



**THE INTRODUCTION  
OF CLASS ACTIONS  
IN BELGIUM**



# **Global Evolution of Class Actions & Group Litigation**

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# Class Action & Group Litigation Procedures Are Proliferating

- Modern economies produce mass injuries
  - Successful enterprises have large-scale markets
  - When problems occur, they affect large numbers of consumers, workers, other firms
- Modern societies have higher expectations of safety, including financial protection
- When injuries or losses can be attributable to another's fault a significant fraction of those harmed will feel that entity should compensate them

# Multiple Institutional Approaches to Minimizing Loss and Providing Compensation

- Self-help
  - Private and public insurance
- Industry self-regulation
  - Industry-supported ADR
- Public regulation
  - Government-subsidized compensation
- Private enforcement by litigation
  - Compensation by liable corporations
- Private arbitration
  - Contractual damages

# Despite Attractions, Each Approach Has Limitations (1)

- Self-help
  - Diminishes incentives for industry self-regulation and public enforcement
- Industry self-regulation and ADR
  - Does not always properly internalize costs of harmful behaviour
  - ADR systems not designed for mass claims
- Public regulation
  - Subject to industry & political capture
  - Expensive & therefore often not sufficiently funded

## Despite Attractions, Each Approach Has Limitations (2)

- Private enforcement by litigation
  - Expensive & time-consuming
  - Often barriers to access to courts for ordinary people
  - Does not always target the right behaviour, entities
- Private enforcement by arbitration
  - Only works in contractual context
  - May be subject to self-dealing in “form contract” situations
  - Not currently well adapted for mass claims

# Where Litigation Is One Approach, Mass Claims Procedures Are Required

- Informal practices that collect similar lawsuits for similar judicial treatment
  - Allow efficient interim decision-making
  - Facilitate settlement
- Formal group procedures (MDL, GLO, Kap-Mug)
  - Allow efficient interim decision-making
  - May bind all claimants to single decision
- Representative class actions
  - Provide binding outcomes on all class members after notice & hearing, with judicial approval
- Class arbitration ?

# Debate Over Class Actions Is Similar From Country to Country

- Significant support for providing access to courts for compensation
- Concern that class actions may
  - Encourage too much litigation
  - Violate individual rights
- Strong stated desire not to adopt “American-style” class action
  - Based to a considerable extent on misinformation



# 6 Myths About American Class Actions

- US courts are inundated with class actions
- Certification by courts is virtually automatic
- Once a class action is certified, defendants are forced to settle
- Class actions only benefit plaintiff lawyers
- Plaintiff class action lawyers get one-third or more of every class action settlement
- Without class actions, there is no mass litigation

# Class Actions Account for a Tiny Percentage of All Civil Case Filings

- Less than one percent of all torts & contract filings are framed as class complaints
- Only 12-14% of class complaints are resolved as class actions
  - 47-55% dismissed or settled as individual actions
  - 29-37% decided on summary judgment
  - 12-14% certified
    - Most of these settle but some are tried to verdict and some are dropped after certification

# Class Certification Now Requires Extensive Evidentiary Process

- Plaintiff class must demonstrate that each requirement of class action rule is satisfied
- By preponderance of evidence
- In a contested hearing
- May be preceded by a “Daubert” hearing on admissibility of evidence

# Most of the Small Percent of Class Actions That Are Certified Are Settled

- Most of these are “settlement class actions” that are certified by the court *for settlement purposes only*
  - At the joint request of plaintiffs and defendant
- Some settlements occur *after a defendant contests certification*
- Defendants and plaintiffs can appeal class certification decisions before case proceeds
  - And do: e.g. *Dukes v. Wal-Mart*

# Class Actions Can Benefit Defendants

- Defendants obtain “res judicata” with regard to class
  - With proper notice and hearing, an opt out class action may allow defendant to bind most potential litigants
  - Settlements may be conditional on there being a minimal number of opt-outs
- Class settlements cap exposure
- Class settlements diminish or terminate media attention

# Judges Award Fees to Prevailing Plaintiff Class Counsel

- Fees are *not* a private matter between class and class counsel
- Based either on reported hours & expenses plus a multiplier, or on a “percentage of fund”
- Average 20 – 25% of recoveries where class prevails
- Fee percentage declines as the size of settlement funds increase
  - <\$ 5M: 25%
  - > \$190M: 12%

## Summary:

### Mass Harms Lead to Mass Litigation

- Individual litigation is not a practical substitute for class actions
- In case of class actions, individual claims are “aggregated”
- Aggregated litigation in the US provides less court scrutiny of
  - Process fairness
  - Settlement adequacy, reasonable and fairness
  - Attorney fees

# Mass Harms Require Multi-Pronged Approach

- Self-help, self-regulation and ADR are appropriate for one off situations and moderate numbers of smaller value claims
- Where the scale of harm is larger some form of public dispute resolution is likely to be necessary
  - And additional enforcement may be justified
- Where litigation ensues some form of mass proceeding is necessary
- Key question: Relative benefits of class actions and mass non-class litigation



# Global Class Action Exchange

[www.globalclassactions.stanford.edu](http://www.globalclassactions.stanford.edu)

- International research collaborative
  - Co-chairs:
    - Deborah Hensler, Stanford Law School
    - Christopher Hodges, Oxford Centre for Socio-Legal Center
    - Ianika Tzankova, University of Tilburg
- Conducting comparative research on class actions & group litigation procedures
- Sponsor annual conferences

# Fifth Annual Conference on Global Class Actions: Dec. 8-9, 2011

- Raad van State, the Hague
- Judges, practitioners & academics from Asia, Australia, Canada, Europe, South America, US
- Topics include
  - Judicial case management challenges
  - Consequences of third-party financing
  - Approaches to calculating damages
  - Role of the media
  - Multi-jurisdictional class actions