Zut Alors! Class Actions Have Landed in the EU

The U.S. Chamber of Commerce surveys 10 states

By David Hechler

The legal industry has gone global. You already knew that. The proof has been abundant for some time. But if anyone had lingering doubts, a report issued in late March should lay them to rest. It's called The Growth of Collective Redress in the EU: A Survey of Developments in 10 Member States.

Yes, class actions are coming to the European Union. Actually, according to the report, they've already landed. And a sign of the times, the author says, is that they're beginning to look like their forebears in Canada, Australia and especially the United States. In other words, he argues, the abuses that increasingly mar them in those countries are starting to migrate to the EU. That's one of the downsides of globalization, the report implicitly argues.

What's also interesting is the organization that commissioned the report. It's not based in Europe. In fact, it's the U.S. Chamber of Commerce's Institute for Legal Reform (ILR).

On this side of the Atlantic, the ILR has been working to support the Fairness in Class Action Litigation Act of 2017, which in early March passed in the House of Representatives and moved to the Senate, where its prospects do not look good. A similar bill died there two years ago.

Now the ILR is working both sides of the pond. The report spells out why. It's a lot easier to lobby to prevent a mess than to fix one after it lands with a splat. "The same systems of incentives that have led to abuses of the civil justice system in other countries are now arising in EU member states," ILR President Lisa Rickard said in a March 21 press release accompanying the report. "These collective redress lawsuit systems are developing without the safeguards needed to protect the courts from being abused for private gain by lawyers and litigation funders."

The European Commission's Initiative

The timing of this effort is in response to the European Commission's own actions. In 2013, the EC released its Recommendation on Collective Action in which it encouraged its members to move swiftly to adopt legal reforms to facilitate resolutions of this sort. It pressed member states to adopt a framework by July 2016 and to report back on their progress this coming July. The commission said it would then evaluate whether further action was needed.

The ILR saw a chance to weigh in. It engaged Ken Daly, a Sidley Austin partner in Brussels, who prepared the 74-page report (with help from Jennifer Watts). Daly examines six key policy areas in each of the 10 states (Austria, Belgium, Bulgaria, France, Germany, Italy, the Netherlands, Poland, Spain and the United Kingdom). Cumulatively these 10 account for 79 percent of the EU population and 82 percent of its gross domestic product. Daly credited local counsel in each jurisdiction with helping gather material.

The policy areas are: who may file a claim; compensation of representatives and other third parties; loser pays; opt-in/opt-out; admissibility and certification standards; and jurisdictional overreach/forum shopping.

The ILR's Conclusions

It's certainly worth a read, though most of the conclusions and recommendations were predictable, given the well-known positions of the ILR. You probably already know, for example, that the ILR favors opt-in rather than opt-out class actions. The report might have been more effective had it been less tendentious and provided examples of class actions the authors deemed appropriate.

The report's greatest value may be in the details it provides about "collective redress" in each state. Daly and company seek to report not only on the frameworks and the laws on the books, but also on the way the systems function on the ground.

A good example is the principle of "loser pays." This is one of the EC's recommendations as a safeguard against what Daly calls "risk-free have-a-go litigation." Loser pays does exist "to some extent," the report notes, in all jurisdictions surveyed. But it isn't the protection it's purported to be. First, it applies only to court costs, not to the actual costs, including lawyer fees, the report found. And in many places (such as Italy, Spain and France), the court maintains discretion and often declines to enforce this rule against plaintiffs.

Probably the strongest arguments are in the section on compensation. As detailed in the report, there appears to be a gaping hole in the rules for third-party litigation funding (TPLF). And according to Daly, this is an area that's growing rapidly. "TPLF has now become a prominent feature of the litigation landscape in several member states, most notably in the Netherlands and the UK," he writes. "In some cases funders appear to have structural relationships with law firms."

He goes on: "Despite lawyers typically being prohibited from operating on a contingency fee basis because of the risks to consumers and victims, none of the jurisdictions surveyed has any mandatory regulation of third-party funding arrangements, which also operate on a contingency fee basis."

The lack of regulation makes it hard to know just how much third-party funding there is. "Where funding exists in EU member states," the report says, "it operates in the shadows, without mandatory disclosure rules."

This is particularly problematic, the report argues, because third-party funding can place lawyers in an ethical quagmire. Quoting a legal commentator, Daly wrote: "Lawyers in this arena need to acknowledge that, like it or not, they're working for two masters. Acting for the claimant with disregard to the commercial imperatives of the funder will result in ruination for all."

Some of the most prominent funders are hedge funds, the report notes. "Hedge funds and similar entities may owe fiduciary or other duties to their investors, but they owe no duties whatsoever to the claimants in the lawsuits in which they invest. There is a clear risk of the interest of claimants being treated as a consideration which is secondary to the profit of funders."

The EC was cognizant of the risk of abuse and recommended rules that would impose duties on third-party funders. So far, the report insists, to no effect: "There appear to be no examples of any member state adopting any of these safeguards."

What About the Good Cases?

Near the end, the report includes a section called "Example Cases." It includes several very large shareholder settlements, like the case against RBS in the UK, the Fortis case in the Netherlands, and the Volkswagen case, currently being litigated in multiple jurisdictions. These are all intended to send a shudder through the reader's spinal cord.

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The author opines later in the chapter: "The Commission's starting premise in discussing collective redress actions … was that they have proven to be an effective tool, but on close inspection of the cases cited, this does not appear to be the case." He goes on to say: "The mere possibility of launching a form of collective actions is entirely distinct from the question of whether a collective action is an effective means to actually deliver redress to claimants."

On the last point: fair enough. But the author didn't address the merits of any of these cases, relying instead on the specter of huge payouts to claimants and their lawyers (the legal fees in RBS are predicted to reach €90 million, he wrote). And he never introduced a case that satisfied his definition of one that was properly brought and resolved.

Even when he describes a case that ended in a manner that would seem to meet his standards, he never even acknowledges that. The case was brought by tenants against a French landlord and was dismissed by the judge on the merits. Still, he used it not as an example of the system working but as another instance of public announcements leading to plaintiffs' inflated claims.

The report also includes statements that many readers may agree with but which tend to polarize the conversation. For example: "If collective redress is used as a form of punishment, rather than as genuine compensation for multiple harmed individuals, this would detract from the purpose of collective action. Punishing defendants who may or may not have violated the law, or seeking to deter them from future misconduct, should remain the exclusive responsibility of public authorities. At the same time, private collective litigation should not be use as a vehicle to promote social causes."

Was this argument really necessary? Isn't it possible to believe that punitive damages sometimes serve a public purpose while also believing that class actions are sometimes abused on both sides of the Atlantic?

The Bottom Line

The end is more effective. "Recommendations to Prevent or Limit Abuse" is succinct and recaps the previous material without being unnecessarily repetitive. And the two-paragraph section labeled "Conclusion" is followed by a four-page appendix that features a chart summarizing the class-action frameworks in each country. This alone would seem particularly useful to companies that do business in the EU. Seven pages of endnotes are a testament to the diligent research that went into the final product.

Though one may have caveats about the sometimes argumentative tone of this document, its timing and depth are likely to raise important questions for the EC to consider as it assesses the progress of the system it has encouraged. And in this global world, it didn't take a European organization to recognize that these are issues that are likely to affect companies everywhere.

AI Revolution

Continued from page 47

in e-discovery production. AI can help your team get to a decision point faster and at a lower cost, but attorneys must still make the final decision about how to proceed in a given matter.

3. Improved Corporate Internal Investigations

One of the keys to a successful internal corporate investigation is the effective collection of data and other evidence, which forms the basis for the legal assessment of the situation. AI can significantly improve data collection efforts when it comes to digital forensics. And digital forensics is ripe for disruption. Investigators have an increasingly large and complicated pool of data to sift through, from e-communication and social media to video footage and smart sensors, and they have less time and budget to handle these increased demands.

"Digital forensics is an area that is becoming increasingly important in computing and often requires the intelligent analysis of large amounts of complex data," concluded a study published by Digital Evidence & Electronic Signature Law Review. "It would therefore seem that AI is an ideal approach to deal with many of the problems that currently exist in digital forensics."

AI technologies have already made their way into digital forensics and corporate internal investigations, even if they were not marketed as such. Sophisticated algorithms are used today for DNA sequence matching, crime detection and other use cases now in the works. Some researchers are exploring how AI can facilitate improved collaboration when it comes to the analysis of cybercrimes at any corporate location around the world. Others are experimenting with how AI can assist with recognizing patterns in the programming signatures of suspected criminals or wayward employees.

We're still in the early stages of seeing how machine learning can bring greater efficiencies and deeper insights to digital forensics investigations, but the future of AI has clearly arrived, and we have a unique opportunity to put this technology to work.

What's Next?

Innovations are in the works now that will help corporate legal departments and their outside law firms to take AI to even greater heights of efficiency and productivity. In this next iteration, we're likely to see it further leveraged as a predictive tool that anticipates emerging threats and risks to the corporate enterprise.

For example, AI will soon be able to help lawyers make better strategic decisions in litigation management, such as: How likely are we to be sued when we roll out a certain new product? Where are our greatest areas of vulnerability? How likely are we to win/lose a case if we choose to go to trial?

This is not about replacing people or squeezing more productivity out of a diminished workforce. As Thomas Davenport and Julia Kirby posit in their Harvard Business Review article "Beyond Automation": "Augmentation … means starting with what humans do today and figuring out how that work could be deepened rather than diminished by a greater use of machines." They lay out several strategies, from moving up the cognitive hierarchy to diving into a specific niche, that people and companies can use to thrive in an era of smart machines.

The organizations that embrace and incorporate AI into their culture and capabilities will see a competitive advantage over their peers. Improved security, risk management and efficiency are already in reach, and strategic insights are right around the corner. The question is no longer if or when AI will be ready for mainstream use. The question now is whether one reaps its benefits or gets left behind.