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DISPUTE RESOLUTION MAY 2008

A CLASS ACT CAN BE HARD TO FOLLOW: RECENT INITIATIVES ON "COLLECTIVE REDRESS"

Where the US leads, Europe often follows, but not yet, at least, with class actions. There has been a great deal of legal discussion in Europe on the subject of class actions and collective redress. Collective redress enshrines the process whereby large groups of claimants band together to seek redress as a large group.

In the US, there have been numerous class actions brought against global companies with attempts by the US Claimant Bar to bring the actions on behalf of shareholders based in Europe. Not many of these attempts have been successful, but what these attempts highlight is the difficulty for European claimants with legitimate claims to benefit from global settlements with defendant companies.

EU legislation is not blind to this issue. For example, under recent Dutch law class wide settlements can receive court approval (if found to be reasonable). However, the courts do not have the power to award damages and Dutch law does not allow aggrieved individuals to petition the court for a class-wide settlement. Instead, the power to petition the Court to approve a class-wide settlement can only be done through the creation of a special purpose legal entity - a foundation or association, set up to represent aggrieved claimants.

In contrast, Class actions in the US are typically made up of hundreds or even thousands of claimants, most of whom will be unidentified and unnamed, with a common interest in the claim eg having purchased the same product or shareholding, or suffered the same or similar injury. Such actions employ the 'opt out' principle, whereby individuals within the class will be deemed to be included in the litigation unless they take a positive step to remove themselves from the group.

Here we report on three current EU and UK-based collective redress initiatives.

UK Consultation on Representative Claims

In a representative claim, claimants would be represented by a "qualified" entity – for example a consumer or trade association.

The Government previously consulted on representative claims in 2001-2, finding little perceived need for their introduction largely leaving the evolution of representative claims to EU and sector-specific legislation, such as the UK's Enterprise Act of 2002 which facilitated the empowerment of large groups of consumers to bring representative claims arising from beaches of competition law. So far just one claim has been successfully concluded under this provision. The UK Consumer Association – the only body with "qualified" entity status – acted in a claim arising from price-fixing in the sale of football shirts. The claim settled earlier this year with successful claimants receiving £15-20 each.

2006 witnessed a fresh Consultation, focusing on consumer protection cases (http://www.berr.gov.uk/files/file31886.pdf).

In March this year the Government concluded that it remained unconvinced that sufficient evidence existed to justify their introduction. On the basis that every defendant has a right to know its accuser, many respondents to the consultation said there should always be a clear linkage between the alleged wrongdoing and an identifiable consumer. (for responses see http://www.berr.gov.uk/files/file45051.pdf)

The EU Commission White Paper

Over the past year, the EU Commission has been gearing up to promote revised collective redress procedures, particularly in the area of competition claims. These proposals were published at the beginning of April this year. Designed to enhance and promote the existence of an EU-wide level playing field for consumers and businesses, the proposals encourage the 'aggregation' of individual claims to ensure that disparate claimants are not deterred from bringing low value claims.

The Commission paper considers there is a clear need for a collective redress mechanism *'allowing aggregation of the individual claims of victims of antitrust* (competition) *infringements.'* The

Commission favours the representative claims mechanism, albeit adopting the 'opt-in' rather than the 'opt out' principle. The decision to require that participants must expressly decide to participate in the action is based upon the concern that litigants must not be deprived of the right to bring their own individual action for damages if they so wish.

Interestingly, under the proposals, claimants may also be entitled to recover compensation for loss of profits. There is even mention of a possible derogation from the familiar "loser pays" costs principle so that losing claimants may not be required to pay the costs of a successful defendant in certain circumstances.

The Civil Justice Council Paper

In England and Wales, under the Civil Procedure Rules, we currently have Group Litigation Orders ('GLOs'). The legal basis of each claim has to be clearly defined and should have intrinsic merit. Claimants must choose to 'opt in', usually within prescribed time limits.

GLOs recently came under fire in a paper published by the Civil Justice Council in February (Reform of Collective Redress in England and Wales: http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf), which criticised GLOs as unwieldy and balanced against the interests of would-be claimants.

The paper described how the absence of 'opt out' procedures in GLOs meant that claimants were disadvantaged from the outset and that collective redress mechanisms in England in Wales were inferior compared to those of other EU and Commonwealth jurisdictions.

The specific nuts and bolts of this supposedly fairer all-embracing mechanism remained vague, with the paper merely stating that it would be *'a generic, statutory 'build the field and they will come'*-type regime' covering all potential types of collective actions.

What Next?

With the current EU Commissioner for Consumer Affairs championing a wide-ranging review of the availability of adequate consumer redress procedures across member states, some degree of change in the UK appears likely. However, there is a reticence over adopting a US-style 'opt-out' provisions which effectively intimidate defendants into surrender by sheer weight of claimant numbers, leaving the true merits of such claims untested.

The issue of funding collective redress remains problematic. It is very likely that defendants if they succeed in defending the action have little prospect of recovering a penny of their defence costs. Again, this may lead to settlement through intimidation.

For all the good intentions that undoubtedly motivate these and other initiatives, the real challenge will be to design mechanisms that achieve greater access to justice and redress for wronged claimants, but which at the same time are also practical, cost-effective and, most importantly, equally fair to those on both sides of the dispute.

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