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Developments and Trends in Collective Actions


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I Introduction

Collective actions are claims in which a large number of people with a common interest or grievance bring legal proceedings as a group. While the concept developed in the United States of America ("U.S."), an increasing number of other countries have enacted and expanded collective redress procedures.

Many factors are driving this expansion. There is an increasing global trend towards consumer protection, with a concomitant increase in awareness of consumer rights. Technological developments are also key, as is an increase in the availability of funding in many jurisdictions. More recently, the onset of the COVID-19 pandemic and resulting economic upheaval have also affected the growth and direction of collective actions. COVID-19 will continue to present an unparalleled opportunity for claimants to seek collective redress against defendants across multiple jurisdictions.

In this chapter, we summarise the main characteristics of the established class action system in the U.S., before considering the position in Europe, with particular reference to the developing collective action procedures in Germany and England. We also consider the key trends and developments as well as the future landscape for class actions globally, with the significant growth in available funding likely to have a profound effect.

II U.S.

Class Actions Generally

A class action in the U.S. is a method by which a group of plaintiffs seek redress for a legal wrong. While specific requirements vary by state, under the federal rules and most state rules a plaintiff must provide evidence showing (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation by the named plaintiff that will fairly and adequately protect the interests of the class. A plaintiff must further demonstrate that: (a) with individual class members bringing separate actions, a risk of inconsistent or varying adjudications would arise; (b) the defendant has acted or refused to act on grounds that apply generally to the class; and (c) questions of fact or law common to class members predominate over individual issues.

Trends

The COVID-19 pandemic has generated an influx of class action lawsuits in various categories.

a. Consumer Protection

Event Cancellation

COVID-19 has forced numerous businesses in the U.S. to cancel or postpone events and/or shut down facilities because of public health mandates, stay-at-home orders and travel restrictions. Plaintiffs and plaintiffs' lawyers have seized upon this to file an array of class action lawsuits seeking refunds and other relief for pandemic-related cancellations. Many of these putative class actions involve allegations based on state consumer protection statutes and common law claims including unjust enrichment, conversion, and breach of contract. In these actions, consumers often request complete monetary refunds, rather than vouchers or substitution of services. While at first sight such actions would appear to present obvious class action opportunities, often the facts are more complex and individualised, and the varying factual scenarios and damages can make these types of class actions difficult to maintain. The defences available in each ticket refund case are case-specific, and will depend in part on the relevant contracts and any intervening factors that preclude the plaintiff's recovery. Some companies have also defended these class action complaints with more traditional arguments, including that each plaintiff is uniquely situated and that generic class-wide relief would require individualised trials to ascertain damages.

Membership Fees

As gyms, country clubs, and other member-based social clubs have shut down their facilities due to the pandemic, members have initiated class action lawsuits alleging breach of contract, unjust enrichment, conversion, and violations of state consumer protection laws. The plaintiffs generally seek relief in the form of refunds and/or damages incurred for the value of any unfulfilled services. The defences available will turn on the facts and circumstances underlying each case, including the relevant contract at issue. In at least one case, a fitness centre successfully defeated a putative class action for refunds of membership fees by moving to compel arbitration under the terms of the membership agreement as to one plaintiff, and arguing that the other plaintiff received a refund and therefore lacked standing to pursue the action. *Barnett et al. v. Fitness International LLC*, No. 0:20-cv-60658 (S.D. Fla. Sept. 17, 2020).

Airlines

The airline industry has been impacted by cancellations due to the pandemic. Many travellers have taken issue with airline cancellation policies and have initiated class actions against airline companies seeking refunds for cancelled flights. These actions have had varying degrees of success. They typically include claims for

breach of contract based on the terms and conditions of the ticket, as well as other allegations such as violations of state consumer protection acts, unjust enrichment, conversion, and fraudulent misrepresentation. In addition to not receiving refunds, plaintiffs allege that they lost the benefit of their bargain or suffered out-of-pocket loss, and are entitled to recover compensatory damages.

Some airlines have sought to rely on the terms of their agreements to argue they are permitted to offer a credit towards future travel for non-refundable tickets when the airline cancels a flight. Other defences involve allegations that damages and pricing would vary from passenger to passenger, necessitating individual trials and precluding "one size fits all" class treatment. Courts face the difficult task of evaluating these issues, as these cases are generally in the early stages of litigation – or pending.

Higher Education Tuition Reimbursement

Plaintiff students have brought an array of putative class actions in connection with cancellations or virtual learning. These lawsuits typically bring claims for breach of contract, unjust enrichment, conversion and/or breach of state unfair business acts, and seek refunds for tuition, room and board and other fees. They generally allege that the educational institution has not delivered the services and amenities that students contracted and paid for (i.e. living accommodation, dining plans, access to various campus facilities and resources). Furthermore, a number of these class action lawsuits allege that online and remote learning is substandard, and thus students are now receiving a lesser quality of education that will be of lesser value in the marketplace.

In defending against these actions, institutions of higher learning are alleging that all students are uniquely situated and therefore the cases are not appropriate for class treatment. To date, most of these cases have not yet been decided on the merits. Nonetheless, in the cases where a motion to dismiss has been filed, the educational institutions typically allege failure to state a claim, pointing to a contract (or lack thereof), and the plaintiff's inability to cite a contractual provision that was breached. Moreover, in at least one case, a public university asserted a sovereign immunity defence in its motion to dismiss, though the case was ultimately voluntarily dismissed by the plaintiffs. *Egleston et al. v. University of Florida Board of Trustees, and Florida Board of Governors' Foundation*, No. 1:20-cv-00106, Dkt. 31 (N.D. Fla. Aug. 21, 2020).

b. Privacy and Cybersecurity

The mass shift to remote work, online education and video communications due to COVID-19 has led to an increased popularity and usage of videoconferencing applications. As a result of the surge in demand, a variety of these online platforms are growing rapidly and facing challenges related to data breaches as well as other privacy-related issues. For example, Zoom Video Communications, Inc., the popular application used for video and content sharing, currently faces a number of class action lawsuits alleging violations of the California Consumer Privacy Act ("CCPA"), breach of contract for privacy violations, and false and misleading statements about its security and privacy practices. These lawsuits emerged in late March 2020, soon after it was alleged that Zoom was sharing user data with unauthorised third parties and had allegedly failed to disclose this practice in its privacy policy. Generally these actions scrutinise Zoom's privacy policies for alleged violations of consumer privacy rights, state consumer protection laws and data privacy statutes, among other claims. All of these actions have been consolidated or transferred to one class action pending in the federal court in the Northern District of California. *In Re: Zoom Video Communications Inc. Privacy Litigation*, No. 5:20-cv-02155-LHK (N.D. Cal. Mar. 3. 2020), the plaintiffs seek injunctive relief and damages pursuant to federal law and California unfair competition, consumer protection and privacy laws. In early September 2020, Zoom filed a motion to dismiss, alleging several defences including that Section 230 of the Communications Decency Act bars the claims "to the extent they are predicated on unwanted meeting intrusions", and that the plaintiffs do not adequately allege that they have been personally harmed from the alleged data sharing to third parties. *Id.* Dkt. 120.

To the extent that class action lawsuits involving data privacy and cybersecurity were on the rise before the pandemic, it is likely these kinds of suits will continue to increase with the growth in remote working and virtual learning.

c. Securities

The economic volatility caused by COVID-19 has led to an uptick in securities class actions filed by investors. These lawsuits generally allege that a company made false or misleading statements, either by downplaying the effects of the pandemic on the company's business operations, or by overstating the company's ability to respond to the crisis and announcing positive forecasts, thus causing investors to purchase or acquire stock at artificially inflated prices. Additionally, the pandemic has exposed problems in certain areas of company operations, prompting shareholders to file class actions alleging that certain disclosures were false or misleading. For instance, Zoom investors have filed a class action against the company, alleging that the company misled investors about its encryption capabilities. *Drieu v. Zoom Video Communications, Inc. et al.,* No. 3:20-cv-02353-JD (N.D. Cal. Apr. 7, 2020).

d. Employment

Worker Adjustment and Retraining Notification ("WARN") Act Class Actions

Mass layoffs and furloughs due to COVID-19-related business shutdowns have brought the WARN Act and its state law equivalents into sharp focus. In particular, the WARN Act requires employers of a certain size to give advance notice before closing a plant or conducting a mass layoff. Employees have begun filing class actions against their employers, alleging that they were terminated without receiving appropriate notice. Since the WARN Act includes an "*unforeseen business circumstance*" exception to the notice requirement, courts are now contending with the applicability of this in the unprecedented context of pandemic-prompted layoffs.

Other Employment Actions

Other groups of employees have filed class action lawsuits for failure to pay minimum and overtime wages, failure to pay sick leave, discrimination, workplace safety, challenging benefits policies and disability accommodation. These actions claim violations of various federal and state labour laws. For instance, Lyft drivers have sued Lyft for failure to provide sick leave, in violation of D.C.'s 2008 Accrued Safe and Sick Leave Act. In response to the proposed class action, Lyft has filed a motion to compel individual arbitration, arguing that Lyft and its drivers agreed to arbitrate any disputes and waived any right to bring a class or collective action; such waivers are generally enforceable under U.S. law. The matter is currently pending in the D.C. court. *Osvatics v. Lyft, Inc.*, No. 1:20-cv-01426 (D.D.C. May 29, 2020).

In conclusion, COVID-19 has brought with it a flood of issues that have become the subject of numerous class action disputes across the U.S. These cases have varying merits as class actions, and reflect different motivations, including aggrieved consumers, frustrated students and laid-off employees. Whatever the genesis, the pandemic has certainly seen a spike in class action litigation. Other areas that have also seen an increase in putative class

actions are insurance claims for business interruption, negligence claims for failure to protect or prevent exposure to COVID-19, price gouging, and/or false advertisement for misleading or mislabelling sanitation and medical devices.

III Europe

In contrast to the U.S., the European Union ("EU") has had no consistent approach to class actions, although this is expected to change with the introduction of the Collective Redress Directive in June 2020.

Collective Redress Directive

On 30 June 2020, after many controversial debates over a period of two years and altogether 20 years of planning, the European Parliament and the European Commission ("EC") agreed on a text for an EU directive "*on representative actions for the protection of the collective interests of consumers*" ("the Directive"). The Directive forms part of the EC's "New Deal for Consumers", included in its 2018 Work Programme (COM (2017) 650).

The Directive allows "*qualified entities*" to bring claims on behalf of consumers. While some EU Member States (e.g. France and the Netherlands) already provide for this type of group claim, the Directive will significantly increase the options available for EU citizens, particularly in cross-border actions. It has the potential fundamentally to revolutionise the EU's collective redress landscape within the next few years.

The Directive applies to infringements by traders that harm "*the interests of a group of consumers*". In such a case, qualified entities have the right to apply for an injunction and/or for redress action on behalf of the consumers affected by the infringement. With the injunction action, the qualified entity can apply for a trader to cease an illegal activity; redress actions are intended to provide for compensation or termination of the contract.

The Directive is unlikely, however, to establish full harmonisation across the EU, as it affords Member States the discretion to implement their own class action measures. Some Member States are likely to turn the Directive's requirements into an opportunity and position themselves as leading hubs for collective redress by consumers, by providing more favourable rules for claimants. As a result, EU claimants may start forum shopping in order to find the jurisdiction most suitable for their needs.

The draft text of the Directive is still contingent on the EU Parliament and Council formally adopting it, but assuming it is adopted, Member States will have 24 months to transpose the Directive into national law, with a further six months to apply it.

While the Directive is a pan-EU measure, many European countries are also implementing domestic legislation enabling class actions to be brought before the courts. Below we shine a spotlight on two of the developing jurisdictions for collective actions: Germany and England.

Germany: Class Actions Generally

The key mechanism for something akin to class actions in Germany is the Model Declaratory Action (*Musterfeststellungsklage*) ("MDA"). This was introduced (perhaps somewhat hastily) into the German Code of Civil Procedure in 2018. The introduction of the Directive may, however, assist the German legislator in correcting any perceived deficits of the MDA, such as the *modus* for registering claims.

In similar fashion to the Directive, the MDA allows qualified consumer associations to pursue claims by consumers through a model proceeding, where at least 50 consumers join. The model proceeding ends with either a settlement or a declaratory decision; the declaratory decision being binding on the consumers who joined. As indicated by its name, the MDA does not provide for damages to be awarded to the individual consumer; in order to be awarded damages, each consumer needs to bring a stand-alone claim before the German courts.

One of the goals of the MDA was to prevent diesel emissions technology-based claims against Volkswagen from becoming time-barred; in fact the law was initially called "lex Volkswagen" and action against Volkswagen was brought on the same day the new law entered into force. The Federation of German Consumer Organisations filed a claim on behalf of around 470,000 registered diesel customers, with the action settling in April 2020.

It is important to note that the MDA is not the only means of collective redress in Germany. Other forms of multi-party and representative actions exist, albeit subject to relatively strict criteria.

Trends

Five MDA actions have already been filed during 2020. There has been an uptick in banking-related claims, including proceedings against three savings banks, all concerning the question of whether variable interest rate adjustment provisions can be agreed effectively by way of general terms and conditions.

Other legislative developments have also had an effect. Various amendments have been made to the Act against Restraints of Competition, allowing for the more effective recovery of damages resulting from anti-competitive practices such as cartels.

Finally, in common with other jurisdictions, Germany can expect to see a slew of claims due to the economic, supply-chain, and consumer challenges brought about by the unprecedented, global pandemic of COVID-19.

England: Class Actions Generally

While England does not have an established class action system in the same way as the U.S., it is nevertheless an emerging market for multi-party actions. With recognised collective redress mechanisms, a marked increase in the availability of third-party funding, and the English courts' international reputation for determining high-value, complex and international disputes, the current economic environment is proving to be fertile ground for group actions, both domestic and global.

Various procedural and legislative changes have increased the number of collective actions being commenced. England's main form of collective redress is the group litigation order ("GLO"), which (unlike its U.S. counterpart) operates on an "opt-in" basis, i.e. a party will not be included in the claim unless it positively takes steps to join the class. GLOs are suitable for many different types of claims, including data breaches, shareholder actions, and environmental damage claims.

In addition to GLOs, a representative of a number of claimants sharing the same interest may bring a representative action against a defendant on an "opt-out" basis (i.e. claimants in the group need not be named, as the representative claimant is the lead party). Representative claims can only be brought if the group has the "same interest", and so are not appropriate when there may be a broad class of claimants with individually different claims (even if linked) against a defendant. Data privacy proceedings are an example of where the representative claim mechanism might be used, as interests and claims over loss of data may be aligned.

England's class action procedure for competition cases was introduced by the Consumer Rights Act 2015, allowing mass claims to be brought before the Competition Appeal Tribunal ("CAT"). This mechanism operates on an "opt-out" basis with a representative claimant, without the need for affected individuals to be identified in the proceedings. A number of high-profile cases have been brought using this procedure, including the consumer action on transaction fees in *Merricks v Mastercard Incorporated* [2019] EWCA Civ 674, and (the ongoing) Forex litigation in *O'Higgins/Evans* (Case 1329/7/7/19 *Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others*; Case 1336/7/7/19 *Mr Phillip Evans v Barclays Bank PLC and Others*).

Trends

The rise in the number of class actions in England and Wales is due in part to the procedural changes establishing the mechanisms for collective action, but also to other developments such as the increase in availability of litigation funding. Class actions and funders tend to go hand in hand – the claims are expensive to run, reputationally important, and have the potential to yield significant returns. While some claimants may be able to bring claims without the involvement of a funder, for many the increased availability of funding marks a real shift in access to justice.

A recent development in this area is the collaboration between funders and other professional service providers. In July 2020, a litigation funder announced its collaboration with an accountancy firm and a law firm to offer combined services for COVID-19-related claims. With litigation funders growing in strength and scope, and with some funders now setting up specialised teams to work on class actions, this may well lead to a greater number of collective actions being commenced.

Other developments, such as the introduction of new data legislation (the General Data Protection Regulation and the Data Protection Act 2018), have also been drivers of the increase in class actions. With data breaches generally affecting more than one claimant, they naturally lend themselves to collective action. With data privacy likely to be an increasing concern moving forward, not least due to the numbers of remote workers due to COVID-19, further class actions in this area are expected.

The challenges brought about by the unprecedented COVID-19 pandemic are also expected to lead to a rise in collective actions. This expectation has already been met by pleas, including by two of the most distinguished judges and former heads of the Supreme Court, Lord Neuberger and Lord Phillips, for greater conciliation between parties in order to seek to avoid the inevitable deluge of pandemic-related litigation.

Signs of claims linked to the pandemic are already visible, with law firms and funders starting to gather claimant groups for COVID-19-related collective actions. The insurance sector in particular is likely to see an increase in group litigation, following the judgment in the Financial Conduct Authority's ("FCA") business interruption test case (*The Financial Conduct Authority v Arch Insurance (UK) Ltd and Ors* [2020] EWHC 2448 (Comm)). This was commenced by the FCA on behalf of policyholders in an effort to provide greater clarity as to whether certain common wordings of business interruption insurance policies were triggered by "non-damage" losses incurred as a result of COVID-19.

Securities class actions are also likely to increase, due in part to market volatility caused by the impact of the pandemic, as well as any fallout from companies making difficult decisions, including relating to shareholder dividends and difficulties over assessing future performance. Key securities actions brought in this jurisdiction to date include: the *RBS Rights Issue Litigation*, concerning claims brought by shareholders against RBS following its 2008 rights issue and the alleged inaccurate information having been provided as to its financial position; the *Lloyds/HBOS Litigation* (*Sharp v Blank* [2019] EWHC 3078 (Ch)), concerning claims for, *inter alia*, breaches of directors' duties; and *SL Claimants v Tesco plc* ([2019] EWHC 2858 (Ch)), where institutional investors claim compensation from Tesco for (allegedly) false and misleading income and profit statements. With the full impact of the pandemic on business performance yet to play out, securities actions are an area to watch for group litigation in the forthcoming months.

IV Conclusion – The Future?

Definitive global trends are emerging in the collective action arena. The unprecedented impact of COVID-19 will bring a fresh wave of collective actions globally, not only in the consumer space but also in commercial insurance, aviation, data privacy, and securities litigation. While already well-established in the U.S., changes in legislation to permit collective actions are facilitating a European increase in collective proceedings, with the expectation that the introduction of the Directive may place class actions even more on litigants' agendas. The exponential increase in funding opportunities has also had a significant impact on collective actions, and this upward trend, combined with the impact of any consequences of the pandemic, looks set to continue.

So what can we expect to see moving forward? The full consequences of the health crisis are still to play out, but its timing coincides with the coming together of other drivers of the increase in collective actions. With funders and litigators joining forces, the expectation is for a significant number of class actions in all industry sectors to be commenced by parties seeking redress for actions taken as a result of the pandemic.

When class actions are on a global scale, and with the introduction of the Directive, an element of forum shopping may come into play, with parties looking to bring claims in the most favourable jurisdiction for them. This new environment, with a trend towards jurisdictions making collective actions more accessible to parties, coupled with the expected impact of the pandemic, means class actions are set to be not so much a growing global trend, but an established tool in litigation around the world.

Note

Any views expressed in this publication are strictly those of the authors and should not be attributed in any way to White & Case LLP.

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