

New French Class Action Law Could Span The Gamut



Law360, New York (May 05, 2014, 5:39 PM ET) -- French President Francois Hollande recently signed "Loi Hamon," or the French Consumer Act, into law, which includes a troubling class action procedure for consumer protection and antitrust claims. Most of the law's provisions took immediate effect on March 19, 2014, but the class action provisions will not become effective until the publication of the implementation decree, which is still being prepared and is expected later this summer.

The Consumer Act has survived a review from the French Constitutional Council, and the government has already indicated that it wishes to extend the class action model to health and environmental claims. Companies that might be the target of such claims are well-advised not only to learn about this new law, but also to engage in this approaching debate.

Background to the Class Action Debate in France

The introduction of class actions into French law has been debated for many years, with new proposals and discussions appearing regularly. Discussion of the class action model as adopted in the Consumer Act, however, arguably dates to May 2010, when a French Senate working group chaired by Sens. Laurent Beteille, of the then-majority party, the Union pour un Mouvement Populaire, or UMP, and Richard Yung, of the then-minority party, the Socialists, released its recommendations for the introduction of class actions into French law.

The working group recommended an opt-in class action for contractual consumer disputes, broadly defined and including claims based on violations of the law governing competition and securities. Damages would be limited to economic injuries only (i.e., no damages for physical injuries).

In the first phase, a qualified consumer or investor association would have standing to submit a limited number of exemplary cases in which the individuals were harmed by the same defendant's breach of its legal obligations. The court would then rule on the defendant's general liability based on those exemplary cases. In the second phase, the court would define the class of individuals who suffered similar injuries and allow them to join the action to collect their damages.

Several attempts were made to introduce the working group's proposals, including two members' bills introduced by Sens. Beteille and Yung and an amendment to the then-government's consumer protection bill. None of these efforts were adopted by both chambers of the French Parliament before the Spring 2012 national elections and expiration of all pending bills. The Socialist Party overwhelmingly swept the elections and took control of the government.

The new Socialist government drafted its own Consumer Act, which contained a provision for class actions based primarily on the Beteille-Yung model. After several months of debate, a joint committee from the National Assembly and Senate agreed to a final text in February 2014. During this time, the Socialist majority sought to exert tight control over the debate and prevented any substantial changes to the bill's text.

The Class Action Procedure

- **Standing:** Only consumer associations that are officially recognized as representative on a national level are authorized to initiate a class action on behalf of individual consumers. Presently, there are 15 such associations.
- **Scope:** Class actions are available only to recover pecuniary damages for injuries suffered by consumers due to the same breach of contract or statutory duty by the same defendant in connection with the sale of goods or the supply of services (excluding personal injuries), or as a result of anti-competitive practices.
- **Jurisdiction/venue:** Class actions may be filed in any civil courts.
- **Decision on liability and certification:** During the first phase, the consumer association files a claim based on several exemplary individual cases. The civil court then decides the defendant's general liability toward the class based on these exemplary cases. In the same ruling, the civil court orders that a class be certified, defines the class and the means of notifying absent class members, and determines the compensation to be paid to class members. The defendant may appeal this decision immediately.
- **Opt-in to enforce:** In the second phase, once the appeals are exhausted, notice is provided to the absent class members as defined in the judgment; they are given between two and six months to join the case and enforce their claim.
- **Simplified procedure:** If the necessary information about the impacted class of consumers is clearly identifiable (i.e., their names, the number in the class, the total damages suffered), then the judge may order the defendant to compensate each of the consumers directly and individually.
- **Exception to the prospective-only application:** Plaintiffs may initiate a class action based on competition law breaches that occurred before the entry into force of the Consumer Law, except: (1) if the claim is time-barred or (2) when the ruling acknowledging the breaches of competition law became final before the bill's entry into force (i.e., March 19, 2014).

Significant Procedural Flaws

General Liability is Determined Before a Class of Claimants is Certified

By assessing general liability before a class is formed, the procedure forces a defendant to defend a

claim without knowing all of the opposing parties and therefore the potential extent of its liability for the claim. It also deprives the defendant of defenses it might have if the claim were brought individually (e.g., lack of reliance, assumption of the risk and other contributory conduct on the consumer's part).

While these defenses may be raised against the class representatives, because the consumer association selects them unilaterally, and without a response by the defendant as to whether they are truly representative, they will likely be carefully selected and vetted to avoid or mitigate such affirmative defenses. Even if these defenses might still be available during the liquidation phase for the remaining class members, that is of little comfort to a company facing a general declaration of bad conduct and the resulting media attention and stock depression that inevitably follow.

The procedure also creates one-way res judicata. If the court rules at the end of the first phase that the professional is not liable, this judgment would not bind the absent class members because they would not yet have joined the case. They could, therefore, initiate individual lawsuits against the defendant on the same grounds or benefit from another consumer association's successful attempt to initiate an identical class action in another court, provided this second class action was filed before judgment is rendered in the first class action.

This flaw could have been avoided if a class certification stage had been inserted ahead of the determination of general liability, as recommended by the European Commission and as adopted by other European member states. An amendment to do so was, however, defeated in the French Parliament. Members of the Socialist majority reportedly expressed concern that such a preliminary phase would overly complicate and delay the process.

A Mechanism to Stay or Consolidate Competing Classes Doesn't Exist

As it currently stands, no specific means for staying or consolidating overlapping putative classes is available. The law would therefore allow consumer associations to bring multiple attempts with different class representatives in different civil courts in the hope of eventually obtaining a nationwide class action.

Consumer associations would need to win only once and might not be encumbered by failures in the competing classes; conversely, the potential defendant must win every time to avoid a nationwide class. Once judgment is rendered in one, however, no new class action may be filed that targets the same set of facts and damage claims. Notwithstanding, this problem should be addressed during the drafting of the implementation decree or through the general civil procedure rules.

Constitutional Challenges and Implementation Decree

After the French Parliament adopted the Consumer Act, the principal opposition party, the UMP, challenged the bill's constitutionality before the Constitutional Council of France. With minimal analysis and explanation, the council concluded that the class action procedure was constitutional. The bill was then forwarded to the president for signature and publication in the Official Journal.

While most of the provisions entered into force on March 19, the class action provisions will not take effect until the publication of the implementation decree, which is expected this summer. The decree provides more technical information about the operation and interpretation of the law. For example, in its current form, the law provides little guidance for courts with regard to the criteria to apply in determining whether a claim is appropriate for class resolution.

Plans for Expansion

The class action debate in France has been partially driven by several high-profile product defect scandals in recent years that resulted in calls for class actions to redress the individuals harmed. For example, in early 2011, it was reported that a diabetes drug, which had also been prescribed as an appetite suppressant, was allegedly responsible for the deaths of as many as 2,000 people and cardiovascular complications in countless others before it was ordered off the market in 2009.

Soon after, a government bill was introduced in the French Senate to strengthen the safety of pharmaceutical and health products. The French Senate adopted the law with an amendment to include a class action mechanism for any kind of harm caused by a violation of a pharmaceutical company's legal, regulatory or contractual obligation. The class action amendment, however, was withdrawn in the National Assembly.

Similar public outcry and political rhetoric about the need for a class action followed from the high-profile scandals involving breast implants and horsemeat. Still, as explained above, the class action law that was adopted excludes the ability to recover for physical injuries.

It is perhaps for these reasons and others, however, that the final paragraph of the class action section of the Consumer Act states that within 30 months of the law's effective date, the government must submit to the French Parliament its assessment of the class action procedure and its plan for extending it to health and environmental claims.

In fact, a number of attempts to expedite that 30-month timeline have already been made. Several minority parties proposed amendments during the review of the Consumer Act to extend its scope or simply proposed stand-alone bills to introduce a class action for these types of claims. The Ministry of Social Affairs and Health has announced on several occasions that it is looking into this issue as well — and it is possible it will do so as part of its anticipated National Health Strategy Bill, which is also expected this summer.

—By Marc E. Shelley and Emily R. Fedeles, Shook Hardy & Bacon LLP

Marc Shelley is a partner and Emily Fedeles is an associate in Shook Hardy & Bacon's Geneva office, where both are members of the firm's global product liability practice group.

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