

Learning to Love the Class Action

The latest U.S. export entices overseas jurisdictions with an appealing offer of ‘justice for all.’

by Laura K. Christa,
Christa & Jackson
Los Angeles

In at least one pivotal arena, Americans have long understood “justice for all” better than the rest of the world. Witness French President Jacques Chirac lamenting recently that consumers in France who suffer small monetary losses are left without recourse because high legal costs effectively bar their assertion of claims. So far, his demand that French legislators come up with a class action-like remedy for consumers and investors has stalled in the face of opposition from French professional groups.

To be sure, the recent indictment of Milberg Weiss Bershad & Schulman has many critics crowing that their claims of a corrupt U.S. class action system are proven and that the system doesn’t work, except to line the pockets of plaintiff’s lawyers.

Yet a number of other countries, exasperated at the high cost of litigating legitimate claims individually, have rather quietly been enacting procedural rules to permit some form of group adjudication. Most appear to have been motivated by a desire for simple fairness, but the effect may be the creation of a global chess game for lawyers on both sides of litigation in those and other jurisdictions. Chief considerations are forum-selection opportunities in countries without juries, punitive damages or pretrial discovery, benefiting defendants; and the opportunities for group adjudication in a growing number of jurisdictions, benefiting plaintiffs.

To be sure, none of the laws being developed in other countries comes close to offering plaintiffs the advantages provided by the U.S. class action system. As a result, U.S. courts remain the forum most favored by plaintiffs, even in cases that include foreign parties and foreign laws.

To begin with, an individual plaintiff in the U.S. system can initiate class actions on behalf of unnamed class members, can request a jury

trial and can sue for punitive damages. Unnamed class members typically will be bound by the class action unless they opt out. That ensures plaintiffs a maximum recovery (while also providing defendants with the widest possible protection from additional lawsuits.)

Another crucial advantage for plaintiffs is that they can compensate attorneys with a contingency fee, representing a portion of any recovery, so that there is no need to finance attorney fees at the outset. Another critical advantage is that the United States, unlike virtually anywhere else, does not require a losing litigant to pay the winner’s attorneys fees. Finally, in sharp contrast with most other jurisdictions, the U.S. pretrial discovery rules allow plaintiffs to depose dozens of witnesses and to force defendants and third parties to turn over mountains of documents. This evidence often seals the fate of a lawsuit that might have been weak when filed.

Spain adopted a class action law, the Spanish Civil Procedural Act, in January 2001. It permits consumer organizations to commence representative actions seeking damages or injunctions to protect the interests of consumers. The action may be brought even if all affected consumers are not easily identified. Antonio Bravo, an attorney with Gomez-Acebo & Pombo Abogados in Madrid, reports in a recent e-mail that consumer groups quickly put the law to use.

One example was a class action that sought reimbursement from banks that offered variable-interest mortgages with “rounding-up” clauses. Another suit won 3.1 million euros from Vodafone Espana for a two-day service interruption. The consumer groups cannot be held responsible for the fees of a successful defendant, and are subsidized by the Spanish government.

Sweden followed Spain a year later with its Act on Group Actions. The law permits non-profit environmental organizations to seek remedies for environmental damage and



groups of consumers and employees to seek compensation from businesses for economic harm. The most striking feature of the law is its authorization of “individual” representative actions. In some respects, it is more advantageous for plaintiffs than U.S. class action rules, because it does not require formal certification or a finding that common issues predominate. However, class members must opt in and, while prevailing plaintiffs’ lawyers can receive a success fee, the loser pays the winner’s attorney fees.

Alternative forums

Neither Spain nor Sweden is more ideal as a forum for plaintiffs than a U.S. jurisdiction, but the possibility of individual actions in Sweden and the presence of an active consumer bar in Spain give each a unique advantage

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Laura K. Christa is a partner in the Los Angeles business litigation firm of Christa & Jackson. She may be contacted at lchrista@christalaw.com.

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over most other European jurisdictions. Consequently, both countries are potential forums for actions on behalf of groups that may well involve nonresident – including U.S. – parties.

English common law has long provided for representative proceedings, but only for group members with nearly identical interests. In the past, this requirement was interpreted so restrictively that not even damages could be proven individually. Perhaps in reaction, group litigation orders (GLOs) were introduced in 1999 to permit group claims that “give rise to common or related issues of fact or law.”

The main distinction between U.S. class actions and GLOs, according to Jonathan Wood, the partner in charge of the commercial recoveries and dispute resolution practice in Clyde & Co.’s London office, is that claimants in a GLO have to opt in by a specified deadline. And a judgment on any issue subject to the GLO binds all claimants, leaving any non-GLO issues, such as damages, to be determined in individual cases. By contrast, under the laws of United States, a settlement would be binding on all members of the class, except for those who take positive steps to opt out of the litigation, minimizing the risk of additional lawsuits against the defendant in the future.

To date, more than 50 GLOs have been issued; they are listed on a court Web site, www.hmcourts-service.gov.uk/cms/150.htm.

Wood, whose firm has successfully represented defendants subject to GLOs, including China Airlines Ltd. in deep vein thrombosis litigation, said in an e-mail that the notion that a GLO amounts to a class action “is in large part used as a scare-monogering tactic by plaintiff lawyers.”

For instance, Wood’s firm recently defended the British rail company, Railtrack, against a claim by its shareholders challenging a decision to take the company through a proceeding similar to Chapter 11 bankruptcy. The case was often called a “class action.” There were 49,000 claimants and it was brought by a representative person, but it was neither a class action nor subject to a GLO, according to Wood. “At one point, the shareholders did apply to the Court for a GLO, but it was refused as it would not have been cost efficient for the Government to have had to collect [loser-pays attorneys fees] from individuals with costs ranging from a £40 liability to a £2M one,” he said. Still, lawyers using the GLO procedures generally commend them,

notwithstanding their relative novelty and limited predictability of judicial rulings.

New German law

In Germany, a new law took effect on November 1, 2005, that allows individual investors to sue companies that have allegedly concealed information or made false or misleading claims. Abbreviated as KapMuG, the law allows multiple individual securities actions involving common issues to be decided collectively. The law provides that if at least 10 similar cases have been filed, a plain-

Plaintiffs and defendants alike may find benefits

tiff or defendant in any one of them can petition a court to order model proceedings for issues of fact or law. If the order is approved, the other cases are stayed, and the higher court selects a lead case for determination of common questions.

Stefan Ruetzel, a litigation and arbitration partner with Gleiss Lutz in Frankfurt, who represents EM.TV in one of the first model proceedings, reports that plaintiffs’ lawyers immediately filed petitions in pending lawsuits against Deutsche Telekom A.G., EM.TV A.G. and DaimlerChrysler A.G., among others, after the new law entered into force. He observed in an e-mail that there even seemed to be even a “run” by specialized plaintiffs’ firms to file as many petitions as possible, in order to increase the chance that one of their own cases is selected as the lead case by the higher court.

As of now, no higher court has started model proceedings, and defendants are actively testing various unclear procedural aspects of the new law.

KapMuG has no opt-out provision, and the court’s findings in the lead case are binding on all other claimants. The individual actions resume once the common questions are decided. Although the law is new, Deutsche Telecom has already mentioned in its 2005 Annual Report that 2,000 shareholder lawsuits, accusing the company of inflating real estate valuations, will be subject to KapMuG proceedings.

In one of its more important provisions, the

new law declares that Germany is the exclusive venue for securities claims against German companies. Claims against directors of the company and its banks or advisers also may be brought in the German courts, even when they are domiciled abroad. The law is certain to weigh heavily on plaintiffs’ forum choices. For example, it might prompt foreign plaintiffs to consider proceeding against German companies in Germany. In other respects, Germany is not an attractive forum for plaintiffs, given its lack of juries, punitive damages and pretrial discovery. Moreover, German law doesn’t permit contingency fees and the loser pays the winner’s costs, though they are limited by statute.

Stakes for U.S. lawyers

A growing consensus clearly is emerging in support of the notion that group adjudication is the best way to resolve many types of claims. Both plaintiffs and defendants benefit from letting a single tribunal decide at least some common issues. In cases in which the defendant is highly likely to be found liable, a system like Spain’s, in which an action brought by a consumer organization resolves all claims, can be remarkably efficient for all concerned.

In the future, lawyers will certainly bring additional actions in newly available jurisdictions when it makes economic sense. But prudent plaintiffs’ lawyers will have to proceed cautiously in jurisdictions with loser-pays rules, and bans on contingency fees may mean that plaintiffs will not have the economic means to hire them. Perhaps of paramount importance is that U.S. plaintiffs’ lawyers will also have to take a harder look at the evidence they have in hand before proceeding in jurisdictions that bar pretrial discovery.

Defendants may also benefit in some ways from the global proliferation of laws allowing for group adjudication of common claims. For example, they may have new opportunities to favor cases in forums that bar juries, punitive damages, pretrial discovery and that have loser-pays rules.

Of course, the notion of achieving “justice for all” reflects a uniquely American optimism. Yet its growing legacy worldwide may also be uniquely American.

Laura K. Christa is a partner in the business litigation firm of Christa & Jackson, which frequently defends against class actions. She may be contacted at lchrista@christa-law.com.