These concerns may encourage alternative fee agreements – either with specialist securities litigation lawyers or through professional litigation funders who offer de facto contingency fee schemes.

This area of litigation is taking off in Germany. Claimant firms systematically monitor the internet litigation register and use the register to solicit claimants.

Italy

Introduction

The class action (initially called the “collective action for compensation”) was supposed to have entered into force at the end of June 2008. This new legal framework, however, was extremely complex and certain vague aspects of the provisions raised doubts as to the effectiveness of the new form of legal action, even before its entry into force. Accordingly, pending the necessary clarifications, the Italian legislature postponed the date of entry into force of such provisions on more than one occasion, until it finally adopted the new and better worded section 140 *bis* of the Italian Consumer Code (entitled “Class Action”).

First of all, it is important to note that the application of the new legal framework is subject to two time restrictions: class actions can be brought from 1 January 2010 (date of entry into force of section 140-*bis* of the Italian Consumer Code) only with regard to unlawful acts committed after 15 August 2009.

This particular provision has given rise to numerous perplexities, given that since the provision in question is procedural in nature (class action introduces a new form of action to be used to protect substantive rights that are already protected through ordinary legal proceedings), on the basis of the principle of *tempus regit actum*, it should have been possible for it to be used against all unlawful acts committed (and therefore for the purposes of protection against damages suffered as a consequence) even prior to 15 August 2009, subject only to the limit set by an ordinary time bar.

Current position

Art. 140 *bis* of the Consumer Code

The new legal framework provides that homogeneous individual rights of consumers and users may also be protected through class action.

In particular, the class action may be used in all cases in which harm is caused to many consumers or users in connection with: (i) contracts entered into by many different consumers and users with the same company, in the same situation, including rights pertaining to contracts entered into in accordance with sections 1341 and 1342 of the Italian Civil Code; (ii) identical rights belong to the final consumers of a given product, against the manufacturer of the same, regardless of whether or not there exists a direct contractual relationship between the manufacturer and the consumer; (iii) identical rights to compensation for damages caused to consumers and users by unfair business practices or conduct in breach of principles of fair competition.

Under section 140*bis*, first sub-section, each member of the class, individually or indirectly through associations which such member may grant a mandate or committees to which he/she belongs, may take action for the determination of liability and for a court order for compensation of damages and restitution of amounts already paid. It follows that standing to take legal action, which rests with a person who claims to be the holder of a legal relationship under dispute, does not belong only to associations and committees (as provided under the previous version of the provisions), but also to the individual member of the class who may take action independently for purposes of initiating a class action or use associations or committees to which he/she belongs.

Opt-in Rule

Unlike the US, Italy has adopted the opt-in rule. The benefits of the class action and the consequent right to compensation cover only those persons who have expressly stated their intention to take part in the class action or who have become party to the proceedings by raising claims having the same subject matter as the main claim.

The proceedings

The claim is raised before an ordinary court located in the capital of the region where the defendant company has its registered office; ad hoc courts are also envisaged for certain regions.

In order to prevent the commencement of lawsuits based upon claims that are clearly specious and unsubstantiated, a “filter” is envisaged, to be used by the court in question, which prior to entering into the merits of the lawsuit, issues a decision on its admissibility. The lawsuit would be deemed inadmissible where (i) it is manifestly unfounded; (ii) there exists a conflict of interests, (iii) the rights subject to protection are not identical; and (iv) the proponent of the class action is not capable of adequately acting in the interest of the class.

If the court decides that the class action is admissible, it sets out the terms and arrangements for the announcement of the lawsuit by way of a court order to allow the members of the class to join the lawsuit and commences the related proceedings. The court order admitting the class action is broad in scope, governing both procedural and substantive aspects, and constitutes the expression of the broad power of organizational management of the class action which the new legal framework grants to the court (known as the “case management” of the lawsuit).

If the court grants the claim, it issues a decision against the defendant which is not limited to the determination of the existence of individual rights, but also orders the defeated company to effect performance, or in other words to make payment of compensation to each consumer/user participating in the lawsuit. If a specific amount of damages may not be determined, the court must indicate the calculation criteria.

Other features of Italian litigation

In Italy:

- contingency or conditional fees are now allowed: this possibility exists in practice in Italy as a result of law 223/2006 which repealed the regulations providing for "the setting of obligatory fixed rate or minimum tariffs, i.e. the prohibition on agreeing on fees linked to the attainment of the objectives pursued";
- there are no juries in civil cases;
- there are no punitive damages;
- the loser usually pays the winner's costs according to a fixed scale; and
- there is no discovery of documents or pre-trial witness depositions.

Future developments

Forms of aggregate claims and legal proceedings will allow for the reduction of costs thanks to the sharing of litigation expenses among numerous parties and will discourage individuals from taking an apathetic approach. Secondly, the new mechanism of protection seeks to reduce the number of lawsuits, by concentrating many claims under a single lawsuit, thus reducing congestion in the courts and furthering the principle of procedural economy.

The first effects of this new form of protection and the use (which initially is likely to be excessive) made of it by its beneficiaries is not likely to be evident until a considerable period of time has passed from its actual implementation. It should also be recalled that this is an instrument alien to Italian civil procedure and, like all novelties, will inevitably be subject to an initial testing period and will take on its definitive legal form only through its concrete interpretation and application.

The Netherlands

Introduction

The Dutch Civil Code allows representative organizations to bring actions to protect the interests of others. Although no damages may be claimed in representative actions, damages are often claimed for each individual in the group through a power of attorney.

On 27 July 2005 a new Act came into force facilitating the collective settlement of mass damages.

Current position

Representative Actions

The Dutch Civil Code allows representative actions under article 3:305a. A representative organization may file a claim to protect the interests of others, if the organization's objective, as defined in its articles of association, is to act for the benefit of those interests.

The interests must be sufficiently similar to be dealt with in one action and claims must include common questions of law or fact. The representative organization brings the proceedings in its own name - the affected parties are not party to the claim. Before filing a claim, the representative organization must attempt settlement with the defendant.

Damages claims are not permitted. The claim may, however, seek to enforce or terminate a contract or the publication of certain information about the defendant's products or services.

The judgment is binding between the representative organization and the defendant, but does not bind the individuals.

Although damages claims may not be brought by the representative organization under article 3:305a, affected individuals may grant a representative organization a power of attorney to represent them and claim damages on their behalf.

All types of actions may be brought under article 3:305a, including securities, competition and product liability claims. Securities actions of this kind are becoming more frequent. There have been cases against Dexia Bank (the "Legiolease" case) and ABN AMRO and World Online (regarding the IPO of World Online).

Collective Settlement Agreements

On 27 July 2005, the Act on Collective Settlement of Mass Damages (*Wet collectieve afwikkeling massaschade*) came into force, facilitating the collective settlement of mass damages. The Act was originally created for "mass disaster accidents" where many people suffer similar damages at the same time. Under the settlement agreement, one or more parties agrees to pay damages to all those affected. Damages are settled on the basis of "damage classes". The settlement agreement is entered into between a representative organization, which according to its articles of association acts in the interests of the parties affected, and the party or parties that will pay the damages.

The Court of Appeal at Amsterdam may declare such a settlement collectively binding on all parties affected. A joint request must first be made by a representative organization acting on behalf of those affected and the party that agrees to pay damages.

The settlement agreement must contain:

- a description of the class of persons affected;
- the compensation that will be paid;
- the requirements needed to be eligible for compensation; and
- details of how the compensation has been calculated.

An affected person may choose to "opt out" within three months after approval of the settlement agreement and thus avoid being bound by its terms. Those who have not opted out may collect their compensation within a timeframe specified in the settlement agreement (up to one year). Those who do not collect their compensation in time will lose their rights.

A collective settlement under this Act was entered into by Dexia with regard to its duty of care towards individuals in respect of certain share lease products. Shell entered into a settlement regarding a class action initiated in the US with regard to the re-categorisation of its proved petroleum reserves and this settlement has been declared collectively binding on the non-US

aggrieved parties. Settlements that have been declared collectively binding have also been entered into in relation to affected policyholders of a bankrupt insurance company (Vie d'Or) and in relation to investor claims for late disclosures by Vedior.

Other features of Dutch litigation

In the Netherlands:

- "no win no fee" agreements are not allowed but a success fee may be agreed for successful claims (including a percentage of the damages or settlement sum, unless this would be excessive);
- there are no juries in civil cases;
- there are no punitive damages;
- the loser usually pays the winner's costs according to a fixed scale;
- there is no general discovery but specific documents may be requested; and
- there are no pre-trial witness depositions but preliminary witness hearings are possible.

Future developments

Recent case examples show that the Act on the Collective Settlement of Mass Damages has led to an increase in collective action activity. It is likely that this trend will continue.

The Ministry of Justice has reviewed the experiences with this new legislation and comes to the conclusion that this law provides for an effective and efficient method for collective dispute resolution, however, only in case there is willingness to negotiate. The disadvantage of this system is that parties are often only willing to enter into a settlement after essential legal and factual questions have been judged by the highest court, which takes considerable time. It has been suggested to improve the system by introducing a pre-trial hearing. In such a hearing the Court may be instrumental in reaching an agreement. Another suggestion was to introduce a direct request to the Supreme Court for prejudicial questions (of law).

There has been considerable debate on the corporate governance of the various organizations that wish to represent the affected parties and the compensation for the persons involved in these organizations. This debate led to a private initiative for a model form (a "Claimcode") for the corporate governance of such representative organizations, currently in the form of a consultation document.

Poland

Introduction

The institution of representative actions similar to American class actions was recently introduced in Poland by means of the Act on the Pursuit of Claims in Multi-party Proceedings (the "**Act**"). This is a new legal remedy that allows a number of similar cases being brought by different entities to be examined in single civil proceedings. The Act comes into force on 19 July 2010.

Current position

Scope of application of the Act

The Act will apply to civil proceedings instituted by at least ten persons pursuing claims of the same type, based on the same or similar situation in fact.

The scope of application of the Act is limited exclusively to claims in the following cases:

- consumer rights;
- product liability;
- acts in tort.

Claims for the protection of personal rights have been excluded from the possibility of being pursued in multi-party proceedings.

Members of the Multi-party Group - "Opt-in" Model

Under the Act, multi-party proceedings will cover the claims of persons who join the proceedings in the time-frame specified by the court. Therefore, Poland has adopted the so-called "opt-in" model (unlike the USA).

Furthermore, persons who leave the group or decide not to join the group in the first place, may pursue their claims in separate proceedings. The court decision issued in the multi-party proceedings is effective only vis-a-vis the persons who participated in such proceedings as members of the group.

Representative of Members of the Multi-party Group

Multi-party proceedings may be instituted by a representative, who at the same time is one of the parties or a municipal (city) consumer spokesman. Multi-party proceedings would be conducted by the representative in its own name, but for the benefit of all the parties in the group.

Under the Act, each party in the multi-party proceedings must be represented by an advocate or a legal adviser.

Multi-party Proceedings

Cases in multi-party proceedings will be examined by three professional regional court judges, which is an exception to the general rule that cases are heard by one district or regional court judge. This should ensure a higher degree of professionalism in court judgments in multi-party proceedings.

First of all, the court will decide whether multi-party proceedings are admissible in the given case. If so, a decision will be issued for the case to be examined in multi-party proceedings.

Secondly, the court will order the institution of the proceedings to be announced in the national, popular press, so that each person injured by the given event may join in as a participant. Pursuant to the provisions of the Act, the announcement should indicate the deadline by which the injured parties may join the proceedings. If a party breaches the deadline, the party's claims cannot be pursued in multi-party proceedings, but they may be pursued in separate proceedings.

The Act does not preclude an amicable resolution of the dispute that is the subject-matter of multi-party proceedings. The court may, at each stage of the proceedings, refer the parties to mediation.

The Act does not modify the currently applicable rules of assessing the damages owed to the injured party. In particular, the Act does not provide for punitive damages.

The relevant provisions of the Code of Civil Procedure will apply to multi-party proceedings in matters not regulated by the Act.

Costs of Multi-party Proceedings

In Poland the losing party to multi-party proceedings will be obliged to reimburse the winning party for the costs of the proceedings in statutory amounts prescribed by Polish law.

Moreover, pursuant to the Act, a claimant may be ordered to pay a deposit as security for the costs of the proceedings, to prevent multi-party proceedings from being abused. However, the deposit may not exceed 20% of the value of the claim in question.

Pursuant to the Act, the attorney-in-fact may be remunerated *pro rata* to the amount awarded to the claimant, but not exceeding 20% of that amount. This rule is similar to American contingency fees, according to which the claimant's attorney's fees are usually a percentage of the damages awarded to the claimant.

Other features of Polish litigation

In Poland:

- contingency or conditional fees are allowed;
- there are no juries in civil cases;
- there are no punitive damages;
- the loser pays the winner's costs according to a statutory fee scale; and
- there is no discovery of documents or pre-trial witness depositions.

Future developments

As the Act has not yet come into force, it is too early to foresee any future developments in this respect.

Spain

Introduction

Spanish law allows representative actions to defend the interests of consumers. This recent system, established by the current Procedural Law (which came into force in 2001) raises several problems of interpretation and there is currently no consistent approach to these cases by the courts. It is also necessary to consider the Legislative Royal Decree 1/2007, dated 16 November, which has comprised in single legal text the various regulations on the multiple sides of the protection of consumers and users.

Current position

Consumers under Spanish Law

Spanish Law uses a broad concept of "consumer": consumers are those who in the case at hand do not act as an entrepreneur or as a professional. So:

- consumers may be individuals or legal entities;
- the products in question may be goods (moveable or immovable), products, services, activities or functions; and
- the producer or service provider may be public or private, individual or collective.

This includes, therefore, purchasers of defective products and users of financial and health services, if they are the end users.

Claims Aimed at Protecting Consumers' Interests

The interests of consumers that are protected may be "collective" or "diffuse".

- The interests are "collective" when the affected consumers are easily identifiable. Both consumer organizations and groups of consumers themselves may bring an action, if the group includes a majority of affected consumers.
- The interests are "diffuse" when the affected consumers are not easily identifiable. Only certain consumer organizations are entitled to file these claims.

The claims may require the defendant to pay damages or take specific action. They may also seek a declaration that the defendant's conduct is illegal.

Preliminary enquiries may be undertaken before the process starts, although this is more limited than US discovery.

All affected consumers must be notified of the actions (through the media) so that they may assert their individual rights in the case.

Evidence is governed by the usual rules: each party may seek to introduce evidence, and sometimes the court may itself ask for specific evidence.

If the claim is brought by a group of affected consumers, only those included in the group may benefit from the judgment. Consumers who do not participate will be neither bound by nor able to enforce the judgment. If the claim is brought by a consumer organization, any affected consumer (including those who do not participate) may benefit from the judgment.

There are rules about the content of judgments and their enforcement in the case of claims by consumer organizations.

- If the defendant is ordered to take specific action, the judge must identify the consumers who are to benefit from the action. The judgment must at least describe the criteria for determining whether an individual is intended to benefit.
- If the judgment declares conduct illegal, it must determine whether this declaration affects people not party to the proceedings.
- If individual consumers take part in the proceedings, then the decision must address their specific claims.

Injunctions

The entitlement to seek an injunction (or "cessation action") depends on the specific sector and law in question. Consumer organizations may seek injunctions, but groups of affected consumers may not.

Other features of Spanish litigation

There are other features of the Spanish legal system that affect representative actions.

- There is no trial by jury in civil proceedings.
- The Supreme Court (Civil section) has acknowledged the validity of contingency fee agreements ("*pactum de quota litis*") between lawyers and clients, although the scope of permissible agreements needs clarification.
- The burden of proof is reversed in consumer protection cases: the product or service provider is liable for any damage, unless they prove that they fulfilled all legal requirements and took all other necessary measures.
- An "objective liability" system applies to particular products and services (such as foodstuffs, pharmaceuticals, health services and motor vehicles) where certain standards and quality controls are required. This means that the defendant may seek to avoid liability by proving that the damage was caused by an act of nature or the victim's negligence. But proof of its own diligence is not enough for the defendant to avoid paying damages.
- Spanish law does not acknowledge punitive damages.
- In most cases the losing party must pay the legal expenses of the successful party. This means paying the actual legal expenses up to a third of the amount in dispute.

Future developments

There is increasing awareness among consumers of this type of litigation and several recent cases have applied the new law. For example, the Consumers and Users Organization has taken action against some companies acting in the telecommunication and financial services sectors and some of the contractual terms used by such firms were found to be abusive by the courts. It is likely that more claims will be brought in the future, which places a significant risk on manufacturing and service businesses. In particular, further actions have been brought regarding air transportation, although there have not been any Court resolutions in this regard as of yet.

United Kingdom

Introduction

There is no direct UK equivalent of a US "class action". There are, however, various forms of collective action and other mechanisms for pursuing "group complaints".

Current position

Collective Actions In General

No procedural mechanism is required for claimants with similar grievances to bring a collective action. The most extreme example is the recent Railtrack case in which nearly 50,000 shareholders sued the government for allegedly forcing the privatised Railtrack into administration in order effectively to renationalise the business without having to compensate shareholders. But several mechanisms do exist for bringing collective actions.

GLOs - General Application

Group Litigation Orders (GLOs) were introduced by the 1999 procedural reforms promoting access to justice. A GLO is made under the Civil Procedure Rules (CPR 19.11) for claims which "give rise to common or related issues of fact or law" (GLO issues). The claims are brought as a group, usually with at least 10 claimants and often using the same lawyers.

Unlike US class actions (where all potential claimants are bound unless they opt out of the class), all claimants wishing to join the group litigation must apply to be entered onto the group register ("opt in") by a date specified by the Court. Judgment on one or more of the GLO issues will bind all of the claimants on the group register; any non-GLO issues (such as compensation) will be determined in each individual case.

GLOs have been issued in a range of areas, including product liability (McDonalds Hot Drinks, Sabril Group Litigation) and the compatibility of UK tax provisions with EC law (Thin Cap Group Litigation). A list of GLOs is published on the Court website at <http://www.hmcourts-service.gov.uk/cms/150.htm>. So far there have been no antitrust or securities GLOs. Take-up of GLOs has so far been modest (only 64 since 1999).

Representative Actions - General Application

Representative actions may be made by (or against) one or more persons who have the "same interest" in every part of a claim (CPR 19). The "same interest" requirement is restrictive and a GLO (which only requires common or related issues) will usually be a preferable route for claimants.

Representative Actions - Competition Law

Sections 47A and 47B of the Competition Act 1998 allow representative actions to be brought by a "specified body" on behalf of consumers in claims for damages for breach of UK or EC competition law, following findings of anti-competitive conduct by the Competition Appeal Tribunal (CAT). Unlike GLOs, these claims are made by consumer organizations on behalf of claimants. The only claim to be made under section 47B to date was brought by which (the Consumers' Association) in relation to price-fixed football shirts. It was settled and regarded as only a qualified success.

"Super-Complaints" - Competition Law

Section 11 of the Enterprise Act 2002 enables consumer organizations designated by the Secretary of State (such as the Consumers' Association) to submit "super-complaints" to the Office of Fair Trading (OFT). The organization must consider that there is a market feature or combination of features (such as the structure of a market or the conduct of those operating within it) that significantly harms consumer interests. The OFT may take enforcement action, launch a market study or refer the complaint to the Competition Commission or a sector regulator.

Injunctions - Consumer Contracts

A representative organization may complain to the OFT (or other qualifying body) that a contract term drawn up for general use is unfair under the Unfair Terms in Consumer Contracts Regulations 1999. The OFT will decide whether to bring proceedings for an injunction. This procedure does not allow damages claims.

Other features of UK litigation

The modest take-up of collective actions in the UK is probably due to a combination of no contingency fees, no juries, no punitive damages and the "loser pays" principle. Although these features have probably curbed any US-style class action explosion, the UK can expect to see an increase in collective actions.

Future developments

The issue of collective redress has been the subject of consultation exercises, including:

Civil Justice Council ("CJC") consultation

In its paper "Improving Access to Justice through Collective Actions" published on 5 August 2008, the CJC recommended introduction of a generic collective action, on either an opt-in or opt-out basis. The paper was published as formal advice to the Lord Chancellor. It followed an extensive consultation process by the CJC and a series of stakeholder events which canvassed views on potential developments in collective actions.

The Ministry of Justice published its response to the CJC paper in July 2009. It said that it did not support a generic right of collective action. Instead, it called for an investigation of regulatory options that might provide compensation for claimants in certain sectors, and a sector-based approach to the development of collective actions.

Office of Fair Trading ("OFT") recommendations

On 26 November 2007 the OFT published its recommendations to the Government on steps to improve the effectiveness of civil law remedies for those who allege that they are victims of breaches of competition law in the UK.

The OFT recommended modifying existing procedures, or introducing new procedures, so as to allow representative bodies to bring stand alone and follow-on representative actions for damages and applications for injunctions on behalf of consumers, whether named consumers or consumers at large. There was also a suggestion that this right could extend to actions on behalf of businesses. While it advocated the introduction of opt-out actions, this was on the basis that only designated bodies should be allowed to bring representative actions in the UK.

It also said that there should be no provision for the award of treble damages (common in the US) and that the principle that the unsuccessful claimant in the UK is liable for the defendant's costs should remain.

Financial Services Bill

When the Financial Services Bill was published in the UK in 2009, it set out a proposed regime for collective proceedings in relation to financial services claims. These would have been permitted on an "opt-in" or an "opt-out" basis but both types of claims would have required the permission of the court. Much of the detail of the proposals was reserved for regulations to be made by the Treasury, or by rules of the court. The Bill was also silent on the issue of costs awards and specifically whether the "loser pays" principle would be maintained. Objections to the proposals for collective proceedings meant that the relevant clauses were removed from the Bill before it was finally passed, but it is possible that another attempt will be made at some future time to resurrect them.

Appendix

Class actions in the United States

Introduction

Class actions permit a group of similarly placed individuals or entities to make claims in a single action. They allow redress for wrongs that are ordinarily too small to support individual cases. They also offer defendants the benefit of resolving complex questions of liability and damages in a single action that binds the entire class apart from those class members who opt out.

Class action law in the United States is well-developed. Rule 23 of the Federal Rules of Civil Procedure ("Rule 23") outlines the procedures for filing and maintaining a class action in federal court. Each US state also has procedural rules for bringing class actions.

One or more plaintiffs (a "class representative") may file an action on behalf of a proposed class. The burden of proving that a proposed class satisfies Rule 23 rests with the class representative. The parties are permitted discovery to assess whether Rule 23 is satisfied.

The trial court will decide whether a proposed class may be certified. Although courts cannot assess the merits of the class representative's claims when considering class certification, they are required to conduct a "rigorous analysis" of the facts before certifying a class. A proposed class may be certified as sub-classes, but each sub-class must independently satisfy every requirement of Rule 23.

Rule 23 was recently amended to allow a defendant to seek an immediate appeal of a trial court's decision to certify a class. In addition, the Class Action Fairness Act of 2005 and the Securities Litigation Uniform Standards Act of 1998 were enacted to address procedural flaws in class action litigation. The primary purpose of this legislation was to streamline and "federalise" class actions, ensuring that most class actions are litigated in the federal courts.

Specific requirements

The court must consider the following elements in deciding whether to certify a class:

- Ascertainable class: class members must be ascertainable under objective criteria.
- Numerosity: A class must be so "numerous that joinder of all parties is impracticable."
- Typicality: the class representative's claim must be typical of the class members' claims. Class certification is often opposed on the basis that the class representative is subject to "unique defenses" inapplicable to the proposed class members.
- Adequacy: the class representative must be able to pursue the claims of class members "fairly and adequately". This often requires evaluation of conflicts of interest between the class representative and the class members, or among class members.
- Commonality: there must be "questions of law or fact common to the class." This requirement is designed to ensure fairness and efficiency but is not usually a rigorous standard for plaintiffs to meet. Most class certification motions are instead opposed by defendants on "predominance" grounds.
- Predominance: the class representative must show that common issues of fact and law predominate over individual ones.

After a class is certified, notice must be provided to the class members. This may be done through direct mailing or advertising in national media, and the notice must be given "in plain, easily understood language." A class member may then elect to "opt out" of the class action and thereby would be permitted to bring an individual case on the same facts and circumstances. It has become more routine for plaintiffs with large claims to opt out of the class, often before the class has been certified and notice has been given. Those not opting out may not bring their own individual cases and will be bound by the outcome of the class action.

Often, classes are certified along with settlement between the parties. The court must find that both the settlement and the fees awarded to class counsel are fair. Fees are awarded to class counsel from the settlement amount and can be as high as 35%. Members of the class who do not opt out are bound by the settlement and are deemed to release all claims related to the case.

If class certification is denied, a court may prevent class members from seeking class certification in another forum. The class members may still bring individual cases.

Securities Litigation

Courts frequently find class issues to predominate in cases alleging securities fraud, because plaintiffs often can cite to a uniform misrepresentation and a “fraud on the market” that removes the need to show individual reliance.

Antitrust/Competition

Provided that the proposed class consists of direct (rather than indirect) purchasers, courts regularly find antitrust issues to predominate over individual ones. For example, the impact of alleged price fixing and tying will usually be common to all class members, and the impact of monopolization will usually be common to class members within a particular market.

Product Liability

Courts usually distinguish between single-event cases and longer-term ones. In single-event cases, the class-wide common causation issues posed by a single disaster will often predominate. Longer-term cases involve class members exposed to an allegedly harmful product over a long period of time; they are seldom certified because of complex individual issues around causation and contributory negligence.

Other features of US litigation

In the US:

- contingency fees are allowed and, in fact, the norm for plaintiffs in class actions;
- most civil trials involve juries;
- punitive damages are allowed;
- the losing party does not usually pay the winner’s costs; and
- there is extensive pre-trial discovery and witness depositions.

Class actions will continue to be the primary method for resolving large-scale disputes in the United States, particularly given the lucrative incentives to plaintiffs’ lawyers to bring class actions on a contingency fee basis. Potential defendants are likely to continue to face increasingly large exposure to class actions in the United States.