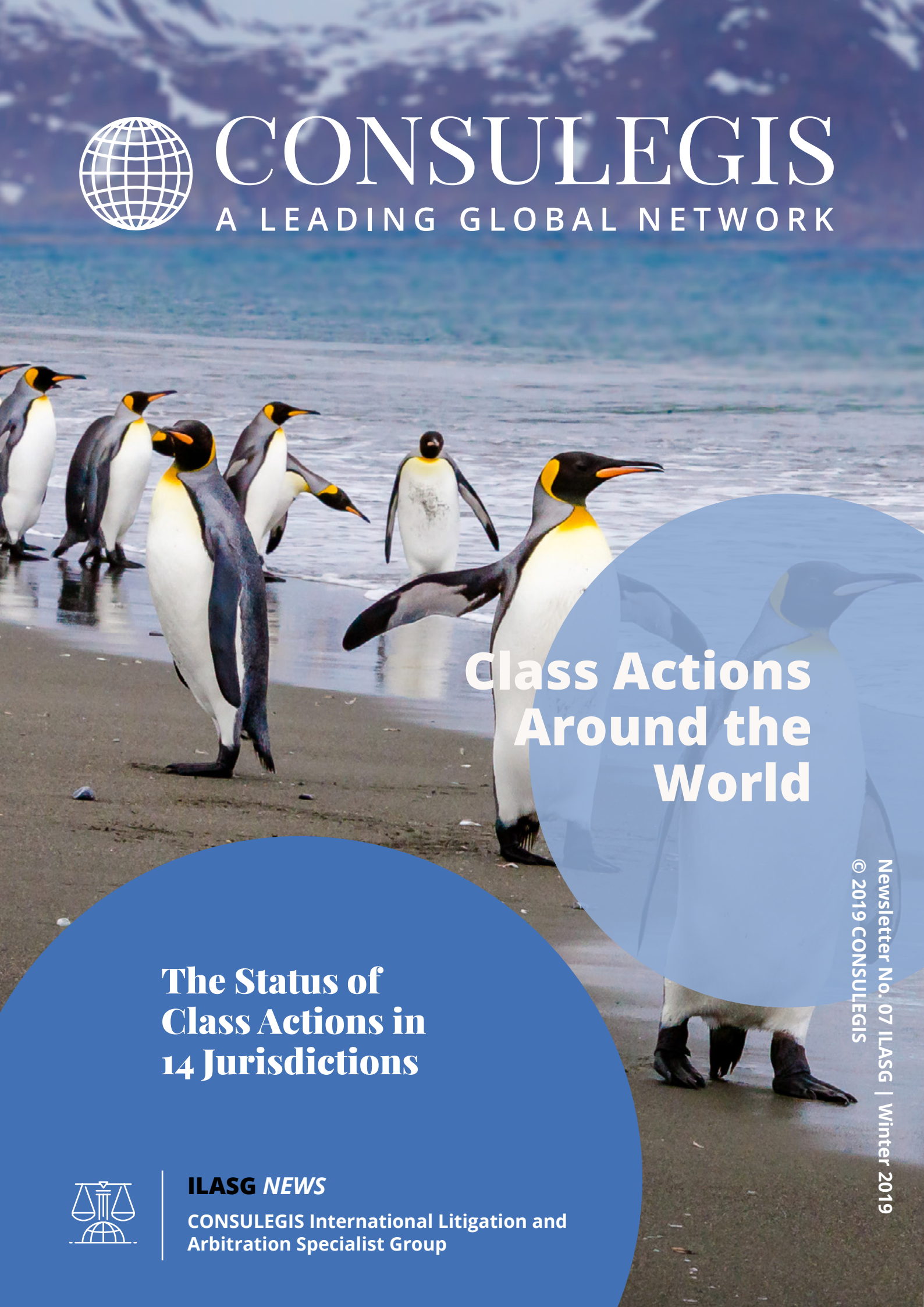
CONSULEGIS

A LEADING GLOBAL NETWORK



Class Actions Around the World

The Status of Class Actions in 14 Jurisdictions

Newsletter No. 07 ILASG | Winter 2019

ILASG *NEWS*

CONSULEGIS International Litigation and Arbitration Specialist Group

INDEX

CONSULEGIS
A LEADING GLOBAL NETWORK

Note From The Chair

Welcome to the latest edition of the Newsletter of the CONSULEGIS International Litigation and Arbitration Specialist Group ("ILASG"). We hope you will find useful the articles from around the world on Class Actions.

The ILASG will continue to be active in dispute resolution and helping people and businesses avoid disputes. We are always looking for new topics to be discussed in forthcoming newsletters and we encourage suggestions.

We must also thank Tom Arndt and Chrystalla Georgiou for the extensive work and effort they have put into the creation of this Newsletter as Editors.

Please contact us to receive further information on Consulegis, our Specialist Group, or how to obtain specialized assistance from any of our members.

The CONSULEGIS network has lawyers in 35 countries and approximately 150 cities – and we are still growing.

You can connect with Consulegis on LinkedIn and Facebook at:

HERE HERE

HERE HERE

Best regards

Jeffery J. Daar
Chair

Consulegis International
Litigation and Arbitration
Specialist Group

Daar & Newman
Los Angeles

Note From The Editor

It is our pleasure to present you with the first of a series of newsletters on Class Action law in our member's jurisdictions around the world. This inaugural newsletter answers the question: Are class actions (or similar lawsuits) available in your jurisdiction? It provides some background on the history of class actions and considers the mischief they are intended to address. We trust you will find it informative. It has been our pleasure to work with the many skilled contributors to put it together. We look forward to providing follow-up newsletters on topics that matter to you (our member's clients). Please contact the contributors and/or the editors directly if you have any questions or comments. This does not constitute legal advice.

Tom Arndt
Himelfarb Proszanski
Canada

Chrystalla Georgiou
Levitt Robinson
Australia

Article Index

BRETT IMLAY

JEM PUNTHAKEY

Class Actions in Australia

What is a class action in your jurisdiction? What is the rationale for having class actions in your jurisdiction? When did they start?

1. A class action is a case brought by one or more lead plaintiffs who represent group members against one or more defendants. The minimum number in the class is 7 (but is often in the hundreds and sometimes in the thousands) and they must all have claims that give rise to common questions of law or fact. Not all group members need to have a claim against all defendants.

2. The lead plaintiff does not need the permission of group members to start a class action and represent them. Some class actions are "opt out" class actions, meaning that if you fall within the definition of group member then you are a group member whether you like it or not. Others are "opt in" class actions, meaning that only those who agree to participate are group members.

3. In an opt out class action, at some point in the case, group members will be given notice of the proceedings and will have the right to "opt out" of the class action. If a group member does not opt out, they will be bound by the outcome of the class action whether by a settlement or a judgment. If a group member opts out, they cannot participate in the class action, they will not receive compensation, and they are not bound by any settlement or judgment.

Levitt Robinson

162 Goulburn Street Ground Floor. Sydney, Australia
T +61 (2) 9286 3133 | bimlay@levittrobinson.com
jpunthakey@levittrobinson.com | www.levittrobinson.com

4. Australia's class action regime dates from March 1992 for Federal Court proceedings, in response to a 1988 Australian Law Reform Commission report. His Honour Justice Murphy of the Federal Court explained the rationale as follows: "This modern procedure is an attempt to deal with the problems of mass claims arising from the very large civil wrongs that sometimes occur in modern economies – that is, a mass solution for mass wrongs." The states of Victoria, NSW, Queensland and Western Australia have introduced similar regimes. Litigants may have the option of commencing proceedings in the Federal jurisdiction or the above State jurisdictions.

What was the mischief they were intended to address? How do they help clients (plaintiff/defendant)?

5. Class actions facilitate the bringing of large claims affecting many people and provide an effective and efficient procedure at a cost proportionate to the remedy sought.

6. Class actions benefit:

(i) The group members, who are not liable for the defendant's legal costs should the proceedings be unsuccessful. While the lead plaintiff is liable for costs, class actions are often funded by commercial funders (in return for a percentage of the proceeds) who typically provide an indemnity to the plaintiff.

(ii) The lead plaintiff, as they would usually lack the resources to sue a large corporation or government entity. A litigation funder (or the combined resources of a large number of group members) makes their claim possible.

Some argue that defendants benefit too, as class actions provide a consistent and final outcome. However, defendants perceive class actions as expensive and damaging to their reputation, since most class actions would not be run as individual cases.

What area of law did they start in? Have they expanded into other areas?

7. Many early class actions concerned migration matters. Rules were introduced in October 2001 to prohibit class actions concerning migration laws. Gradually, more class actions arose with respect to:

- Product liability
- Shareholders misled by a failure to disclose information to the market
- Investor claims against Banks for their role in collapsed investment schemes
- Consumer claims, eg due to cartel conduct
- Injury and damage to property and business from disasters like bushfires and floods where human fault is involved
- Environmental disasters
- Franchisee-franchisor disputes
- Breaches of human rights
- Employee rights, especially underpayment of wages.

Currently, shareholder class actions are the most common type of case.

Is there something peculiar about your jurisdiction's class action law? Please explain.

8. Unlike the US or Canada, there is no certification regime in Australia. A class action may be struck out or "de-classed" into an individual proceeding, but a class action need not seek Court approval as a pre-condition.

9. Settlements are subject to court approval, which typically includes a review of the legal fees and the percentage charged by any litigation funder.

10. Group members can object to a settlement. Group members can also appeal judgments or court-approved settlements, though they rarely do.

11. Since 2013, Courts have approved "funding equalisation orders", which ensure that group members who fund the proceedings or who sign a commercial litigation funding agreement, are not worse off than those group members who don't (known as "free riders").

12. Since 2016, in lieu of funding equalisation orders, Courts have approved "common fund" orders. Common fund orders permit a litigation funder to deduct a lower Court approved flat percentage fee from the compensation due to all group members, whether they have signed a funding agreement or not. What that percentage will be, depends on complexity, risk, the nature of the proceedings and, if applicable, the stage at which the matter settles. Cases involving human rights and disasters will typically attract much lower common fund orders than complex commercial matters.

13. Common fund orders make class actions more commercially viable for litigation funders and law firms as they obviate the need to persuade large numbers of group members to sign funding agreements.

14. Common fund orders are currently the subject of a constitutional challenge in Australia's High Court. The outcome is being watched very keenly by all participants.

ELISABETH
MAYER-WILDENHOFER

Class Action Law in Austria

Austrian civil procedural law does not provide for class actions of the U.S. type, but there are alternatives to enforce collective interests.

Since approximately 40 years Austrian Consumer Protection Act and Austrian Act against Unfair Competition allow the filing of **class actions by certain organisations** (i.a. chamber of commerce, consumer protection agencies, trade union confederation, federal competition authority). These actions are not intended to enforce claims of individuals, but to obtain injunctive relief from violations against consumer protection law or the law against unfair trade practice; therefore these actions constitute an effective way of market surveillance.

Due to the lack of specific statutory provisions for class actions in Austrian legislation, each and every individual had to initiate a litigation to enforce his claim, which led to a flood of lawsuits, thus leading to legal uncertainty, which is why the legal practice has implemented their own **'Austrian-style class action'** to enforce mass claims. But also in consideration of the risk of litigation costs individuals are exposed to when filing individual lawsuits, class actions do make sense, since they are most likely funded by third-parties, wherefore the expense risk is outsourced. This collective redress mechanism was originally developed through case law on the basis of existing civil procedure law, thus ordinary civil procedural law is applicable, but it is not limited to any specific areas of law.

Kraft Rechtsanwalts GmbH & Co KG

Heinrichsgasse 4, A-1010 Vienna, Austria
T +43 1 587 16 60-0 | office@kwlaw.at | www.kwlaw.at

With Austrian-style class actions, mass claims can be enforced by having the owners of a claim assigning their rights to a natural person or legal entity (most frequently a consumer organisation). Hence follows that, unlike other class action systems such as those in the United States, Austrian-style class actions are based on an opting-in mechanism. Subsequently the person or entity brings a single action against the defendant on behalf of the assigning individuals; therefor acting as the sole plaintiff.

As there are no special provisions for class actions in Austria, the Supreme Court has developed requirements that have to be met for class actions to be brought to court. Although the claims are aggregated, each claim still remains legally separate, which means that the court has to decide on each claim. Unlike above-mentioned class actions brought only by certain organisations, Austrian-style class actions are mostly aimed at compensatory relief, thus the individual consumer remains entitled to collect proceeds of the litigation.

Given the high value in litigation, the cost risk is rather high as well, which is why a lot of cases of class actions brought to court have been settled extrajudicial.

As no specific class action law exist, the implementation of a class action system has been an on-going discussion in Austria. In April 2018, the EU Commission presented a draft Directive 'New Deal for Consumers' aiming at the introduction and harmonisation of an EU-wide collective redress mechanism. However, due to heavy opposition, the Austrian legal system still remains without an effective redress mechanism.

MARINUS VROMANS

Class Actions In Belgium

Act of 28 March 2014 on actions for collective redress

A claimant can only file a court action if he or she has a personal interest. Therefore collective actions are as such not permitted. The Act of 28 March 2014 introduced on 1 September 2014 as an important exception to the personal interest requirement "the action for collective redress" in Title 2 of Book XVII of the Code on Economic Law ("CEL"). Since then 8 class actions have been initiated in Belgium.

Considerations for the introduction of a Belgian class action

Until 1 September 2014 claims for mass damages had to be handled in a creative way under classical procedural rules which were designed for 2 party relations. In consumer law individual claims mostly do not justify the costs of litigation. The Act of 28 March 2014 initially only concerned consumer claims. Since June 2018 actions for collective redress can also be initiated by small and medium sized enterprises ("SME's"). Enterprises employing less than 250 persons and which have an annual turnover not exceeding 50 million EURO and/or an annual balance sheet not exceeding 43 million Euro qualify as SME's.

Main features of actions for collective redress

The Brussels Commercial Court and the Brussels Court of Appeal have exclusi-

Sirius Legal
Veemarkt 70 2800 Mechelen Belgium
T +39 02 3670 7650 | marinus@siriuslegal.be
www.siriuslegal.be

ve jurisdiction to deal with actions for collective redress. Under the following conditions:

- Violations by an enterprise of its contractual obligations or of Belgian and European rules, specifically mentioned in art. XVII.37 CEL, which mainly aim at protecting consumers (competition law, unfair market practices, environmental and financial law). Since 2017 the class action regime also became applicable to infringements of European competition law;
- The claim is initiated by one single claimant ("Group Representative");
- The action for collective redress should be more effective than an individual court action.

Group Representative

Only a so called Group Representative ("GR") may file an action for collective redress. The claimant must fulfill the requirements laid down in art. XVII.39 CEL in order to qualify as a Group Representative ("GR"). In practice this means up till now that only one consumer association in Belgium (Test-Aankoop/Test-Achats) qualifies as a GR to initiate an action for collective redress on behalf of consumers. A professional organization with legal personality which defends the interests of SME's and represented in the High Council for the Self-Employed and SME's or recognized by the Minister of Economic Affairs has legal standing concerning SME's class actions. Only consumers and SME's can be represented. Professional commercial claimants cannot buy consumers' claims for a share of the proceeds of the action.

"Opt-in" and "opt-out" system and effect of the judgment:

The class represented by the GR is a group of consumers/SME's who personally suffered damage as a consequence of a common cause.

The group of consumers/SME's that can benefit from compensation is defined by an "opt-in" or "opt-out" system. The Court decides on which system applies. However the opt-in system is compulsory for consumers/SME's who do not have their habitual residence/main establishment in Belgium and in actions for restoration of physical or moral collective damage.

The GR files a claim on behalf of an unknown group of individuals or SME's who have not previously given a proxy to the claimant. The action leads to a court decision that prevents subsequent litigation, not only towards the GR and the defendants, but also towards all group members that have opted in or have not opted out of the procedure.

IVA NIKOLOVA

A Brief Introduction to Collective Claims or Class Actions in Bulgaria

A special procedure on collective claims or class actions was first introduced with the Civil Procedure Rules ("CPR") in force since 2008.

There is an ongoing debate about the value of collective claims and the way they are regulated. The legislation dealing with class actions in Bulgaria is scarce and that area of the law remains relatively untested.

A basic characteristic of collective claims is that the dispute over the rights of multiple claimants is resolved within the confines of a single process. The claimants need not be individually identified but have to be defined by a mutual feature where they are all affected by the nature of the offence.

It is noteworthy that not all aggrieved persons participate in collective claims litigation, there are sometimes special representatives appointed. In some instances, specialized organizations for the protection of particular rights such as organizations for consumer protection, protection of copyright, and protection against discrimination bring the action. Such claims were well established before the introduction of the new CPR through the Consumers Protection Act and the Collective Labour Disputes Act but the CPR sets out special litigation procedure. In some instances, the re-

Dimitrov & Partners
65, Evlogy Georgiev, Blvd, apt. 7, floor 3. Sofia - Bulgaria
T + 359 (2) 987 61 51. F +359 (2) 987 61 44
office@dp-lawfirm.com | www.dp-lawfirm.com/en/

presentatives can be constituted by a group of people amongst the class who seek a remedy.

The claimants can ask for specific performance in the form of orders restraining the infringement, rectification of the consequences of the infringement upon the infringed collective interest or damages. Further, the court may order the defendant to do or not to do something or to pay a specific sum, needed to rectify the offence or constituting damages to the claimants, the court can also order preliminary measures – which are intended to protect the infringed right/interest of further suffering of the members before the court delivers a judgment.

There is initially a special hearing where the court decides based on statements of the parties about the circumstances defining the pool of aggrieved individuals who could join as claimants and the appropriate ways and means of publishing the claim. The court also determines a time period for potential claimants to join the action.

Persons who claim to be affected by the conduct complained of can join the litigation in the prescribed period if there is evidence that they conform with the approved circumstances defining them as potential claimants. It is also possible that the court may exclude persons who declare their intention to seek their rights individually and in separate litigation. However, such persons, can use a judgment finding against the defendant arising from the class action in their individual claims. To aid that process, there is a list of excluded parties attached to the judgment.

In circumstances where a class action is unsuccessful, the path for those who chose not to participate in the class action is open for individual litigation, although more difficult to pursue after an adverse judgment in the collective action.

TOM ARNDT

Class Actions in Canada

Are class actions available in your jurisdiction?

Class actions are available in Canada. Some provinces, including Ontario, also permit defendants' class actions.

When did they start?

Representative actions, the predecessor to the modern class actions, have been available in Canada since at least the 1800s. Comprehensive legislation and case law developed through the 1980s and 1990s to establish and clarify modernized class actions across Canada.

What areas of law did they start in, and have they expanded into different areas?

Class actions are available in all areas of litigation in Canada. Early class actions cases included mass torts (e.g. tainted blood, residential schools, municipal landfill failure) and contract disputes (corporation's failure to pay interest to its debenture holders). Class action cases have expanded into essentially all areas of law including: franchise law, constitutional law, privacy law, price-fixing, employment, corporate, securities and fraud.

What is the mischief they were intended to address?

Class actions allow parties to seek compensation where public regulators or individual law suits are ineffective or inefficient. The three overriding policy ob-

Himelfarb Proszanski
480 University Avenue, Suite 1401Ontario M5G1V2
Toronto, Canada | T . +1 (416) 599 8080
tom@himprolaw.com | www.himprolaw.com

jectives of class actions in Canada are: (1) improving access to justice (2) improving judicial economy, and (3) modifying behaviour of persons who have or potentially will cause widespread injury in our society (aka behaviour modification). Class actions allow plaintiffs to share the costs and risks of litigation. Class actions also ensure judicial decisions on similar issues are consistent and generally avoid multiple legal claims using up valuable judicial resources.

The sizeable damage claims and settlements that can result from a class action help deter major commercial enterprises and governments away from potentially harmful activities that affect large segments of the population.

How do they help clients?

Class actions overcome economical and emotional barriers to pursuing litigation by providing vulnerable plaintiffs a means of redress without needing all plaintiffs to participate in the public court process.

The parties to class actions also benefit by the application of consistent and ongoing court oversight, typically a single judge is appointed to manage the litigation.

Class members' interests are also protected by the requirement that a judge approve any settlement between parties and the lawyers' fees.

Plaintiffs are given notice and can opt out of a class action if they do not wish to be bound by the result of the class action (settlement or court imposed).

Oft overlooked, class actions also help defendants by establishing a resolution (settlement or court imposed) to a risk with all class members in one lawsuit which permits the defendant to cleanse itself and its balance sheet of that the risk.

Is there something peculiar about your jurisdictions class action law?

National class actions are becoming more common in Canada. Thus a class action brought in Ontario can be certified to include all plaintiffs across Canada. This increases judicial efficiency and avoids the risk of inconsistent results.

A recent development in Canada is the use of litigation funding agreements, which allow class action plaintiffs to shed their liability from class action costs altogether. Litigation funding agreements, which historically may have been out-

lawed as maintenance and champerty, are permitted in Canada. Funders can pay the plaintiffs' lawyer's fee, and agree to pay adverse cost awards, disbursements, and security for costs, in exchange for a percentage of the winnings of the case.

The Law Commission of Ontario recently published a report on class actions in Ontario with a number of recommendations aimed at streamlining the class action procedure to increase access to justice, judicial efficiency while continuing to achieve behavior modification.

Tom Arndt has been doing class actions in Canada for over 20 years. In the 1990s he acted on the tainted blood (Hep C and HIV) class actions and litigation. He has acted for plaintiffs and defendants. Most recently, he was lead class counsel in a nation-wide $1.2Billion franchise class litigation and obtained court approval for an innovative litigation funding agreement in a widely reported decision. Tom would like to thank the invaluable assistance of his articling student, Stephane MacLean, in drafting this article.

MGR. ANNA VŠETEČKOVÁ

Czech Republic

Becker & Poliakoff

Class Action Law in Czech Jurisdiction

A complex regulation of class actions is not currently available in the Czech Republic.

There are some elements of collective protection of rights (including protection of consumers by consumer protection associations or collective claiming of a right on top-up of the owners of the participating securities against the principal shareholder), however, they are fragmented into various legal acts, which is often criticized. As this lack of legal regulation is strongly undesirable, the Czech Ministry of Justice has worked on some legislative changes in the past few years and finally this Spring proposed an act on class actions (hereinafter referred to as the "Bill").

The regulation of class actions is proposed as an independent act, which shall be in position of speciality to the Czech Code of Civil Procedure. The fragmented regulation of collective protection of rights is however not intended to be amended and derogated by the Bill. This circumstance is strongly criticized by representatives of Czech justice, as the Bill will not fulfil one of its main purposes and remove the non-unified regulation on collective protection of rights.

The declared purpose of the Bill is further increasement of effectivity and uniformity of judicial decision making. The main benefit of the new regulation shall be to ensure access to court for persons who would not otherwise bring an in-

Becker & Poliakoff

U Prasné brány 1078/11-Staré Mesto, 110 00
Prague - Czech Republic | +420 (224) 900 000
Vseteckova@becker-poliakoff.cz | www.becker-poliakoff.cz

dividual proceeding . The professional public, including the Supreme Court and the Czech Bar Association, however, claims that none of these purposes can be fulfilled with the current wording of the Bill, for the following reasons.

First, the proposed regulation of class actions will bring many new administration processes to the courts associated not only with the necessity to maintain the necessary lists of participants of the proceedings and registers of the active actions, but also with examination of fulfilment conditions for participation on the proceedings. In addition, the rights of the participants of the civil proceedings arising from the Czech Code of Civil Procedure including right to be heard shall be reserved also to the members of the class action group. In extreme cases this could lead to collapse of the court hearings.

The other issue is the establishment of a so called "group administrator," which is a person representing the plaintiff. The group administrator may be awarded between 20 – 30 % of the amount obtained. This could lead to the transformation of the civil proceedings into a business venture, where the primary aim would be generating of profits instead of protection of rights.

The regular legislative procedure of the Czech class actions act has only begun, and the legal community is already strongly divided. We will see when and in which wording the Bill will become effective.

TRISH D'SOUZA

Class Action Law in England and Wales

Class action, commonly referred to as collective action or multi-party litigation, tends to be an umbrella term for group action claims in England and Wales. Litigants may bring multiple joint claims, Group Litigation Orders ("GLO"), Representative Actions and informal test cases. GLOs tend to be the main form of class action in this jurisdiction.

Prior to 2000, there was no formal procedural framework available in England and Wales for multi-party litigation. Procedural reforms were introduced by Lord Woolf in his 1996 report and the Law Society's predecessor report in 1995. Most of Lord Woolf's proposals were implemented into the Civil Procedure Rules under Rule 19.

The aims of the reforms were to minimise costs and delays and to streamline processes, by allowing claimants to pool together their resources for claims of similar factual and legal issues.

Multi-party litigation can operate as an effective form of justice by permitting multiple claimants, or any representatives, to present the court with a consolidated claim. In reality, the benefits are often shrouded by the expense of running such claims, with only those able to obtain third party litigation funding able to pursue this type of action. The benefit to clients who overcome this high financial burden is the notoriety and the hi-

Capital Law

Capital Building, Tyndall St, Cardiff CF10 4AZ.
United Kingdom | t.dsouza@capitallaw.co.uk
T +44 2920 474 400 | www.capital-law.co.uk

gh-profile publicity attached to collective actions.

In theory, class action is not confined to a particular area of law. Historically, multi-party litigation was used in competition law, personal injury or pension disputes. Nowadays, collective actions have been used in shareholder actions, product liability issues, financial services and consumer redress and environmental and human rights disputes. We anticipate that, being a year on from GDPR and with a heightened focus on the protection of personal data, we are set to see more class action claims in relation to data breaches.

Unlike other jurisdictions, class actions in England and Wales are primarily managed by an 'opt in' procedure, with one exception. Under the Competition Act 1998, collective action in respect of competition law claims can be managed by either an 'opt in' or an 'opt out' basis. This exception to the general legal position, was amended to acknowledge that the previous system for these types of cases was not working.

Whilst there has been a noticeable increase in multi-party litigation claims since the reforms, they have not gained as much traction as originally anticipated. For example, the court's narrow interpretation of the 'common or related issues of fact or law' requirement, means that GLOs have not become a widely used mechanism, with only 105 claims being made since 2000. However, that is not to say that collective actions in this jurisdiction are fruitless. Mastercard are currently appealing a multi-party litigation claim made against them, worth up to £14 billion (€15 billion), in the areas of consumer law and competition law. The recent developments in this case demonstrates that class action is still a developing area in England and Wales, with many aspects yet to be refined.

VERENA SCHNATTERER

The legal situation in Germany

A class action lawsuit, as known in the US, is not subject to German law. A general class action suit is not possible under German law. A judgment works according to the so-called "inter partes" principle only between the parties involved. At most, joint litigation is possible if the plaintiffs or defendants are entitled or obliged to do so for the same legal or factual reason.

There are a few exceptions:

1.Declaratory model action for consumers

As of 1 November 2018, the model declaration action was newly introduced into German law. The model declaration action is a civil association action. Only so-called qualified institutions whose statutory duties include the exercise of consumer interests through non-professional information and advice are entitled to take legal action.

In a declaratory model action, consumers join the lawsuit of an association that is not acting for commercial interests.

With the declaratory model action, damages cannot be demanded. Only the determination of existence or non-existence of the factual and legal prerequisites for the existence or non-existence of claims or legal relationships (determina-

Klink & Schnatterer

Göttelmannstrasse 17 55130 Mainz - Germany
verena.schnatterer@advomayence.de
+49 6131 28 4370 | www.advomayance.de

tion objectives) between consumers and a company can be requested.

A judgment only binds the courts to the findings in the model action proceedings for subsequent actions for payment by an affected consumer, provided that the consumer has filed his claims in the action register in the model action. The enforcement of consumer claims is thus reserved for subsequent individual proceedings, unless a settlement with effect for and against the registered consumers has been concluded in the model declaratory procedure. There is no litigation cost risk for the consumers involved in the model determination procedure. Recovery is limited to the court and attorney costs prescribed by law.

2. Model proceedings for investors

An exception exists since 1.November 2005 for investors. The Capital Investor Model Procedure Act provides for a model procedure as a special form of class action if investors are misinformed or insufficiently informed. As soon as at least ten private shareholders sue, whose claims are based on the same legal and factual issues, a test case is brought before the competent Higher Regional Court. The judgment binds all registered plaintiffs. Other proceedings before courts related to the model proceedings will be suspended until a judgment of the Higher Regional Court is reached.

3. The right of action of consumer protection associations to bring actions for injunctive relief in the event of infringements of consumer rights

Consumer protection law also provides that consumer protection associations are entitled to seek an injunction in the event of infringements of consumer protection rules.

4. Association action in environmental law

A class action in the form of an association action can be found in German environmental law. Environmental or nature conservation associations are authorized to bring an action (so-called collective action) against state decisions.

DR. ERAN TAUSSIG, ADV

Class Actions in Israel

Class actions are not a new phenomenon in Israel. They were recognized in subsidiary legislation decades ago. However, it is only since the late 1980s—with the enactment of subject-matter-specific laws (e.g. Securities Law(1988); Consumer Protection Law(1994); Banking Law(1996)), under which class actions could be instituted—that a significant increase in the number of petitions for class actions is evident.

The current comprehensive Israeli Law concerning class actions was adopted in 2006. The Class Actions Law ("the Law"), which replaced all of the subject-matter-specific laws, allows the filing of class actions for causes of action enumerated in the second addition to the law, which—unlike prior legislation—provides a broad framework for most subject-matters in the law.

The Law was enacted in order to solve two main problems: One—the lack of uniformity among the various class action procedures applicable under each different subject-matter-specific law; Second—lack of a general basis for consumer class actions that were not based on the Consumer Protection Law (but rather on other laws such as the Contracts law) or claims against the State and its authorities (including municipalities) in relation to collection of taxes without authority under the law.

Balter Guth Aloni & Co.

Ampa Building 96 Yigal Alon Street, 6789140
Tel Aviv - Israel | taussig@bgalaw.co.il
+972 3 511 1111 | www.bgalaw.co.il

Section 1 of the Law describes its goals: to establish uniform rules concerning the management of class actions; to improve the protection of rights and the right to access to court; enforcing the law and deterring its breach; providing adequate relief to the those who sustained damages by the breach of the law; efficient, fair and comprehensive management of claims.

In general, class actions in Israel take after their American counterparts. Like in the United-States, a class action in Israel is conducted in two phases: first, a Motion to certify a class action is filed. Only if certification is granted, the second phase takes place, namely the hearing and the adjudication of the action on its merits. There is one important difference between class actions in Israel and the United-States: whereas according to Rule 23 of the Federal Rules of Civil Procedure, American courts are not entitled to examine a claim's likelihood of success when deciding whether or not to certify a class action, the Israeli Supreme Court has ruled that the court is obligated to conduct a preliminary inquiry into the merits of the claim. The purpose of this requirement to look further into the merits in the class action context is to protect potential defendants from frivolous suits, which can impose high costs on them.

Due to allegations that growing numbers of frivolous class actions are filed in Israel, in 2018 the then Minister of Justice decided to impose courts fees on representative plaintiffs, in amounts ranging from 2,300 to 4,600 USD. Although the introduction of the new court fees led to a relatively small reduction in the number of class actions filed, it indeed caused a significant shift in the areas of law in which the actions are filed. For example, there is a significant increase in the filing of claims related to rights for people with disabilities, because these claims are exempt from the said court fees.

KAZUHIKO NISHIHARA

Japan

Honmachi International Law Office P.C.

Mass Litigation and Class Action in Japan

1. Mass Litigation in Japan

Japan does not have a general class action system like the US, however, under the Article 38 of the Code of Civil Procedure (hereinafter "CCP"), if the rights or obligations that are the subject matter of litigation are (1) common to several persons, (2) based on the same factual or statutory causes, or (3) the same kind and based on the same kind of factual or statutory causes, persons may sue or be sued as co-litigants. Mass litigations can be filed under this Article in Japan. Unlike class actions in the US, persons have to file a case to become plaintiffs, and court proceedings do not affect any other persons outside of such litigation. In the large-scale litigations, a panel of five (5) judges may be formed in district court (Article 269), a three (3)-judge panel is normal.

The Article 30 of the CCP allows persons with a common interest to appoint one or more persons from among themselves to stand as the plaintiff or defendant on behalf of all. The appointed plaintiffs represent the appointors and the court proceedings only affect the appointors. This system has seldom been used for mass litigation in Japan.

2. Class Action for Consumers in Japan

The new act on special civil procedure for consumers came into effect in 2016.

Honmachi International Law Office

Azuchi-machi 2-3-13, Osaka Kokusai Building 8F
541-0052 Chuo-ku, Osaka / Japan | T+81(6) 6226 7213
k-nishihara-ml@honmachilaw.com | www.honmachi-law

Under this act, only Specific Qualified Consumer Organizations can file proceedings against companies for declaration judgments as to the defendant's liability under consumer contracts. If the court finds the defendant's liable, then consumers who suffer damages can join the litigation and recover their damages. Many cases are being filed under this act now.

3. HBV Litigation in Japan

HBV Litigation is the largest mass litigation in Japan. It as brought by victims who contracted hepatitis B virus through childhood vaccination where needles and syringes were routinely reused filed against the Japanese government. The total compensation was expected to total up to JPY 3.2 trillion (around USD 35 billion).

The litigation was originally filed by only 5 plaintiffs in 1989 . Attorneys represented them on a pro bono basis, and they finally won the case in the Supreme Court in 2006. However, the Japanese government did not accept any actions for other prospective victims therefore the original members called out to new plaintiffs and attorneys all over Japan who filed cases at 10 district courts in 2008. The authors have been members of the plaintiff's attorney's group. Kazuhiko Nishihara played a key role in the settlement negotiations, and the plaintiffs finally reached a settlement agreement in 2011. As this settlement agreement affects only plaintiffs that have already filed, the government enacted a special act which traced the settlement agreement and allowed other victims to file new cases and achieve settlements under the same conditions. Until now, this group has been filing many cases based on this Act, and many law firms other than this group are collecting plaintiffs by using mass advertisements and filing cases as free-riders.

MAARTEN JANSEN

Class Action Law in the Netherlands

In the Netherlands, it is possible to start class actions. Since 1994 article 3:305a of the Dutch Civil Code rules that a foundation or an association with full legal capacity can take legal actions to protect similar interests of others. For example they can file for a declaratory judgment. However, on the basis of this article it is not possible to claim for damages.

In 2005 the Collective Mass Claims Settlement Act (hereinafter referred to as: "Mass Claims Act") came into effect. The Mass Claims Act has made changes to the Dutch Civil Code and makes it possible for claim organisations to pursue collective claims by filing class-action lawsuits or by requesting judicial approval on collective settlements, including claims for damages. In 2011 the Claimcode came into effect. The Claimcode is an instrument of self- regulation created by parties who are active on the claims market. The reason for introducing the Claimcode was to regulate principles about the tasks, responsibility and governance of claim organisations. On 4 March of 2019 an amended version of the Claimcode came into effect. The main changes are:

- Claim organisations and people involved with them can only operate on a non-profit basis. However, claim organisations can demand "market terms" compensation for costs incurred including a reasonable extra amount which the claim organisation can use for future representation of collective interests.

De Advocaten van Van Riet B.V.

Euclideslaan 201 PO Box 85207 3584 BS
Utrecht - Netherlands | T +31 30 263 50 50
jansen@avvr.nl | www.avvr.nl

- Recognition of the increasing role of third party litigation funding in collective lawsuits. Claim organisations have to ensure that independence is maintained between: 1. the external funder and the claim organisation (including its lawyers), and 2. the external funder and the defendant in the collective lawsuit. Moreover, it is not allowed for the funder to influence the litigation or settlement strategy. This has to be safeguarded by the claim organisation.

- On a publicly accessible website the claim organisation will have to disclose: 1. that third party funding was obtained; 2. the identity of the funder; 3. the arrangements made between the funder and the claim organisation; 4. if any percentage of the awarded damages or settlement will be paid to the funder and if so, what percentage.

The Claimcode has special rules for small organisations. An organisation is classed "small" if it has a maximum of 1.000 members, the average damage is € 1.000,-- per person and the requested participation of members is maximum € 100,--.

In 2002 the "stockleaseaffaire" started in the Netherlands. Much bigger, in numbers and extent of the damages, is the so-called "woekerpolisaffaire" (profiteering policy affair) that started at the end of 2006. In 2009 the DSB Bank went bankrupt which lead to several collective claims. In the Netherlands, most class actions have got something to do with the financial market. The most recent class action in the Netherlands though is the Volkwagen dieselgate. On 7 October 2019 the parties in the Volkswagen dieselgate will have the opportunity to orally explain their position to the court of Amsterdam.

JEFF DAAR

Class action lawsuits in California: the basics

Class action lawsuits in California significantly affect business and consumers around the world. The use of class actions can be a tremendous tool, both for plaintiffs and defendants in administering justice. Class actions are frequently utilized in numerous areas, including securities, unfair business practices, mass tort litigation, products liability, holocaust litigation and wage disputes.

This article provides a brief overview and does not contain any citations to statutes and cases. If anyone desires further information, please contact me at jdaar@daarnewman.com. My law firm, Daar & Newman, has had a longstanding role in the development of class actions in California, including major California Supreme Court cases.

California law authorizes a class action when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court. The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceedings as a class superior to the alternatives.

The "community of interest" requirement involves three factors: (1) predominant common questions of law or fact; (2) class repre-

Daar & Newman
Warner Center Towers 21700 Oxnard Street, Suite 350
Woodland Hills, Los Angeles, California 91367. USA
T +1 818 615 0999 | jdaar@daarnewman.com | www.daarnewman.com

sentatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.

Generally, if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages. In certifying a class action, the court must also find that litigation of individual issues, including those arising from affirmative defenses, can be managed fairly and efficiently. Other considerations relative to certification include the probability that each class member will come forward, ultimately, to prove his or her separate claim to a portion of the total recovery and whether the class approach would serve to deter and redress alleged wrongdoing.

California's Consumers Legal Remedies Act includes its own set of requirements for class certification. Under this statute, a class suit can be maintained on behalf of all members of the represented class if all of the following conditions exist: (1) it is impracticable to bring all members of the class before the court; (2) the questions of law or fact common to the class are substantially similar and predominate over the questions affecting the individual members; (3) the claims or defenses of the representative plaintiffs are typical of the claims or defenses of the class; and (4) the representative plaintiffs will fairly and adequately protect the interests of the class.

A proposed class definition articulates an ascertainable class if it defines the class in terms of objective characteristics and common transactional facts that make the ultimate identification of class members possible when identification becomes necessary.

The use of class actions as a weapon or a shield should be carefully considered for major litigation presenting numerous parties. When properly utilized, class actions provide an amazing way to obtain justice on a mass scale.

AILEEN M. JENNER

New York (USA)

Berenthal & Associates, P.C.

Class Actions in New York

The class action is available in New York and, when properly brought, the judgment rendered in the class action is res judicata for or against all members of the class and thus precludes them from bringing their own individual action.

Objection has been made over the years, from time to time, to the effect that the class action posed the danger that plaintiffs' lawyers would settle too cheaply resulting in, not only an unjust discount for the defendant, but, in addition, the receipt by the defendant of the protection of classwide preclusion from subsequent individual lawsuits.

The class action in New York began in 1849, and continued for over a century in its original form, eventually becoming a national model for the class action in other jurisdictions. In 1975, the class action law in New York was changed when the New York Civil Practice Law Rules (CPLR) were amended and a new Article 9, CPLR 901-909, governing class actions was enacted and the old New York class actions law, CPLR 1005, was repealed. The 1975 amendment was based for the most part on the federal class action rule, Federal Rule of Civil Procedure (FRCP) 23, which had undergone a significant amendment in 1966 that converged with the passage of major new federal civil rights and securities fraud laws, violations of which could be litigated as class actions.

The class action relieves the courts of having to deal with numerous separate ac-

Berenthal & Associates, P.C.

777 Third Avenue Suite 22-D, NY 10017 New York - USA
T +1(212) 302-9494 | amj@berenthalaw.com
www.berenthalaw.com

tions. But more importantly, it enables individuals, who may not have the resources to bring their own individual action, to join in a case with plaintiffs holding joint or common or secondary rights and to receive relief to which they would not have access without the class action. Where a defendant lacks sufficient resources to compensate numerous injured potential plaintiffs, class actions allow per capita distributions to the class plaintiffs instead of the compensation each might receive in an individual lawsuit based on a race to the courthouse.

The basic conditions for bringing a class action in New York are set forth in CPLR 901(a) as follows.

One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

In New York, class action certification is a question vested in the discretion of the court. The procedure is for the plaintiff representatives to bring the action and then to move the court for an order permitting its maintenance. After certification by the court, unless the action is brought for injunctive or declaratory relief, notice must be given to the class in the manner directed by the court. See CPLR 904(b). Then, in most cases, an individual may "opt out" and be excluded from the class and the litigation by notifying the court that he/she does not wish to be part of the class or subject to the judgment. See CPLR 903.

In the United States Federal court system, Federal Rule of Civil Procedure (FRCP) 23-Class Actions governs class actions brought in the federal courts of the United States. FRCP 23 was enacted in 1938, amended in 1966, and was most recently amended effective December 1, 2018.

The prerequisites for bringing a class action in federal court are set forth

in FRCP 23(a) and are as follows:

1. the class is so numerous that joinder of all members is impracticable;

2. there are questions of law or fact common to the class;

3.the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

4. the representative parties will fairly and adequately protect the interests of the class.

Note that when bringing a federal class action, there must be a federal law conferring subject matter jurisdiction, such as Title VII of the Civil Rights Act of 1964 or the Fair Labor Standards Act, as FRCP 23 is a only procedural rule. See 28 U.S.C.A. §1331. If the sole basis for federal jurisdiction rests on diversity of citizenship, i.e., citizenship of a state of the United States, rather than on a federal statute, then the citizenship of the class representatives must differ from the citizenship of the defendants. The citizenship of unjoined class members is not considered, but the diversity statute has a monetary requirement of $50,000, which must be met by each class representative and this can be difficult to meet for individuals with small monetary claims. See 28 U.S.C.A. §1332.

Unlike the federal law, New York class action law contains no limitations based on the kind of substantive claim as long as the prerequisites of CPLR 901(a) are met. New York courts are more flexible and examine each case on its own merits in deciding whether to certify it as a class action. New York entertains consumer class actions, such as breach of warranty, negligent misrepresentation, breach of contract, as well as personal injury, product liability, and securities fraud among others. New York also allows actions to be subdivided into "subclasses," allowing easier qualification for class action certification.

SHELLEY BREEDING

Class Action Law in Tennessee

Class action lawsuits were cemented in United States federal law in 1820 when the United States Supreme Court held that "It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be." West v. Randall, 29 FED. CAS. 46 (1820). This recognition of civil actions by numerous individuals then extended to Tennessee.

In 1925, Tennessee arguably had the first civil action suit to receive widespread media attention in the famous case of State of Tennessee v. John Thomas Scopes, known as the "Scopes Monkey Trial." The Scopes case addressed the separation of Church and State when the American Civil Liberties Union challenged the "Butler Act," a Tennessee law that prohibited Tennessee public schools from teaching Darwin's theory of evolution. Scopes, a teacher, was indicted for violating the law, found guilty and ordered to pay a fine (the conviction was eventually overturned). The widespread media attention shone a spotlight on civil actions representing a class of individuals and adjudicating rights of a class of individuals.

Class actions allow a large number of plaintiffs or defendants' claims to be handled in a single suit verses each case having a separate suit and trial. The United States Supreme Court and Tennessee Supreme Court have recognized that class actions advance "effi-

Breeding Henry Baysan PC
900 S. Gay Street Suite 1950 TN 37902 Knoxville - USA
T +121 281 322 92 | sbreeding@bhblegal.com
www.breedinglaw.com

ciency and economy of litigation which is a principal purpose" of class actions. General Telephone of Southwest v. Falcon, 457 U.S. 147 (1982). This affords judicial economy for all parties involved by not prosecuting or defending numerous similar suits. Often, class actions are initiated in matters for a large class when the small claims would otherwise not justify a single plaintiff from seeking relief. Class actions also avoid prejudice to the parties from multiple suits regarding the same manner resulting in different adjudications.

In Tennessee, class actions are permitted only when: (1) the class is so numerous having all class members as parties is impracticable; (2) there are common questions of law or fact; (3) the claims or defenses are typical of the claims or defenses of all members of the class; and (4) the representative parties will protect the interests of the class. Class actions are appropriate when questions of law and fact predominate over individual issues. Members of a class may choose to "opt-out" after the class is certified and preserve their claims for their own suit, but the majority of class members generally choose to join the same action to save on litigation expenses.

The nature of class action lawsuits has expanded over the years to include a wide array of actions. Class actions most common in Tennessee are:

- Employment Matters — related to unfair pay, lack of pay earned, discrimination in the workplace, or wrongful termination;
- Faulty Medical Equipment — related to hip implants, knee implants, and similar medical equipment;
- Pharmaceutical Matters — related to drugs which later cause adverse effects on a large number of plaintiffs;
- Antitrust and Securities Violations — price fixing, unfair competition, insider trading, and similar business matters;
- Property Rights — when a government or utility unfairly takes the property of a number of individual property owners; or
- General Contract Matters — when a large number of individuals have a similar contract with a company that refuses to honor the contract or when there is a contract provision that is unenforceable; or

About Consulegis

Founded in Germany in 1990, we are a growing, international network of quality independent mid-sized and boutique commercial law firms and other advisory professional firms, as well as in-house counsels, that provides clients with access to the knowledge, experience, skills and resources they need to thrive on a global scale.

We stay absolutely current on changing global market trends in order to offer clients an effective and seamless advisory experience that incorporates not only sound legal advice from top firms –including Chambers and Legal 500 ranked firms– but also access to the best accounting + tax firms, consulting firms, IP agencies and M&A firms.

Please provide us with your comments about our Newsletter. We welcome your feedback.

Chair of the International Litigation and Arbitration Specialist Group (ILASG)
Jeffery Daar.
jdaar@daarnewman.com

Secretary
Kazuhiko Nishihara
k-nishihara@honmachi-law.com

CONSULEGIS
A LEADING GLOBAL NETWORK

CONSULEGIS EWIV / EEIG
Poststrasse 14-16 III
20354 Hamburg - Germany

+49 (0)15 236 381 171
office@consulegis.com

CONTACT