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Opt-out class actions in the UK – off the blocks, on a mobility scooter

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A new opt-out class action regime was introduced into the UK on 1 October 2015 under the Consumer Rights Act 2015 (the "CRA"). Since then, practitioners have been waiting patiently; intrigued to see when the first claim would be brought. Six months on, the first claim has now been launched on behalf of a putative class of pensioners and other UK-based buyers of mobility scooters.

This first action has the potential to reveal the true impact of this new form of collective redress for purchasers within and outside the UK. It may also reveal the likely shape of such claims, their practical scope, and their limitations.

A new era

Under the regime introduced by the CRA, it is no longer necessary to bring a collective action on behalf of a group of claimants who have actively "opted-in" to the claim. Instead, in competition cases, a representative action may be brought before the Competition Appeal Tribunal ("CAT") on behalf of a class of claimants on an "opt-out" basis; that is, all members of the class domiciled in the UK are represented unless they actively choose to opt-out from this class. Claimants domiciled outside the UK may also choose to opt-in to the action.

The facts

In 2014, a manufacturer of mobility scooters for the disabled and elderly, Pride Mobility Products, was found guilty by the Office of Fair Trading ("OFT") of breaching competition rules. Pride Mobility had sought to achieve unlawful resale price maintenance, having privately prohibited online retailers from advertising scooters for sale below their recommended retail price. The National Pensioners Convention ("NPC"), a pensioners' welfare association, has launched a class competition claim valued at up to £7.7 million on behalf of potentially overcharged customers. They are now publicising the claim, looking for other class members to come forward.

Funding and risk management

The claim sheds light on how such class actions are likely to be funded. In the US, claims are typically brought on a percentage contingency fee basis (e.g., 30 percent of the class's damages recovery). However, the comparable fee model in the UK (Damages Based Agreements) is expressly disallowed in these types of action; in short, American-style contingency fees are prohibited in UK collective actions. Instead, the NPC's class action has been brought using a combination of a conditional fee agreement (providing for a fee uplift to the lawyers in the event of a successful outcome) and after-the-event insurance (to protect against the representative's potential adverse costs exposure).

Such complex fee structures are often assembled with the backing of third party litigation funders, who will provide funding for legal fees and after-the-event insurance, in return for a portion of any damages recovered. An important step in the proceedings will be for the CAT to review the proposed fee structure and decide whether the sums payable to the representative's lawyers and any third party funders are proportionate. Potential claimants and defendants alike, as well as funders, will be watching this case closely for indications of what the Tribunal will consider acceptable.

Since the class claim is based on the OFT's infringement decision, the CAT will accept that the defendant is liable for the infringement in question, with the issues in the case likely to turn on questions of causation and quantum. So, while the claimants' solicitors, insurers and any funders involved will have assumed a degree of commercial risk in bringing this claim, it is a calculated one.

The empathy that this particular claimant class is likely to induce, and the publicity the claim will attract, is also unlikely to have escaped those who are driving it and who have an interest in showcasing this new type of action.

Contrasts with the US regime

This first action is extremely modest by comparison to the class action claims brought in US antitrust cases. There, the pro-plaintiff costs rules (attorney's fees are recoverable by statute on top of the damages award), joint and several liability of each defendant for the entirety of the damages exposure, the lack of contribution, and the availability of trial by jury and treble damages (three times actual damages), all tip the risk/reward analysis heavily in favour of bringing such claims.

Nevertheless, although the NPC's scooter action is a modest first step, it is one that tests the boundaries of the UK regime and may blaze a trail for more ambitious, higher value claims in the future.

Next steps

The CRA is designed to encourage informal resolution of representative actions. So, despite the fanfare with which the claim was brought, it is possible that the action could prompt without prejudice discussions, with no further formal steps taken. Instead, a collective settlement (which itself would have to be mandated by the CAT) could be reached (in the United States, virtually all antitrust class actions are settled or dismissed at an early stage).

If not, the next phase of the proceedings will be for the representative to apply to the CAT for a Collective Proceedings Order, permitting it to bring the class action. Amongst other things, this would determine the scope of the class of claimants, an issue which could well be hotly contested.

Practitioners and consumer groups alike will be watching closely, as this new field opens out before them.

White & Case team Charles Balmain, Bryan Gant and James Killick discuss the potential for US-style class actions to come to the UK

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