CLASS ACTIONS WORLDVIEW

A Study of Trends Around the Globe

FIRST IN A SERIES • AUGUST 2023

Part I: Class Actions in the United States and the European Union

Although class actions have been common in the United States for decades, they have not been as widely used in the rest of the world. The situation and risks remain in flux, however, as more countries have renewed momentum to enact class actions or class action-like procedures—sometimes without key procedural safeguards that exist in U.S. class proceedings. Jones Day has one of the largest and most successful groups of defense-side class action practitioners in the world. Building on the experience of litigators in 40 offices on five continents, this Guide examines new developments and risks in class action procedures around the globe (in particular, in Argentina, Australia, Belgium, Brazil, China, England and Wales, France, Germany, Italy, Japan, Mexico, Spain, and The Netherlands), and assesses the common trends and differences among respective national laws. It is our goal that, armed with these insights on class action trends, companies operating across the world can understand, assess, and manage class and collective litigation risks in the global marketplace.

This is the first installment of an in-depth, multipart series on class actions that will spotlight a wide array of jurisdictions worldwide. Upcoming in the series:

Part II: Spain, Italy, and England and Wales
Part III: Australia, Germany, and France
Part IV: China, Japan, Belgium, and The Netherlands

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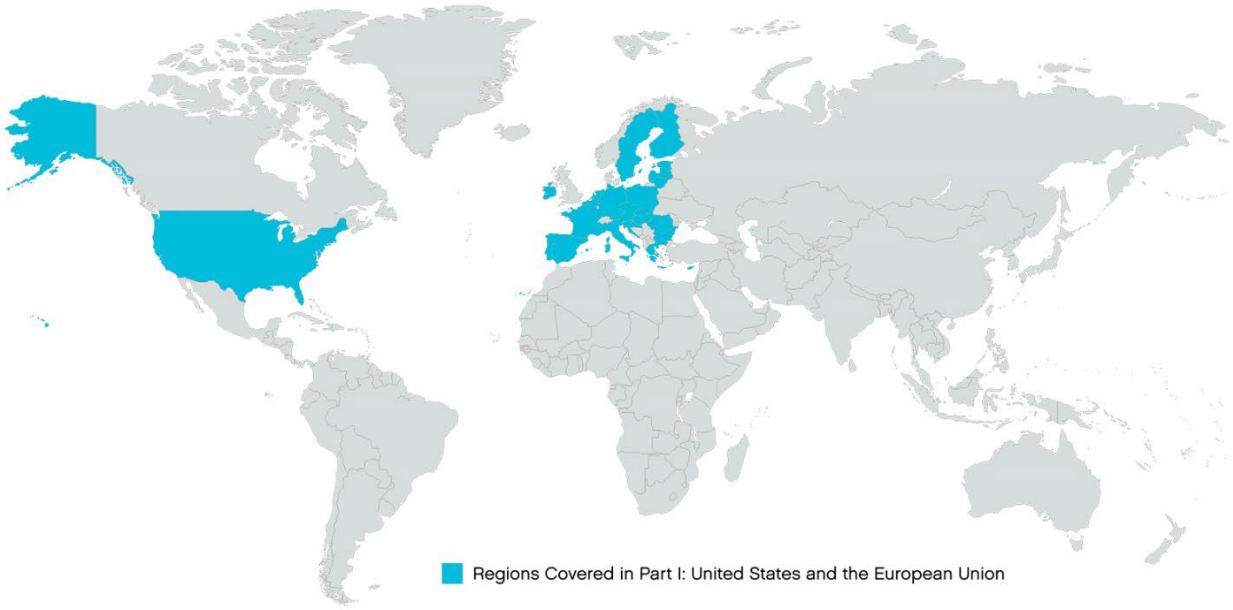

JONES DAY

DIFFERENCES IN NATIONAL LAWS

Class action procedures vary greatly among jurisdictions. These differences include how developed the procedures are; the types of claims parties can bring; the parties that can represent classes; whether classes are structured as opt-in or opt-out; and the rules governing settlement, remedies, and financing. Many countries have enacted more restrictive class procedures than the United States. There are notable exceptions, however, that present risks to defendants sued abroad. This is particularly true with respect to the requirements and procedures for class certification.

Maturity

Class action laws in the United States are highly developed. The current rule governing federal class actions is more than 50 years old, and the thousands of putative cases brought each year have created an ample body of case law discussing the nuances and protections in class action procedure.

Most class action systems are not as formal or longstanding. Some countries, like Argentina, do not have specific class action procedures on the books, but rather allow plaintiffs to assert collective interests before the court under general laws.

Other countries' class action systems are only in their infancy and will be shaped as cases arise. Japan, for example, enacted its class action statute in 2013, and the statute entered into force only in October 2016. Many European countries, including France and Belgium, have also introduced their versions of class action procedures in the last few years, with ongoing proposals for reform and development.

A few jurisdictions—like Australia and China—have had active class action regimes for some time, but these jurisdictions' procedures are not as longstanding as those in the United States, presenting not insignificant risks to those sued there.

Types of claims

Class actions in the United States are not limited to a particular area of law, but can be brought in a variety of matters ranging from securities to civil rights. In other countries, however, class actions are often limited to particular areas of law. Most commonly, class actions are limited to consumers' rights claims, including competition law, contractual liability, financial services, health protection, and product liability. Some jurisdictions also allow class actions in environmental cases. And some jurisdictions, like Brazil and Argentina, allow class actions in other defined areas, such as the protection of the rights of children, minorities, and religious groups.

Beyond legal restrictions on the types of claims that may be brought, some countries may in practice become a preferred forum for global resolution of certain types of class actions or collective claims. The Netherlands, for example, has been the site of several recent cross-border securities law class action settlements between non-Dutch companies and mostly non-Dutch investors.

Class representatives and the right to sue

Another restriction on class actions in many jurisdictions is that, unlike in the United States, private individuals may not file a class action on their own. Rather, the right to bring suit is limited to designated entities, which sue on behalf of the aggrieved individuals.

Each country that limits class actions to designated entities has procedures to give those entities legitimacy. These procedures vary from one country to another. For example, in France and Belgium, plaintiffs must bring their actions through certified associations for the defense of consumers recognized as being representative at a national level. Other countries allow non-governmental organizations (NGOs), public prosecutors, and governmental authorities to be plaintiffs. In Brazil, for example, most class actions are filed by public prosecutors.

Opt-in vs. Opt-out

Jurisdictions also differ on whether and how class or collective proceedings can bind putative class members, with only a handful of jurisdictions adopting true opt-out procedures (as in the United States). Portugal, for example, has an opt-out system, while Italy launched an opt-in system in 2020. Some countries have a mix of opt-in and opt-out procedures. In October 2015, England and Wales began using opt-out class actions for antitrust cases, but still use opt-in procedures for other types of cases. And, the Netherlands permits parties to ask the court to declare a settlement binding on others.

Settlements

In contrast to developed settlement approval and fairness standards for class actions in the United States, national laws elsewhere do not always provide specific rules for settlement. Yet many jurisdictions like the Netherlands and Mexico encourage class action settlement by generally allowing parties to reach full or partial agreement at any stage of the proceedings.

Before the High Court of England, for example, cases can be settled out of court without court authorization as long as all parties agree, and the court need only be informed. If all parties do not agree (e.g., claimant has not reached agreement with other class members on terms), then court authorization may well be necessary.

Remedies

There are also substantial differences among jurisdictions in their available remedies. The United States offers a full range of remedies, including compensatory damages, injunctive relief, and punitive damages in class cases, but remedies in other jurisdictions are often more limited. Most countries outside the United States do not allow punitive damages.

Compensatory damages are the most common remedy, but even for those damages, some jurisdictions are more restrictive than the United States. France, for example, limits compensatory damages in a class action to pecuniary damages—non-pecuniary damages must be recovered individually.

Injunctions are also a common remedy. In Spain, for instance, the court can order the cessation of the illegal conduct and, in certain cases, the publication of the judgment in public media.

Financing

Another important difference among jurisdictions in class actions is in how they treat litigation financing. Two issues in particular are notable: contingency fees and third-party financing.

Most jurisdictions, including the United States, Brazil, England and Wales, Japan, Mexico, and Spain, permit contingency fee agreements under at least some circumstances. Each of these jurisdictions, however, puts different requirements on those agreements. Other jurisdictions, like Belgium, prohibit contingency fee agreements altogether.

Most jurisdictions also allow third-party funding under at least some circumstances, though the specific rules vary among jurisdictions. In many of those jurisdictions, however, parties rarely use third-party funding even though it is formally allowed. One exception is Australia. In that jurisdiction, third-party funding for class actions is quite common—nearly half of class actions receive third-party funding.

Third-party financing may, however, increase as class actions become more widely available and is an issue to be watched as new class devices are instituted across the globe. At least one jurisdiction, Argentina, has financial aid for plaintiffs seeking to file a class action.

Certification requirements

Although non-U.S. jurisdictions tend to have greater formal restrictions on the scope of class actions, many of them also pose their own risks because they lack the well-developed class certification requirements and procedures that exist in the United States.

Class actions seeking damages in the United States require, at a minimum, numerosity, commonality, typicality, adequacy, predominance, and superiority. Additionally, the plaintiff bears the burden to prove all of these requirements at the class certification stage. Decades of case law have clarified these requirements, with the result that defendants faced with non-meritorious class actions often have arguments that can prevent certification.

Other countries may not have these safeguards. Most non-U.S. countries do not have as many substantive requirements for class certification. In particular, many countries do not require predominance, which is often the highest barrier to class certification for damages actions in the United States. Italy, for example, requires only adequacy and that the right infringed be homogeneous. In addition, many jurisdictions do not have a U.S.-style class certification procedure where the plaintiff must prove the requirements for a class action. For example, Brazil does not require class certification; it is largely sufficient that a plaintiff otherwise specified in law as able to initiate a class action has standing. And Mexico allows defendants only five days to oppose class certification.

Australia in particular is a significant class action risk, because it lacks both the formal restrictions on the scope of class actions seen in most non-U.S. countries and the class certification requirements of the United States. Australian class actions are not limited to particular plaintiffs or areas of law. Yet Australian class actions also do not require predominance. They may proceed if there are any issues common to the class. Additionally, Australian plaintiffs face no initial certification burden. The onus instead falls on the defendant to show why the class action is not appropriate.

Towards Broadening the Scope of National Class Actions

Over the last few years, there has been widespread announcement that class actions would take off globally. History has not yet seen this wave of suits. Countries around the world implemented class action legislation, but procedural hurdles have continued to prevent widespread use. Class actions remain most popular in the United States, Australia, and England and Wales. There is still opportunity for global class action growth with countries' renewed momentum to reform their policies.

Jurisdictions enthusiastically implemented class action legislation throughout 2014-16. In May 2015, for example, the Italian Parliamentary Commission of Justice approved a bill to reform the current class action procedure and broaden its scope. In August 2015, Argentina undertook a revision of its Civil and Commercial Code to reinforce class actions. In January 2016, the French Parliament extended the scope of class actions to patients and other users of health care services and products, and then later, the French Parliament adopted a bill to further extend the scope of class actions to victims of discrimination.

However, procedural hurdles at the settlement and financing stages have made collective suits time-consuming and costly. For instance, in China, class actions are administratively burdensome because settlements require unanimous consent from each class member. And countries like Belgium and China do not permit contingency fee arrangements, making it prohibitively expensive for plaintiffs to bring a claim. Additionally, a lack of financial incentives stymied initial class action growth in France.

More, recently, countries have reformed their class action policies in the hopes of making class actions more popular and accessible. Italy implemented a new regime in November 2020 in order to encourage individuals to bring suits and lately, in June 2023, to provide consumers with broader redress rights across a wide range of sectors. This is in contrast to Italy's older class action regime, which was known for being expensive and ineffectual. In January 2020, the Netherlands passed a new class action act which broadened the scope of damages and enabled representative entities to bring claims on behalf of international parties. These recent changes represent a renewed, global momentum for class action reform. The latest development at the European Union level is noteworthy as well. At the end of 2020, the European Parliament and the Council of the European Union adopted the Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (the "Directive"). This important Europe-wide harmonization will shape the future of national and cross-border consumer litigation.

Class actions remain likely to have a broader impact on companies doing business in the future. Particularly in the context of consumer products in a global supply chain, the risk of simultaneously facing class or collective proceedings in Europe, Asia, and Latin America is on the rise. A truly global and coordinated approach to the facts, law, and issues across venues worldwide will be necessary to reduce exposure risks. Jones Day's class actions practice will continue to monitor this expansion, along with the risks and opportunities it brings to our clients.

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The United States

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The United States

A. Brief Overview and History

Although the United States has had class actions since the nineteenth century, federal class actions in their modern form began in 1966 with the adoption of Federal Rule of Civil Procedure 23 ("Rule 23"). Rule 23 sets forth the key procedures for class actions—including the requirements for filing a class action; issuing a class certification order; conducting, settling, and appealing the action; and appointing and compensating counsel.

In addition to federal class actions governed by Rule 23, individual states also have their own class action procedures. In 2005, however, the United States adopted the Class Action Fairness Act ("CAFA"), which expands federal jurisdiction over class actions. Under CAFA, federal courts generally have jurisdiction over any class action where the amount in controversy exceeds $5 million and any member of the plaintiff class is a citizen of a different state than any defendant.

Thus, a class action plaintiff usually has the option of suing in federal court, and a class action defendant who is sued in state court often has the ability to remove the case to federal court.

Class actions in the United States are common—it is estimated that more than 10,000 class action lawsuits are filed in the United States annually.

B. Types of Claims and Scope of Lawsuits That Can Be Filed

Class actions may be filed on any area of law within the court's jurisdiction, so long as the requirements of Rule 23 are met. Unlike in many other countries, class actions are not restricted to any particular type or types of cases.

Although class actions may be brought in any area of law, they are most common in those areas where large numbers of potential plaintiffs have individually small claims. This includes antitrust, consumer, environmental, product liability, and securities cases.

Additionally, certain areas of law have administrative procedures that resemble class actions. For example, the Fair Labor Standards Act provides for a "collective action" mechanism to resolve certain disputes under that act. These field-specific actions have different requirements from the general class action provided for in Rule 23.

C. Class Representatives and Standing to Sue

Any plaintiff, whether an individual or organization, can represent a class if that plaintiff has standing under the substantive law and meets the requirements of Rule 23. Unlike in some other countries, standing for class litigation is not limited to designated organizations or public representatives.

Class actions are typically brought by representatives seeking to represent a class of plaintiffs, but in rare cases, may also be brought against a class of defendants. For example, in *Bell v. Brockett*, 922 F.3d 502 (4th Cir. 2019), the United States Court of Appeals for the Fourth Circuit affirmed the certification of a defendant class of "all persons or entities

who were Net Winners" in an alleged Ponzi scheme. The *Bell* court upheld the lower court's certification while noting that "[d]efendant class actions are so rare they have been compared to unicorns." *Id.* at 504. Notably, the court did so despite what it deemed to be the "inherent risks of such proceedings." *Id.* at 504 n.1. Such defendant class actions are not used in any other jurisdiction but China.

In 2016, two United States Supreme Court cases clarified the requirements for plaintiffs' standing to sue as applied to class actions. *First*, in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Supreme Court clarified that each representative plaintiff must have individually suffered a "concrete *and* particularized" injury to bring a class action. The Supreme Court further held that the existence of a statutory right alone does not confer standing if the plaintiff has no concrete injury. *Second*, in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016), the Supreme Court held that a defendant facing a putative class action cannot moot the case by offering to satisfy the representative plaintiffs' individual claims before the class is certified.

Two more recent decisions by the Supreme Court shed further light on the import of standing to bring class actions post-*Spokeo*. *First*, in 2019, the Supreme Court emphasized the importance of procedural standing in *Frank v. Gaos*, 139 S. Ct. 1041 (2019), remanding the case to the Ninth Circuit on the grounds that there remained substantial questions about whether any of the named plaintiffs had standing to sue for alleged data privacy violations. The Supreme Court also relied on *Spokeo* to deny standing to a class of participants in a defined-benefit retirement plan alleging ERISA violations in *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020). The *Thole* Court held that litigants themselves must have suffered an injury in fact in order to claim the interests of others.

The most recent U.S. Supreme Court decision addressing the "injury-in-fact" requirement of Article III standing in the class context is *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). In that case, the Supreme Court found that a concrete injury for Article III standing requires more than a risk of harm that never materializes. Accordingly, the Court concluded that the majority of putative members of the class—those who could not prove that allegedly inaccurate credit reports were disseminated to any third party—did not have not have standing.

D. Key Procedural Requirements

Rule 23 sets out the requirements for certifying a class. To be certified, a class must meet all four requirements of Rule 23(a), as well as one of the three requirements of Rule 23(b).

Rule 23(a) requires a class to meet all four of the following requirements:

(1) Numerosity—"the class is so numerous that joinder of all members is impracticable";

(2) Commonality—"there are questions of law or fact common to the class";

(3) Typicality—"the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and

(4) Adequacy—"the representative parties will fairly and adequately protect the interests of the class."

Rule 23(b) requires that a class proponent also establish one of the following:

(1) Separate actions would create risk of (A) incompatible standards of conduct with which the defendant must comply, or (B) judgments in individual lawsuits would adversely affect rights of other members of the class; or

(2) Injunctive or declaratory relief is appropriate for class as a whole; or

(3) Common questions of law or fact predominate, and a class is superior to other methods of resolving the issues.

It is important to determine which of the three Rule 23(b) prongs applies, because some procedural rules differ accordingly. Rules 23(b)(1) and 23(b)(2) generally apply only to cases seeking injunctions or cases seeking damages out of a limited fund. On the other hand, Rule 23(b)(3) does not have those limitations and allows recovery of damages. For these reasons, the majority of U.S. class actions are certified under Rule 23(b)(3).

In addition to these requirements, most courts of appeals have recognized an implicit threshold requirement in Rule 23 that members of a proposed class be "ascertainable." *Sandusky Wellness Ctr., L.L.C. v. Medtox Sci., Inc.*, 821 F.3d 992, 995 (8th Cir. 2016) (collecting cases). The courts of appeals are divided on the meaning of ascertainability. *Id.*

To be ascertainable for certification purposes, a class must be clearly defined by objective criteria. *See,* e.g., *Mullins v. Direct Digit., L.L.C.*, 795 F.3d 654, 657 (7th Cir. 2015). The Third Circuit, however, set out a more stringent standard for ascertainability in a trilogy of cases in 2013 by requiring that the method for ascertaining class members be both "reliable" and "administratively feasible." *Marcus v. BMW*, 687 F.3d 583 (3d Cir. 2013); *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349 (3d Cir. 2013); *Carrera v. Bayer Corp.*, 727 F.3d 300 (3d Cir. 2013). Under this standard, class members cannot be ascertained by "a method that would amount to no more than ascertaining by potential class members' say so" as this presents due process risks to defendants. *Id.* Since the *Marcus* trilogy, ascertainability is a hotly contested issue in class action litigation. Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 Conn. L. Rev. 695, 695 (2018).

The heightened ascertainability standard set out by the Third Circuit has been endorsed, to varying degrees, by the courts of appeals for the First and Fourth Circuits. *See In re Nexium Antitrust Litig.*, 777 F.3d 9, 19 (1st Cir. 2015); *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). Moreover, the Sixth Circuit Court of Appeals, which had previously rejected the Third Circuit's ascertainability standard, has suggested that it may, in fact, favor the heightened standard. *Compare Sandusky Wellness Ctr., L.L.C. v. ASD Specialty Healthcare, Inc.,* 863 F.3d 460, 472-73 (6th Cir. 2017) with *Rikos v. Procter & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015); *see* Wasserman, *supra*, at 698 n.10. In a recent opinion, the Sixth Circuit characterized the ascertainability standard as one requiring a "sufficiently definite" class definition, such that it is "administratively feasible" for the court to determine whether a particular individual is a member. *Hicks v. State Farm Fire & Cas. Co*., 965 F.3d 452, 464 (6th Cir. 2020).

However, the courts of appeals for the Fifth, Seventh, Eighth, and Ninth Circuits have either expressly or implicitly rejected the *Marcus* trilogy's administrative-feasibility requirement in favor of the "objective criteria" standard. *See Seeligson v. Devon Energy Prod. Co., L.P.*, 761 F. App'x 329, 334 (5th Cir. 2019); *Mullins*, 795 F.3d at 654; *Sandusky Wellness Ctr., L.L.C. v. Medtox Sci., Inc.*, 821 F.3d 992, 996 (8th Cir. 2016); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017). Additionally, the Second Circuit Court of Appeals, which had previously endorsed the Third Circuit's standard, arguably reversed its position in favor of the traditional approach in *In re Petrobas Sec.*, 862 F.3d 250 (2d Cir. 2017). Compare *In re Petrobas Sec.*, 862 F.3d at 266 *with Brecher v. Rep. of Arg.*, 806 F.3d 22 (2d Cir. 2015). More recently, the Eleventh Circuit formally adopted the traditional ascertainability standard, reversing a position only previously articulated in unpublished opinions. Compare *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1303 (11th Cir. 2021) with *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945 (11th Cir. 2015).

The Tenth Circuit has not addressed the administrative-feasibility requirement. However, in a decision from the District Court of Kansas, the Court "predicts that the Tenth Circuit" would apply "the less restrictive ascertainability test on certification." *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig.*, No. 17-MD-2785-DDC-TJJ, 2020 WL 1180550, at *11 (D. Kan. Mar. 10, 2020).

The United States Supreme Court has denied certiorari in three cases involving the issue of ascertainability since 2015—each of which involved a circuit court's rejection of the heightened standard of ascertainability. *Briseno*, 844 F.3d at 1127, *cert. denied*, 136 S. Ct. 313 (2017); *Rikos*, 799 F.3d at 525, *cert. denied*, 136 S. Ct. 1493 (2016); *Mullins*, 795 F.3d at 654, *cert. denied*, 136 S. Ct. 1161 (2016). Some observers have suggested that this pattern may suggest that the Court is waiting to grant certiorari in a case applying the heightened standard so that it can evaluate the actual impact of that standard on class certification. Andrew J. Ennis & Catherine A. Zollicker, *The Heightened Standard of Ascertainability in Class Actions*, Am. Bar Ass'n (Mar. 13, 2018).

Heightened Ascertainability Standard	**Traditional Ascertainability Standard**
First Circuit (*In re Nexium Antitrust Litig.*, 777 F.3d 9 (1st Cir. 2015))	Second Circuit (*In re Petrobas Sec.*, 862 F.3d 250 (2d Cir. 2017))
Third Circuit (*Marcus v. BMW*, 687 F.3d 583 (3d Cir. 2012))	Fifth Circuit (*Seeligson v. Devon Energy Prod. Co., L.P.*, 761 F. App'x 329 (5th Cir. 2019))
Fourth Circuit (*EQT Prod. V. Adair*, 764 F.3d 347 (4th Cir. 2014))	Sixth Circuit (*Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460 (6th Cir. 2017))
	Seventh Circuit (*Mullins v. Direct Digital, L.L.C.*, 795 F.3d 654 (7th Cir. 2015))
	Eighth Circuit (*Sandusky Wellness Center, L.L.C. v. Medtox Sci., Inc.*, 821 F.3d 992 (8th Cir. 2016))
	Ninth Circuit (*Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121 (9th Cir. 2017))
	Eleventh Circuit (*Cherry v. Dometic Corp.*, 986 F.3d 1296 (11th Cir. 2022))

Another significant issue in class certification in the United States is the predominance requirement. The predominance requirement, found in Rule 23(b)(3), asks whether the common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues. *Ferreras v. American Airlines, Inc.*, 946 F.3d 178, 185 (3d Cir. 2019). Without predominance, individual inquiries threaten to undermine the common proof and class action process, making a class action an unmanageable device to resolve the issues before the court.

Courts can also certify U.S. class actions in part, if some elements of the proposed class meet the requirements but others do not. Under Rule 23(c)(4), the court may certify "a class action with respect to particular issues." Likewise, under Rule 23(c)(5), "a class may be divided into subclasses that are each treated as a class under this rule." However, there is a circuit split on when it is appropriate for a court to do so. The courts of appeals for the Second and Ninth Circuits permit issue certification where it will materially advance the litigation. Petition for a Writ of Certiorari at 9, *Behr Dayton Thermal Prods. L.L.C. v. Martin*, 139 S. Ct. 1319 (2019) (No. 18-472). The courts of appeals for the Third, Sixth,

and Seventh Circuits focus on the fairness and efficiency of issue classes without requiring that any efficiency gains from an issue class materially advance the litigation. *Id.* The court of appeals for the Fifth Circuit requires that predominance be satisfied for an entire cause of action before considering whether to certify an issue class. *Id.*

In 2019, the Supreme Court denied certiorari in *Behr Dayton Thermal Prods. L.L.C. v. Martin*, leaving intact the circuit split regarding the proper standard for issue-class certification under Rule 23. *Supreme Court Declines to Review "Broad" Issue-Class Ruling in Toxic Tort Case*, Jones Day *Commentary* (Apr. 2019).

Once the court decides that a class action is appropriate, it "must define the class and the class claims, issues, or defenses, and must appoint class counsel." Fed. R. Civ. P. 23(c)(1)(B).

E. Binding Others

Class actions in the United States may bind nonparty class members on either a mandatory or opt-out basis, depending on which prong of Rule 23(b) the court uses to certify the class. These rules stand in contrast to many other jurisdictions that utilize opt-in type procedures, binding only those parties who choose to opt into the proceeding.

Classes certified under Rules 23(b)(1) or 23(b)(2) are often referred to as "mandatory actions" because class members are bound by the result and cannot opt out. In those cases, the court "may direct appropriate notice to the class," but the rule itself does not require any notice to potential class members. Fed. R. Civ. P. 23(c)(2)(A). Nevertheless, some courts have held that notice is required in some Rule 23(b)(1) cases. *See,* e.g.*, In re Orthopedic Bone Screw Prods. Liab. Litig.,* 246 F.3d 315 (3d Cir. 2001). By contrast, class members have the right to opt out of classes certified under Rule 23(b)(3). For a Rule 23(b)(3) class, "the court must direct class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2)(B).

Class members who choose not to opt out of a Rule 23(b)(3) class will be bound by the result. When a Rule 23(b)(3) class is settled, however, the court may also give class members a second chance to opt out after being notified of the settlement terms. *See* Fed. R. Civ. P. 23(e)(4).

F. Remedies Available

The remedies available in class litigation are generally the same as the remedies allowed by the substantive law. Depending on the substantive law, these remedies may include compensatory and punitive damages, as well as injunctive or declaratory relief. A court, however, will evaluate whether damages can be proven on a class-wide basis before certifying a class. *See,* e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619 (D.C. Cir. 2019).

For class actions certified under Rule 23(b)(2), plaintiffs can recover damages only insofar as those damages are "incidental" to the injunctive or declaratory relief requested.

G. Settlements and Financing

Settlement

Class actions may be settled, but only with the court's approval. Federal Rule of Civil Procedure 23(e) sets out the procedures for approving a class settlement.

In 2018, certain subsections of Rule 23 were amended to address issues primarily related to settlement and notice. The amendment to Rule 23(c)(2) clarifies that notice may be made by any "appropriate" means—including electronically. *See* Fed. R. Civ. P. 23(c)(2)(B). The commentary to the amended rule suggests that courts consider the circumstances when determining if the form of notice is appropriate and evaluate the content and format of the notice, depending on the audience. Liv Kiser & Joe Regalia, *Rule 23's New Amendments: A New Era for Class Actions?*, Am. Bar Ass'n (Feb. 15, 2019). The 2018 amendments also expanded Rule 23(c)(2)(B) to encompass proposed settlement classes. *See* Fed. R. Civ. P. 23(c)(2)(B). Notably, under the amended Rule 23(e), notice to class members of a proposed settlement class is no longer mandatory but, rather, discretionary. *See id.* Under the amended rule, the court is required to give notice to a proposed settlement class only if it concludes that approval under Rule 23(e)(2) and certification is likely. *See* Fed. R. Civ. P. 23(e)(1)(B). According to the commentary, notice in this context is an important event and should be given only if there is a solid record supporting the conclusion that the proposed settlement will likely earn final approval. Kiser & Regalia, *supra*.

The court can approve a class settlement only if requirements for certification are met and the settlement is "fair, reasonable, and adequate," as determined by the court after a hearing. If the proposal would bind class members, the court may approve it only after a hearing and only after finding that it is "fair, reasonable, and adequate" after considering whether the class representatives and class counsel have adequately represented the class, the proposal was negotiated at arm's length, the relief provided for the class is adequate, and the proposal treats class members equitably relative to each other. Fed. R. Civ. P. 23(e)(2). In considering whether the relief provided is adequate, the court must take into account the costs, risks, and delay of trial and appeal; the effectiveness of any proposed method of distributing relief to the class; the terms of any proposed award of attorney's fees; and any agreement required to be identified under Rule 23(e)(2).

There is significant debate within the legal community regarding the propriety of *cy pres* settlements—wherein a defendant agrees to pay some or all of the settlement funds to a third-party organization. Courts have approved *cy pres* settlements pursuant to Rule 23(e) in at least two circumstance. Kevin M. Lewis, Cong. Resch. Serv., LSB10131, Update: *Is Cy Pres A-OK?* (2019). *First*, where some class members never claim their share of the settlement proceeds, with the result that a portion of the settlement fund remains unclaimed, it may be appropriate to pay some of the funds to charity. *Id. Second*, it may be appropriate to distribute some of the settlement proceeds to charities when it would be economically infeasible to disburse settlement funds directly to class members. *Id.* Supporters of *cy pres* settlements argue that they serve several socially desirable purposes. *Id.* Critics of *cy pres* settlements believe they often provide little or no benefit to class members. In the commentary to the 2018 amendments to Rule 23 of the Federal Rules of Civil Procedure, the rules committee noted its concern about the inequitable treatment of some class members *vis-à-vis* others in what was likely a nod to creative settlement strategies like *cy pres.* Kiser & Regalia, *supra*.

The Supreme Court was expected to weigh in on the issue in 2019 after it granted certiorari in *Frank v. Gaos*—a Ninth Circuit decision that upheld a *cy pres* class action settlement. However, the Court did not address the merits of the *cy*

pres issue—opting instead to vacate and remand the Ninth Circuit's decision on standing grounds. *See Frank v. Gaos*, 139 S. Ct. 1041.

Attorneys' fees

Attorneys' fees in class actions are governed by Federal Rule of Civil Procedure 23(h), which states that "the court may award reasonable attorneys' fees and nontaxable costs that are authorized by law or by the parties' agreement." Although the general rule in the United States is that a prevailing party cannot recover its attorneys' fees, laws in some areas—such as civil rights and antitrust—allow prevailing plaintiffs to recover attorneys' fees from defendants in certain circumstances. Otherwise, if no such fee-shifting statute applies, attorneys' fees in class cases are awardable only pursuant to an agreement of the parties.

In the commentary to the 2018 FRCP amendments to Rule 23, the committee expressed concern about the disconnect in many cases between attorneys' fees and benefits to the class, noting that in some cases, it will be important to relate the amount of an award of attorneys' fees to the expected benefits to the class. Kiser & Regalia, *supra*. The amendments to Rule 23(e) reflect this concern by making "the terms of any proposed award of attorney's fees" an express factor to be considered by the court in assessing the propriety of a settlement class proposal. Fed. R. Civ. P. 23(e)(2)(C)(iii). Many believe that the Supreme Court will soon be wading into the issue of class relief and attorneys' fees. Kiser & Regalia, *supra.*

If attorneys' fees are available, courts calculate attorneys' fees using one of two methods: the lodestar method or the percentage-of-recovery method. *See In re Home Depot Inc.*, 931 F.3d 1065, 1076 (11th Cir. 2019).

The lodestar method is typically used where the substantive law allows prevailing plaintiffs to recover attorneys' fees from the defendant, or where the monetary recovery does not fully capture the benefit to the class. Under the lodestar method, courts calculate fees by multiplying the time a lawyer reasonably spent on the case with a reasonable hourly billing rate for the lawyer, which is typically set equal to the lawyer's usual rate. The court may then make adjustments to the final figure at its discretion, taking into account issues such as the relative financial strength of the parties, each party's good or bad faith, and the class's degree of success.

The percentage-of-recovery method is typically used where the litigation generates a common fund for the class members. Under that method, the class attorneys receive a portion of the settlement before the rest of the settlement is distributed to the class.

District courts have great latitude in setting fee awards in class action cases, and an award of attorneys' fees is reviewed for abuse of discretion. *Id.* at 1078. An abuse of discretion occurs if the judge fails to apply the proper legal standard, fails to follow proper procedures in making the determination, or bases an award upon findings of fact that are clearly erroneous. *Id.*

In the United States, contingency fee arrangements are generally permitted in all areas of law that would be subject to a class action, and are commonly used.

Third-Party Funding

Third-party funding of class actions is also generally permitted, and there are no federal rules against it. But state laws and professional responsibility codes for lawyers put significant limitations on third-party funding, so third-party funding of class actions is rare in practice.

For example, under comment 11 to American Bar Association Model Rule of Professional Responsibility 1.8, lawyers may accept third-party funding only if "the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client." Likewise, Model Rule 5.4(a) prohibits lawyers from sharing legal fees with non-lawyers, with only certain exceptions not relevant here. This rule likely prevents lawyers from sharing legal fees from a class action with third parties, thus weakening the incentive to invest in a case. Most states have adopted rules similar to these Model Rules.

H. Other Key Class Action Issues

An ongoing open issue is the extent to which plaintiffs in a class action can use statistical sampling to prove their case. In 2011, the Supreme Court rejected "Trial by Formula" and held that a class action procedure cannot abrogate a defendant's right "to litigate its statutory defenses to individual claims." *Wal-Mart Store, Inc. v. Dukes*, 564 U.S. 338 (2011). The Supreme Court, however, clarified in 2016 that such collective evidence may be used in appropriate circumstances. *See Tyson Foods, Inc. v. Bouaphaekeo*, 136 S. Ct. 1036 (2016). In *Tyson*, employees filed a class action alleging that their employer failed to pay them for time spent donning and doffing their protective gear. Because there were no records of time spent donning and doffing, the Supreme Court held that the plaintiffs could use an expert study of 744 videotaped observations to estimate how long donning and doffing took on average, and then apply that average across the entire class. The Supreme Court held that the admissibility of sampling evidence must be determined on a case-by-case basis, and that if such sampling evidence would be admissible in an individual case, it should generally also be admissible in a class action. Lower courts, however, have remained hesitant to find representative evidence sufficient for purposes of proving injury in class actions. *See,* e.g.*, In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184 (3d Cir. 2020).

An additional issue that has recently developed in the class action arena is the differing substantive standards applicable to litigation classes versus settlement classes. An en banc Ninth Circuit panel explored the issue in *In re Hyundai and Kia Fuel Econ. Litig.*, 926 F.3d 539 (9th Cir. 2019), and concluded that courts considering whether to certify a nationwide class for settlement purposes, unlike courts considering certification of a litigation class, need not consider the manageability factor. *Hyundai*, 926 F.3d at 556-57. In rejecting the argument that the predominance test is identical for both settlement and litigation classes, the *Hyundai* court noted that "manageability is not a concern in certifying a settlement class where, by definition, there will be no trial." *Id.* Accordingly, *Hyundai* stands for the principle that, in certain cases, settlement classes may be certified under a less stringent standard than litigation classes.

The COVID-19 pandemic has also resulted in a significant and increasing number of class actions related to the spread and impact of the novel coronavirus in the United States. A number of class actions have been brought against banks, financial institutions, educational institutions, employers, airlines, event and ticketing companies, fitness clubs, ski resorts, amusement parks, corrections facilities, and nursing facilities alleging a wide variety of pandemic-related claims. *See* *Class Action Litigation Related to COVID-19: Filed and Anticipated Cases*, 10 Nat'l L. Rev. 318 (November 2020).

Moreover, while class actions are currently far more common in the United States than in other countries, a number of trends have begun to limit class actions.

First, recent case law has interpreted Rule 23's requirements for certifying a class action more strictly. For example, in 2013, the U.S. Supreme Court decided *Comcast Corp. v. Behrend,* 133 S. Ct. 1426 (2013). In that case, a cable company's subscribers sued the company, claiming that the company violated the antitrust laws in several different ways. The lower court ruled that the subscribers could advance only one of their many theories of antitrust violation. But the subscribers' damages expert created a model that failed to separate damages attributable to the viable theory of antitrust violation from the damages attributable to the rejected theories. The Supreme Court held that the subscribers could not meet the Rule 23(b)(3) predominance requirement because the damages model failed to show that damages caused by the viable theory of antitrust violation could be measured across the entire class. Subsequent Circuit Court decisions have made clear that courts must engage in a "rigorous" analysis of Rule 23(a) and (b). *See,* e.g.*, Hyundai*, 926 F.3d at 556 (citing *Comcast*, 133 S. Ct. at 1426).

Second, a number of Supreme Court decisions handed down between 2018 and 2019 have created additional barriers and impediments to class action litigation. In *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018), the Court held that *American Pipe*'s equitable tolling rule, which tolled the statute of limitations for subsequent individual claims by non-party class members during the pendency of the class action, does not apply to successive class actions after denial of certification. Accordingly, upon denial of certification, putative class members may not commence a class action anew beyond the time allowed by the applicable statute of limitations. The *Resh* decision, which resolved a circuit split on the issue, may significantly limit the filing of subsequent class actions after certification is denied. *See* James J. Mayer, *Rejecting the Class Action Tolling Forfeiture Rule*, 94 N.Y.U. L. Rev. 899 (2019). Similarly, in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019), the Court held that the 14-day deadline for seeking immediate appeal from an order granting or denying class certification, contained in Rule 23(f) of the Federal Rules of Civil Procedure, is not subject to equitable tolling.

Third, increased use of arbitration is impacting the prevalence of class action litigation in the U.S. Under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, parties in the United States may generally agree to have their disputes heard in private arbitration proceedings rather than in court. The American Arbitration Association, one of several organizations that administers arbitrations, lists more than 580 class arbitration cases on its online public docket, 107 of which were filed between January 2017 and March 2021. However, arbitrations can be held on a class-wide basis only if all parties consent to class arbitration. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.,* 559 U.S. 662, 684 (2010). In *Stolt-Nielsen*, the Supreme Court held that class arbitration cannot be compelled under the FAA where the agreement is silent on the availability of such arbitration. *Id.* The Court made clear that consent is a foundational principle of the FAA, and as such, consent to class arbitration is essential.

Building on its decision in *Stolt-Nielsen*, the Court held in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), that an ambiguous arbitration agreement is likewise insufficient to provide a contractual basis for compelling class arbitration under the FAA. Moreover, the *Varela* decision highlighted the benefits of individual arbitration, as opposed to class arbitration—including lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. 139 S. Ct. 1407; Alan S. Kaplinsky et al., *Three Supreme Court Decisions and a Ninth Circuit Preemption Ruling Highlight the Year's Arbitration Decisions*, 75 Bus. Law. 1967 (2020). Accordingly, the *Varela* employees were bound by the agreement to arbitrate on an individual basis only.

Companies seeking to avoid class actions in the United States use arbitration agreements and class action waivers in their consumer or other contracts, a practice on which the Supreme Court has taken a widely permissive view. *See,* e.g.*, Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018); *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019). In January 2021, the Supreme Court was expected to address a follow-up question to the 2019 *Henry Schein* decision. The question was who—a court or an arbitrator—has the power to decide arbitrability when an agreement has a carve-out clause for certain types of disputes. However, the Court instead dismissed certiorari as improvidently granted. *See Henry Schein, Inc v. Archer & White Sales, Inc.,* 141 S. Ct. 656 (2021).

The Court's recent decisions have made abundantly clear that arbitration agreements may be used to limit and/or waive the right to class proceedings. *See also Am. Exp. Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011). In July of 2017, the Consumer Financial Protection Bureau (CFPB) announced a new rule banning financial companies from using mandatory arbitration clauses with class action waivers in contracts. But a joint resolution passed by Congress just four months later repealed the CFPB's new arbitration rule, and such arbitration agreements are allowed.

As a result of recent Supreme Court cases strengthening and upholding the validity of arbitration agreements, mass arbitration has emerged as a new tactic. In response to being unable to effectively challenge the enforceability of companies' well-drafted arbitration and class action waiver clauses, plaintiffs who have been compelled to arbitrate individually have instead opted to file voluminous boilerplate arbitration demands on behalf of hundreds or thousands of claimants simultaneously. The filing of such demands, depending on the language of an arbitration agreement, can trigger companies' obligation to pay filing and case management fees prior to assessing the merits of each claim—in some instances, millions of dollars in filing fees alone—creating leverage for plaintiffs to elicit early settlements. In a recent opinion, U.S. District Judge William Alsup of the Northern District of California called a company's attempt to prevent mass arbitration a "hypocrisy" because, "in irony upon irony," the company "now wishes to resort to a class-wide lawsuit, the very device it denied to the workers, to avoid its duty to arbitrate." *Abernathy v. DoorDash, Inc.*, 438 F. Supp. 3d 1062, 1068 (N.D. Cal. 2020). Mass arbitrations are expected to continue to gain popularity alongside the rise in arbitration provisions.

The European Union

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The European Union

A. Brief Overview and History

The European Commission (the "Commission") has long been considering whether to legislate a coherent, pan-European approach to class actions. It adopted a Green Paper on antitrust damages actions in 2005 (COM(2005)672, December 19, 2005) and a White Paper in 2008 (COM(2008)165, April 2, 2008). Beyond antitrust actions and damages, the Commission published a Green Paper on consumer collective redress (COM(2008)794, November 27, 2008), pointing out that while most consumer organizations were in favor of EU-wide judicial compensatory collective redress schemes, many industry representatives feared risks of abusive litigation.

In 2011, the Commission initiated a public consultation. Around 300 institutions and experts, as well as 10,000 citizens expressed their views on the EU framework for collective redress. Based on the feedback received, the Commission issued Recommendation 2013/396/EU in 2013 (June 11, 2013), urging the Member States to implement national collective redress mechanisms. Indeed, the Commission emphasized that while the EU already had some of the strongest rules on consumer protection in the world, recent cases had shown difficulties that one may face when it comes to enforcement.

On April 11, 2018, the Commission launched the "New Deal for Consumers" to boost consumer protection in the EU. The "New Deal for Consumers" initiative, aimed at strengthening the enforcement of EU consumer law in light of a growing risk of EU-wide infringements, also is intended to modernize EU consumer protection rules given the market developments.

As part of the "New Deal for Consumers," and after two years of policy debate, negotiators for the European Parliament and the Council of the European Union (the "Council") have reached an agreement on new EU rules on collective consumer action.

A Proposal for a Directive on representative actions for the protection of the collective interests of consumers was issued by the European Commission in April 2018, which was approved by the European Parliament in March 2019. On June 22, 2020, the Council has thus published a proposal for a "Class Action" Directive (Directive on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC, the "Directive"). The Directive will replace and modernize the 2009 EU directive and address the current issues in enforcement of consumer law by increasing the available options for EU citizens.

The Directive EU 2020/1828 on representative actions to protect the collective interests of consumers was published on 4 December 2020. This important Europe-wide harmonization will shape the future of national and cross-border consumer litigation.

The Directive required all Member States to implement class action mechanisms by 25 December 2022, at both the national and the EU levels, whereas only 19 out of 27 already had some form of legal remedy to victims of mass harm. Under the Directive, Member States shall ensure that qualified entities as defined below can bring domestic and cross-border representative actions on behalf of groups of consumers. The Directive covers many fields such as financial

services, telecommunications, data protection, energy, travel and tourism, in addition to general consumer law. The Directive entered into force on 24 December 2020 and Member States then had 24 months to implement it into national law, as well as an additional six months to start applying its provisions.

B. Types of Claims and Scope of Lawsuits That Can Be Filed

The Directive covers many fields listed in Annex I such as financial services, telecommunications, data protection, energy, travel and tourism, in addition to general consumer law.

C. Class Representatives and Standing to Sue

Actions can be brought by qualified entities designated in advance by the Member States or created on an ad hoc basis for a specific action. These entities will be required to fulfill certain criteria, including nonprofit and transparency requirements in relation to funding, in an effort to avoid conflicts of interest and abusive litigation.

Under the Directive, Member States shall ensure that qualified entities can bring domestic and cross-border representative actions on behalf of groups of consumers (Article 4 of the Directive). A qualified entity is an organization or a public body that represents consumer interests and is designated as such by an EU Member State.

The Directive distinguishes qualified entities entitled to bring domestic actions from those entitled to bring cross-border actions.

The Directive also contemplates improved cooperation between EU Member States, allowing a qualified entity from a Member State to bring a representative action before the courts or administrative authorities of another (Article 4 of the Directive).

D. Key Procedural Requirements

Member States must ensure that representative actions to obtain injunctive relief are processed with due diligence.

They must also ensure that, where a qualified entity has provided reasonably available evidence to support a representative action and has indicated that additional evidence is held by the respondent or a third party, the court or administrative authority may, at the request of that qualified entity, order that such evidence be produced by the respondent or the defendant or third party in accordance with national procedural law.

In addition, Member States must determine the regime of penalties applicable in the event of failure or refusal to comply with a cessation measure referred to above. The penalties provided for must be effective, proportionate, and dissuasive.

Member States must ensure that the sanctions can take the form of, inter alia, fines, penalties, including fines. Companies may be required to produce evidence contrary to their case, subject to rules on confidentiality. Final decisions would be considered as irrefutable evidence that an infringement occurred in the same Member State and would benefit from a rebuttable presumption in actions brought in another Member State.

The limitation period for all potential redress actions would be suspended by the filing of a representative action. In accordance with national law, Member States must ensure that a pending representative action to obtain the above-

mentioned injunction has the effect of suspending or interrupting the limitation period applicable to the consumers affected by the representative action.

E. Binding Others

The Directive applies an opt-out principle to injunction orders, while opting out or opting in to redress orders is left to the discretion of the Member States.

Member States should—where consumers suffered comparable harm—consider the possibility of enabling consumers to directly benefit from a redress order after it was issued without being required to give their individual mandate beforehand.

F. Remedies Available

Qualified entities are entitled to seek at least two types of measures: injunction measures and redress measures (Article 7 of the Directive).

Prior to the Directive, European law only provided for representative actions to stop or prohibit infringements of EU consumer law, but not for collective redress. As a result, significant differences existed in the protection of the collective interests of consumers throughout the European Union, as some Member States have introduced actions for collective redress, whereas others have not.

From now on, if a professional harms the collective interest of consumers by acting contrary to one of the instruments of secondary legislation listed in Annex I of the Directive, the entities qualified to do so in each Member State are able to bring a "representative action" before the authorities of that State in order to obtain not only measures to put an end to the harm (Article 8 of the Directive), but also measures to compensate for the harm individually suffered by certain consumers (Article 9 of the Directive).

The national court in an EU Member State is able to issue injunction orders as well as redress orders in the form of monetary compensation, repair, replacement, price reduction, contract termination, or reimbursement, but not punitive damages, which are still not allowed in the Directive.

G. Settlements and Financing

The Directive implements the "loser pays" principle as a shield against abusive litigation. This rule seeks to force the losing party to pay the successful party's costs of the proceedings (Article 12 of the Directive).

The Directive allows for third-party funding and regulates it under its Article 10 with the aim of ensuring transparency and avoiding any conflict of interest.

Another safeguard is embodied in the possibility granted to courts or administrative authorities to dismiss manifestly unfounded cases at the earliest stage of the proceeding, pursuant to national law (Article 7 of the Directive).

H. Other Key Class Action Issues

The characteristics of the new European representative action for damages are in fact relatively similar to those of the French class action. The proposed changes do not appear as fundamental in France as they might be in other Member States, since French class actions already allow consumers to seek monetary damages.

The choice between opt-in (inclusion of only those consumers who have explicitly joined the action) and opt-out (inclusion of all consumers who have not taken the step of excluding themselves from the action), for example, is left to them (Article 9 of the Directive).

Some authors regret that the initiative of the European class action is reserved for a representative entity, observing that this is a hindrance to the development of class actions.

However, each Member State retains the possibility of extending the conditions laid down in the Directive, which remains only a minimal and harmonized framework for the Member States.

It remains to be seen how European legislations on class actions will take into account the guidelines of the Directive.

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