

The Emerging European Class Action: Expanding Multi-Party Litigation To A Shrinking World

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INTRODUCTION

An American lawyer reading about a class of graffiti painters contending that a security company violated their privacy rights could be forgiven for thinking she had picked up the latest Mealey's or BNA report. In fact, this case is an example of litigation that has emerged in Europe in the last five years.

Historically Europe has had little litigation compared to the United States. This is due to several factors. The level of compensatory damages is relatively low by comparison to the United States, and there are no punitive damages. In addition, contingency fees are generally not permitted, so there has been little incentive for lawyers to take the risk of pursuing claims or to push for new theories of recovery. There are no juries in civil cases; rather, judges determine liability and damages. The "loser pays" rule requires the losing party to pay the winner's costs, including attorney fees, which discourages the filing of weak or problematic cases. Furthermore, U.S.-style discovery is not available, with no depositions and no document discovery in most European countries and only limited document discovery in the U.K. and Ireland. Moreover, Europeans have traditionally relied on their regulatory infrastructure and robust social safety nets to protect consumers and minimize out-of-pocket costs like medical expenses, rather than look to litigation for this protection.

Several forces have come together to produce a change in the European litigation climate. Interest in expanding citizens' ability to pursue claims, efforts to control government spending and the cratering

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of the stock market in 2000, among others, prompted the European Union (EU) as a whole, as well as the individual countries making up the EU, to expand opportunities regarding large scale litigation. Most European countries now recognize some form of multi-claimant litigation – whether class actions, group actions or representative actions by consumer or public organizations.

This article explores the recent developments in the various forms of multi-claimant litigation in Europe, looking at both EU-wide directives and the legislation enacted or proposed by individual Member States. For convenience, the term “class action” will be used in discussing the various multi-claimant procedures Europeans have adopted. The article will then look at how these procedural changes impact U.S. lawyers and their clients.

THE IMPACT OF EUROPEAN UNION DIRECTIVES

Several European Union directives have spurred the development of class and other collective actions in Europe.²

Unfair Commercial Practices Directive 2005/29/EC

The European Parliament and the Council signed the Directive 2005/29/EC on Unfair Commercial Practices on May 11, 2005. The Directive’s purpose is to clarify consumers’ rights and boost trade by harmonizing EU rules on business-to-consumer commercial practices.³ According to the Health and Consumer Protection Directorate General, consumers will now have the same protection against aggressive or misleading marketing whether they buy locally or from other Member States markets. The Member States have until December 2007 to apply its provisions. They may elect to adopt class actions as a means of enforcing these new consumer rights. For instance, the UK expressed a desire to have consumer organizations play such a role in its 2005 Consumer Strategy, *A Fair Deal For All*.⁴

Cross Border Injunctions Directive 98/27/EC

Under this Directive European Member States can permit “qualified organizations,” such as consumer associations or public entities, to bring injunctive actions to stop violations of national laws implementing an array of consumer protection directives.⁵ Thus, the procedural enforcement is

² European class actions can be adopted either across the European Union by an EU Directive (“vertical”) or by an individual Member States independently adopting changes in its national procedure (“horizontal”). The “vertical” adoption of class actions is complicated by the fact that such Directives must be implemented by the Member States and that the EU lacks the authority to require Member States to adopt judicial procedure. Even in the United States, the U.S. federal government cannot require a state to adopt a rule of civil procedure. Anthony J. Bellia, Jr., *Federal Regulation of State Court Procedures*, 110 YALE L.J. 947, 970 (2001). It can only require that the procedure adopted by a state not threaten certain procedural or substantive rights. Similarly, the EU cannot promulgate procedural rules.

Although one might believe that an EU Directive would achieve uniformity among the Member States class or group actions, this has yet to materialize. The Member States frequently retain a great deal of autonomy in the means of implementation, given the varying civil procedure codes among the members and the national autonomy over judicial procedure. Consequently, attaining uniformity can be difficult.

³ Directive 2005/29/EC, 2005 O.J. (L149) 22.

⁴ Department of Trade & Industry, “A Fair Deal For All - Extending Competitive Markets,” available at www.dti.gov.uk/consumers/policy/index.htm.

⁵ Directive 98/27/EC, 1998 O.J. (L166) 51.

arguably the most significant attribute of this Directive, as it opens the door to representative actions. For example, consumer associations can seek to enjoin violations regarding misleading advertising, consumer credit practices, television broadcasting, package holidays, advertising of medicines and unfair terms in consumer contracts.⁶ However, organizations cannot seek damages under the Injunctions Directive. This means of incorporating group action is one reason why non-injunctive relief, i.e., damages, is often unavailable.

The Directive imposes several important restrictions on the power to bring injunctive actions.⁷ First, the Member States individually determine whether an entity has standing by designating the qualifications which organizations must meet to bring injunctive actions.⁸ In addition, Member States can require the organizations to consult with the relevant regulatory authority before filing an injunctive action. They can also require the organization to consult with the prospective defendant.

A significant issue in litigation under the Injunctions Directive is whether and to what extent other consumers may benefit from a determination that a term in a consumer contract is unfair. Some Member States permit consumers who were not a party to the litigation to benefit from such a determination. Indeed, some have determined that such a determination applied to potential defendants which were not a party. For instance, in Spain, the Court of Appeal of Madrid recently determined that boilerplate terms of bank agreements are illicit and abusive and extended the decision to any financing entity, whether or not a party. The Court concluded that Article 221.2 of the Civil Procedure Act permits an extension of *res judicata*. This ruling has been listed as an example of how a non-balanced and planned enactment of a class action regulation can result in a significant change in substantive law.

The Injunctions Directive is still in its infancy. Only time will tell how it will interact with other procedures. In December 2004, the United Kingdom's Office of Fair Trading (OFT) won the first European cross-border court action.⁹ The OFT claimed that D Duchesne SA, a Belgian company operating in the UK as TV Direct Distribution and Just 4 You, was sending misleading unsolicited

⁶ Annex to Directive 98/27, List of Directives covered by Article 1.

Like the Unfair Commercial Practices Directive, the Injunctions Directive may cause Member States difficulties as they attempt to amend both procedural and substantive laws to implement it. Ulrike Docekal, et al., *The Implementation of Directive 98/27/EC in the Member States*, INST. FOR EUR. BUS. AND CONSUMER LAW (Dec. 2005), at 3. The resulting recent study of the efforts to implement the Directive by the Institute for European Business and Consumer Law observed:

. . . it is striking to see how difficult it is to find the relevant implementation provisions in the 25 Member States. Access would be easier if the implementation provisions, as reported to the European Commission, were available publicly. However, the problem remains that the acts and regulations published have to be analysed in order to discover the specific provisions which are designed to implement the requirements of the Directive. A true improvement would result if Member States were compelled to notify the European Commission not only of those acts and regulations but also the specific provisions which implement the articles of the Directives. It is unknown whether and to what extent the European Commission has such information in its hands.

Id. at 3.

⁷ Laurel J. Harbour, et al., "Representative Actions in Europe: Access to Justice?" BNA Class Action Litigation, at 473, June 27, 2003.

⁸ Member States have a great deal of latitude to designate a given association. This latitude may arguably provide some insight into how liberal or conservative a state is toward the practice of representative actions. For instance, a state with a liberal policy will presumably have a longer list of qualified organizations than a state with a conservative policy.

⁹ Office of Fair Trading, "OFT Wins First Ever European Cross-Border Action," 15 December 2004, <http://www.of.gov.uk/News/Press-releases/2004/208-04.htm> (last visited on Aug. 3, 2006).

mail order catalogues to UK residents. The court granted an injunction pursuant to the Injunctions Directive 98/27, which will allow OFT to enforce the judgment in Belgium.

Damages Actions for Breach of EC Antitrust Rules

Arguably the most important impetus to the adoption of class actions at the EU level is the European Commission's interest in enhancing enforcement of EC antitrust ("competition") law.¹⁰ On December 19, 2005, the Commission published its Green Paper, which considered whether the conditions for bringing a damages claim for infringement of EC competition law should be changed.¹¹ Emphasizing the importance of "private as well as public enforcement of antitrust law . . . to a competitive economy," the Commission expressed concern that the current EU system for private enforcement was inadequate.¹² In the Green Paper, the Commission proposed the use of class actions to improve the enforcement of antitrust rules.

The 2005 Green Paper builds on procedures adopted by the EU in 2004 encouraging parties to pursue lawsuits for breach of antitrust rules in courts, as opposed to regulatory agencies. Over 700 judges throughout the Member States are currently being trained in antitrust. The first case under the new EU procedures was filed in Slovenia against the state-owned Mobitel by Western Wireless Corp., which is based in Bellevue, Washington.

Product Liability Directive 85/374/EEC

While the EU is exploring the utility of private enforcement, including class actions, in the antitrust arena, it has not embraced collective actions in products liability litigation. In 1999, the EU Commission considered whether organizations should be permitted to bring injunctive or class actions under the Product Liability Directive.¹³ At that time, the Commission concluded that there was "no indication that action concerning access to justice specifically with regard to product liability cases would be appropriate."¹⁴

Other EU Initiatives

In addition to these directives, the EU is considering other initiatives regarding class actions. In February 2006, the Presidency of the EU called a meeting to discuss consumer protection through injunctive actions and class actions. Little consensus came out of the meeting for the use of class actions in the EU generally. Based on the meeting, an EU-wide "stand alone" class action appears unlikely at this point. However, some interest was expressed in extending of the Cross-Border Injunctions Directive 98/27.

¹⁰ Relatively few antitrust cases have been filed in the courts of the EU Member States -- only 60 since 1962 according to a recent survey, compared to 752 U.S. antitrust suits in 2004 alone. Siobhan Morrissey, *Vive Les Class Actions*, ABA Journal (September 2005), at 49.

¹¹ Commission of the European Communities, *Damages Actions for Breach of the EC Antitrust Rules*, COM (2005) 672; see also Ann Rose Stouthuysen, *Belgium: Votes in Favour of Class Actions*, ASS'N OF CORP. COUNSEL (March 2006).

¹² *Damages Actions*, *id* at 3-4.

¹³ Green Paper: Liability for Defective Products, COM(1999)396 (July 28, 1999).

¹⁴ Report from the Commission on the Application of Directive 85/374 on Liability for Defective Products, COM(200)893 (Jan. 31, 2001) at 27.

In addition, the European Commission responsible for Health and Consumer Affairs, DG SANCO, has commissioned the Consumer Law Faculty of the Catholic University of Louvain to study alternative means of consumer redress other than individual redress through ordinary judicial means. The faculty is to deliver its report in September 2006. The report will include an analysis of possible plans, as well as collective redress such as injunctive class actions.

CLASS ACTION LEGISLATION AND PROPOSALS IN INDIVIDUAL MEMBER STATES

At the same time that the EU has been considering directives which impact class actions, the European Member States have been changing their national procedures to accommodate multi-claimant litigation. A review of a sample of enacted and proposed legislation shows the variety of approaches different countries have adopted.

Legislation

Sweden: An Opt in Class Action

Sweden has been the focus of much of the discussion of class actions in Europe in the last few years. The Swedish Act, which went into effect on January 1, 2003, marked the first vehicle for bringing private, individual class actions by a plaintiff-class member, in addition to the organization actions and public actions seen elsewhere.¹⁵ Moreover, the Act allows for both injunctive and monetary relief, and is not restricted to consumer law or environmental law only, but rather applies to goods and services as well.

Under the Swedish Act, the case must satisfy several preconditions to proceed as a class action. There must be common factual circumstances. The action must be manageable and a superior way of handling the litigation compared to alternatives such as joinder of claims and test cases. The class must be “suitably defined.” The name and address of all group members must be stated in the complaint if that information is required to handle the case. In addition, the plaintiff must be suitable to represent the class.

In contrast to American Rule 23, class members must opt in to be included as a member of the class under the Swedish Act. Only individuals who have chosen to opt in by giving notice to the court will be bound by judgment in the case. The opt in feature of the Swedish Act is a response to concerns that a opt-out system might include in the class people who are not aware of the class action – a violation

¹⁵ Swedish Group Proceedings Act (SFS2002:599).

Some suggest that the first countries to have class actions were The Netherlands (1994), Portugal (1995), England/Wales (2000) and Spain (2001). But as will be set out later, these efforts do not allow an individual class member to bring a representative action together with the ability to recover damages for that class. Portugal and Spain allowed a representative action for damages but not one brought by an individual. The Netherlands took the same approach, but did not allow recovery for damages. England and Wales allow Group Litigation Orders (“GLO”), but in a GLO, each plaintiff is a member of a procedural class as a party, not as a represented non-party. Neil Andrews, *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. OF COMP. & INT’L. L. 249 (2001).

of the Swedish principle that people have the right to decide for themselves whether they want to file a suit or not.¹⁶

The court must notify class members of the institution of the class action, the judgment or final decision and a settlement. The court has substantial discretion in giving notice. It can order a party to give notice to the class if it involves “considerable benefits for the handling of the case.”

The class actions filed since the Swedish procedure was enacted have largely been commercial in nature. For example, class actions have been brought by airplane passengers who were forced to purchase new tickets for return flights and by policyholders alleging a breach of fiduciary duty against an insurance company. The Swedish courts have ruled in several cases that they may proceed as class actions, including a class action by the Swedish Consumer Agency alleging that the defendant violated its contracts to provide electricity to 7,000 customers and a class action brought by thirty-two (32) property owners claiming a construction company violated its contractual obligations to build a marina. None of the class actions filed to date has resulted in a judgment.

The Swedish Act is to be reviewed at the end of 2006 or beginning of 2007.

Norway:

Norway’s new class action law, the Mediation and Civil Procedure Act, is set to take effect in 2007.¹⁷ The Act reportedly permits an opt-in plaintiffs group with a court-appointed legal representative who will advocate on behalf of the group.

Spain: Expansion of Collective Actions

Spain adopted a variation of class action procedure effective January 2001.¹⁸ The Spanish act permits collective actions by 1) groups of alleged victims; 2) consumer and user associations on behalf of their members and unidentified victims; and 3) other entities established to defend the interests of consumers and users. The procedure is only available to consumers and users. It is not available to recover other types of damages such as those damages resulting from securities or environmental violations.

Spanish courts consider the following factors to determine whether the association is sufficiently representative: number of members; activity and resources; national position; and participation in territorial bodies, the Consumer Arbitration System and any international consumer organization.

The Spanish approach to notice is an interesting contrast to notice under the American Rule 23. Under the Spanish Act, all potential claimants must be notified “by appropriate means” before the claim is filed. Once the claim is filed, notice is published in the newspaper.

¹⁶ Proposition 2001/02:1070064, 8.

¹⁷ Smith, *supra* note 23.

¹⁸ Spanish Law of Civil Judgment 1/2000.

Distributing damages under the Spanish Act also differs significantly from the approach typically taken under American Rule 23. The judgment in the case will indicate each individual entitled to receive damages when the individuals in the action have been identified or can be readily identified to receive damages (“collective damages”). For individuals who cannot be readily identified, the judgment must describe the characteristics of the beneficiaries and set out the criteria to identify them. (“general damages”). Individuals who are not plaintiffs have five years to seek enforcement of the judgment.

The Netherlands: Collective Settlement Actions

Prompted by claims concerning the pharmaceutical diethylstilbestrol (DES),¹⁹ the Netherlands adopted the Collective Settlement of Mass Damage Claims, which went into effect in August 2005.²⁰ This law implements a system whereby representative organizations can ask the court to declare the settlement binding. However, it cannot be used to request damages and it must contain an opt-out mechanism -- one of the few opt-out procedures in Europe. The law does not allow a class of plaintiffs to sue in an aggregate fashion, but joint settlement negotiations are now permissible under court supervision.

England and Wales: Group Litigation Orders

Rather than a class action procedure, England and Wales introduced Group Litigation Orders (GLOs) in 2000 to manage claims with common questions of fact or law.²¹ A party can apply for a GLO before or after proceedings begin, or the court may order a GLO. The application includes a case summary, the number of parties and the common questions. If the court approves the GLO, a Managing Judge is appointed and a Group Register is established which includes the necessary administrative information, such as the date for opting in. Notably, only those individuals who opt in are bound by any judgment. In managing the GLO, the court may designate one or more cases to proceed as test cases, appoint a lead solicitor and establish a cut off date for claims to be added to the Group Register. So far, over fifty GLOs have been registered.

Germany: Test Cases

A variation on the individual and group representation models is the test case. This is the approach embraced by Germany. In November 2005, the German Parliament introduced the Capital Markets Model Case Act (“Capital Markets Act”) to improve management of mass securities litigation.²² As the Ministry of Justice explained, the Parliament chose a system based on German and European principles rather than adopt the American class action. The driving force behind this legislation was

¹⁹ Heather Smith, *Is America Exporting Class Actions to Europe?* THE AMERICAN LAWYER, February 28, 2006.

²⁰ Dutch Civil Code (Burgerlijk Wetboek) Arts. 3:305a and 305B.

²¹ Civil Procedure Rules 1998, Part 19, Section III (“CPR”); see also Finn & Leadley, *supra* note 18, at 128.

²² Bundesministerium der Justiz, “The German Capital Markets Model Case Act.” Bundesgesetzblatt Jahrgang 2005 Teil I Nr. 50, ausgegeben zu Bonn am 19. August 2005. English translation at <http://www.bmj.bund.de/kapmug>.

the Deutsche Telekom case, which involved over 2,000 actions filed by 754 law firms on behalf of thousands of investors.²³

Under the Capital Markets Act, claimants must opt in and each must file an individual lawsuit. Limited to securities litigation, the Act provides that common issues of fact or law will be tried in one model proceeding and the judgment will be binding on all claimants who filed an action (“summoned third parties”). Either the plaintiff or the defendant can move for a model proceeding. If claimants in at least ten cases involving the same issues move for a model proceeding within four months, the High Regional Court will conduct a model proceeding. The court appoints a lead plaintiff, considering the amount of the claim and any agreement among the plaintiffs. Claimants who have filed an action can file briefs and participate in hearings. The judgment is not binding on any individuals who have not filed an action. Settlement requires the consent of claimants who filed an action.

The Capital Markets Act will be monitored for five years, when it no longer will be in effect under a sunset clause unless it is renewed by the Parliament. The procedure will then be evaluated to determine whether it should be renewed and if model proceedings should be available in any civil litigation.²⁴

Proposed Legislation

Several other European countries are exploring possible options for expanding the availability of multi-claimant actions.

France

The French debate concerning class action proposals illustrates the competing policies and concerns which come into play. In April 2005, the French government formed the Inter-Ministerial Working Group (“IMWG”) to consider legislative changes to allow consumer groups and associations to initiate collective or group actions. The IMWG’s *Working Document* defines a group action as “an action initiated by a representative on behalf of a class of persons with identical or similar rights and which results in a judgment with *res judicata* effect vis-à-vis all of the members of the class.”²⁵ The IMWG was concerned about ensuring an effective means of remedying small-scale injuries sustained by a large number of individuals, but concluded that “regardless of the form of the group action, it would bring about a proliferation of litigation in economic life in general and in relations between consumers and professionals in particular.”²⁶

Seeking to balance these concerns, the IMWG proposed two possible group action models, each with two stages. The first option was the *U.S./Québecan Model*.²⁷ Under this option, the court would in the

²³ Mark Wegener & Peter Fitzpatrick, *Europe Gets Litigious*, LEGAL TIMES, May 23, 2005.

²⁴ Bundesministerium der Justiz, *supra*, note 21.

²⁵ *Working Group on Collective Recourses under French Law, Working Document*, § 3 (Dec. 16, 2005) (citing Louis Boré: *La défense des intérêts collectives par les associations devant les juridictions administratives et judiciaires*, LGDJ, 1997).

²⁶ *Working Document*, § 3.

²⁷ *Working Document*, § 3.1.A.

first stage examine the appropriateness of the group action and in the second stage determine the defendant's liability and the plaintiffs' damages. The second option was the *Declaratory Judgment Model*.²⁸ Under this alternative, the court would first render a declaratory judgment that the defendant is liable for the injuries sustained by a group of consumers. In the second stage, the court would set a deadline so other consumers could identify themselves as group members and join the action. These group members could then enforce the declaratory judgment for their own recovery.

Following the release of the IMWG's report, the momentum behind class actions appeared to have faded. The president did not mention class actions in his New Year's address in 2006, as he had done in 2005, and much of the discussion concluded that any class action adopted must consider the impact on the French economy, including whether class actions would stifle foreign investment and curtail innovation by domestic companies.

On April 3, 2006, several consumer associations -- UFC-Que Choisir, CLCV, UNAF and Familles Rurales -- jointly submitted a letter to all of the 577 MPs as well as to the government stating that not only should class actions be introduced into French law as soon as possible, but also that they should be a legislative priority on the parliamentary agenda before summer. These associations asserted that class actions should be available for all types of litigation involving consumers. Moreover, they argued that any approved association, as well as possibly any group of consumers, should have the right to initiate a class action, not just approved consumer associations. They also argued that the French class-action system should be an opt-out system, that is, it should exclude only those who expressly refuse to join. Finally, they endorsed the U.S./Québecan Model. This initiative has moved the debate back to center stage.

Denmark: Class Actions Brought By Individuals for Injunctive Relief

Denmark's proposed procedural amendments would allow individuals to bring class actions, but not for damages. The Danish Standing Committee on Procedural Law delivered a report on December 19, 2005 submitting class actions for public hearing.²⁹ The proposal would require court approval of the lawsuit and of the group representative, who may have to guarantee legal costs. The conditions for class certification would include uniformity of the facts and law, the superiority of the procedure, the ability to identify class members, and to provide adequate notice and the adequacy of the group representative. Significantly, under the proposal, the representative could be a member of the class; a group or association, if the action is within its purpose; or a public authority, such as the consumer ombudsman. The Danish Minister of Justice intends to introduce a bill on class actions during the October 2006 - June 2007 parliamentary session.

Finland: Class Actions Limited to the Consumer Ombudsman

In 2003, the Finnish Ministry of Justice appointed a working group to draft a Class Action Act for disputes relating to consumer issues. The group submitted its Report on Class Actions to the Ministry

²⁸ *Working Document*, § 3.1.B.

²⁹ EJV report, p. 5.

on April 1, 2005.³⁰ The Act would apply to consumer disputes that fall under the Consumer Ombudsman's jurisdiction. Unlike Sweden and Denmark, only the Ombudsman could initiate the class actions, which would be comprised of opt-in members.

Ireland: Law Reform Commission Proposal for Class Actions

Currently, there is no codified mechanism for U.S.-style class actions in Ireland, but the system does allow for test cases and representative actions. The Law Reform Commission (LRC), which is an independent statutory body that reviews the law and makes proposals for change, recommended adopting a class action procedure in its September 2005 Report on Multi-Party Litigation.³¹ Under the LRC proposal, the court would have to certify that the multi-party action is an appropriate, fair and efficient procedure in the circumstances. Other proposed requirements include a single representative for the management of the action and a cut-off date beyond which court approval would be necessary to join the action. The proposal would also require that the terms for potential settlement be determined at the opt-in stage and that the costs of the action be shared equally among the class members. It is unclear whether damages would be permitted. The Minister for Justice has so far expressed his personal opposition to the proposal.

Italy:

At the moment, Italy permits representative actions for injunctive relief. Under Law no. 281 of 30 July 1998 implementing EC Directive 98/27, consumer organizations registered with the Italian Ministry of Industry can bring suit to enjoin "acts and conduct that damage the interests of consumers and of users."³² A single lawyer can act on behalf of numerous plaintiffs in what is often called a "group action," but each individual plaintiff must grant the power of attorney.

Two draft bills aimed at permitting consumer and investor associations to bring suits for damages arising out of contracts were introduced in 2004, but neither of these proposals were enacted.

IMPACT ON COSTS AND FEES

Implementing various forms of collective actions has prompted European countries to consider the impact of these procedures on existing laws relating to costs, funding litigation and attorney fees. In doing so, they have tried to balance the ability of citizens to pursue claims against the interest in discouraging weak and frivolous claims. Just as they selected varying procedural approaches to collective actions, European countries have formulated their own solutions to the issues of costs and attorney fees.

³⁰ Ministry of Justice Finland, *Annual Report 2005* at p. 18, <http://www.omifi/uploads/v8qx8zjqr.pdf>.

³¹ The Law Reform Commission, *Report-Multi-Party Litigation*, (LRC 76-2005), <http://www.bwreform.ie/MPL%20Report.pdf>.

³² Law No. 281 (30 July 1998).

Costs

As discussed above, the general rule in Europe is “the loser pays;” that is, the losing party in the case must pay the actual costs incurred by the winner, including attorney fees. The enforcement of this rule has varied from very strict in the U.K. to relatively relax elsewhere. Several countries have revisited the loser pays rule in collective litigation.

- Currently common costs of GLOs in England and Wales are shared equally among the claimants who register. However, the Civil Justice Council (“CJC”) has recently suggested that the cost sharing provisions and costs/benefit ratio have caused cases to be dropped before being tried and has proposed at least partial removal of the loser pays rule.
- The Scottish Consumer Council has expressed concerns about disproportionate costs in low-value cases. In November 2005, the Council’s working party produced a report, “The civil justice system in Scotland -- a case for review,” recommending a more formal review of the judicial system due to costs.
- Under the Swedish class action act, the plaintiff bringing the class action is responsible for legal costs. However, if the action is successful and the defendant fails to pay plaintiffs’ costs under the usual Swedish “loser pays” rule, the plaintiff is not responsible for his costs. Class members can be held responsible for costs if they intervene as parties in the proceedings or if they are negligent or careless during the proceedings.
- The loser pays the winner’s legal costs in Italy. However, Italian courts soften the impact of this rule in two ways. First, they can allocate the legal costs among the parties when the issues are complex or success is not clear cut. Second, they typically award only a portion of the full fees spent by the winning party.
- Under the German Capital Markets Model Case Act, the losing party must bear the costs. However, according to the German Ministry of Justice, “[p]laintiffs . . . benefit from sharing the costs of the model case ruling” and from “being relieved of prepaying costs for the model case proceeding.”³³ Some commentators on the German Act see the retention of the “loser pays” principle as a way of addressing concerns about the reported abuses of American class actions.
- Under the Spanish Act, the general “loser pays” rule applies.

Fees

Historically, many countries in Europe prohibited contingency fees outright. Where such fees were permitted, they were used infrequently. A number of countries are now exploring whether contingency fees should be permitted in the context of collective litigation:

- In the U.K., legal aid, which funded group actions in the 1990s, has been almost completely replaced by conditional fee agreements (CFAs) and after-the event insurance policies. Lawyers representing the GLO do not share in the proceeds of a claim. Under the conditional fee arrangement, the lawyers are entitled to a “success fee,” which is limited to a maximum of double

³³ Bundesministerium der Justiz, *supra*, note 21.

their normal fees. In its 2005 report, the Civil Justice Council believes that some type of contingency fee is necessary to fund multi-claimant litigation.³⁴

- “Risk Agreements” are permitted under the Swedish Class Action Act³⁵ to the extent to which the action is successful. The court must approve the risk agreement if it is to be asserted against class members and will only approve the agreement if it is “reasonable.” If legal fees are based solely on the value of the dispute, the agreement is not considered “reasonable.”
- Italian law historically has prohibited contingent fees. However, in July 2006, the Government implemented a Law Decree, with immediate effect, which abolishes the prohibition on contingency fees and allows lawyer advertising. The Decree must be ratified by the Parliament within 60 days or it is retroactively null and void.

WHY SHOULD U.S. LAWYERS AND THEIR CLIENTS CARE ABOUT EUROPEAN CLASS ACTIONS?

European countries have chosen a variety of ways to permit multi-claimant litigation to go forward and be managed. Notably, none of these bears much resemblance to American Rule 23. This is not surprising. First, American class actions have a bad reputation in Europe. They are the poster children of the “American litigation disease.” European commentators and drafters of proposed legislation frequently cite examples of abuses of class actions in the United States and express concerns that American class actions are lawyer driven, that they subject defendants to judicial blackmail and that the accompanying media coverage adversely impacts share prices even if claims are not meritorious. Some features of the procedures they have adopted regarding multi-claimant litigation are directed at these concerns. For example, the German Ministry of Justice took pains to emphasize that the German Capital Markets Model Case Act was not a class action and that features of American class actions such as putting unauthorized pressure on the defendant by allowing an individual to represent a class of plaintiffs, the American rule that each party bears its own costs and contingency fees were not permitted in Germany.³⁶ Similarly, concerns about American-style litigation and class actions drove Sweden’s choice to require class members to opt in rather than opt out.

European concern about American-style class actions is also reflected in the limitations built into multi-claimant procedures. Sweden, Germany, The Netherlands, Italy and others have limited their multi-claimant procedures to specific types of claims such as consumer or securities claims; to specific entities like registered consumer associations; to specific contexts like settlements only; or to a specific time period after which the procedure dies if not reenacted or must be reviewed.

Second, Europeans are genuinely interested in formulating multi-claimant procedures which fit their legal principles and cultures. Their legal systems, while often very different from the American system, have worked well for many years. They do not want graft a rule onto their system which does not reflect the ethos of that system. For example, the Swedes crafted a class action which was

³⁴ Civil Justice Council, *Annual Report 2005*, p. 26 passim, <http://www.civiljusticecouncil.gov.uk/164.htm>.

³⁵ Swedish Act, *supra* note 14.

³⁶ Bundesministerium der Justiz, *supra*, note 21.

consistent with their fundamental principle of civil procedure that people have the right to decide for themselves whether to file proceedings or not.

Why should American lawyers bother to learn about European approaches to multi-claimant litigation? The reality is that just as trade and business have become global, litigation has been globalized. Companies based in the United States do business and have shareholders in Europe and vice versa. As a result, cases are being filed in Europe against clients whom American lawyers represent, or against businesses American lawyers have sued, making allegations American lawyers have seen in their cases.

In addition, plaintiffs in the United States increasingly seek document discovery from European entities and take depositions of European personnel. Similarly, plaintiffs in cases filed in European countries, most of which do not have document discovery, may attempt to obtain documents available in the United States. Furthermore, parties may seek to enforce American judgments in the European country where the defendant is based or vice versa. The interaction of U.S. and European regulators also contributes to the increasing interaction between the European and American legal systems.

American lawyers will also increasingly face forum non conveniens issues. With the availability of jury trials, large compensatory awards, punitive damages, contingency fees, discovery and the American cost rule, United States courts are likely to be preferred by plaintiffs. For the same reasons, defendants sued by European nationals in the U.S. are likely to continue to move to dismiss those actions on the basis of forum non conveniens. The more aggressively European plaintiffs seek to litigate in the United States, the more European countries may work to come up with effective approaches to multi-claimant litigation in their own legal systems. The Deutsche Telecom securities litigation illustrates this phenomenon. The Deutsche Telecom litigation in Germany involved over 2,500 actions filed by over 700 law firms on behalf of over 14,000 investors. While the German court was still striving to get control of the avalanche of paper which the litigation precipitated, a class action was filed in the United States District Court for the Southern District of New York and was settled for \$120,000,000. This case spurred the introduction of the German version of class actions.

Likewise, as European countries experience more litigation, they may well seek to control it through procedures the United States enacted to deal with its burgeoning litigation dockets. Motions to dismiss and motions for summary judgment, which are not generally available in European civil law jurisdictions, could be embraced in the future. There are already signs that European judges who face multi-claimant litigation come up with solutions which are remarkably similar in result to American courts. For example, an English court which handled pharmaceutical litigation effectively achieved a similar result as American-style class action discovery by requiring group members to give basic facts about their injuries.

To paraphrase the Beatles, we are coming together.

ABOUT THE PRESENTER

Laurel J. Harbour

A partner at Shook, Hardy & Bacon L.L.P. in Kansas City, Missouri, Laurel has defended clients in both U.S. and international class actions, and written and spoken frequently about class actions. While émigréd to SHB's London office, where she served as Managing Partner for seven years, Laurel defended individual cases, class actions and other aggregate actions in Europe and the Middle East. She coordinated the effort in England on behalf of a major international client to defeat the Legal Aid funding of a group action against tobacco companies. She also authored submissions to the English and Scottish governments on aggregate actions and their impact on business and the judicial system.