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

• 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