Chapter 7

Class Action Developments Overseas

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§ 7:1 Overview

During the twentieth century, few jurisdictions, other than the United States, had adopted procedures for class actions.[1] Only a handful of product liability class action cases were filed outside the United States, primarily against pharmaceutical and tobacco product manufacturers. Now, into the second decade of the twenty-first century, the landscape has changed dramatically. The number of countries that have adopted class action (or similar) procedures has increased; more importantly, proposals to adopt or expand existing procedures are being actively discussed in legislative bodies around the world. Different concepts and various rationales for class actions, or similar forms of collective redress, are now regularly debated in

1. *See* Mark A. Behrens, Gregory L. Fowler & Silvia Kim, *Global Litigation Trends: Trying to Take the "Good" and Not the "Bad" from the American Civil Law System*, 17 MICH. ST. J. INT'L L. 194 (2009) (listing United States, Australia, Brazil, Chile, China, India, Canada, and South Africa as examples of countries with class actions) [hereinafter Behrens, Fowler & Kim]. Countries that have adopted legislation since 2000 include: Argentina (2008), Costa Rica (2008), Denmark (2007), Finland (2007), Japan (2006), Netherlands (2005), Sweden (2002), Indonesia (2002), and Spain (2000).

conferences, legal and industry journals and newsletters, on Internet blog sites, and in the lay press. As more jurisdictions adopt class action procedures or make it easier to maintain such actions, the number and significance of class actions will increase.

This chapter is not intended to provide a comprehensive review of class action laws outside the United States. Given the current pace at which class action legislation is being proposed in Europe, Latin America, and Asia, such a review would be out of date by the time it was printed. Further, given the breadth of the subject, it is better left to a stand-alone source.[2] Accordingly, this chapter will examine common themes and trends observed in class action laws and debates around the world. In most countries, the interest in class action procedures parallels increased efforts to protect and empower consumers, and to improve access to justice. But specific needs and goals in different countries will vary, as will the ultimate structure of the procedures they may adopt. Our goal is to highlight class action developments in the most active jurisdictions, beginning with common law jurisdictions, and explore how class actions may impact product liability claims.

§ 7:2 Overseas Class Action Models

Given the volume of class actions in the United States, U.S. litigation has had some influence on class action debates overseas. Many countries cite the U.S. "litigation culture" as an example of what they would like to avoid.[3] Nevertheless, it is a system that many non-U.S. plaintiffs have invoked in so-called "foreign-cubed" claims, which involve a foreign plaintiff, a foreign defendant company and a foreign market. Availability of a U.S. forum, and the unavailability of a forum in the plaintiffs' home jurisdiction, may have previously appeased demands for collective redress abroad. But this is changing.

In June 2010, the U.S. Supreme Court limited the extraterritorial effects of Rule 10b-5 of the U.S. Securities Exchange Act of 1934.[4]

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2. *See* DEBORAH R. HENSLER & CHRISTOPHER HODGES, STANFORD LAW SCHOOL, GLOBAL CLASS ACTION CLEARINGHOUSE, *available at* http://globalclassactions.stanford.edu/; *see also* CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS (Hart Publishing 2008).
3. *See, e.g.*, The European Commission, Commission Staff Working Document, *Towards a Coherent European Approach to Collective Redress* ¶ 21 (Feb. 4, 2010), *available at* http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/collective_redress_consultation_en.htm [hereinafter EC Working Document].
4. Morrison, et al. v. Nat'l Austl. Bank Ltd., et al., No. 08-1191, slip op. (June 24, 2010).

Morrison v. National Australia Bank Ltd. holds that the Act only applies to claims arising out of securities purchased or sold in the United States or listed on a U.S. exchange.[5] The Court's decision to limit the availability of securities class actions in the United States for foreign plaintiffs may influence the adoption or expansion of class actions in other countries.[6]

§ 7:2.1 Generally

The class action as a means of collective and representative redress is familiar to U.S. lawyers, but it is not necessarily a model that is accepted in other jurisdictions.[7] Civil justice systems around the world have devised different ways to litigate similar claims of multiple parties. In most cases, the purpose of the procedure is the same—to resolve disputes by or against a group of similarly situated individuals who are too numerous to litigate individually. A collective action may be appropriate because the amount in controversy is too low to justify the costs of individual suits (so-called "negative value" suits) or there is a need to save judicial resources. While the ultimate goals may be similar, the procedures vary widely. Thus, the term "class action" is used broadly in this chapter to refer to many different schemes.[8]

In comparing class action models, both existing procedural codes and those under consideration, it is helpful to examine defining features, such as the type of claim that may be resolved (that is, the scope), who has standing to bring the claim and represent the class, whether class members must affirmatively include or exclude themselves (that is, opt-in versus opt-out), and the manner in which the court decides whether the claim is suitable to proceed as a class action.

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5. *Id*. at 24.
6. *See, e.g.*, Luke Green, *Morrison v. National Australia Bank—The Dawn of a New Age?*, RISKMETRICS GROUP BLOG (June 25, 2010, 5:54 PM), *available at* http://blog.riskmetrics.com/slw/2010/06/morrison-v-national-australia-bank--the-dawn-of-a-new-age.html.
7. In some jurisdictions, the stated goal is to avoid a U.S.-style model perceived to have led to waste and abuse of the system. *See, e.g.*, EUROPEAN COMMISSION, SUMMARY OF THE LEUVEN BRAINSTORMING EVENT ON COLLECTIVE ACTIONS (June 29, 2007), *available at* http://ec.europa.eu/consumers/redress_cons/docs/summary_leuven_event.pdf.
8. *See* Laurel J. Harbour & Marc E. Shelley, *The Emerging European Class Action: Expanding Multi-Party Litigation to a Shrinking World*, 18:4 PRAC. LITIGATOR 23, 24 (2007); Richard O. Faulk, *Armageddon Through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 10 MSU-DCL J. INT'L L. 205, 224 (2001) ("Many nations now permit 'group actions' which allow multiple claimants to aggregate their causes of action and which enable them to pursue those claims in a single forum.").

[A] Scope

In common law countries, particularly the United States, class actions do not usually limit the type of claim that may be asserted. Instead, the rules may provide a standard set of criteria by which certification or admissibility of a class action is to be judged. If these criteria are met, the claim may proceed. Over time, case law has emerged to guide courts on the types of claims that may be appropriate for collective resolution. For example, because the U.S. rule requires common issues to predominate over individual issues, personal injury claims that raise questions of individual reliance, and medical and legal causation have been denied class action status.[9]

In some civil law jurisdictions (notably, in Latin America), potential "classes" are broken down into three categories based on the type of right or interest being protected: collective rights, homogeneous individual rights, and diffuse rights.[10] Collective rights are rights that belong to a group whose members suffered injuries that share a common link. For example, in the case of a mislabeled product, although only the consumers who bought the product with the wrong labeling information were likely to be affected, relief also benefits future consumers. In contrast, homogeneous individual rights are divisible in nature and belong only to an identifiable group of persons whose injuries arise from a common origin. For example, a group of passengers injured in an airplane crash or a group of bank customers who were wrongly charged a processing fee. Thus, unlike collective rights, the remedy for a violation of a homogeneous individual right only benefits the members of a particular group. Finally, diffuse rights are held by an unidentifiable group of persons joined by factual or legal circumstances, such as an indivisible right to a clean environment, and the relief is not to the individual members.[11] The potential standing and admissibility requirements sometimes vary depending on the different category of rights being asserted.

[B] Standing

The basic class action concept is that a group of claimants are represented by an individual or an organization, who brings an action

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9. *See, e.g.*, Jolly v. Eli Lilly & Co., 44 Cal. 3d 1103, 1123 (Cal. 1988) ("mass-tort actions for personal injury most often are not appropriate for class action certification.").
10. *See* COLOMBIA'S POPULAR ACTION LAW No. 472 of 1998; BRAZIL'S CONSUMER DEFENSE CODE, Law No. 8078 of September 11, 1990, article 81; and PROPOSAL FOR A MODEL CODE FOR CLASS ACTION PROCEEDINGS FOR LATIN AMERICA from the Latin American Procedural Law Institute.
11. *See* William Crampton & Silvia Kim, *Class Actions—Mexican Style*, LAW360, Sept. 6, 2011.

on behalf of a class of "aggrieved" plaintiffs who have similar claims. In some jurisdictions, *only* organizations, such as consumer associations who have taken on the task of protecting consumer interests, may bring class actions. Some countries require a registered consumer association with standing to bring representative claims. For example, in Spain,[12] only a small universe of officially registered associations are permitted to file such claims. Until recently, the same was also true in Italy.[13] In Brazil,[14] although registration at least one year before filing suit is required, the court may dispense with this requirement whenever it considers it appropriate. The net result is that two people can form an association one day and file a claim the next. An alternative method is to identify one or more lead cases that are the most representative and apply the outcome of the lead cases to all the other cases in the class. This approach is found in the Group Litigation Orders (GLO) in England and Wales,[15] and the test case model's in Germany[16] and Finland.[17]

[C] Opt-In or Opt-Out Model

Another class action debate involves the adoption of either an opt-in or opt-out model.[18] An opt-out class presents potential defendants with the possibility of plaintiffs creating a massive claim at the time of filing; claimants, on the other hand, may be concerned that their constitutional rights are being infringed because a collective action is being initiated on their behalf. The constitutionality of an opt-out model has been vigorously debated in Europe under Article 6 of the European Convention on Human Rights. Notwithstanding, opt-out models already exist in some European countries, albeit with certain restrictions. For example, Portugal limits the types of claims that may be brought to remedy violations of rights based on either the Constitution or Consumer Protection Law; Denmark and

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12. Civil Procedure Act, 1/2000 (Spain).
13. Consumer Code, art. 139 (Italy). This limitation was expanded under the new Collective Redress Action, Art. 140bis, to give standing to individuals and ad hoc consumer associations as well.
14. Consumer Defense Code, art. 82 (Brazil).
15. Civil Procedure Rules 1998, pt. 19, sec. III (U.K.).
16. BUNDESMINISTERIUM DER JUSTIZ, THE GERMAN CAPITAL MARKETS MODEL CASE ACT, BGBL. I 2005 at 50 (Aug. 19, 2005), English translation, *available at* www.bmj.bund.de/kapmug [hereinafter BUNDESMINISTERIUM DER JUSTIZ].
17. Group Action Act, 444/2007 (Finland).
18. *See* John H. Beisner, U.S. Chamber Institute for Legal Reform, "Opt-In" vs. "Opt-Out" Procedures in Collective and Representative Litigation (July 28, 2010), *available at* www.instituteforlegalreform.com/images/stories/documents/pdf/international/optoutpaper.pdf.

Norway—discussed below—permit opt-out classes for claims with low values; and the Netherlands allows opt-out classes for settlement only. In the class action debates in Sweden and the UK, some have expressed a view that an opt-in model reduces the procedure's utility.[19]

Whether the model adopted is opt-in or opt-out, a more important consideration may be the time frame for exercising the decision to opt in or out. In Brazil, for example, the period for opting-in takes place after the liability trial, when the outcome is already known. While this is referred to as an opt-in system, it creates similar issues for defendants as an opt-out class where the class size is not clearly determinable. Moreover, it requires the defendant to defend an action without having evidence of potential contributory conduct, which would otherwise be available in an individual claim based on the same facts. It also permits potential class members to wait and see whether the result is successful before binding themselves to the outcome (so-called "one-way *res judicata*"). Regardless of the system, in order to protect the rights of all parties, all parties must be known (or at least defined) and be bound at the time of judgment.

[D] With or Without Certification

The U.S. model provides for a two-stage approach—an initial court decision to certify a class followed by a trial on the merits. An alternative model, found in civil law jurisdictions such as Brazil, defers the decision to certify until after the liability trial. If liability is found, the court then defines the class of injured claimants and invites them to file a claim for individual recovery within a stated period of time. This does not usually require that the class be ascertainable; in fact, most of the U.S. requirements for defining and certifying the class are absent.

Another major concern is the issue of "one-way *res judicata*." A potential class member can decide whether to opt-in to the claim after the court has ruled on the merits.[20] This means that a defendant

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19. *See, e.g.*, PER HENRIK LINDBLOM, STANFORD LAW SCHOOL, GLOBAL CLASS ACTION CLEARINGHOUSE, GROUP LITIGATION IN SWEDEN 37 (Dec. 6, 2007), *available at* www.law.stanford.edu/library/globalclassaction/PDF/Sweden_National_Report.pdf [hereinafter LINDBLOM]; Per Henrik Lindblom, Academy of European Law Conference in Italy: Group Litigation in Scandinavia (Oct. 12, 2008); and The UK Department for Business Innovation & Skills, *Private Actions in Competition Law: A Consultation on Options for Reform* (April 2012), at 31–32 [hereinafter BIS Consultation Paper].

20. *See, e.g.*, Ada Pelligrini Grinover,: *Brazil*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 63 (Mar. 2009) (describing the Brazilian system as being a "res judicata secundum eventum litis," which means that if the collective action

that loses on general liability is bound in subsequent claims by individual plaintiffs, but the reverse is not true. If the defendant succeeds on liability in the first phase, that finding does not preclude individual actions based on the same claims, because that individual never opted into the class and, therefore, cannot be bound.

The backdrop for this model, at least in Europe, is the existence of procedures that allow collective actions by consumer protection organizations for declaratory or injunctive relief only.[21] Individuals may then file a separate action for damages using the court's findings in the collective action. This process is similar to so-called "follow-on actions," in which private claimants can rely on the findings of liability in lawsuits by public competition authorities as the basis for recovering their individual losses.[22] However, this process has been criticized as cumbersome and inadequate for distributing individual damages, particularly when the number of potential claimants is high, as in the case of the financial fraud by Parmalat in Italy[23] and the price fixing claims against mobile phone operators in France.[24] The solution often proposed in European parliaments is to preserve the initial liability trial but remove the requirement of filing a separate individual action.

All of these issues frame class action debates taking place in countries outside the United States.

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ruling is unfavorable to the class then class members are only precluded from re-filing as collective plaintiffs, but they may file individual actions based on the same facts), *available at* www.law.stanford.edu/display/images/dynamic/events_media/Brazil_National_Report.pdf [hereinafter Grinover].

21. *See, e.g.*, Articles L. 421 and L. 422 of the French Consumer Code; the 5th Part of Article 49 of the Lithuanian Civil Procedure Code; and Article 3.305 of the Dutch Civil Code.
22. *See, e.g.*, BIS Consultation Paper, *supra* note 19, at 16.
23. *See* Peter Gumbel, *How It All Went So Sour*, TIME, Nov. 21, 2004 (detailing history of Parmalat financial scandal), *available at* www.time.com/time/magazine/article/0,9171,901041129-785318,00.html; ELISABETTA SILVESTRI, STANFORD LAW SCHOOL, GLOBAL CLASS ACTION CLEARINGHOUSE, THE GLOBALIZATION OF CLASS ACTIONS: ITALIAN REPORT 1 (discussing need for group action in Italy to afford access to justice in aftermath of several huge financial and securities frauds), *available at* www.law.stanford.edu/library/globalclassaction/PDF/Italian_National_Report.pdf [hereainafter SILVESTRI].
24. *See* VÉRONIQUE MAGNIER, STANFORD LAW SCHOOL, GLOBAL CLASS ACTION CLEARINGHOUSE, CLASS ACTIONS, GROUP LITIGATION & OTHER FORMS OF COLLECTIVE LITIGATION PROTOCOL FOR NATIONAL REPORTERS: FRANCE 20 (discussing claims brought against Vivendi Universal, S.A., 2005 decision by Competition Commission that three mobile phone operators were guilty of price-fixing, and calls by consumer groups for more effective group litigation), *available at* www.law.stanford.edu/library/globalclassaction/PDF/France_National_Report.pdf.

§ 7:2.2 Securities Forerunner

Regardless of the class action models debated outside the United States, class actions are rarely used for product liability claims. In 2008, class actions made news in the Netherlands, where the Collective Settlement Act (Wet Collectieve Afhandeling Massaschade, or "WCAM") enabled the settlement of an approximately $350 million securities claim brought by non-U.S. investors against Royal Dutch Shell PLC in relation to a 2004 restatement of reserves.[25] The case was filed in January 2006 in the United States, but U.S. law presented several obstacles for Shell's foreign shareholders to join the proceedings. So, the parties devised a settlement under the Dutch Act, signaling what some are calling a new global litigation strategy for the future.[26] As of 2012, the Amsterdam Court of Appeal had declared six settlement agreements binding under the Dutch Act.[27]

Securities litigation has been viewed as a springboard for the adoption of broader class action litigation in some countries. In November 2005, the German Parliament introduced the Capital Markets Model Case Act (Kapitalanleger-Musterverfahrensgesetz or "KapMuG")[28] to improve management of mass securities litigation. Under the Act, claimants must opt in and each file an individual lawsuit. Common issues of fact or law are tried in one model proceeding, and the judgment is binding on all claimants who filed an action. After several extensions,[29] the Act is currently scheduled to sunset in 2020.[30]

The genesis of this legislation was the Deutsche Telekom case, which involved over 2,000 actions filed by 16,000 plaintiffs and 800 lawyers against Deutsche Telekom. The shareholders had accused the company of providing inflated financial information when it issued new shares in June 2000.[31] Ultimately, the Higher Regional Court in Frankfurt ruled

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25. Michael D. Goldhaber, *Shell Games*, FOCUS ON EUROPE (Winter 2008).
26. *Id*.
27. U.S. Chamber Institute for Legal Reform, *Collective Redress in the Netherlands*, Feb. 6, 2012, *available at* http://www.instituteforlegalreform.com/doc/collective-redress-in-the-netherlands.
28. BUNDESMINISTERIUM DER JUSTIZ, *supra* note 16.
29. BUNDESMINISTERIUM DER JUSTIZ, *supra* note 16; *see also* Honorable Thomas Kehren, *Handling of Class Actions: The Perspective of a Judge*, International Association of Lawyers Conference in Frankfurt, Germany (Mar. 2010).
30. Ina Brock & Stefan Rekitt, *New Reform of the Capital Markets Model Case Act ("the KapMug")*, LEXOLOGY, Mar. 31, 2013.
31. *Bad Connection*, THE ECONOMIST, Apr. 10, 2008, *available at* www.economist.com/business/displaystory.cfm?story_id=11021139; *see also* Mark Wegener & Peter Fitzpatrick, *Europe Gets Litigious*, 28 LEGAL TIMES 44 (2005).

in favor of Deutsche Telekom, although the plaintiffs stated they would appeal.[32]

In Taiwan, the legislature enacted the Securities Investors and Futures Traders Protection Act, which became effective in January 2003.[33] This law established (1) a fund to compensate investors from investments in insolvent firms, and (2) the Securities and Futures Investors Protection Center (IPC) to manage the fund. The IPC also has the sole responsibility to either file securities class actions or initiate arbitration on behalf of defrauded investors whenever there is a single event that injures more than twenty investors.[34] From 2003 until 2007, "the IPC . . . brought 36 securities class actions on behalf of more than 57,470 investors [sic], seeking NT$ 21.731 billion (about US$ 658 million) in civil damages."[35]

While securities litigation is beyond the scope of this chapter, it is instructive to note that this type of class action has taken hold overseas, as these and other types of class action cases may be the catalyst for expanding class actions to areas such as product liability.

§ 7:3 Australia and Canada

The two most active common law jurisdictions for class actions other than the United States—Australia and Canada—are debating further expansion of their models, which are considered even more plaintiff-friendly than the U.S. model.

§ 7:3.1 Australia

The federal courts of Australia first adopted class actions in March 1992 as part of a reform package to enhance product liability litigation.[36] The procedure is similar to Rule 23 of the U.S. Federal Rules of Civil Procedure[37] in that it permits representative actions on virtually any cause of action. It is an opt-out system. The rule additionally requires at least seven class members who have claims against the

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32. Karin Matussek, *Deutsche Telekom Didn't Mislead 16,000 Investors, Court Says*, BLOOMBERGBUSINESSWEEK, May 16, 2012, *available at* http://www.businessweek.com/news/2012-05-16/deutsche-telekom-didn-t-mislead-16-000-investors-court-says.
33. Yu-Hsin Lin, *Modeling Securities Class Actions Outside the United States: The Role of Nonprofits in the Case of Taiwan*, 4 N.Y.U. J. L. & BUS. 143, 168–70 (2007) [hereinafter Yu-Hsin Lin].
34. *Id*. at 169.
35. *Id*. at 181.
36. S. Stuart Clark & Christina Harris, *Class Actions in Australia: (Still) A Work in Progress*, vol. 31, No. 1, AUSTRALIAN BAR REV. 63, at 63–64 (July 2008) [hereinafter Clark & Harris].
37. FED. R. CIV. P. 23.

same person or persons arising out of "the same, similar or related circumstances," and there must be at least one "substantial common issue of law or fact" among the class members.[38] Unlike the U.S. model, there is no certification stage; rather, defendants have the burden to challenge the propriety of the class form at any stage.[39] Another important difference is that the "substantial common issue" need not *predominate* as the U.S. rules require. Significantly, Australian courts are comparatively less likely to de-certify a class because the action "is more properly described as a mass of individual claims with some common connections."[40]

Initially, there was little class action activity; today, however, Australia is one of the most active jurisdictions for class actions outside of the United States.[41] Securities class actions, in particular, have taken hold in Australia due to settlements in a few high-profile cases and increased "shareholder vigilance."[42] But there have also been product liability class actions involving pharmaceuticals, medical devices, tobacco products, and others, including food products. Many of these have been so-called copycat claims imported from the United States.[43]

Although many of these cases settle, so far at least two drug or medical device class actions have been tried to verdict: *Courtney v. Medtel Pty Ltd.*[44] and *Peterson v. Merck Sharpe & Dohme (Australia) Pty Ltd.*[45] In *Courtney*, the plaintiff claimed that his pacemaker was not of merchantable quality at the time of its implantation. Mr. Courtney was awarded AUS$9,988 as compensation,[46] and he settled the outstanding claims of the other class members.[47] In *Peterson*, the first Vioxx case tried outside of the United States, a federal judge ruled that Merck & Co. Inc. violated Australia's Trade Practices Act and that the painkiller Vioxx doubled the risk of heart attack among patients.[48] Mr. Peterson was awarded AUS$288,000 in damages and the decision was expected to result in hundreds of

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38. Federal Court of Australia Act § 33C(1); *see also* Clark & Harris, *supra* note 36, at 71.
39. Federal Court of Australia Act §§ 33M, 33N; *see also* Clark & Harris, *supra* note 36, at 67.
40. Clark & Harris, *supra* note 36, at 68.
41. *Id*. at 63 (citing S. Tucker, *Culture of Class Actions Spreads Across Australia*, FIN. TIMES, Mar. 9, 2006, at 12).
42. Clark & Harris, *supra* note 36, at 85–87.
43. *Id*. at 64–65.
44. Courtney v. Medtel Pty Ltd. (2003) 126 F.C.R. 219 (Austl.).
45. Peterson v. Merck Sharpe & Dohme (Austl.) Pty Ltd., [2010] FCA 180 (Mar. 5, 2010).
46. Courtney v. Medtel Pty Ltd. (2003) 126 F.C.R. 219, 260 (Austl.).
47. Clark & Harris, *supra* note 36, at 69 (discussing *Courtney*).
48. Peterson, ¶¶ 4 and 11.

additional claimants seeking recovery.[49] However, on October 12, 2011, the verdict was overturned by the Federal Court of Australia Full Bench, which held unanimously that the plaintiff's epidemiological evidence was insufficient in light of Mr. Peterson's other risk factors and therefore he failed to prove that his heart attack was necessarily caused by his consumption of Vioxx.[50]

In September 2009, the Attorney General's Access to Justice Task Force issued its recommendations for the federal government to develop a "strategic framework" for improving access to justice in the federal civil justice system.[51] Among its recommendations, the Task Force proposed a review of the federal class action regime that would consider:

- limiting interlocutory proceedings in class actions;
- limiting or removing the court's ability to terminate a class action if the certification requirements are not met (as noted above, these are not proved at the outset in a preliminary stage but are instead affirmatively raised by a defendant);
- granting greater power to regulatory agencies and allowing *cy pres* remedies;
- allowing opt-in class actions funded by litigation funders; and
- eliminating the principle from case law that currently requires all members of the class to have claims against all defendants.

Fueling access to justice activity in Australia is the increased availability of third-party litigation funding. Thanks to a 2006 decision by the High Court of Australia,[52] private, for-profit litigation funders may now be established in Australia, and at least five appear to be operating so far.[53] Since mid-2005, "all of the securities class actions commenced in Australian courts . . . are being funded by commercial litigation funders."[54]

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49. Jesse Greenspan, *Australian Ruling Opens Door for 100s of Vioxx Claims*, LAW360, Mar. 5, 2010.
50. Merck Sharp & Dohme (Austl.) Pty Ltd. v. Peterson, [2011] FCAFC 128 (Oct. 12, 2011).
51. Australian Government, Attorney-General's Department, A Framework for Access to Justice in the Federal Civil Justice System (Sept. 2009).
52. *See* Campbell Cash & Carry Pty Ltd. v. Fostif Pty Ltd. (2006) 229 A.L.R. 58 (finding that the fears about the adverse effects on litigation as a result of litigation funding are not enough to establish a public policy prohibiting them, thereby paving way for creation of litigation funding industry).
53. STANDING COMMITTEE OF ATTORNEYS-GENERAL, LITIGATION FUNDING IN AUSTRALIA, DISCUSSION PAPER 4 (2006).
54. Clark & Harris, *supra* note 36, at 90.

One notable example of the role third-party funders are having in fueling Australian class actions is a claim against ANZ Bank,[55] which was initiated by the law firm Maurice Blackburn on behalf of 34,000 bank customers who allege they were wrongfully charged certain types of "exception" fees on their accounts. The lawsuit, which is being financed by litigation funder IMF (Australia), is estimated to be worth AUS$50 million and is the first of twelve similar class actions worth an estimated total of AUS$250 million.[56] Trial in the ANZ case is scheduled to begin in December 2013 in the Federal Court of Melbourne.[57]

Changes are also occurring at the state level. In 2007, the Victorian Law Reform Commission (VLRC) prepared a number of law reform proposals including many of the same principles identified by the Task Force recommendations listed above.

New South Wales, which did not have a class action regime, adopted a law in late 2010 that is based on the current Federal Court and Victorian Supreme Court models with similar features as those recommended by the Task Force and VLRC.[58] In addition, the Law Reform Commission of Western Australia (LRCWA) launched a public consultation on class actions that yielded a discussion paper in February 2013 that recommended Western Australia should adopt legislation to create a class actions regime substantially the same as that of the Federal Courts.[59]

§ 7:3.2 Canada

Although Québec adopted class actions in 1978, class actions were not fully accepted in the rest of Canada until the 1990s. Today, most of the provinces and the Federal Court permit class actions.[60] While the

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55. Bryan Frith, *ANZ Ahead on Points in Early Stages of Class Action on Fees*, THE AUSTRALIAN, Dec. 6, 2011, *available at* www.theaustralian.com.au/business/opinion/anz-ahead-on-points-in-early-stages-of-class-action-on-fees/story-e6frg9kx-1226214539468.
56. *Id*.
57. *Australian Bank Fees Class Action Scheduled for December Hearing*, BANKINGDAY.COM, June 19, 2013.
58. Ross Drinnan & Jenny Campbell, Allens: Client Update: New Class Action Regime for NSW (Aug. 10, 2010), *available at* www.aar.com.au/pubs/ldr/culdraug10.htm?email=true.
59. Law Reform Commission of Western Australia, Representative Proceedings, Discussion Paper Project No. 103 (Feb. 2013), *available at* www.lrc.justice.wa.gov.au/_files/P103-DP.pdf.
60. W.A. Bogart, Jasminka Kalajdzic & Ian Matthews, The Globalization of Class Actions Conference at Oxford University: Class Actions in Canada: A National Procedure in a Multi-Jurisdictional Society? (Dec. 2007), *available at* www.law.stanford.edu/library/globalclassaction/PDF/Canada_National_Report.pdf [hereinafter Bogart, Kalajdzic & Matthews].

standards vary across the federal system and the provinces, courts in Canada have been somewhat receptive to certifying class actions in mass tort and product liability cases.[61] Some commentators have suggested that the reason for this is that provinces such as Ontario and British Columbia do not require common issues to predominate over individual issues as required by U.S. Rule 23(b)(3).[62] It suffices that a class action is a *preferable* means of resolving the common issues. While arguably a weaker standard than predominance and superiority, these are factors some courts consider to determine preferability.[63] In fact, Québec's Court of Appeal has given increased weight to the predominance language, which is included in the Québec statute, thereby raising the bar for certifying a class action in that province.[64]

Data related to class actions have been extremely limited; and none of the available data provide precise numbers.[65] However, according to one summary of class actions, at least 287 proposed class proceedings were filed in Ontario between 1993 and April 2001.

According to the Canadian Class Proceedings Registry, sixty-two class actions were commenced in the first six months of 2007, the vast majority of which originated in Ontario, British Columbia, or Québec, a significantly increased pace compared to an average of fifteen class actions total per year a decade before.[66]

This increased activity in Canada has led to the problem of competing national class actions certified by different provinces.[67] In 2008, an Ontario court faced a question of certification in two class

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61. *Id*. at 4.
62. *Id*. n.15 (citing Ward K. Branch, *Class Actions in Canada*, 5-1 to 5-17 (Release no. 19, July 2007) (Aurora, Ont.: Canada Law Book, 2007)).
63. *See, e.g.*, Hollick v. Toronto (City), 2001 SCC 68 (CanLII) (concluding that the drafters of the rule did not intend for the preferability analysis "to take place in a vacuum" and holding that the presence of individual issues defeated the judicial economy and preferability of the class action).
64. Bogart, Kalajdzic & Matthews, *supra* note 60, at 7.
65. *Id*. at 15 (citing Garry D. Watson & Charles Wright, *Class Actions in Ontario and British Columbia 1993–2001: An Analysis of the First Eight Years of the Class Actions in Canada's Common Law Provinces*, First Annual Class Actions Symposium, Class Actions: "Where are We and Where are We Going? Osgoode Hall Law School of York University, Toronto, Canada (2001).
66. Bogart, Kalajdzic & Matthews, *supra* note 60, at 15–16.
67. This summary is based upon the class action alerter published by Jeff Galway and Gordon McKee of the Blakes law firm, JEFF GALWAY & GORDON MCKEE, BLAKES, THE FUTURE OF CLASS ACTIONS IN CANADA: ADDED COMPLEXITY AND COSTS FOR CORPORATE DEFENDANTS (Aug. 2008).

actions, each filed on behalf of individuals who were prescribed the drug Vioxx. The court concluded that a consortium of plaintiffs' law firms pursuing one of the cases was better suited to prosecute the claim than the Merchant Law Firm that filed the other.[68] Accordingly, the Ontario court stayed the Merchant Law Firm's class action in favor of the consortium claim.

Meanwhile, a Saskatchewan court certified an identical class action brought by the Merchant Law Firm. Based on a newly amended law, the class representative successfully petitioned to expand the class to include residents outside of Saskatchewan who choose to participate.[69] The consortium counsel from Ontario petitioned the Saskatchewan court to stay its decision to expand the class definition until the Ontario court ruled on its motion to certify. Nevertheless, the Saskatchewan court granted the Merchant Law Firm's motion to certify a class of residents in all provinces except Québec.[70] On July 28, 2008, the Ontario court, in turn, granted the consortium's motion to certify a class of residents in all provinces except for Saskatchewan and Québec.[71] However, on March 30, 2009, the Saskatchewan Court of Appeals reversed the trial court's certification decision.[72]

The appellate court's decision avoided the problem of having two identical and overlapping nationwide Vioxx class actions in Canada. In a separate case decided later in 2009, the Supreme Court of Canada acknowledged the problem created by national but parallel class actions, but held that it was not the "Court's role to define the necessary solutions."[73]

The Canadian Bar Association has responded to the call for a solution by creating a National Task Force on Class Actions, which developed a draft Judicial Protocol to aid courts in different provinces in coordinating the hearing or settlement of parallel cases.[74] The public consultation on the draft began in July 2011 and was adopted by the Bar in August 2011.[75]

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68. *Id*.
69. *Id*.
70. *Id*.
71. *Id*.
72. Merck Frosst Can. Ltd. v. Wuttunee, [2009] SKCA 43, slip op. (Court of Appeal, Mar. 30, 2009).
73. Canada Post Corp. v. Lépine, [2009] SCC 16 (Apr. 2, 2009).
74. The Canadian Bar Association, at www.cba.org/CBA/ClassActionsTaskForce/Main/.
75. A copy of the protocols may be found at www.cba.org/CBA/resolutions/pdf/11-03-A.pdf.

In addition, the Ontario Superior Court rejected a class action in what has been viewed as a significant milestone in product liability litigation in Canada.[76] The plaintiffs in *Andersen v. St. Jude Medical Inc.* brought a claim on behalf of a class of individuals implanted with allegedly defective heart valves.[77] The case is significant for at least two reasons. First, there are few examples of product liability cases that are actually tried to verdict in Canada. Second, it is the first class action that included a claim for "waiver of tort" to go to trial. The "waiver of tort" theory has often been used to create a common issue among class members. However, there is considerable debate whether it exists as an independent cause of action. Under this theory, the plaintiffs waive their right to tort and seek instead to recover the benefit the defendant has purportedly derived from the alleged wrongful conduct.[78] In this case, after a trial that lasted nearly one and a half years, consisting of 138 days of evidence, four months of written submissions, and eight days of closing arguments, the court concluded that because there was no wrongful conduct by St. Jude, it was unnecessary to resolve the issue in this case. But in reaching this conclusion, the court "respectfully disagreed" with the prior case law that allowed "waiver of tort" and suggested the policy issues the doctrine raised required action by the legislature.[79]

§ 7:4 England and Wales

Somewhat surprisingly, despite their popularity in common law jurisdictions like the United States, Australia, and Canada, class actions have not been as common in English courts. In fact, before introduction of the Group Litigation Order, collective litigation in England and Wales was sanctioned only through the use of a test case, consolidation, or a representative action under Rules of the Supreme Court Order 15 (now Civil Procedure Rule 19.6, as of 2000).[80] However, a representative action is narrow in scope and requires all represented persons to have the same interest in the claim (for example, "a common interest arising . . . under a common document"

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76. *See* Stikeman Elliott, *Ontario Superior Court of Justice Releases Class Action Trial Decision*, CANADIAN CLASS ACTIONS LAW BLOG, June 29, 2012, *available at* www.canadianclassactionslaw.com/product-liability/ontario-superior-court-of-justice-releases-class-action-trial-decision/.
77. Andersen v. St. Jude Medical Inc., [2012] ONSC 3660, slip op. (Ont. Super. June 26, 2012).
78. *Id*. at 193.
79. *Id*. at 196–201.
80. *See* CIVIL JUSTICE COUNCIL, IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS, *available at* www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf.

or "a common grievance").[81] The relief obtained must be equally beneficial to all, which has meant that individual damages were usually unavailable. Consequently, the procedure has been underused, notwithstanding decisions that have attempted to expand its scope to apply to torts and to instances where a declaration of individual damages might be awarded.[82]

Because this device was considered inadequate for significant multi-party cases, which increased during the 1980s and 1990s, in May 2000, Group Litigation Orders (GLOs) were introduced to improve the management of claims with common questions of fact or law.[83] If the court approves a GLO, it appoints a Managing Judge and establishes a Group Register. 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 individuals to add their claims to the Group Register. So far, seventy-six GLOs have been registered.[84]

As of 2003, consumer organizations have the ability to seek authority from the Competition Appeals Tribunal (CAT) to bring claims on behalf of wronged consumers.[85] The U.K. consumer organization "Which?" brought the first such action against the sportswear company JJB regarding price-fixing of football shirts. In January 2008, the case reportedly concluded in a settlement for £18,000, representing around £10 per shirt. Julian Connerty, who represented Which?, said: "What this case proves is that the question of an opt-in versus an opt-out system is key: having an opt-in system makes it very difficult for the claimant and for Which?"[86]

Whether an opt-out system is on the way remains uncertain. On August 5, 2008, the Civil Justice Council submitted its 483-page report on its recommendations to the Lord Chancellor.[87] Despite its length, the report is helpfully distilled into eleven recommendations,

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81. *Id.* at 27.
82. *Id.* at 27–28.
83. Civil Procedure Rules 1998, pt. 19, sec. III (U.K.). *See also* DR. CHRISTOPHER HODGES, STANFORD LAW SCHOOL, GLOBAL CLASS ACTION CLEARINGHOUSE, COUNTRY REPORT: ENGLAND AND WALES, *available at* www.law.stanford.edu/library/globalclassaction/PDF/England_Legislation.pdf.
84. Her Majesty's Courts Service (U.K.), *available at* www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders.
85. Competition Act 1998, § 47B (U.K.); *see also* Rules and Guidance of the Competition Appeal Tribunal, *available at* www.catribunal.org.uk/rules/default.aspx.
86. Caroline Binham, *JJB to Pay Out After Football Shirts Claim*, THE LAWYER (Jan. 9, 2008), *available at* www.thelawyer.com/cgi-bin/item.cgi?id=130660&d=415&h=417&f=416.
87. CIVIL JUSTICE COUNCIL, IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS, *available at* www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf.

which generally conclude that collective actions brought by individuals or organizations should be permitted on an opt-out or opt-in basis on a wide range of subjects. It further recommends an up-front certification process that is subject to appeal and full costs shifting. Also, like the VLRC recommendations in Australia, unallocated damages are directed to a trustee for *cy pres* distribution. The final recommendations, published on December 8, 2008, were rejected by the government on July 20, 2009.[88] The government concluded that it would be better to proceed in targeted areas where there is evidence of need, rather than to create a general right of collective action.

In late 2009, the government attempted to do so by proposing a new Financial Services Bill that sought to introduce opt-out class actions for financial services claims, among other new protections for consumers.[89] The bill had only completed the committee stage when the general elections were scheduled, causing all pending legislation either to be quickly adopted or to fail with the dissolution of Parliament. Because class action litigation was a controversial issue, the opt-out provision was removed in the final version adopted on April 8, 2010.[90]

This does not mean the government has abandoned class action reform altogether. The Ministry of Justice is working with the Civil Justice Council and Civil Procedure Rule Committee to develop a set of generic procedural rules that any collective action scheme should have. In addition, the Department of Business Innovation and Skills (BIS) conducted a public consultation on expanding private damages actions for competition cases in 2012.[91] Among the proposals in the consultation paper is the introduction of opt-out class actions. As follow-up to the consultation, the BIS released its draft Consumer Rights Bill in June 2013 that proposed a series of enhancements to consumer redress, including the availability of opt-out class actions before the Competition Appeals Authority.[92]

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88. Press Release, U.K. Ministry of Justice, *Government Response to Civil Justice Council Report on Collective Actions* (July 20, 2009), *available at* www.justice.gov.uk/latest-updates/response-civil-justice-report-collective-actions.htm.
89. Lisa Rickard, *Tort Lawyers Set Their Sights on Britain*, WALL ST. J., Mar. 30, 2010.
90. *See* Martin Day, *United Kingdom: An Overview of the Financial Services Act 2010*, MONDAQ.COM, May 25, 2010.
91. BIS Consultation Paper, *supra* note 19.
92. For the government response to consultations on consumer redress, see Department for Business Innovation and Skills, Draft Consumer Rights Bill, Government Response to Consultations on Consumer Rights (June 2013), *available at* www.gov.uk/government/uploads/system/uploads/attachment_data/file/206373/bis-13-916-draft-consumer-rights-bill-government-response-to-consultations-on-consumer-rights.pdf.

§ 7:5 Africa

§ 7:5.1 Nigeria

Nigeria, another common law jurisdiction, takes much of its jurisprudence from the laws of England and Wales, but unlike England and Wales, Nigeria permits class actions that are arguably more like those in the United States, at least in principle. In fact, the certification standard found in Nigerian procedure is far more permissive on its face. Order 12, Rule 8 of the 2000 Federal High Court Rules states that one or more persons may bring a claim for injunctive or monetary relief on behalf of a group of claimants with the same interest. Many of the Nigerian states have similar rules; Order 13, Rule 12 of the 2004 Lagos state rules in particular is very similar to the federal rules.

Notwithstanding the availability of class actions, purportedly no class action lawsuit had been successfully concluded in the courts of Nigeria until July 2010.[93] At that time, a federal trial court awarded plaintiffs NGN 15.4 billion (approximately $70 million) as compensatory and punitive damages against Shell International Company Ltd. and several of its affiliates in Nigeria for damages caused by an oil spill in 1970 in Rivers State.[94] However, the conclusion of this class action may be an outlier since the defendant reportedly did not submit evidence.[95]

§ 7:5.2 South Africa

South Africa's legal system also borrows from its colonial past, incorporating elements of both British common law and Dutch civil law, as well as indigenous legal traditions. Section 38 of its 1996 Constitution permits class actions for groups of individuals who are seeking redress for infringement of a right protected by the Bill of Rights.[96] The class may be represented in the action by one of its

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93. Tochukwu Onyuke, *Class Action Lawsuits: A Global Trend for Accountability and Better Service Delivery*, BUSINESSDAY, Nov. 3, 2010, *available at* www.businessdayonline.com/NG/index.php?option=com_content&view=article&id=15955:class-action-lawsuits-a-global-trend-for-accountability-a-better-service-delivery-2&catid=133:insight-from-outside&Itemid=557.
94. Chido Nwangwu, *Shell gets N15b Oil Pollution Ruling Against its Nigeria Operations*, USAFRICAONLINE, July 6, 2010, *available at* www.usafricaonline.com/2010/07/06/shell-15b-oil-pollution-nigeria-operations-chido-and-obinwa-2010/.
95. *Id*.
96. Pieter Conradie, Global Legal Group, The International Comparative Legal Guide to: Class and Group Actions 2010, Chapter 23: South Africa (2010).

members or by "anyone acting in the public interest."[97] Notwithstanding this provision, there are no procedural rules for judges to follow and they must instead rely on their discretion and case law. For other types of cases, the High Court Rules only provide that any number of persons may be joined together in claims having the same question of law or fact.[98]

In addition to claims for violations of constitutional rights, as of April 2011, the Consumer Protection Act (2008) permits class actions for injuries caused by violations of consumer protection laws. Specifically, section 76(1)(c) of the Act states that "a court can award damages against a supplier for collective injury to all or a class of consumers generally, to be paid on any conditions that the court considers just and equitable to achieve the purposes of the Act."[99] However, the regulations still do not address the procedure by which class actions will be litigated in South African courts.

In 2011, South Africa's Supreme Court ruled for the first time that a miner could sue his employer to recover for his lung disease.[100] As a result of that ruling, the plaintiff's lawyer has threatened a class action on behalf of miners from South Africa and neighboring countries—an estimated class size of hundreds of thousands of workers—against the four biggest mining companies.

The Supreme Court then ruled in 2012 on two cases that had been watched very closely for their potential to influence the class action issue. The two cases, which were referred to as the bread price-fixing cases, were *The Trustees for the Time Being of the Children's Resources Centre Trust and others v. Pioneer Food (Pty) Ltd and others*,[101] and *Imraahn Ismail Mukaddam and others v. Pioneer Food (Pty) Ltd and others*.[102] The Supreme Court ruled that the classes should not be admitted and provided guidance on the application of certification criteria; it emphasized the importance of a clear class definition, the lack of a triable issue, and the rejection of *cy pres* relief. Despite the

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97. *Id*. (discussing secs. 38(c) and (d)).
98. *Id*.
99. *See* Eric Levenstein, *The Consumer Protection Act: An Opportunity for Class Action Suits in South Africa*, MONDAQ, Aug. 9, 2011, *available at* www.mondaq.com/x/141880/Consumer/The+Consumer+Protection+Act+An+Opportunity+For+Class+Action+Suits+In+South+Africa.
100. Ed Cropley, *From South Africa's Gold Mines, Billion-Dollar Class Action Emerges*, REUTERS, Mar. 21, 2012, *available at* www.vancouversun.com/business/From%20South%20Africa%20gold%20mines%20billion%20dollar%20class%20action%20emerges/6337526/story.html.
101. (50/2012) [2012] ZASCA 182 (Nov. 29, 2012).
102. (49/2012) [2012] ZASCA 183 (Nov. 29, 2012).

clarity offered by his ruling, the justice who wrote this decision also suggested the need for additional clarification and improvement of the class action system by Parliament.

§ 7:6 Israel

Like South Africa, Israel's legal system is a mixture of common law and civil law influences, but like Australia and Canada, the Israeli Class Action Law, enacted on March 12, 2006, also created a relatively receptive class action venue.[103] While class actions were already available, they existed under several separate statutes. The new law establishes a single model. The certification prerequisites are largely unchanged in the new law. Plaintiffs must demonstrate the following:

- a personal cause of action;
- a reasonable probability that common questions of law or fact will be decided in favor of the putative class members;
- that the class action is an efficient and fair means of adjudicating the claim;
- that there is adequate representation for the plaintiffs; and
- that plaintiff has acted in good faith.[104]

The law creates an opt-out model, except in special circumstances where the personal claim for each class member is substantial, such as some personal injury claims.[105]

One of the more notable additions provided in the new law is the "Fund for the Financing of Class Actions" as part of the Israeli annual state budget to assist class representatives in financing class actions that are of public and social importance.[106] The law also allows the court to award class counsel a "partial attorney fee" if the court deems it appropriate.[107] However, the provisions for funding class actions had

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103. AMICHAI MAGEN & PERETZ SEGAL, STANFORD LAW SCHOOL, GLOBAL CLASS ACTION CLEARINGHOUSE, THE GLOBALIZATION OF CLASS ACTIONS NATIONAL REPORT: ISRAEL 7, *available at* www.law.stanford.edu/library/globalclassaction/PDF/Israel_National_Report.pdf; *see also* ISRAELI CLASS ACTIONS LAW (2006), *available at* www.law.stanford.edu/library/globalclassaction/PDF/IsraeliClassActionLaw_2006.pdf.
104. Class Actions Law § 8 (Israel).
105. *Id*. § 12.
106. *Id*. § 27.
107. *Id*. § 23(c).

not yet come into practice since there have been no regulations guiding the fund's operation. In May 2010, the Israeli Ministry of Justice issued regulations to do so.

According to one Israeli lawyer, there has been a significant increase in the number of motions for class certification since the enactment of the new Class Actions Law.[108] On October 7, 2008, the Tel Aviv District Court awarded ILS 55 million—the highest compensation ever awarded in a class action—against Tnuva, Israel's largest milk distributor, for allegedly concealing that fact that it had mixed silicon into its products.[109] Citing the Supreme Court's decision affirming class certification, the District Court held that despite the absence of any physical damage, Tnuva's actions violated the consumers' freedom of choice because "it is the right of consumers to decide what to put into their mouths and bodies and what to avoid." In determining the amount of the award, the District Court relied on section 20 of the Class Actions Law, which "grants the court broad discretion regarding calculation of damages and its allocation among class members."[110] Subsequently, the Israeli Supreme Court reduced the amount of the award and ruled that it is not enough to simply prove breach of autonomy, plaintiffs must show an actual injury.[111]

The notion of "breach of autonomy" has inspired other food-related class actions. In April 2008, plaintiffs presented a similar legal theory by alleging that the Israeli franchisee of McDonald's restaurants misled consumers about the sodium content of their food, even though this information had been provided until 2005.[112] McDonald's conceded that the sodium content reported until then was incorrect, but denied that this created an injury.[113]

In 2011, a putative class action was filed in the Jerusalem District Court against the Central Bottling Company Group Ltd., which is the Israeli franchisee for Coca-Cola.[114] The plaintiff, a Muslim, claimed

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108. YAEL NAVON, INT'L LAW OFFICE, TNUVA MILK DRINKERS AWARDED IS55 MILLION IN CLASS ACTION (Nov. 6, 2008), *available at* www.internationallawoffice.com/Newsletters/Detail.aspx?g=0a3f1424-8317-4a15-8f11-76625771a24e.
109. *Id*.
110. *Id*.
111. C.A. 10085/08, Tnuva v. Estate of Tawfiq Rabi and the Israeli Consumer Council, Supreme Court of Israel, Dec. 4, 2011.
112. Nurit Roth, *McDonald's Israel Hit with Class Action Over Sodium*, HAARETZ, Apr. 8, 2008, *available at* www.haaretz.com/hasen/spages/972841.html.
113. *Id*.
114. Yossi Nissan, *Israeli sues Coca Cola for containing alcohol*, Globes Online, Feb. 20, 2011, *available at* www.globes.co.il/serveen/globes/docview.asp?did=1000624838&fid=1725.

that the recipe for Coca-Cola, which is a well-guarded secret, allegedly contains alcohol. Because alcohol is forbidden by Islam, the plaintiff claimed he unknowingly consumed alcohol for years by drinking Coca-Cola and the company was therefore guilty of consumer fraud and causing mental anguish. He sought ILS 1,000 (approximately $280) for each of the 1.2 million Muslims living in Israel; however, the claim was ultimately withdrawn.

§ 7:7 Europe

§ 7:7.1 Overview

Turning now to civil law jurisdictions, in Europe, various forms of collective redress have emerged in the last decade, both at the EU and the Member State levels. Beyond the GLOs and the more recent class action debates in England and Wales discussed above,[115] and the limited forms of collective redress that has appeared, as already discussed in Germany and the Netherlands, more robust class action models have taken hold in several places, such as the Nordic countries, Italy, and Poland. Soon, as a result of the European Commission's Recommendation on collective redress released in June 2013 (discussed below), such models may become standard in all Member States.[116]

§ 7:7.2 Belgium

In late 2009, the Minister of Justice and the Minister of Consumer Affairs, with the assistance of two law professors, drafted a bill that would introduce a class action system in Belgium. The bill included a presumption of an opt-out model and the court's discretion to award *cy pres* remedies. The bill was never submitted to Parliament and discussion on it slowed in May 2010, when the Belgian Government fell and the June elections failed to create a coalition.

A new government formed in December 2011. The government's coalition agreement explicitly mentioned the intention to strengthen consumer rights by way of the introduction of a collective redress procedure. The Ministry of Economic and Consumer Affairs, which

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115. *See* EU Parliament Directorate General for Internal Policies, *Overview of Existing Collective Redress Schemes in EU Member States*, July 2011.

116. EUROPEAN COMMISSION, RECOMMENDATION OF 11 JUNE 2013 ON COMMON PRINCIPLES FOR INJUNCTIVE AND COMPENSATORY COLLECTIVE REDRESS MECHANISMS IN THE MEMBER STATES.

is responsible for preparing a draft, completed its draft in mid-May 2013 and it was approved by the Council of Ministers in July 2013. As currently framed, the model would permit virtually any type of consumer protection claim, provided the underlying basis for the claim occurred after the law goes into effect, including physical injury. In the case of physical or moral injury, the class must be opt-in, but otherwise the judge has discretion to certify a claim as either an opt-in or opt-out class. In the decision on whether to admit the claim as a class, the judge must determine that the class action is more efficient than individual claims. Standing is given only to approved organizations. The bill also prohibits punitive damages and contingency fees.

§ 7:7.3 Bulgaria

When Bulgaria joined the European Union (EU) in January 2007, it was under pressure from the European Commission (EC) to implement a new civil procedure code, which it enacted on March 1, 2008.[117] The new civil code includes a provision for collective claims on behalf of groups of individuals injured by the same infringement.[118] The Bulgarian model permits any person or organization to file a claim on behalf of all injured persons for damages.[119] After the court verifies the admissibility of the action and assesses the capacity of the class representative, it sets a time limit for notification of other class members to join, and the case proceeds to trial.[120]

On March 12, 2008, the first class action suit was filed in Sofia City Court against twenty-one tobacco companies, alleging violations of certain labeling and marketing requirements for various cigarette brands, thereby depriving the consumer of the opportunity to make an informed choice.[121] However, in May 2011, the Bulgarian Supreme Court affirmed the trial court's decision not to admit the case as a class action.

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117. Elitsa Savova, *Bulgarian Lawyers Warn About New Civil Procedure Code Flaws*, SOFIA ECHO, Feb. 4, 2008, *available at* www.sofiaecho.com/article/bulgarian-lawyers-warn-about-new-civil-procedure-code-flaws/id_27378/catid_66; Petar Bonchovski, *Development in the public law framework of doing business in Bulgaria*, IFLR1000.com, *available at* www.iflr1000.com/default.asp?page=38&CH=3&sIndex=2&CountryID=32.
118. Civil Procedure Code (2008), ch. 33, art. 379(1) (Bulg.).
119. *Id*. at art. 379(3).
120. *Id*. at art. 382.
121. Galina Gerginova, *Cigarettes and Lawsuits, Lawsuits and Cigarettes*, CASH WEEKLY, May 9, 2008.

§ 7:7.4 Denmark, Norway, and Sweden

The class action models in Denmark,[122] Norway,[123] and Sweden[124] require that the court first assess whether the statutory requirements for allowing a class action has been satisfied (this stage is similar to the "certification" stage under Federal Rule of Civil Procedure 23). A class action is generally permitted for most types of claims and for both injunctive and monetary relief, provided that the claims of several individuals are based on identical or materially similar factual or legal grounds. The action must be manageable and a superior way of handling the litigation, compared with alternatives such as joinder of claims and test cases. The class must be "appropriately defined." The representative, which may be an individual or organization whose charge is to promote the interests at issue in the case, must be able to guard the interests of the class and also account for its potential liability.

To join the class, individuals must opt in. One notable difference among these models is that, unlike Sweden, both Norway and Denmark permit opt-out class actions in some instances.[125] Class actions on an opt-out basis are permitted if the claims would involve amounts or interests so minor that they are unlikely to be raised by way of individual actions and preclude the need for dealing with them individually. For these opt-out classes, class members are not liable for the costs imposed on the class representative.

Even though Sweden already appears to be the most active Scandinavian country for class action litigation, there have been calls for expansion. In October 2008, after four years of work, the Swedish Ministry of Justice released a 293-page evaluation of the Class Actions Act.[126] Notwithstanding the report's conclusion that the Act has been successful in providing access to justice and avoiding abuse, the report proposed a number of amendments to the Act. Importantly, it recommended clarifying the criteria for class certification and the

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122. *See* Administration of Justice Act, § 254a (Den.); *see also* DANISH MINISTRY OF JUSTICE, LAW DEPARTMENT REPORT, NEW RULES ON CLASS ACTIONS UNDER DANISH LAW (June 26, 2007), *available at* www.justitsministeriet.dk/fileadmin/downloads/rules.pdf [hereinafter DANISH MINISTRY REPORT].

123. *See* CAMILLA BERNT-HAMRE, STANFORD LAW SCHOOL, GLOBAL CLASS ACTION CLEARINGHOUSE, CLASS ACTIONS, GROUP LITIGATION & OTHER FORMS OF COLLECTIVE LITIGATION IN THE NORWEGIAN COURTS, *available at* www.law.stanford.edu/library/globalclassaction/PDF/Norway_National_Report.pdf.

124. *See* LINDBLOM, *supra* note 19, at 6.

125. *See* LINDBLOM, *supra* note 19, at 30 n.28 (comparing Act to the Norwegian rules); *see also* DANISH MINISTRY REPORT, *supra* note 122, at 5.

126. SWEDISH MINISTRY OF JUSTICE, CLASS ACTION COMMITTEE REPORT, DS2008:74.

availability of an interlocutory appeal by either party. However, it also recommended allowing U.S.-style contingency fees up to 30% of the disputed amount and an increase of legal aid to facilitate the financing for the plaintiffs, which courts are already starting to permit in practice.[127] Finally, the report did not propose changing to an opt-out model, despite some vocal proponents of doing so.[128] Ultimately, in 2009, the Swedish government rejected the proposal to expand the law and preserved the *status quo*.

In comparison, there has not been as much activity under Denmark's new Act, notwithstanding one Danish lawyer's prediction that claims brought under the new law would "first and foremost be consumer claims organized by the Consumer Ombudsman," such as claims involving allegedly defective goods.[129] So far, only a few class actions have been filed, and none have concerned defective goods.[130] The first claim under the new Act was brought by a group of investors against the Danish Bank Trelleborg based on losses sustained from a failed investment.[131] The second claim was also against a bank, Jyske Bank, which claimants alleged was similarly liable for losses they sustained as a result of a poorly managed hedge fund.[132] There have been rumors of other cases and Danish courts have created a website to assist potential class members to identify pending class action lawsuits.[133]

§ 7:7.5 Finland

Until recently, collective redress in Finland was available only through representative actions by the Consumer Ombudsman or

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127. The first class action initiated in Sweden was brought by Bo Åberg against Aer Olympic. The plaintiff sought compensation on behalf of a class of passengers for cancelled flights and unused tickets due to the airline's bankruptcy. The District Court of Stockholm certified the class in May 2003. The parties ultimately reached a settlement in February 2007, and the court also approved the contingency fee agreement between the plaintiff and its counsel.
128. *See, e.g.*, LINDBLOM, *supra* note 19, at 37.
129. Lex Mundi, *Europe Braces for Class and Group Actions*, INSIDE COUNSEL, Dec. 2007, at 63 (quoting Jens Rostock Jensen of the Kromann Reumert law firm).
130. Dan Terkildsen & David Frølich, *New Possibilities for and First Experiences with Class Actions in Denmark*, INT'L LITIG. Q., Summer 2010, at 1.
131. *Id*. at 7 (referencing the availability of additional information about the Trelleborg Bank case at www.btaktier.dk).
132. *Id*.
133. DANISH CLASS ACTIONS HOME PAGE, *available at* www.domstol.dk/Selvbetjening/gruppe/Pages/default.aspx (as of the time of writing, the only other claim is one filed in late 2010 by shareholders of a wind power company).

organizations for injunctive relief,[134] or through the use of test cases with the support of the National Consumer Agency, although without true *res judicata* effect.[135] The new Group Action Act is considered to be Finland's class action procedure and is allowed only for mass consumer disputes where the facts are identical and it is reasonable to handle the dispute as a single trial.[136]

A group action may only be brought by the Consumer Ombudsman and begins with an application for summons, which must include the reasons why the case should be heard as a group.[137] If the requirements for a group action are met, the court shall provide notice to all class members setting a time limit to opt into the class. The Group Action Act does not separately provide for any remedies; therefore, all legal remedies in ordinary cases are available to the parties.

Since its adoption, only one group action has been filed; however, many other cases have reportedly been settled based on the fear of class actions.[138] The first group action, which was brought against a housing developer for allegedly misrepresenting the maintenance fees and costs associated with an apartment building, was rejected by the Consumer Disputes Board as unfounded.[139]

§ 7:7.6 France

In July 2007, President Sarkozy announced that class actions would be a priority. Several class action proposals were introduced, although none was adopted by the close of 2007. Nevertheless, the interest in class actions in France has not subsided, and new proposals have been introduced every year since the President's announcement.

In May 2010, the Senate Working Group released twenty-seven recommendations for the introduction of class actions into French

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134. KLAUS VIITANEN, STANFORD LAW SCHOOL, GLOBAL CLASS ACTION CLEARINGHOUSE, COLLECTIVE LITIGATION IN FINLAND 23, at 4, *available at* www.law.stanford.edu/library/globalclassaction/PDF/Finland_National_Report.pdf [hereinafter VIITANEN].
135. *Id*. at 9.
136. FINNISH GROUP ACTION ACT (Ryhmäkannelaki) (444/2007); VIITANEN, *supra* note 134, at 3.
137. FINNISH GROUP ACTION ACT, §§ 4, 5; VIITANEN, *supra* note 134, at 4.
138. Interview by Edilex News Service with Mrs. Outi Haunio-Rudanko, Deputy Executive of the Consumer Agency, in Finland (July 2, 2008).
139. Finnish Consumer Agency, *Finland's First Group Complaint Rejected*, CURRENT ISSUES IN CONSUMER LAW 3/2012, *available at* www.kulutta javirasto.fi/Page/34eb3afa-518b-450d-ab79-b13b2e0256b8.aspx?groupId=e1ccf939-e2c7-4cb9-a399-a0c14b33dabb&announcementId=4c91aa22-0724-445d-a796-2b74624df767.

law.[140] The recommendations include, among other things, introducing class actions for consumer disputes based only on contract, and for economic damages, which means it would exclude compensation for personal injuries and awards of punitive damages.[141] In December 2010, Senators Béteille and Yung introduced two Members' Bills with identical text in order to introduce the 2010 proposals of the Senate Working Group on class actions they co-chaired. The bills were not considered by the National Assembly before the national elections in 2012 and expired.

In March 2013, Mr. Benoît Hamon, the junior minister within the Ministry of Economy and Finance, published his draft Consumer Bill, which includes a provision for class actions. Class actions would be available for a group of consumers who have sustained similar injuries, excluding personal injuries, as a result of the same professional's breach of contractual obligations or competition law. There is no separate admissibility phase. Instead, the court would rule on admissibility, class definition, liability, and damages (or the means of determining damages for individual class members) at the same time. Class members would then join after this ruling in order to liquidate their damages. The bill was approved by the National Assembly in July 2013 and sent to the Senate for debate.

§ 7:7.7 Italy

Immediately after Italy's 2006 elections, there was considerable legislative activity related to civil procedure. A law decree abolished both the prohibition on lawyer advertising and against contingency fees, among other things.[142] From the end of 2006 until late 2007, there were eleven separate draft bills presented to Parliament proposing the introduction of class action legislation.

During December 2007, a class action proposal was adopted as an amendment to the 2008 Finance Act, and introduced article 140bis ("Collective Redress Action") in the Consumer's Code.[143] Under the

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140. Sénateurs Laurent Béteille et Richard Yung, *Rapport D'Information N° 499*, Session Ordinaire de 2009–2010, *available at* www.senat.fr/rap/r09-499/r09-4991.pdf.

141. *Id*. at 5–7; *see also* Dominique de Combles de Nayves & Benoit Javaux, *The International Comparative Legal Guide to: Class and Group Actions 2010, Chapter 14: France*, Global Legal Group 2011.

142. *See* Dr. Antonio Lirosi, *The recent reform experiences in Italy*, in *The Economic Case for Professional Services Reform*, Brussels, Dec. 13, 2006 (discussing the Bersani Decree (tit. 1 of Law 4 Aug. 2006 nr. 248)), *available at* http://ec.europa.eu/comm/competition/sectors/professional_services/conferences/20061230/lirosi.pdf.

143. Finance Act 2008, bill no. 244/2007 (Italy), provisions regulating the drafting of the annual and multi-year state budget.

statute's broad language, standing to file class actions would be given not only to registered consumer associations, but also to almost any consumer association. Class actions would apply to standard form contract disputes, or as a consequence of tort liability, unfair trade practices, or anti-competitive behavior. Class actions would consist of a two-stage procedure similar to a number of the previous proposals. In the first stage, the focus would be on whether a tort has occurred. In the second stage, the parties would have an opportunity to mediate a settlement and define the class of claimants. The law would provide for an opt-in mechanism, and consumers would be allowed to opt in at any time before a final decision, even if the case is on appeal.

Shortly before the effective date, the newly elected Berlusconi government suspended the new class action Act, citing the need to improve the text and expand the possible defendants to include public entities.[144] Finally, on July 23, 2009, an amendment proposed by the government was passed by both chambers and became effective August 15, 2009. The new law modifies the December 2007 law by requiring:

(1) a stronger certification stage followed by the right to an interlocutory appeal,

(2) class members to join the class within 120 days of certification,

(3) jurisdiction to be given to the court in the capital city of the region where the defendant has its headquarters, and

(4) claims to be based on torts occurring after the effective date of the law (August 15, 2009)—notwithstanding that the law is still suspended until January 1, 2010.[145]

As of January 2010, the bill has become law, despite early threats of constitutional challenges by various consumer organizations that are disappointed in the final version of the bill (particularly the bill's prospective-only application). Several class actions have been filed, predominantly against banks.[146] However, at least two product liability cases have yielded decisions rejecting certification of a class.

The first case concerned a claim against the manufacturer of a home flu test, Voden Medical Instruments S.p.A. The claim alleged

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144. Law Decree No. 112 of June 25, 2008 (Italy); *see also* Francesco Manacorda, *Quelle Cause Collettive Mai Decollate Davvero (Those class actions never really started)*, LA STAMPA, June 16, 2008.

145. *See Great Margins of Utility: Interview with Gian Battista Origoni*, IL SOLE 24 ORE, Aug. 4, 2009.

146. *See* Renzo Comolli, Massimiliano De Santis & Francesco Lo Passo, *Italian Class Actions Eight Months In: The Driving Forces*, NERA Economic Consulting, Sept. 16, 2010.

that the test was not as reliable as advertised. In December 2010, the court ruled that the consumer fraud claim could proceed as a class action, but it denied admissibility of the product liability claim.

The second case was filed by the consumer association, Codacons, along with three smokers against BAT Italia S.p.A. The plaintiffs essentially sought damages for their alleged addiction to BAT Italia's cigarettes. Both the Civil Court of Rome and the Court of Appeals of Rome denied certification of the claim in part because of the individual issues presented by the plaintiffs' addiction claims and because both the plaintiffs' addiction and the companies' alleged conduct occurred before August 15, 2009.[147]

In January 2012, a draft Government Decree to amend the class action law was issued. The proposal initially included the removal of the requirement that a judge must refuse to admit a class where it is clearly groundless or there are conflicts of interest. Ultimately, the government approved a decree that merely changed the word "identical" to "totally homogeneous," but did not include the more robust changes that were contained in the original draft.

§ 7:7.8 Lithuania

As part of the new Lithuanian Civil Procedure Code in 2003, a rule was included to allow for the filing of group actions. However, because the rule did not also include a specific procedure to govern group actions, it is practically impossible to maintain a group or class action in Lithuania.[148] In September 2010, the Ministry of Justice published a paper outlining its concept of a class action model, and a revised version was released in early July 2011.

After the concept paper was accepted by the Council of Ministers, the Ministry of Justice appointed a drafting committee to prepare a bill to reflect the concept paper's class action model. However, the draft bill, which was made available to the public for comments on January 24, 2012, deviated significantly from the concept paper. For example, the concept paper proposed a limited scope, whereas the draft would permit a class action for any cause of action. In June 2012, the Ministry released its draft class action bill, which remained largely unchanged, and its responses to the public consultation. The Cabinet adopted the Ministry's draft class action bill during its June meeting and the bill was then sent to Parliament to begin the legislative process, which, as of the time of writing, remains pending.

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147. Civil Court of Rome, decision no. 11 (Mar. 25, 2011); Court of Appeal of Rome, decision no. 2758 (Jan. 27, 2012).

148. Rytis Paukste and Egle Ivanauskaite, *The International Comparative Legal Guide to: Class and Group Actions 2010, Chapter 18: Lithuania*, Global Legal Group 2010.

§ 7:7.9 Malta

On June 19, 2012, the Collective Proceedings Act was signed into law by the President after having been adopted by the Maltese Parliament on June 5.[149] The Act, which is effective as of August 1, 2012, introduces opt-in class actions for claims for damages arising under competition and consumer law. A class may be represented either by a member of the class or an association. The Act includes an up-front certification process that requires commonality and superiority, but it specifically excludes a predominance requirement. An interlocutory appeal of a class certification decision is only allowed with leave of court.

§ 7:7.10 Poland

Poland joined the EU's "class action club" when the President signed a Class Action Bill into law in January 2010.[150] The law permits a class action where at least ten claimants have claims that share common facts and legal grounds. The group's representative must either be a member of the group or the municipal consumer ombudsman. After the claim is filed, the court sets a window within which other claimants must opt in if they want to join, and the defendants have an opportunity to object. There is an admissibility stage where the court determines if the case should proceed as a class action. That decision is subject to an interlocutory appeal. In addition, the law permits legal fees to be a percentage of the award, but no cap on the amount is set. However, class members may be required to provide security for costs of up to 20% of their claim's value.[151] The law went into effect on July 19, 2010.

Within the first few years, at least thirty-nine class actions were filed under the new Act, of which twenty-two were dismissed for technical reasons, sixteen went forward and a settlement was reached in the remaining case.[152] To our knowledge, none of these cases concern product liability, although the new model is being used for personal injury claims. For example, one of the early, more prominent claims is against the government by patients in state-owned hospitals who allege that they developed infections and diseases as a result of

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149. Collective Proceedings Act, Act No. VI of 2012, *available at* www.parlament.mt/file.aspx?f=21294.
150. Andrzej Tomaszek, *Pełnomocnik powoda w polskim postępowaniu grupowym ("A Plaintiff's Attorney in the Polish Class Action")*, MONITOR PRAWNICZY, June 15, 2010.
151. *Id*.
152. J.C., *Pojedyncze Pozwy Zbiorowe* ("Few Class Actions"), POLITYKA, #22 (2080), Aug. 10–16, 2011.

unsanitary conditions.[153] Another claim was also against the government based on the alleged failure to guard against flood waters, which resulted in damage to personal property in the surrounding area.[154] The District Court in Krakow certified this class—reportedly the first of its kind—on May 20, 2011.[155]

§ 7:8 European Union

The European Union has been considering some form of collective redress for several years. In early 2008, the Directorate General for Consumer Protection ("DG SANCO") launched a consultation process on collective redress, which culminated in its Green Paper on Consumer Collective Redress, released on November 27, 2008.[156] The Green Paper invited comment on four possible options then under consideration:

(1) take no action and wait for further information on the impact of the measures being debated at the national level;

(2) establish a collective redress network to encourage cooperation among Member States;

(3) adopt a mixture of nonbinding and binding instruments short of a collective action model that could include improving ADR mechanisms and extending small claims procedures to mass claims; and

(4) introduce an EU model on judicial collective redress through representative actions, group actions or test cases.[157]

Interested parties were invited to comment by March 1, 2009. On May 8, 2009, the Directorate General released its Consultation Paper summarizing the comments it received and briefly reopened a period for additional public comments.

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153. Mariusz Jałoszewski, *Pozew Tylko dla Wybranych* ("Claims for the Chosen Few Only"), METRO, Aug. 26, 2010; *see also* www.pozew-zbiorowy.com.pl/zlozone_pozwy/1-3-zarazeni-zoltaczka-skladaja-pozew-zbiorowy-przeciwko-skarbowi-pastwa.html.

154. *Id.; see also Class Action Against Pension Reforms*, BIZPOLAND.PL, Apr. 7, 2011, *available at* www.bizpoland.pl/news/index.php?contentid=207274.

155. *See* Kubas Kos Gaertner, News Page, *available at* www.kkg.pl/en/aktualnosci/.

156. EUROPEAN COMMISSION, EU DIRECTORATE GENERAL FOR HEALTH AND CONSUMERS, GREEN PAPER ON CONSUMER COLLECTIVE REDRESS, Nov. 27, 2008.

157. *Id.*

In addition, the Directorate General for Competition ("DG COMP") proceeded separately, focusing only on judicial collective action solutions for antitrust violations. DG COMP released its Green paper in April 2007, followed by a White Paper in April 2008.[158] In early 2009, the European Parliament's Economic and Monetary Affairs Committee recommended that the Competition proposal be held pending the outcome of the review of the Consumer Protection proposal to improve coordination.

Following the EU elections and the installation of new commissioners within DG SANCO and DG COMP in February 2010, a new joint consultation process between the two Directorates, with the help of DG JUST (Justice, Fundamental Rights and Citizenship), was initiated. The new effort was at the EU President's request to work toward a more coordinated policy on collective redress across sectors.[159] On February 4, 2011, the Commission released its working document, "Towards a Coherent European Approach to Collective Redress" reflecting its shift to a more "horizontal approach" (that is, across all sectors).[160] The public consultation was conducted between February and April 2011. The Commission published the responses it received—306 by Member States, consumer associations, corporations, law firms and others; and 18,388 from citizens.[161] The focus then shifted to review by committees of the EU Parliament. In February 2012, the EU Parliament plenary adopted the report of the Justice committee, which recommended prioritizing alternative dispute resolution and urged caution with regard to collective litigation, emphasizing the need for effective safeguards.[162]

The European Parliament adopted the Commission's proposal for a Directive on ADR in May 2013 and Member States have two years to implement it.[163] In addition, in June 2013, the Commission

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158. For a copy of the EU Directorate General for Competition's Green Paper and White Paper, see European Commission, Action for Damages, Documents Page, *available at* http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html.

159. *See, e.g.*, European Commission, Commission Work Programme 2010, Mar. 31, 2010, *available at* http://ec.europa.eu/atwork/programmes/docs/cwp2010_en.pdf.

160. EC Working Document, *supra* note 3.

161. For the responses, see European Commission, Directorate General for Health and Consumers, Replies to the Consultation Page, *available at* http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/replies_collective_redress_consultation_en.htm.

162. *See* www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2011/2089(INI).

163. EUROPEAN PARLIAMENT, DIRECTIVE 2013/11/EU OF 21 MAY 2013 ON ALTERNATIVE DISPUTE RESOLUTION FOR CONSUMER DISPUTES.

released its final Recommendation on collective redress, which encourages, but does not require, Member States to adopt collective redress within two years "equally and horizontally" in the areas of competition claims, consumer protection, environmental protection, and data privacy.[164] The Commission would then review the Member States' progress after four years and consider if stronger steps are warranted. The Commission also released a proposed directive on competition claims.

The common principles outlined in the Recommendation include an opt-in model in which only "*ad hoc* certified entities" would have standing to bring representative actions. It suggests additional safeguards to prevent abuse such as by requiring the determination of admissibility at the earliest possible opportunity, preserving the loser-pay rules and banning punitive damages. However, the Recommendation leaves open the possibility of opt-out, if justified by the just administration of the claim, and the use of contingency fees, subject to national legislation and provided they do not create incentives for filing meritless claims. Third-party funding also appears to be supported, provided it does not allow the funder to exert influence over the litigation, including decisions on settlement. Ultimately, the test of the Commission's Recommendation will be how it is implemented by the Member States.

§ 7:9 Latin America

§ 7:9.1 Overview

Several Latin American countries have adopted some form of collective redress. Brazil, in particular, has experienced considerable class action litigation already, and the adoption or expansion of class actions has generated interest throughout Latin America. Notably, the Ibero-American Procedural Law Institute has developed a model class action law for civil law countries that has been actively promoted in Latin America and parts of Europe.[165] The model bill omits a certification requirement and grants standing to individuals, organizations, legal entities, and public officials, such as the public prosecutor or consumer ombudsman. The model bill also proposes to allow "passive" class actions whereby a claim adjudicated against one

164. EUROPEAN COMMISSION, RECOMMENDATION OF 11 JUNE 2013 ON COMMON PRINCIPLES FOR INJUNCTIVE AND COMPENSATORY COLLECTIVE REDRESS MECHANISMS IN THE MEMBER STATES.

165. Grinover, *supra* note 20.

member of an industry could bind other members of that industry, even though they were not parties to the case.[166]

§ 7:9.2 Argentina

In March 2008, the Argentine Senate passed an amendment to the Consumer Defense Act, which the House of Representatives approved in December 2007.[167] The Act codifies the availability of class actions, which the Constitution technically already permits, by granting standing to consumer associations to bring collective actions on behalf of consumers. This model includes an opt-out procedure, and *res judicata* effect is given to judgments favorable to plaintiffs when raised by other consumers or users who share similar circumstances. Finally, it establishes punitive damages of up to $5 million pesos (approx. US $875,000) per plaintiff when "a product manufacturer fails to fulfill his obligations." The model also allows administrative authorities to award damages to consumers without the normal civil proceedings required in courts. The measure became effective on April 7, 2008.

For the moment, there is still no law establishing a procedure for certifying and maintaining class actions in Argentina, although the Supreme Federal Court has provided some non-binding guidance for courts to follow.[168] As of this writing, there are four pending federal bills to establish class action procedures.

§ 7:9.3 Brazil

Beyond the promotion of the Ibero-American model, over the years there have been numerous class action proposals in Brazil ranging in purpose and in their respective progress in the legislative process. For example, one bill proposed to grant standing to file class actions to any member of the Legislative Branch (federal, state, and municipal), but

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166. For example, there is at least one known instance where a court in Spain permitted a "passive" class action. A consumer association had sought a declaratory judgment regarding the illegality of abusive clauses in standard form contracts used by banks. On May 11, 2005, the Court of Appeals of Madrid confirmed the lower court's declaration of their illegality and, relying on the Spanish Civil Procedure Act, art. 221.2, additionally declared that its decision had *res judicata* effect on non-defendant parties who had also incorporated similar clauses.

167. *See* Hector A. Mairal, *Argentina*, 2009 ANNALS AM. ACAD. POL. & SOC. SCI., 622, at 54–62 (discussing proposal by Representative Juan Manuel Urtubey, 33 TRAMITE PARLAMENTARIO 19/4/07), *available at* www.law.stanford.edu/library/globalclassaction/PDF/Argentina_National_Report.pdf.

168. Halabi, Ernesto v. Fed. Exec. Branch, Law 25,873 Decree 1,563/04, Federal Supreme Court of Argentina, Feb. 24, 2009.

it was withdrawn in response to opposition. A similar proposal passed the House and Senate in 2007, but it was amended, and ultimately only the Public Defender was given standing to file class actions. Another bill proposed granting judicial power in connection with collective actions to the Public Prosecutor. Yet another bill proposed extending standing to associations and labor unions, while also broadening the extraterritorial effect of court decisions to extend beyond the territorial jurisdiction of the court.

A Ministry of Justice Task Force led by the Secretary of Law Reform at the Ministry of Justice, Mr. Rogerio Favretto, prepared a draft Brazilian Model Code for Collective Actions.[169] In March 2009, the Task Force circulated its proposal to create opt-out class actions, which was introduced as a bill in the House of Representatives on April 27, 2009.[170] The bill would have granted standing to political parties to file class actions and made the rules for consumer association standing even less stringent. Most shockingly, it would have empowered the judge to shift the burden of proof, change procedural rules as he or she felt appropriate, and pierce the corporate veil if not doing so would prevent redress. After significant debate, the bill was ultimately rejected in March 2010, although the bill's rejection has been appealed and a separate, but identical bill was filed in 2012 and it is pending in committee.

While debates continue over expanding the use of class actions in Brazil, they have already been used as a means for achieving other types of legislative changes through judicial action. As one example, a consumer association filed a class action against a beer company, requesting that a non-alcoholic beer be removed from the market.[171] Despite the product's conformity with the applicable regulations that allowed for marginal alcohol content, the consumer association claimed that any presence of alcohol rendered the label misleading and the product dangerous to consumers.[172] The court granted the association's request for an injunction, ordering the defendant to take the product off the market. This decision was appealed and the injunction was stayed.[173]

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169. *See* Press Release, Ministry of Justice (Braz.) MJ estuda mudanças na legislação sobre tutela coletiva ("MJ Studying Changes in the Law on Collective Protection") (Aug. 15, 2008), *available at* www.mj.gov.br/data/Pages/MJ65097B8FITEMID5C548FC9147C4306B72B3AEC0328F71EPTBRIE.htm.
170. Brazilian House Bill 5139/2009 (Apr. 28, 2009).
171. Luiz Migliora, Walter Cofer & Gregory L. Fowler, *Trial and Error: Class Actions in Brazil and the US, and the Global Trends*, 6 LATIN LAW. 38 (Sept. 2007).
172. *Id*.
173. *Id*.

In the Brazilian system, a decision on liability in the first phase is followed by individual actions, known as liquidation actions, in which individuals prove class membership and damages. The question whether liquidation actions could be filed in courts, other than the court that issued the decision on liability, has been debated for years. Plaintiffs have argued that class members should be permitted to file liquidation actions in any court throughout the nation, so as to facilitate access to justice. Defendants have argued that it is unfair and unreasonable to force them to defend these actions before courts that lack any knowledge about the class actions, and sometimes in remote places that have no connection with the defendants. A Special Panel of the Supreme Court settled this issue in a 2011 ruling that liquidation actions may be filed in any court. As in other civil law jurisdictions, Supreme Court rulings in Brazil are not binding but they are highly persuasive.[174]

§ 7:9.4 Chile

Chile has had a class action law since 2004. It provides for a certification phase, which includes criteria such as numerosity, superiority, and adequacy of representation. Like the U.S. law, the Chilean law allows for an appeal of a certification ruling, with an automatic stay of proceedings pending the appeal.[175] Since the law was enacted, numerous class actions have been filed, but only one has been decided by a trial court, and that case remains on appeal. Some recent class actions filed by the Chilean consumer protection agency, SERNAC, alleging fraud by retail outlets in connection with credit card interest rates, have drawn media attention to the class action procedure as a means of consumer redress.[176]

However, the infrequent use of the class action rules has caused some to criticize the original procedural rules as slow and cumbersome.[177] On August 16, 2011, the Chilean Congress passed a bill

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174. Banco Banestado et al. v. Deonisio Rovina, Superior Court of Justice, Oct. 19, 2011.

175. Chilean Law No. 19.955, which amends Consumer Protection Law No. 19.196, published on July 14, 2004, *available at* www.leychile.cl/Navegar?idNorma=227543.

176. Alexei Barrionuevo, *Rise of Consumer Credit in Chile and Brazil Leads to Big Debts and Lender Abuses*, N.Y. TIMES, July 23, 2011, *available at* www.nytimes.com/2011/07/24/business/global/abuses-by-credit-issuers-in-chile-and-brazil-snare-consumers.html?pagewanted=1&_r=2.

177. Chilean Senate Economy Committee, Bulletin No. 7256-03, entitled "Relativo al procedimiento aplicable para la protección del interés colectivo o difuso de los consumidores" ("Concerning the procedure for the protection of collective or diffuse interests of consumers."), Oct. 6, 2010, *available at* http://sil.senado.cl/cgi-bin/index_eleg.pl?7256-03.

intended to streamline class actions. The bill eliminates the evidentiary phase during certification proceedings and eliminates two certification criteria—numerosity and superiority. It also eliminates the right to a stay of proceedings pending an appeal of a trial court decision to certify the claim.[178] This new bill has been heralded as a means to improve the speed of consumer redress in Chile by making class actions more "agile."[179]

§ 7:9.5 *Costa Rica*

In November 2011, a new Civil Procedure Code bill was introduced in the Costa Rican Unicameral Legislature. The bill's preamble states that it was inspired by the following foreign legislation or proposals: the Ibero-American Model Procedural Code; the Ibero-American Model Collective Actions Code;[180] and the Uruguayan, Spanish, Brazilian, German and Salvadorian Civil Procedure Codes. Among other features, the bill seeks to introduce an opt-in class action model that lacks a certification phase, but provides for an admissibility hearing, either at the request of a party or on the court's own initiative, to assess admissibility requirements, including adequate representation, social relevance, utility of the collective protection, and predominance of common issues over individual issues for homogeneous individual rights cases. The bill gives standing to (i) any individual or entity to file diffuse rights class actions, (ii) organizations to file collective actions, and (iii) any class member to file individual homogeneous rights class actions. Monetary and injunctive relief is allowed in all types of claims; however, in order to recover money damages in actions involving diffuse rights, the plaintiffs must show individualized harm. Under the proposal, the final ruling in a class action has *res judicata* effect unless the claim is rejected for lack of proof. Further, courts are allowed to grant financial incentives in favor of nonprofit plaintiff organizations in limited circumstances.[181]

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178. Relativo al procedimiento aplicable para la protección del interés colectivo o difuso de los consumidores ("Concerning the procedure for the protection of collective or diffuse interests of consumers"), no. 7256-03 (2010), *available at* http://sil.senado.cl/cgi-bin/index_eleg.pl?7256-03.

179. Senado aprueba proyecto de ley que agiliza acciones colectivas ("Senate passes bill to speed up collective actions"), LA TERCERA, Aug. 16, 2011, *available at* www.latercera.com/noticia/politica/2011/08/674-386712-9-senado-aprueba-proyecto-de-ley-que-agiliza-acciones-colectivas.shtml.

180. Grinover, *supra* note 20.

181. Civil Procedure Code Bill, Permanent Special Drafting Commission, May 2013.

§ 7:9.6 Ecuador

There is no class action procedure in Ecuador, but a new constitution and Civil Procedure Code allow individuals and interest groups to file claims seeking redress for environmental damages that affect the population as a whole. Under article 396 of the Constitution, liability for environmental damage is objective and there is no statute of limitations. All damages to the environment shall also imply the obligation to restore the ecosystems entirely and to indemnify the affected persons and communities. In such claims, the defendant bears the burden to prove there is no environmental damage.

In 2012, the National Judiciary Council proposed a class action rule as part of a new Civil Procedure Code initiative that was broader in scope. It lacked a clear certification phase, provided a confusing mixture of both opt-in and opt-out elements, and gave judges the discretion to limit the *res judicata* effect if the class representative failed to litigate the claim diligently. For the moment, this proposal has been removed from the bill in favor of an alternative model that is expected from the executive.

In addition, another bill was introduced in December 2011 seeking to establish a new opt-out collective action before an administrative agency (Ministry of Industry and Productivity). The bill grants broad standing to individuals, legal entities, groups, and communities linked by a common interest to recover compensation for damages. Like the proposed model in the Civil Procedure Code, no certification or admissibility rules are provided for. Within one year of the publication of the agency's ruling on certification, class members must file liquidation actions in which they only need to show "summary proof of the alleged damage." The ruling is subject to appeal before the same agency, but the final agency ruling is subject to judicial review through a contentious administrative action. However, it is not clear if any appeal or judicial review action stays the execution of damage awards.

Illustrating the significance of these developments for foreign companies with operations in Ecuador, one need only consider a now-famous environmental class action filed against Chevron by indigenous residents of Ecuador's oil fields.[182] The claim was originally filed in

182. Michael Isikoff, *A $16 Billion Problem*, NEWSWEEK, July 26, 2008, *available at* www.newsweek.com/id/149090; Judith Kimerling, *Transnational Operations, Bi-National Injustice: Chevrontexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 AM. INDIAN L. REV. 445 (2006/2007) [hereinafter Kimerling].

1993 in New York as *Aguinda v. Texaco, Inc.*,[183] alleging that Chevron/Texaco is liable for dumping billions of gallons of toxic oil wastes upstream from the class members. The claim was dismissed on *forum non conveniens* grounds in 2002, and it was resumed in Ecuador in May 2003.[184] The claimants, who are being assisted by U.S. lawyers, sought a judicial determination of the costs of a comprehensive environmental remediation, which includes the removal of all air pollution, restoration of natural resources, and medical monitoring for the affected class members.[185] In February 2011, Judge Nicolás Zambrano in Lago Agrio, Ecuador, ordered the company to pay $8.6 billion in damages, and double the award if the company does not issue a public apology within fifteen days of the order.[186] The company was also ordered to pay $860 million to Amazon Defense Coalition, the NGO representing the plaintiffs.

Both the company and the plaintiffs are challenging the decision. The plaintiffs claim the amount awarded is still inadequate. The company is challenging what it believes to be fraudulent conduct and corrupt actions by the plaintiffs' counsel. The company filed a civil racketeering suit against the plaintiffs' lawyers in the U.S. District Court for the Southern District of New York and in March 2011 obtained a preliminary injunction against the enforcement of the Ecuador judgment in the United States.[187] This issue continues to grow more complex as these challenges have in turn spawned a series of appeals, investment treaty arbitrations to prevent enforcement in Ecuador, and efforts to enforce the judgment in Canada and in Brazil.

In addition to the claims of fraud, Chevron's action against the plaintiffs' lawyers in the Southern District of New York is noteworthy with respect to the funding arrangement that was revealed. Burford Capital, an investment firm based on the British island of Guernsey, invested $4 million in the case in exchange for a 1.5% recovery.[188] However, the seventy-five-page litigation funding agreement creates a

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183. *See* Aguinda v. Texaco, Inc., No. 93 Civ. 7527, 1994 WL 142006 (S.D.N.Y. Apr. 11, 1994), *adhered to by* 850 F. Supp. 282 (S.D.N.Y. 1994), *dismissed by* 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated sub nom.* Jota v. Texaco Inc., 157 F.3d 153 (2d Cir. 1998), *on remand*, 2000 U.S. Dist. LEXIS 745 (S.D.N.Y. Jan. 31, 2000).

184. Kimerling, *supra* note 182, at 475.

185. *Id*. at 476.

186. Simon Romero and Clifford Krauss, *Ecuador Judge Orders Chevron to Pay $9 Billion*, N.Y. TIMES, Feb. 14, 2011.

187. Chevron Corp. v. Steven Donziger, et al., Case No. 1:11-cv-00691 (S.D.N.Y Mar. 7, 2011).

188. Roger Parloff, Have you got a piece of this lawsuit?, CNNMoney.com, June 28, 2011, *available at* http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/.

"distribution waterfall" and only after eight levels of funders, attorneys, experts and advisors have been paid will the balance—"if any"—be paid to the claimants.[189]

§ 7:9.7 Mexico

In November 2007, the Federal Congress in Mexico announced that it would begin discussions regarding the adoption of class actions.[190] In response, there were several proposals to introduce collective actions, one of which resembled Rule 23 of the U.S. Federal Rules of Civil Procedure. Another proposal was drafted by Professor Alberto Benitez of the ITAM University,[191] which would have given standing to the Consumer Protection Agency and to consumer associations meeting certain lenient requirements. The proposal did not provide for class certification procedures, but it would have allowed statistical evidence and estimations in calculating damages. Private interests and the Federal Government in Mexico took issue with many provisions of the Benitez bill, and it was ultimately rejected.

Other proposals for class actions have been presented in Mexico, with varying provisions for an opt-in or opt-out model, which parties would have standing, whether to create a form of certification, and how *res judicata* should be applied. Discussions among the consumer associations, academics, private entities, and government representatives continued for several years.[192] In March 2010, the Federal Congress approved a constitutional amendment to enable federal class action legislation intended to preempt state and municipal class action legislation, such as the one proposed in Mexico City. The amendment also required the Federal Congress to enact a class action procedure law by July 2011.

In April 2011, a bill introduced by Senator Jesus Murillo Karam was adopted by both houses of Congress, and the law took effect on March 1, 2012. This bill contains a certification phase and provides for opt-in classes. The opt-in period, however, extends for eighteen months after a first phase trial on liability. Class members who opt-in may then file individual claims for damages based on the class judgment. Already, there are efforts to amend the law to expand the scope and make it easier to bring class actions.

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189. *Id*.

190. Ricardo Rios Ferrer, et al., *Class Actions in Latin America: A Report on Current Laws, Legislative Proposals and Initiatives*, 1:1 Latin American Forum Newsletter (International Bar Association), Oct. 2008, at 72.

191. *Id*.

192. Lucero Almanza, (Negocios) Preven Afianzar Accion Colectiva, INVERIA, Oct. 8, 2008, *available at* http://mx.invertia.com/noticias/noticia.aspx?idNoticia=200810081627_INF_321439.

Meanwhile, the first class action under the law was filed on March 5, 2012, against the two largest telecommunications companies in Mexico—Telmex and Telcel—seeking payments for cell phone and land line service interruptions. The lawsuit also named the Federal Telecommunications Agency as a co-defendant for allegedly failing to regulate them properly.

§ 7:9.8 Peru

Until recently, the Peruvian Code of Civil Procedure and Consumer Defense Code only allowed government agencies, and private associations with specific authorization from the Consumer Protection Agency (INDECOPI) to file representative actions. Such actions were limited to "diffuse" public interests, referring to matters of interest to the population as a whole, and not the interests of a defined class. In September 2010, a new Consumer Code was adopted that will enable true class or collective actions and extend standing to INDECOPI, public prosecutors, and consumer and bar associations.[193] On April 14, 2011, INDECOPI issued implementing regulations for the management of actions filed under the new law.

§ 7:10 Asia

§ 7:10.1 Overview

In addition to Taiwan's securities class actions discussed earlier,[194] other Asian countries have begun adopting class action procedures in recent years. Of course, some Asian countries have followed their English common law tradition, and representative actions based on Rules of Supreme Court Order 15 continue to exist, such as in Hong Kong,[195] India,[196] Malaysia,[197] and Singapore[198] (in addition to these Asian countries, New Zealand's representative action rule is also based on the English model[199]). Indonesia allows class actions in consumer protection cases.[200] However, the spread of the class action device in Asia has not been as rapid as in Europe and Latin America—although

193. Walter Gutiérrez, *¿Y el código de consume?* ("What About the Consumer Code?"), EL COMERCIO, Sept. 1, 2010.
194. *See supra* section 7:2.2.
195. Order 15, Rule 12, of the Rules of the High Court (1988).
196. *See* S.P. Gupta v. Union of India, 1981 Supp. SCC 149, A.I.R. 1982 SC 149.
197. Order 15, Rule 12(1), of the Rules of the High Court (1980).
198. Order 15, Rule 12, of the Rules of Court (1996).
199. Rule 78 of the High Court Rules (1882).
200. Article 46(b), (c) of the Consumer Protection Law (2000) and Regulation of the Supreme Court of the Republic of Indonesia Number 1/2002.

this may change, as illustrated by the rise of legal challenges and consumerism in China.[201] It is also worth examining recent discussions in Hong Kong, Korea, and Japan for signs of expansion.

§ 7:10.2 People's Republic of China

Chinese law has permitted collective redress in one form or another for some time.[202] However, the increase in the number of multi-party disputes led to the enactment of the Civil Procedure Law of 1991, for which China reportedly was influenced by the U.S. experience.[203] The law provides two categories of class actions: (1) where the number of litigants is ascertainable and there are ten or more claimants, and (2) where the number of litigants is not known at the time of filing.[204] If unknown, the court issues a public notice to inform all persons who are similarly affected so that they may register with the court. The decision is binding on all parties who register and are represented in the claim, and it is applicable to those who do not register but institute legal proceedings within the statute of limitations.[205] Notwithstanding these rules, courts have had little other guidance, and "thus appear free to continue to experiment with class action procedures."[206]

While class actions are not rare in China, most cases eventually settle and recent figures on the number and type of class actions filed are difficult to come by. However, one report concluded that as of 1998, class actions had been filed over "low quality products, consumer fraud, environmental pollution, economic contracts, and local government actions."[207] A class action against Dell made headlines in 2006. Consumers reportedly filed class actions in Xiamen and Shanghai for Dell's allegedly fraudulent substitution of a different chip

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201. *See, e.g.*, Jerome A. Cohen, *China's Legal Reform at the Crossroads*, 169 FAR E. ECON. REV. 23 (Mar. 2006) (discussing the strengthening of China's judiciary and the continued challenges facing Chinese courts as a result of the rapid rate of economic development and social change in the last few decades); Mao Ling, *Clinical Legal Education and the Reform of the Higher Legal Education System in China*, 30 FORDHAM INT'L L.J. 421 (2007) (examining the trend in Chinese law schools to follow U.S. education models in response to the country's legal reforms and economic expansion).
202. For an excellent overview of Chinese class action law, see Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998) [hereinafter *Class Action Litigation in China*].
203. *Id*. at 1525.
204. *Id*. at 1526.
205. *See* Article 55 of Civil Procedure Law of People's Republic of China; *see also Class Action Litigation in China, supra* note 202, at 1527.
206. *Class Action Litigation in China, supra* note 202, at 1527.
207. *Id*. at 1528.

in its laptops than as advertised.[208] On consumer fraud grounds, the plaintiffs sought compensation equal to twice the value of the goods and legal fees.

In 2006, the All China Lawyers Association (ALCA) released its practice guidelines for lawyers involved in collective cases.[209] The ALCA's *Guiding Opinion on Lawyers Handling Collective Cases* focuses on the "comparatively complicated social, economic, and political causes" presented in class actions.[210] Accordingly, the guidelines seek to address issues of professional ethics, case management, and coordination with judicial agencies, the government, and the media in order to "safeguard social stability while also safeguarding the lawful rights of the mass client."[211] To accept a class action, "two or more politically and professionally qualified, well-experienced lawyers" must complete an intake record after receiving the approval of at least three law firm partners who will jointly accept the retainer, designate a person to undertake the case, and develop a work plan. After accepting a class action, a lawyer must "promptly and fully communicate with the relevant justice bureau" and "promptly report the situation to the relevant government bureaus."[212] Finally, the guidelines reiterate that class action lawyers must comply with the guidance and supervision of the judicial administration authorities and the bar associations.[213]

The availability of class actions received increased international discussion with the simultaneous increase in the number of food and drug safety problems in China. The most notable of these problems concerned melamine-tainted milk, which reportedly caused the death of at least six children and illness to 300,000 people.[214] Whatever

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208. *Chinese Consumers Sue Dell*, CONSUMERAFFAIRS.COM, Aug. 10, 2006, *available at* www.consumeraffairs.com/news04/2006/08/dell_china.html; *Dell Faces Class-Action Lawsuit in China*, PEOPLE'S DAILY ONLINE, Aug. 4, 2006, *available at* http://english.peopledaily.com.cn/200608/04/eng20060804_289910.html.

209. *See* Edward Wong, *Courts Compound Pain of China's Tainted Milk*, N.Y. TIMES, Oct. 17, 2008 [hereinafter Wong].

210. *Guiding Opinion of the All China Lawyers Association Regarding Lawyers Handling Cases of a Mass Nature* (Mar. 20, 2006), translation prepared by the Congressional-Executive Commission on China. The authors would like to thank their friends at the law firm of King & Wood who shared this translation.

211. *Id*.

212. *Id*.

213. *Id*.

214. Henry Sanderson, *China Court Refuses to Accept Tainted Milk Lawsuit*, ASSOCIATED PRESS, Dec. 8, 2008 [hereinafter Sanderson]; *see also* Leslie Schulman, *China Lawyers Allege Political Pressure After Aiding Parents of Sick Infants in Milk Scandal*, JURIST LEGAL NEWS & RES., Oct. 8, 2008,

explanation there may be for this tragedy, class actions would no doubt follow if a similar scandal broke in the United States, as suggested by Prof. Zhang Xinbao, a law professor at the People's University of China.[215] However, Prof. Zhang expressed doubts that class actions would follow in China under the ACLA's 2006 *Guiding Opinion*, ironically, because of the number of potential claimants and the perceived threat to social stability.[216] Chinese courts declined to hear at least two related lawsuits arising out of this scandal.[217]

One class action lawsuit was filed by dozens of families against a Chinese dairy, although it was quickly denied by the Hebei Supreme Court on December 8, 2008.[218] According to press reports, the claimants sought eight different compensation packages, based on the severity of illnesses. The total amount sought for medical fees and other damages is 6.82 million yuan ($1 million at the time), plus 6.91 million yuan ($1.02 million) for psychological damage.[219] For the first time, the Xinhua District Court in Shijiazhuang, the capital of Hebei Province, finally agreed to allow a lawsuit to proceed on March 25, 2009.[220] However, the judge in that case refused to accept the claim as a class action and required each victim to file an individual claim.[221] In addition, four parents, who were unable to obtain redress in China, eventually took their case to Hong Kong, believing it to be a friendlier forum because of its Western-style judicial system.[222]

In February 2009, the Beijing Municipal Bureau of Labor and Social Security announced the creation of a national compensation fund for victims of the tainted milk.[223] Under this proposal, Sanlu and twenty-one other dairy companies will contribute to the fund to pay for medical care for the children until their eighteenth birthday. However,

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available at http://jurist.law.pitt.edu/paperchase/2008/10/china-lawyers-allege-political-pressure.php; Peter Ford, *What China's Tainted Milk May Not Bring: Lawsuits*, CHRISTIAN SCI. MONITOR, Sept. 22, 2008, *available at* www.csmonitor.com/2008/0923/p01s01-woap.html.

215. Wong, *supra* note 209.
216. *Id*.
217. *Id*.
218. Sanderson, *supra* note 214.
219. *Id*.
220. Michael Wines, *Local Court Is China's First to Accept a Tainted-Milk Suit*, N.Y. TIMES, Mar. 25, 2009.
221. Lauren Katz, *Class Actions with Chinese Characteristics: The Role of Procedural Due Process in the Sanlu Milk Scandal*, 2 TSINGHUA CHINA L. REV. 421, 426–27 (2010) [hereinafter Katz].
222. Min Lee, *China Tainted-Milk Victims Sue in Hong Kong*, ASSOCIATED PRESS, May 4, 2010.
223. Katz, *supra* note 221, at 426.

some families are concerned that their childrens' health care needs will be lifelong and challenged the government compensation plan in court.[224]

The Chinese legal community will likely continue to debate how to address class action issues as they arise in other cases. For example, Prof. Zhang reportedly spearheaded an effort to host a conference in April 2011 with national and local government officials and judges for the purpose of discussing proposed guidelines to overcome the current obstacles and facilitate the filing of mass tort claims. But other signs of extending judicial redress to Chinese consumers for mass torts continue to emerge in response to events like the tainted milk tragedy; for example, as of July 2010, punitive damages are now available for defective products.[225]

§ 7:10.3 Hong Kong

In November 2009, the Law Reform Commission's Class Actions Subcommittee released a consultation paper "to consider whether a scheme for multi-party litigation should be adopted in Hong Kong and, if so, to make suitable recommendations generally."[226] The subcommittee concluded, among other things, that the introduction of class actions could enhance access to justice.[227] The subcommittee's conclusion was based on the assertion that there is an imbalance between consumers and corporate defendants and the current scheme is inadequate to provide redress or handle large-scale multi-party litigation.[228] It therefore recommended, among other things, the creation of an opt-out class action.

In May 2012, the Commission released a 313-page report reflecting the public comments it had received.[229] The report suggested that product liability claims should be within the scope of any proposed model, but agreed with the inclusion of a certification process as a necessary safeguard. The report further recommends that (i) Hong Kong's damages rules should not be expanded; (ii) juries should not be allowed in class actions; and (iii) the "loser pays" rule should be preserved in any proposed class action system. However, the proposal

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224. *Id*. at 449.
225. E.W. Gentry Sayad & Nan Zhang, *What you need to know about Chinese product liability law*, LAW360, Aug. 23, 2012.
226. The Law Reform Commission of Hong Kong, *Consultation Paper—Class Actions*, Nov. 5, 2009, at 244, *available at* www.hkreform.gov.hk/en/publications/classactions.htm.
227. *Id*. at 81.
228. *Id*.
229. The Law Reform Commission of Hong Kong, *Report—Class Actions*, May 28, 2012, *available at* www.hkreform.gov.hk/en/projects/class_action.htm.

has not yet been finalized and the next step is for a working group to be appointed to draft the law for submission to the legislature.

§ 7:10.4 Japan

The 2006 amendments to Japan's Consumer Contract Act (CCA) provide consumers with a limited class action measure or group litigation.[230] At the time it was amended, the CCA protected consumers by enabling them to avoid contractual obligations where the terms were unconscionable or where limitations of liability were unenforceable. But the injunctive relief offered under the CCA was available only to consumers who suffered a direct injury. Effective June 7, 2007, the CCA permits consumer groups to seek injunctive relief on behalf of all consumers to protect them equally from violations of the CCA.[231]

In December 2011, Japan's Consumer Affairs Agency published a new class action proposal that would authorize designated consumer associations to bring lawsuits where there is a common interest. If the consumer association's claim succeeds, individual consumers would then be invited to make claims for money damages. The types of common interests that would be permitted under the new law are (i) unjust enrichment claims based on fraudulent contracts; (ii) damage claims for nonperformance of contractual obligations; (iii) tort liability in connection with consumer contracts; and (iv) claims for defective products. The law would preclude damage claims for personal injury. The bill was submitted to the Diet for consideration in 2013, but at the time of writing, it still had not been debated or put up to a vote.

§ 7:10.5 Korea

Korea is following the examples of Japan and Taiwan with regard to collective redress. Effective January 2008, Korean consumer groups or public interest organizations are permitted under the amended Consumer Protection Act to file a suit on behalf of consumers for injunctive relief to cease allegedly unlawful company business activities.[232] This model is similar to Japan's Consumer Contract Act and Germany's Capital Markets Model Case Act adopted a few years

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230. International Affairs Office, *Consumer Policy Regime in Japan*, Sept. 2006, *available at* www.consumer.go.jp/english/cprj/index.html; *see also* Ikuo Sugawara, *Japan*, 2009 ANNALS AM. ACAD. POL. & SOC. SCI. 622, at 280–285, *available at* www.law.stanford.edu/display/images/dynamic/events_media/Japan_National_Report.pdf.

231. *Id*.

232. Sang-Ho Han, Kwan-Seok Oh & Lance B. Lee, *Korea*, GETTING THE DEAL THROUGH—PROD. LIAB. (Aug. 2008).

earlier. Korea's amended Act does not allow damage compensation relief.

Korea previously enacted the Securities-Related Class Action Bill on December 22, 2003—the same year as Taiwan's Securities Act[233]—that applies only to claims related to, for example, insider trading and accounting fraud. The law took effect in January 2005, and the first class action under this law was filed in the Suwon District Court against Jinsung T.E.C. for losses allegedly caused by the company's accounting fraud.[234]

In 2013, several amendments to the "Framework Act on Consumers" have been introduced to permit class actions.[235] One such proposal is designed to allow for U.S.-style, opt-out class action suits and would (i) allow a representative action for damages if fifty or more people have suffered the same harm from a defective product; (ii) permit the court to conduct an evidentiary investigation *ex officio*, when deemed necessary during the process; and (iii) allow the use of sampling, averaging and statistical methods in calculating compensatory damages in some instances. This proposal is in addition to other efforts to aid consumer claims, such as a measure that would shift the burden of proof to the manufacturer if the damage is such that it would have reasonably been caused by a defect in the product.

§ 7:11 Forecasting the Future for Class Actions Overseas

We have witnessed the growth and development of class actions in many countries around the world since the beginning of the twenty-first century. This has been particularly true in Europe, Latin America, and, to a lesser degree, Asia. This trend coincides with a wave of consumer movements and demands for greater access to justice to protect consumer rights.[236] In some countries that already permit class actions and have seen an increase in such litigation—for example, Australia and Brazil—there are proposals for expansive reform.

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233. *See* Yu-Hsin Lin, *supra* note 33, at 168–70.

234. Kim Rahn, *First Class-Action Suit in Offing*, THE KOREA TIMES, June 25, 2009, *available at* www.koreatimes.co.kr/www/news/nation/2009/06/113_47475.html.

235. Jay J. Kim, *South Korean Product Liability Law: Plaintiff-Friendly Changes Proposed*, 20:1 Product Law & Advertising (International Bar Association—Legal Practice Division), Sept. 2013, at 13.

236. Rod Freeman, *How the Class Action Pendulum Swings in Europe*, 47:3 FOR THE DEFENSE 67 (Mar. 2005); Lloyd's, *Directors in the Dock: Is Business Facing a Liability Crisis?* (May 2008) ("There is widespread agreement among business leaders that a US-style compensation culture is spreading, especially within Europe.").

Within most class action debates, while there is an express desire to avoid American-style compensation, there is also a belief that class actions provide the best means of improving access to justice.[237] The question for any legal system is what model to follow? For many years, the U.S. model was a leading candidate if only because it was the best known. Today, with more and more countries creating their own systems, or following the lead of civil law countries, the U.S. model may be taking a back seat. Stay tuned.

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237. *See* Behrens, Fowler & Kim, *supra* note 1 (discussing how the United States did not intend the abusive consequences of its class action rule and noting that an examination of the historical debate in the United States suggests how, over time, a model's ambiguity can create opportunities to expand down a slippery slope); *see also* Anne Marie Borrego, *An Unwelcome American Export*, 29:12 AM. LAW. S15 (Winter 2008) (discussing fear of the spread of the U.S. litigation culture).