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Bundling of follow-on damages claims – an efficient way to litigate in the Netherlands?

Mieke Dudok van Heel[1]

Private enforcement actions are often brought in the Netherlands as mass claims. Claimants do not – and cannot (yet) – use the procedure for collective actions provided for in the Dutch Code of Civil Procedure since 1 January 2020,[2] but bring the claims using the 'assignment model'. A special purpose vehicle (litigation or claim vehicle), usually financed by professional litigation funders, 'collects' claims – sometimes thousands – from numerous injured parties – usually substantial companies in their own right – throughout Europe, or even beyond, and brings these 'bundled' claims before the court in its own name.

Follow-on cartel damages actions, also when they are brought as an individual claim, or more claims by one national group of companies, entail interesting and sometimes difficult legal issues. These include limitation periods, joint and several liability, disclosure of evidence (information asymmetry), quantification of damages, indirect purchasers, passing-on, and umbrella damages. These issues multiply when multiple claims are bundled. It is self-evident that the sheer multitude of claims from companies in various (European) countries presents challenges for the judiciary and the parties. It raises additional issues, not only of substantive but also of procedural law. The bundling of claims is envisaged by the Damages Directive[3] as an efficient method for the recovery of damages. It may indeed seem an efficient – and possibly the only economically realistic – manner for injured parties to obtain damages, as bundling is often the only way "to attain the critical mass required to merit enforcement activities".[4]

Yet, as a result of the bundling, the proceedings do not necessarily become more efficient (to put it mildly), especially as this concerns uncharted waters. As Advocate-General Drijber phrased it in an article: "The larger cartel damages proceedings in the Dutch courts (*Air Cargo, Cathode Tubes* and *Trucks*) seem to plod along from one interim judgment to the other. (...) This is, however, inevitable because it concerns new matter and the claimants are playing for high stakes. This in turn provokes the defendants to put forward a whole range of defences)".[5] The assignment model is – or was until recently – an unknown phenomenon in Dutch law. A litigation vehicle as such is not attributed any special status under Dutch procedural law and the litigation vehicle's claims are nothing more than the collected claims of each of the injured parties that have assigned their claims to the vehicle. Therefore each injured party (e.g. the purchaser of the trucks) must still – as if it had initiated the action itself – prove it has suffered harm as a result of the infringement. And as the courts have ruled consistently, claims brought by a litigation vehicle must be substantiated accordingly. This, does not mean though that all litigation vehicles do so.[6] In addition, in all cases a battle royal also takes place about the validity of the assignments: to what extent must the litigation vehicle produce evidence of the assignments? Hopefully, in due course the Supreme Court will put an end to that battle. On 5 April 2024, the Advocate-General rendered his opinion in *Air Cargo* on just this issue.[7] Under Dutch law, the debate whether the assignment model as such is admissible seems to have died out. In the Supreme Court appeal in *Air Cargo*, no grounds challenging the judgment of the courts in this respect were filed. In Germany, however, the *Landgericht* in Dortmund, on 20 April 2023, submitted a request to the European Court of Justice for a preliminary ruling on this matter.[8]

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1. Judge of the Amsterdam District Court and Netherlands Commercial Court (NCC).
2. The Act on the Settlement of Mass Damages Claims in Collective Actions (the **WAMCA**, in Dutch: *Wet afwikkeling massaschade in collectieve actie*).
3. Directive 2014/104/EU, article 2.
4. CDC, www.carteldamageclaims.com.
5. Berend Jan Drijber, Massaclaims en mededingingsrecht, *Markt & Mededinging*, (2023) no. 1.
6. Arnhem-Leeuwarden Court of Appeal 5 February 2019, ECLI:NL:GHARL:2019:1060 (*Lifts*), Rotterdam District Court, 29 May 2019, ECLI:NL:RBROT:2019:4441 (*Lifts*), Amsterdam District Court 19 September 2019, ECLI:NL:RBAMS:2019:9965 and 24 May 2023, ECLI:NL:RBAMS:2023:3454 (*Air Cargo*), Amsterdam District Court 15 May 2019, ECLI:NL:RBAMS:2019:3574 and 28 February 2024, ECLI:RBAMS:2024:1119 (*Trucks*).
7. ECLI:NL:PHR:2024:369.
8. Case C-253/23, ASG.

Last but not least I should mention governing law. Obviously, when claims of injured parties based in various countries are bundled (or worse: of injured parties that fly air cargo all over the globe), the question which national law governs the claim for damages arises. Fortunately, at long last also this question will be answered by the Supreme Court in due course. In line with the judgments of the lower courts, the Advocate-General in both the *Air Cargo* and the *Trucks* cases[9] is of the opinion that it should be Dutch law for all claims, wherever the truck(s) were purchased or whatever the route was the air cargo travelled.

As a result of all the preliminary skirmishes, in *Air Cargo*, after 14 years, only now have we finally reached the heart of the matter: the quantification of damages. In *Trucks*, seven years after the first claims were filed, we yet have to reach that stage. Which begs the somewhat rhetorical question: is this efficient?

To end on a positive note: for lawyers it is interesting and challenging work. We are all pioneers. As a judge, one must not only possess a good legal brain, but also project management skills. It is one of the few fields of law where national judges in Europe must apply – to a large extent – the same law and are bound by the judgments of the European Court of Justice. As national judges we are connected in the Association of European Competition Law Judges (AECLJ).[10] At our meetings we share ideas and insights. And we learn from one another.

This Mass Claims Journal is another truly international initiative and a good source of information for all lawyers around the world – in the judiciary and private practice alike – who are handling mass claims of all sorts, including follow-on damages claims.

9. See (n 6).
10. www.aeclj.com

To Settle or Not to Settle; That's the Question

An Economic Analysis of the Factors Determining the Settlement of Mass Damage Disputes and Implications for Legal Practice

Ruud Hermans[1]

1. Introduction

In many cases, large numbers of victims have suffered or continue to suffer damages for which a limited number of parties are deemed responsible, at least from the victims' perspective.[2] This constitutes mass damage, which requires collective redress to be resolved. Collective redress for mass damage refers to dispute resolution (a) on behalf of or for the benefit of a large number of victims,[3] (b) against a limited number of defendants and (c) involving the same factual or legal issues. Typically, although not necessarily, one or more claim organisations are also involved. These include both interest groups as referred to in Article 3:305a of the Dutch Civil Code ("DCC") and other legal entities which consolidate claims, e.g by assigning their claims or providing a proxy to the claim organisation.[4] This definition excludes compensation schemes not based on liability law, such as damage compensation arrangements, government-initiated compensation schemes aimed at alleviating certain forms of societal adversity voluntarily, and compensation schemes for (more or less recent) historical injustices.[5]

Mass damage encompasses various forms of damage. It can involve:

- physical harm (defective drugs, Q-fever, Legionella, Chromium 6, asbestos, long COVID);
- psychological harm (sexual abuse, exploitation);
- damage from discrimination or privacy violations, various forms of pure financial loss (consumer claims, shareholder claims, earthquake damage, cartel damage); and
- other types of damage.

Some cases of mass damage fall into multiple categories. For example, the so-called "allowance affair"[6] involved discrimination, psychological harm, and pure financial loss. Certain victims could be considered victims of injustice, and the consequences

1. Dr. Ruud Hermans is a fellow at the Radboud Business Law Institute (OO&R) of Radboud University, a guest researcher at Leiden University, and a deputy justice in the Court of Appeals in The Hague. From 2019 to 2022, he held the position of CPO (Centre for Professional Legal Education) professor in Dispute Resolution in (Inter)national Private Law Practice at Radboud University. This article is an adaptation of his inaugural lecture, which he delivered in a condensed form on May 12, 2021.
2. Of course, that liability must be determined by the court in case of a dispute.
3. The determination of what constitutes a large number is somewhat arbitrary. The characteristic of a mass damage case is that it is no longer feasible or efficient to establish the liability of the defendant and the damage suffered by the victims individually. Previously, I mentioned a number of at least 25. Refer to the following footnote for details.
4. R.M. Hermans, 'Collectief Herstel', in C.C.J.H. Bijleveld e.a. (red.), Nederlandse Encyclopedie Empirical Legal Studies, Den Haag: Boom juridisch 2020, p. 405-442 (on p. 408).
5. See R.J.B. Schutgens, 'Afhandeling van schade via schaderegelingen' in I. Giesen, E.R. de Jong & R.J.B. Schutgens, *De spankracht van de civiele rechter, preadviezen 2022 uitgebracht voor de Vereniging voor Burgerlijk Recht*, Zutphen: Uitgeverij Paris 2022, p. 81-140; C. Ruppert, 'Regelingen voor collectieve schade, Geef slachtoffers erkenning', 2nd edition, Den Haag: Boom juridisch 2023.
6. The Dutch "toeslagenaffaire" (allowance affair) refers to a scandal involving the Dutch Tax Administration's wrongful accusation of fraud against thousands of parents who applied for childcare benefits. The system of childcare benefits, designed to financially assist parents with daycare costs, was mismanaged, leading to severe consequences for affected families. Beginning in 2013, the Tax Administration implemented strict policies, accusing numerous parents of fraudulently claiming childcare benefits and demanding repayment. Many innocent families were subjected to severe financial distress, facing debt, unemployment, and even bankruptcy due to unjustified claims of fraud. The situation escalated when it was revealed that authorities had used discriminatory practices, disproportionately targeting families with dual nationality. The scandal came to public attention in 2019, leading to widespread condemnation and calls for accountability. The Dutch government resigned in January 2021, taking responsibility for the systemic failures. The aftermath involved ongoing investigations, compensation efforts, and discussions about reforming the social benefits system to prevent such injustices in the future.

for their personal lives can be profoundly impactful. To move on with their lives, they need more than just financial compensation, especially in cases of personal injury. However, this paper does not delve into that topic.[7] Instead, it focuses on mass damage cases where victims seek compensation for financial damages.

The incurred financial damage can range from tens of thousands of euros per victim to very limited amounts. The addressed party is usually a company, but sometimes it can also be a public legal entity or government body, a non-profit legal entity, or a natural person. In short, even in the context of avenues to obtain compensation for financial damage specifically, there is an enormous diversity of mass damage cases. Such mass damage cases need resolution. While resolution usually ultimately happens, it can take a very long time, sometimes even decades.[8] Not everyone is satisfied with the end result, and this dissatisfaction is often magnified by the time it takes to reach a resolution. There are various ways in which a mass damage dispute can be resolved.[9]

The first option is that of a collective settlement. A characteristic of a collective settlement in Dutch legal practice is that a claim organisation, acting to protect similar interests of certain victims, reaches an agreement with one or more liable parties. This could be an opt-in settlement or an opt-out settlement. In an opt-in settlement, persons who meet the conditions can individually decide whether they want to join the settlement. In an opt-out settlement, the victims eligible to obtain compensation are bound by the settlement unless they declare that they do not want to be bound. Unlike an opt-in settlement, an opt-out settlement requires a legal basis. This legal basis is included in the Dutch Act on Collective Settlement of Mass Damages ("WCAM").[10] An opt-out settlement, after approval by the Amsterdam Court of Appeal, becomes binding on all victims entitled to compensation unless they timely submit an opt-out declaration as specified in Article 7:908(2) Dutch Civil Code ("DCC"). An opt-out settlement can also be agreed upon in a procedure to which the Dutch Act on the Resolution of Mass Damages in Collective Action ("WAMCA") applies.[11] In this case, the settlement agreement must be approved by the court before which the dispute is pending (Article 1018h(1) of the Dutch Code of Civil Procedure ("DCCP")). The provisions of the WCAM apply *mutatis mutandis* to this procedure (Article 1018h(2) DCCP). In this scenario, the victims who meet the conditions can submit an opt-out declaration (Article 1018h(5) DCCP), assuming they have not done so earlier in the WAMCA proceeding.

The second option is that the liable party reaches individual settlements with a large number of victims.

The third option is that the liability of a party and how much that party needs to pay is conclusively determined by a court or through alternative dispute resolution. This could involve both collective and individual proceedings. Since the introduction of the WAMCA, Dutch courts can now determine damages in a collective action. Previously, this was only possible through voluntary consolidation of individual claims. Nevertheless, since 1994, it has been possible to seek a declaratory judgment or an injunction in a collective action. Of course, victims also retain the option to pursue their claims individually.

The fourth option is that the mass damage dispute dissipates because no proceedings are initiated or they are prematurely terminated. If the reason for this is that, upon further consideration, the defendant is not liable, this is not a problem. However, there is a problem if it turns out that a valid claim cannot be pursued.

In every mass damage dispute, four central questions arise:

1. Is the defendant liable, and if so, what is the extent of the victims' damages?
2. Through which procedure do you determine the liability of the defendant and the amount the victims receive as compensation?
3. What are the costs associated with establishing the liability of the defendant, determining the amount the victims receive, and disbursing the compensation to the victims?
4. How much time does it take to resolve the mass damage dispute?

7. R. Rijnhout, 'De positie van de rechter bij conflictoplossing in personenschade die via het aansprakelijkheidsrecht worden afgewikkeld' in M.J. Dubelaar, L.R. Glas, A.B. Terlouw & M.J. ter Voert, *Conflictoplossing: het domein van rechters? Een vergelijkende studie naar rechterlijke en alternatieve conflictoplossing in verschillende rechtsgebieden*, Deventer: Wolters Kluwer 2021, p. 63-98, with further literature references on the position of the judge in conflict resolution involving personal injury settled through tort law; R. Rijnhout, 'Van compensatieconflicten naar betekenisvol compenseren', inaugural lecture Utrecht University, Den Haag: Boom Juridisch 2023; K. van Doorn, De mensen achter de grote getallen, een empirisch-juridisch onderzoek naar de belangen van benadeelden in situaties van massaschade, diss. Tilburg University 2024, Den Haag: Boom Juridisch 2024.
8. C.L.J.M. de Waal & F. van der Hoek, 'Decennia denken over Dexia, De afhandeling van de effectenlease-affaire in de spiegel', *NJB* 2022/1514, p. 1826-1843.
9. For an overview of the various procedures in which mass damage claims can be settled, refer to Hermans 2020, p. 405-442.
10. Act of June 23, 2005, amending the Civil Code and the Code of Civil Procedure in order to facilitate the collective settlement of mass damages (Collective Settlement of Mass Damages Act), *Stb.* 2005, 340.
11. Act of March 20, 2019, amending the Civil Code and the Code of Civil Procedure to enable the collective settlement of mass damages through a collective action (Mass Damages Settlement in Collective Action Act), *Stb.* 2019, 130. For an English language overview of the WAMCA I refer to Dennis Horeman & Machteld de Monchy (eds.) Unlocking the WAMCA, a practical guide to the new collective action regime in the Netherlands, 3rd edition, Amsterdam: De Brauw Blackstone Westbroek 2024.

These questions are interconnected. Determining the damages each victim suffered and the compensation each victim is entitled to in the context of all circumstances of the case requires an individualised process. Such process, however, is both time-consuming and costly. If a quick, cost-effective procedure is desired to determine to what an individual victim is entitled, it becomes necessary to abstract from the individual circumstances of the case. The trade-off is that some victims may receive more compensation than they would through an individualised assessment, while others may receive less. Alternatively, a quick proceeding might only allow for partial compensation for the damage suffered, rather than full compensation.

2. Problem Statement

The desirable outcome of a mass damage dispute is clear: a settlement providing a fair compensation to the victims, which is acceptable to both the victims and the defendant, within a reasonable timeframe and with limited implementation costs. Achieving this in a collective proceeding is nearly impossible. It takes many years to obtain a final judgment in a WAMCA procedure, determining the damages for the victims.[12] While certain legal questions can be decided in individual proceedings, other victims cannot derive any rights from them if they are not the plaintiff in those cases. The only practical way to resolve a mass damage case within a reasonable time is through a collective settlement.

Why does this sometimes succeed and sometimes not? Can we identify factors that determine whether a mass damage dispute can be settled collectively? I have previously written on this topic based on my practical experience as an attorney.[13] In this contribution, I choose a different approach: employing a law and economics analysis to identify these factors. However, a crucial caveat applies. A law and economics analysis is a tool to arrive at an answer to the problem statement, but by no means provides the final answer. To get a more complete picture, empirical research is also necessary, such as through interviews and questionnaires.[14]

Understanding the factors that determine whether a mass damage dispute can be settled collectively is interesting for a scholar but does not advance legal practice. It does not make mass damage disputes settle more quickly or with lower implementation costs. To achieve these goals, it is necessary to nudge the behaviour of the involved actors in the desired direction. This can be achieved through interventions by the legislator and the judiciary. In this paper, I will make some suggestions for policy interventions by the legislature and the judiciary that can help solve the problem: settling mass damage disputes in a way in which the victims receive compensation acceptable to them, the relevant claim organisation, and the defendant, within a reasonable timeframe and with limited implementation costs.

3. The Use of Law and Economics Models and the Assumptions on Which They Are Based

Models can be used for reasoning, explaining, designing, communicating, acting, predicting, and investigating,[15] and their use has advantages. A model is not a representation of reality but a simplified version of it, which is not always realistic. This simplification is deliberate: the model is as simple as possible, but not simpler. This simplicity allows for the analysis and explanation of the behaviour of the involved actors, as well as for drawing conclusions and reasoning about which rules are necessary to redirect the behaviour of the actors in the desired direction. As the model becomes more complex, this becomes much more difficult.

The model I use in my analysis is the rational choice model. This model describes human behaviour based on the assumption that people make choices through rational thinking. It also assumes that people behave in a utility-maximising manner, choosing the alternative that best suits their preferences.[16]

For my analysis, I translate utility maximisation into achieving an optimal financial outcome in the mass damage dispute. The assumption is that the actors involved (the claim organisation representing the collective interests of the victims, the collective victims, the defendant in the proceeding) will make the choice that is most advantageous for them in this specific dispute. I exclude other motives that could influence decision-making, such as precedent-setting, damage to reputation, general and specific

12. The WAMCA was introduced on January 1, 2020. However, as of now, there has not been a final judgment, let alone a legally binding one, in any of the lawsuits initiated since its implementation, where compensation is being sought. The same holds true for collective opt-in procedures in which the aggregation of claims occurs through assignment or power of attorney. Experience has shown that it takes several years before a final judgment is reached in these cases as well.
13. R.M. Hermans, 'De oorzaken van het niet tot stand komen van collectieve schikkingen in massaschadezaken', in M. Holtzer, A.F.J.A. Leijten & D.J. Oranje (red.), *Geschriften vanwege de Verenigng Corporate Litigation 2014-2015*, Serie vanwege het Van der Heijden Instituut 128, Deventer: Wolters Kluwer 2015, p. 361-387
14. See e.g. Kees van den Bos, *Inleiding Empirische Rechtswetenschap*, Den Haag: Boom Juridisch 2021.
15. Scott E. Page, *The Model Thinker, What You Need to Know to Make Data Work for You*, New York: Basic Books 2018, p. 13-25. Page uses the acronym REDCAPE: Reason, Explain, Design, Communicate, Act, Predict, Explore.
16. Robert B. Cooter jr. & Thomas Ulen, *Law and Economics*, 6th Edition, Harlow, UK: Pearson Education Limited 2014; B.C.J. van Velthoven & P.W. van Wijck, *Recht en efficiëntie, Een inleiding in de economische analyse van het recht*, 6th edition, Deventer: Wolters Kluwer 2019, par. 2.2.

deterrence, and the infliction of harm. In the model I use, these motives are not considered rational.

Another important assumption I make is that parties are risk-neutral. Being risk-neutral means that an actor has no preference for receiving or being obligated to pay a fixed amount of 50, or having a 50% chance of winning or losing 100. In reality, economic actors are typically not risk-neutral but risk-averse.[17] Furthermore, I assume that the defendant is sufficiently solvent to compensate for the damages for which they are liable.[18]

The rational choice model has limitations. The primary limitation stems from the psychological insight that, in practice, people often do not behave rationally. This has led to a new science: behavioural economics. Research in behavioural economics demonstrates that economic actors do not always behave rationally in practice and that, in fact, decisions are often made irrationally.[19]

Despite the limitations inherent in using the rational choice model and the assumptions I employ, using the model is useful for reasoning and identifying the factors that determine whether a mass damage dispute can be settled collectively. Ultimately, empirical research will be necessary to show whether these factors play a role in settlement decisions in reality, how significant that role is, and whether other factors also play a role. To my knowledge, such empirical research has never been conducted. In its absence, this article contains the best available analysis.

The results also align with my own practical experiences, which formed basis for my 2015 analysis,[20] and with insights from other practicing lawyers. This indicates that the outcomes of this analysis can be used as a basis for the possible policy interventions described.

4. Settlement of a Dispute between a Plaintiff and a Defendant

4.1. Basic Model

I begin with a simple situation of a dispute between one plaintiff and one defendant. Assume that the plaintiff P has a monetary claim against the defendant D. I denote the amount of the claim with a lowercase letter d. The probability that the court awards the claim is denoted as p, where $0 < p < 1$. Further assume that the costs incurred by the plaintiff for the procedure are C_p. Additionally, I disregard any potential cost orders,[21] and also the time value of money related to the longevity of the procedure (I will discuss the time factor hereafter). The expected value of the net proceeds of the procedure for the plaintiff is then equal to the probability of the claim being awarded, multiplied by the damages and reduced by the litigation costs:

$$NEV\,(P) = pd - C_p \quad (1)$$

For defendant D, assuming that its defense costs are C_d, the expected value of the net outcome of the procedure is equal to the probability of the claim being awarded, multiplied by the damages and increased by its litigation costs:

$$NEV\,(D) = pd + C_d \quad (2)$$

For clarity, the expected value of the net outcome of the procedure is the revenue for the plaintiff and the expense for the defendant.
Instead of proceeding with litigation, parties can also settle their dispute. I assume that both parties have the same expectations regarding the likelihood of winning or losing and the costs of the procedure (hereafter, I will discuss the more realistic situation that the expectation of the parties thereof diverge).

Furthermore, I assume that the costs of a settlement are negligible and can be disregarded. In this situation, it is rational for the plaintiff to ac-

17. A possible explanation for this phenomenon is provided by prospect theory. See Daniel Kahneman, *Thinking Fast and slow*, New York: Farrar, Straus and Giroux 2011.
18. Regarding the situation that arises when there are insufficient funds to pay for a collective settlement, please refer to Hermans 2015, section 3, p. 366-368. Additionally, for insights into the use of insolvency procedures to resolve mass damage disputes, consult R.M. Hermans, 'Settling mass damage claims inside and outside insolvency procedures: A comparison of the available procedures', in: Third party releases by means of bankruptcy law: guarantees and mass tort (Preadviezen NVRII 2022), The Hague: Eleven International Publishing 2023, p. 73-80; A. Tavakolnia, Insolventierecht als panacee voor massaschade aansprakelijkheid? Recente Amerikaanse pogingen tot afwikkeling van massaschade in Chapter 11, TvI 2023/27, p. 221-230; D.A.M.H.W. Strik, 'Afwikkeling van massaschade in *distressed* situaties', in: 100 JAAR VEB: Bundel ter gelegenheid van het honderdjarig bestaan van de Vereniging van Effectenbezitters, Wolters Kluwer, p. 388-417.
19. See Kahneman 2011; Richard H. Thaler, *Misbehaving, The Making of Behaverial Economics*, New York: W.W. Norton & Company, Inc. 2016.
20. Hermans 2015.
21. In the law and economics literature, a common distinction is made between the American model, where each party bears its own costs, and the English model, where the court, in principle, orders the losing party to pay the full costs of the prevailing party in case of a win or loss. See Cooter & Ulen 2014, p. 382. The Dutch system is considered hybrid. Article 237 DCCP stipulates that the party that is unsuccessful in the judgment is, in principle, ordered to pay the costs. This cost order is a fixed amount that does not cover the actual costs. Especially in complex disputes with significant financial stakes, this fixed-cost order only covers a portion of the actual costs. For this reason, the Dutch cost allocation system is more comparable to the American model than the English model. It is noteworthy that the WAMCA provides the possibility to recover the actual legal costs, including the costs of the litigation funder, from the defendant (Article 1018l (2) DCCP). I will not delve into that aspect here.

cept a settlement offer S from the defendant if the settlement offer is higher than the expected net proceeds of the procedure:

$$S > NEV\,(P) \tag{3}$$

For the defendant, accepting any settlement offer is rational if it is lower than the expected total amount he would have to pay as an outcome of the procedure:

$$S < NEV\,(D) \tag{4}$$

The settlement range ΔS, where it is rational for both the plaintiff and the defendant to settle instead of litigate, is then equal to the litigation costs saved by both parties in a settlement:

$$\Delta S = NEV(D) - NEV\,(P) = C_p + C_d \tag{5}$$

However, the following must be considered. The defendant will not want to settle if the plaintiff cannot credibly threaten to initiate proceedings. This is only the case if the expected net proceeds value of the potential lawsuit for the plaintiff is positive:[22]

$$NEV\,(P) > 0 \tag{6}$$

After all, a rationally acting plaintiff will not initiate or continue the proceedings if he assumes the expected net proceeds value of the lawsuit to be negative.[23] To make this analysis slightly less abstract, let's assume that the probability of the plaintiff winning the lawsuit is 20% (p = 0.2), C_p =2 , *and* C_d = 3.

As previously indicated, I assume that both parties are aware of each other's expectations regarding the likelihood of winning and the costs of the procedure. It is possible to graphically represent the net expected value of the proceeds of the procedure for the plaintiff and the defendant *NEV (P, D)* as a function of the damages d:[24]

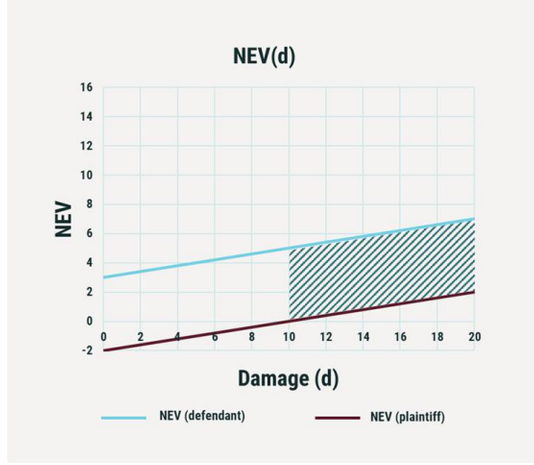


Figure 1: Net Expected Outcome of the Procedure as a Function of Damages when Plaintiff and Defendant Share Similar Expectations Regarding the Likelihood of the Court Granting the Claim

Figure 1 shows that based on these assumptions, the plaintiff can credibly threaten to initiate a procedure if the damage d > 10, because it is otherwise not rational for the plaintiff to start a procedure if the amount expected to be awarded by the court (20% of the damage) is not higher than the costs incurred (C_p = 2). For both the plaintiff and the defendant, it is then rational to settle the dispute if the damage d > 10, with a constant settlement range ΔS amounting to 5, as indicated by formula (5).

However, the fact that rational actors can reach a settlement does not necessarily mean they will indeed settle. The model I employ can predict whether parties can settle their dispute but not whether they will settle and, if so, for what amount. An economic theory that addresses this prediction is game theory, which is beyond the scope of this discussion.[25]

4.2. Implications for the Baseline Model when Parties Have Different Expectations about the Likelihood of Success in Litigation

In practice, parties may not assess the probability of the court granting the claim in an uniform way. Often, the plaintiff may estimate this probability higher than the defendant, perhaps due to both parties being overly optimistic about the litigation outcome.[26] In such cases, reaching a settlement becomes more challenging because both

22. Van Velthoven & Van Wijck 2019, p. 210-211. I recall that I am excluding the cost allocation from consideration and assume that parties are aware of each other's expectations regarding the likelihood of success and the costs of the proceedings.
23. This conclusion requires a nuance. The plaintiff might speculate that the defendant will want to settle due to the high costs of defense, even if the expected net proceeds of the procedure are negative. This can occur if the litigation costs the plaintiff expects to incur are small compared to the defendant's costs or if the plaintiff can shift the litigation costs to third parties.
24. It is, of course, also possible to keep the damage fixed and represent the net expected value of the proceeds as a function of the costs. As in practice the costs of the procedure tend to be more predictable than the awarded amount of damages, it makes more sense to keep the costs fixed and the amount of damages variable.
25. See Douglas G. Baird, Robert Gertner & Randal C. Picker, *Game Theory and the Law*, Cambridge, Ma: Harvard University Press 1994, chapter 8.
26. Another reason why parties may assess this chance differently is information asymmetry. The exchange of information is a significant aspect of the law and economics analysis of litigation and settlements. See, for example, Cooter & Ulen 2014, p. 385-393.

parties may lean towards the belief that they are better off litigating than settling. This difficulty also arises when parties differ in their expectations regarding their own litigation costs and the opposing party's litigation costs.

Let's assume now that the plaintiff believes the chance of winning the lawsuit is 80% (P_p = 0.8), while the defendant believes the chance of the plaintiff winning is 20% (P_d = 0.2), and both parties are aware of each other's expectations. All other assumptions remain unchanged. The consequences for the net expected value of the claim's proceeds for the plaintiff and the defendant, *NEV (P, D)* as a function of damages *d*, are depicted in Figure 2:

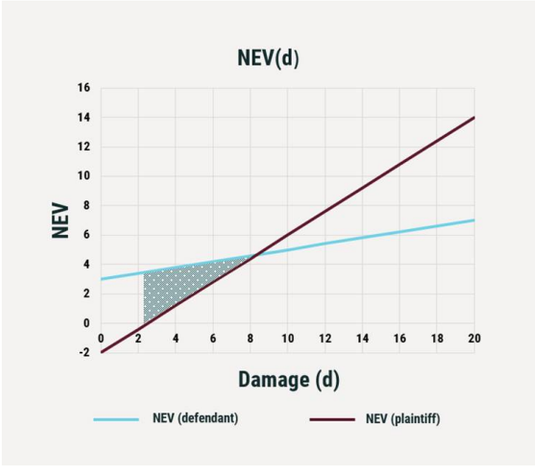


Figure 2: Net Expected Value of the Litigation Outcome as a Function of Damages when the Plaintiff and the Defendant Have Different Expectations about the Likelihood of the Court Granting the Claim

Upon comparing Figure 2 with Figure 1, three differences are notable:

- The first difference is that the plaintiff can credibly threaten to initiate or continue the proceedings if damages $d > 2.5$, compared to $d > 10$ in the previous scenario.
- The second difference is that reaching a settlement becomes much more challenging, as the settlement range ΔS is smaller. With damages $d > 8.33$, risk-neutral parties will not settle. Both parties believe they can achieve a better result through litigation than by accepting the opposing party's best settlement offer.
- The third difference is that the settlement range ΔS is no longer constant (5) but smaller, decreasing from 3.5 (at d = 2.5) to 0 (at d = 8.33).

This shows the impact on the net expected value of the litigation, and therefore settlement range, when the plaintiff assumes higher likelihood of the court granting the claim than the defendant.

These assumptions are also a simplification of reality. In practice, it is unlikely that parties are fully aware of each other's assessments of their chances of winning or losing the lawsuit, as well as the expected litigation costs for both sides. Moreover, parties may have differing expectations regarding the amount of damages that will be awarded if they are successful.

Each party will formulate an assessment of the expected net outcome of the litigation for themselves and the opposing party, which in turn determines the settlement range. Crucially, according to this model, a settlement can only be achieved if, and to the extent that, the settlement ranges determined by both parties overlap.

This simple rational choice model for determining whether settlement or litigation is more advantageous for the parties already offers insight into the factors that influence whether a settlement can be reached, even in the simplest situation of one plaintiff and one defendant. From the plaintiff's perspective, these factors include his expectations about:

- his own chance of winning;
- what the defendant thinks the plaintiff's chances of winning will be;
- its own legal costs;
- what the defendant thinks the plaintiff's legal costs will be;
- the legal costs that the defendant will incur;
- what he thinks the defendant expects to incur in legal costs;
- the amount of compensation if the claim is successful; and
- the defendant's expectations about this.

The defendant will have his own expectations regarding all these factors.

Even in this simple scenario of a lawsuit between one plaintiff and one defendant, matters quickly become intricate. However, two crucial lessons emerge. The first lesson is that the settlement range, and consequently the likelihood of parties reaching a settlement, is determined by the four factors shaping the net expected value of the proceeds from the lawsuit: (a) the likelihood of the claim being granted, (b) the awarded damages amount, (c) the plaintiff's litigation costs, and (d) the defendant's litigation costs. The second lesson is that when the expectations the parties hold about these four factors align more closely, the likelihood of settling their dispute increases. Conversely, when these expectations diverge more, reaching a settlement becomes impossible or, at the very least, more challenging.

5. Settlement of a Mass Damage Dispute

5.1. Baseline Model

In a mass damage dispute, there are multiple victims acting as the plaintiff (or represented by a claim organisation acting as plaintiff) and one or more de-

fendants. Similar to the model of one plaintiff and one defendant, it is possible to determine the expectation of the net proceeds or net costs of the litigation, and thus whether there is room for settlement.

First, I will again consider the baseline model, assuming that all parties share the same expectations regarding the likelihood of the claim being granted and the costs they will incur in the litigation. Let's assume there are *n* plaintiffs, and the average damage per plaintiff is *d*. There is one defendant. The expected value of the cumulative net proceeds from the litigation for all plaintiffs together is then equal to the number of plaintiffs *n,* multiplied by the likelihood of the claim being granted *p* and the average damage amount per plaintiff *d*, minus the litigation costs of all plaintiffs C_p:

$$\sum_{i=1}^{n} NEV(P_i) = npd - C_p \quad (7)$$

The expected value of the net outcome of the litigation for the defendant is then *n,* multiplied by *p* and *d*, plus the costs C_d:

$$NEV(D) = npd + C_d \quad (8)$$

The settlement range is again equal to the costs that the plaintiffs, or a claim organisation representing them, as well as the defendant, would incur in litigation and could save through a settlement:

$$\Delta S = NEV(D) - \sum_{i=1}^{n} NEV(P_i) = C_e + C_d \quad (9)$$

Furthermore, the requirement that the plaintiffs must be able to credibly threaten to initiate litigation holds, which means that the net expected proceeds value of the litigation must be positive:

$$\sum_{i=1}^{n} NEV(P_i) = npd - C_p > 0 \quad (10)$$

Although the method of calculating the net proceeds of a mass damage case is essentially the same as in an individual case, the threshold for initiating legal action is lower. This is partly because the potential gross proceeds of the procedure are much higher due to the larger number of victims, and partly because the litigation costs can be shared among the victims, regardless of how their claims are consolidated. This also makes it possible to attract external litigation funding (third-party litigation funding).

Therefore, the possibility of collective litigation is beneficial from the perspective of access to justice. It can also lead to settlements that would not be achieved in individual cases because an individual plaintiff cannot credibly threaten to initiate a procedure.

5.2. Implications for the Baseline Model when Parties Have Different Expectations about Litigation Chances

Just like in the situation involving one plaintiff and one defendant, parties in a mass damage dispute will assess the likelihood of the claim being granted differently. The same applies to their expectations regarding the costs of the litigation and the amount of damages the court might award. I will not delve further into these details here but refer to section 4.2.

5.3. Uncertainty about the Number of Victims Entitled to Compensation

In many mass damage cases, it is uncertain in advance how many victims are eligible for compensation and how many will actually claim it. This uncertainty is felt both in litigation and during a collective settlement.

Let's start with some observations about litigation. If a claim organisation initiates a collective action, it represents the interests of all victims on whose behalf it has filed the collective action. According to the WAMCA, a claim organisation cannot bring a claim solely for its own constituency.[27] Therefore, in a collective action, both the claim organisation and the defendant are uncertain about the number of victims who will eventually claim compensation.[28]

A collective settlement can be structured in two main ways. The first option is for the defendant to finance a settlement fund to be distributed among the victims. The second option is for the victims to each receive a fixed amount determined by the settlement agreement, which can vary from victim to victim depending the damage suffered. If the defendant finances a settlement fund for the victims, the defendant knows what he has to pay, but the victims and the claim organisation do not know the specific amount they will receive. This depends on the number of victims seeking compensation from the settlement fund. The more victims make a valid claim, the less each of them will receive individually. If the parties reach a settlement where each eligible victim is entitled to a fixed compensation determined by the settlement agreement, the victims know what they will receive. However, the defendant does not know the total cost of the settlement because the number of victims entitled to compensation is uncertain.

27. This results from the provisions of art. 3:305a DCC. For this reason, a representative organisation that has initiated a WAMCA procedure is also not allowed to enter into a collective settlement solely for the benefit of its own members. See *Parliamentary Documents II* 2017/18, 34 608, 6, p. 22; *Parliamentary Documents II* 2017/18, 34 608, 9, p. 7.
28. This is, however, not necessary the case in collective actions in which the claims are consolidated in an alternative way, e.g. by way of assignment to a claim organisation. In those cases the number of victims represented in the procedure is known.

Another question arises in the context of a collective settlement: the choice between an opt-in or opt-out settlement. In an opt-out settlement, all victims falling within the scope of the settlement are bound by it unless they timely submit an opt-out declaration. The settlement specifies how and by what date a victim can seek compensation. Because in an opt-out settlement the victims who did not opt out are bound by the settlement agreement, a court must declare an opt-out settlement binding. Furthermore, the victims must be informed about the consequences of the settlement, if possible individually. This means that implementing an opt-out settlement takes a considerable amount of time and is costly.[29] The advantage of an opt-out settlement for the defendant is that it achieves finality. Once the court has declared the settlement binding, the defendant can only be sued by victims who submitted an opt-out declaration.

In an opt-in settlement, victims must take the initiative to claim compensation. Some opt-in settlements are open to all victims who meet the settlement conditions. However, the representative organisation negotiating the collective settlement with the defendant can also choose to settle exclusively for its own constituency.[30] There are several reasons for a claim organisation to choose a settlement only for its own members. The first reason is to prevent the so-called free riders, that is victims not affiliated with the organisation, from benefitting from the settlement.[31] It also makes it easier to allocate the costs of the collective action to the victims. Finally, in a collective settlement exclusively for its own constituency, a higher compensation per victim can be paid because the number of victims eligible for compensation is smaller. However, in an opt-in settlement, the defendant does not achieve finality. Any victim who has not claimed compensation can still sue the defendant, of course subject to limitation periods.

From the above, two conclusions can be drawn. The first is that, in addition to the uncertainties already present in a situation involving one plaintiff and one defendant, the uncertainty about the number of victims who can and are expected to file a claim makes it more challenging to reach a settlement. In a settlement fund, victims do not know what they will receive. Where an amount is fixed amount per victim, depending on the conditions agreed upon in the settlement agreement, the defendant does not know how much he has to pay.

A second conclusion is that sometimes only an opt-in settlement open to the claim organisation's members is feasible. This is because, in this way, the defendant can reach a settlement with a portion of the victims at acceptable costs, while still providing those individual victims with an acceptable compensation, the amount of which is known in advance.[32] The price the defendant pays is that he does not achieve finality with this kind of settlement. If there are no well-organised claim organisations active, this may be an acceptable risk for the defendant.

5.4. Damage Assessment in a Mass Damage Dispute in a Collective Settlement and Collective Litigation

5.4.1. Introduction

The model assumes that, in deciding whether to settle or litigate, the actors compare the expected net proceeds of the litigation with the amount they would receive in a settlement. In other words, the expected net proceeds of the litigation are the benchmark by which they determine whether it is rational to accept a settlement offer from the opposing party or to make a settlement offer themselves. Within the assumptions underlying this analysis (parties are risk-neutral and opt for the best possible financial outcome of the dispute), this decision is non-problematic in a dispute between one plaintiff and one defendant. It simply involves comparing two amounts.

In a mass damage dispute, however, it is different. In a collective settlement, it must be determined to what compensation an individual victim is entitled. Each collective settlement includes (at least) the following elements for this purpose: (a) a calculation rule or algorithm used for determining the entitlement of an individual victim; (b) the data to be inputted into the calculation rule or algorithm; and (c) the determination of the entitlement. This determination can sometimes be automated but often requires a human assessment of (the probative value of) the provided data. As an example, consider a collective settlement in a personal injury case involving damage scheduling. The settlement involves grouping victims into a limited number of categories depending on the severity of the injury. The amount

29. See D.F. Lunsingh Scheurleer, 'Enkele gedachten omtrent wenselijk procesrecht in collectieve acties', in W.J.J. Los, B.P.M. van Ravels, D.F. Lunsingh Scheurleer & S. Voet, *Collectieve acties in het algemeen en de WCAM in het bijzonder*, preadviezen Nederlandse Vereniging voor Procesrecht najaar 2012, Den Haag: Boom Juridische uitgevers 2013, p. 33-40.
30. With the understanding that this is no longer possible after the representative organisation has initiated a WAMCA procedure. See footnote 26.
31. C.E. Santman & R.J. Philips, 'De financiering van collectieve schadevergoedingsacties onder de WAMCA, Een inventarisatie van onzekerheden en mogelijkheden vanuit het perspectief van een procesfinancier', *MvV* 2021/7.7, p. 275-286
32. For example, in 2023 and 2024, Vereniging Woekerpolis.nl, ConsumentenClaim, the Consumentenbond, Wakkerpolis, and Stichting Woekerpolisproces reached opt-in settlements exclusively for their own members with Allianz, Nationale Nederlanden, and ASR. See www.woekerpolis.nl/news/schikking-nn-300-miljoen-voor-woekerpolis/. For completeness, it should be noted that according to the press release, an amount has also been reserved for distressing cases of affected individuals who are not affiliated with these representative organisations.

of compensation to which a victim is entitled varies per category (step a). The victim will have to provide medical data (step b). Subsequently, someone (such as a doctor) must determine in which category the victim falls,[33] and the payment of the compensation must be administratively arranged (step c).

5.4.2. *Scalability of Determining Victims' Entitlements*

In a collective settlement, it is crucial to keep the process of determining compensation for individual victims as simple as possible. This approach is more straightforward organisationally, requires fewer human resources, can be expedited, and is cost-effective. The importance of simplicity cannot be overstated. As calculation rules become more complex, the system needs more data. Can this be efficiently organised? Is the data already present in automated files? How reliable is this data? If victims have to provide data, are they able to do so? It should be noted that the data to be collected or provided may relate to a distant past and may no longer be easily ascertainable. Moreover, if the settlement process takes longer, the costs increase exponentially. This is evident in practice. The implementation costs of damage assessment can be very high in mass damage cases, both absolutely and relatively. I cite three examples.

The first example is the resolution of the interest rate derivatives scandal. This scandal involved several banks selling unsuitable interest rate derivatives to small and medium-sized enterprises (SMEs), which caused severe problems when the derivates got a negative value caused by a significant drop of interest rates.[34] The report by Bernard ter Haar from March 2022 contains the following data on this matter.[35] Compensation was offered to a total of 18,917 plaintiffs, with a total amount of €1.57 billion. The implementation costs amounted to €800 million. And this was not due to the complexity of the statutory damage assessment according to Section 6.1.10 DCC. 56% of the total compensation paid out concerned a leniency payment.

The second example of the settlement of damages resulting from earthquakes caused by natural gas extraction in Groningen, the Netherlands. Ten thousands inhabitants in Groningen suffered both physical and immaterial damages as result of those earthquakes. The Institute for Mining Damage Groningen (IMG) awarded a total of €362.5 million in 2022 and €309.6 million in 2023 in compensation. The operational costs amounted to €225.6 million in 2022 and €250.3 million in 2023.[36] The operational costs per euro awarded were €0.62 in 2022 and €0.78 in 2023.[37]

The third example is the recovery following the allowance affair, discussed in the introduction.[38] The costs are (for now) estimated at €7.1 billion. According to the State Secretary for Benefits and Customs, about 70% of the €7.1 billion allocated for recovery directly reaches the parents in the form of financial compensation and other tangible assistance. The remaining 30% (over €2.1 billion(!)) consists of, among other things, operational costs as well as costs incurred for the emotional and social recovery of the affected parents.[39] I do not know the exact amount allocated for the latter, but it is likely only a very small portion of that 30%.

For all these reasons, the entitlement of the victims must be determined in the most abstract way possible. Only then can this determination be scalable. This means considering as few individual circumstances as possible. I have previously written about scalability in solutions for mass damage cases and will not repeat or elaborate on that here, although there is certainly much more that can be said.[40]

What is important for my analysis is that a collective settlement provides the opportunity to organise the determination of the amount of compensation to which an individual victim is entitled in an efficient manner. After all, parties have freedom of contract. Only in an opt-out settlement is there a limitation as the court must approve the settlement, and it will not approve the settlement if the amount of the awarded compensation is not reasonable, taking into account (i) the extent of the damage, (ii) the simplicity and speed with which the compensation can be obtained, and (iii) the possible causes of the damage (Article 7:907 (3)(b) DCC). However, this lim-

33. In addition, the assessor will also collect data, partially combining steps b and c.
34. Derivatencommissie.nl.
35. ABDTOPConsult, Collectief schadeherstel: kan het sneller en slimmer?; Evaluatie afwikkelingsproces rentederivaten mkb, p. 11.
36. Annual Report IMG 2022, p. 21; Annual Report IMG 2023, p. 14-15. According to the IMG, 2023 was an "exceptional year," and this was also true for the operational costs. Be that as it may, since the inception of the IMG, the operational costs each year have amounted to more than half of the awarded compensation.
37. See also S.C.J.J. Kortmann, 'Afwikkeling van aansprakelijkheid NAM door de overheid', *NJB* 2023/1096, p. 1298-1306. Kortmann refers approvingly to an evaluation report by Andersson Elffers Felix and Utrecht University, stating that the high implementation costs are the 'inevitable consequence' of the tasks and goals assigned to the IMG under the Temporary Dutch Mining Damage Act. I am willing to accept that, but my point is that these costs can be reduced if the damage settlement is organized differently.
38. See footnote 6.
39. Response from State Secretary De Vries (Finance – Benefits and Customs) (received on October 10, 2023) to questions from Member Inge van Dijk (CDA) to the State Secretary of Finance regarding the report "Herstel van Toeslagenaffaire groeit uit tot peperdure, ambtelijke moloch", *Appendix Parliamentary Documents II* 2023/24, no. 197.
40. R.M. Hermans, 'Prejudiciële vragen in massaschadezaken', in D.H. Dongelmans, T. Hartlief, G.C. Makkink, S.J. Schaafsma & T. Thuijs (eds.), Rechtsontwikkeling in rechterlijke dialoog, Tien jaar prejudiciële vragen aan de Hoge Raad in civiele zaken, Den Haag: Boom Juridisch 2023, p. 173-198.

itation is not insurmountable. The wording of the law itself shows that the court, in its decision to declare the settlement binding, may take into account the simplicity and speed with which the compensation can be obtained. Therefore, there is no reason why parties in a collective settlement cannot agree on compensation that (i) abstracts from the circumstances of the case, (ii) is based on data that are already available or can be easily obtained, and (iii) can be implemented quickly and with limited execution costs.

Establishing a scalable and efficient compensation scheme is in the interest of both the defendant and the victims. The defendant can benefit from an efficient compensation scheme because in practice the execution costs of the scheme are borne by the defendant and a quick resolution of the dispute saves management time, allows the defendant to focus on its business objectives and can enhance its reputation. The victims, on the other hand, can benefit from an efficient compensation scheme because it is plausible that the benefit that can be achieved with lower execution costs may lead to a higher amount that will be actually available for compensating the victims and in any case will speed up the process.

5.4.3. The Benchmark for a Collective Settlement: Expected Net Proceeds of an Individual Lawsuit

Despite the fact that establishing a scalable, efficient compensation scheme is in the interests of both the defendant and the victims, practice shows that this is often not achieved. Within the context of my analysis, I focus on one of the explanations. The rational choice model assumes that, in deciding whether to settle or litigate, victims and the claim organisations compare the amount the victims would receive in a settlement with the expected net proceeds of a potential lawsuit. The benchmark for a settlement is the expected net proceeds of an individual lawsuit. Although it has been possible to collectively claim damages in a WAMCA procedure since 2020, no procedure has advanced to the stage where the damages of the victims can be collectively determined. And it will likely take many more years before that might happen.[41] Additionally, in collective proceedings, the method of calculating collective damages will, in most cases, be derived from the damages of representative examples of individual victims.

Since the benchmark for any settlement is the likely outcome of a court procedure, there is a tendency to align the method of damage calculation in a settlement with how the court would determine the damages. Both victims and claim organisations, as well as the defendants, have their own reasons to advocate for a damage settlement comparable to what a court would decide in a procedure. Claim organisations and the victims they represent sometimes find it difficult to accept that victims might not receive full compensation for their damages, leading them to reject an abstract form of compensation. This is especially true in particularly distressing cases, and claim organisations have an interest in bringing these distressing, individual cases to public attention to put pressure on the defendant. This suggests that these cases are representative of the average victim. Conversely, defendants find it difficult to accept that an abstract method of damage calculation might lead to some victims being overcompensated. This pressure can lead to the refinement of the rules on which the compensation is based to the point where foreseeable execution complications are downplayed at the time of settlement. Additionally, setting high standards for the reliability of damage calculation and verification can cause operational costs to skyrocket.[42] Not to mention, the additional time required to implement the collective settlement further complicates the process.

6. The Time Involved In Settling the Mass Damages Dispute

In deciding whether to settle a mass damages dispute or proceed with litigation, parties must also consider the factor of time. It is important for at least three reasons.[43]

The first reason is that the state of the law is not static but continues to evolve. Parties must consider new jurisprudence that can positively or negatively influence the expected net outcome of the procedure. De Waal and Van der Hoek note that the representative of the victims, Leaseproces, deliberately waited to file a large number of cases against Dexia until more favorable jurisprudence had developed, considering their own business interests.[44]
The second consequence of the passage of time is that the compensation the defendant may have to pay to the victims is increased by statutory interest, which is currently 7% per year in the Netherlands, but for many years was much lower, 2%.

41. The WAMCA procedure is designed in such a way that the parties are encouraged to settle the dispute. The question is therefore whether collective damages will ever be determined by the courts.
42. That occurred in the interest rate derivatives dossier, where under pressure from politics and regulators, accounting controls had to be applied to the allocation of compensations. For more information I refer to ABD-TOPConsult, Collectief schadeherstel: kan het sneller en slimmer?; Evaluatie afwikkelingsproces rentederivaten mkb.
43. This list is not exhaustive. The time it takes to resolve a mass damage dispute also affects the costs of financing a collective action, especially if external litigation funding is involved. In many cases, an external litigation funder demands a fee that increases the longer the dispute lasts. It is also conceivable that the expected duration of the procedure makes it impossible to obtain external litigation funding, causing a potentially well-founded collective claim to fail to get off the ground.
44. C.L.J.M. de Waal & F. van der Hoek 2022, p. 1839-1840.

The third aspect that parties must consider is that in a settlement, they receive or pay money sooner than if they wait for a judgment. As outlined in the introduction, the resolution of mass damages disputes can take a long time, in extreme cases – as the Dexia affair demonstrates – even decades. It originated with the dot-com crisis in 2001, 23 years ago now, and is still not fully resolved. The time value of money is, therefore, a significant factor that parties must take into account. How do they do that?

The standard method to calculate the present value of a future payment obligation or receipt nominally equal to *K (PDV (K))* is to exponentially discount it:

$$PDV\ (K) = (1 + r)^{-t} \tag{11}$$

where r is the discount rate, and t is the time. For a claim nominally equal to *K*, increased with the statutory interest i and discounted with a discount rate *r*, the present net present value is:

$$PDV\ (K) = K(1 + i)^{t}(1 + r)^{-t} \tag{12}$$

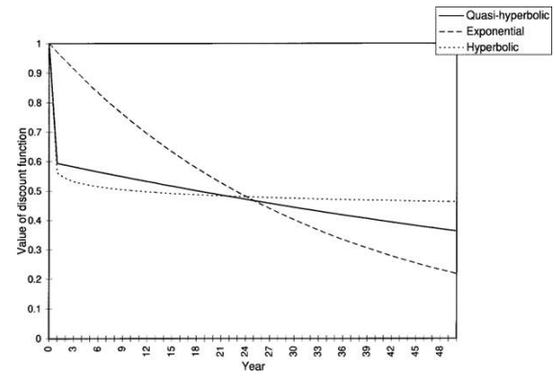
To provide an idea of the effect, I have included in a table the present net present value of a nominal amount of 100 with a statutory interest of, for example, 2% (the statutory interest rate from 2015-2022) over a period of 1, 2, 5, 10, and 20 years at discount rates of 1, 2, 5, and 10%:

Time in years	**1**	**2**	**5**	**10**	**20**
Discount rate (%)					
1	101	102	105	110	122
2	100	100	100	100	100
5	97	94	87	75	56
10	93	86	69	47	22

This table illustrates how significant the effect of the discount rate is. If it is lower than the statutory interest rate, the net present value is higher than the nominal value. If it is higher, the net present value is smaller.

The discount rate parties will use when considering whether or not to settle their dispute depends on their situation. Commercial enterprises often relate it to the weighted average cost of capital ("WACC") or the return they can make if they invest the funds necessary to settle elsewhere.[45] It is plausible that the discount rate derived from the WACC is significantly higher than the statutory interest rate. In that case, they have a rational reason to defer the problem rather than settle immediately. Thus, the defendant's perspective is fundamentally different from that of the court. From the Supreme Court's viewpoint, it may seem that once the legal question is decided, parties should be able to settle since they know where they stand. However, if the defendant can delay the dispute for many years without incurring significant costs, this can be quite attractive. This is especially true if the defendant hopes that by deferring the problem, not all potential victims will file a claim.

The above analysis applies to defendants. Perhaps it also applies to professional plaintiffs, but not to the vast majority of individual victims, as in practice their behaviour is often not rational. Behavioral economic research shows that the way they discount a money claim is not exponential but (quasi-)hyperbolic. That means the discount is very high at the beginning and flattens afterward, as illustrated in the following graph:[46]



This can be explained by the following example. If one were to ask a private victim: what would you prefer as compensation, 80 euros today or 100 euros in a year, many would choose 80 euros today. However, if you ask them to choose between 80 euros in a year or 100 euros in two years, many would say, "Give me 100 euros." For an economist, this answer might seem illogical because it's essentially the same question viewed rationally. However, a psychologist or behavioural economist can explain the different answers easily. A victim struggling to make ends meet every month wants to satisfy immediate needs. The difference between now and waiting for a year feels like an eternity, while the difference between waiting one or two years seems emotionally negligible.

Behavioural economists have extensively researched how individuals discount money claims, such as decisions regarding saving for old age. This research is robust and has a solid empirical basis. As far as I know, a similar study has not been conducted for determining damages in mass damage cases, ei-

45. The WACC is used by companies looking for expansion opportunities or potential acquisitions. Investments only add value to a company if the expected return is greater than the WACC.

46. Derived from D. Laibson, "Golden eggs and hyperbolic discounting," The Quarterly Journal of Economics, May 1997, pp. 443-447. I won't delve further into the distinction between hyperbolic and quasi-hyperbolic discounting, as it is irrelevant to my argument.

ther in the Netherlands or elsewhere. I cannot empirically assert that for many victims, a quick resolution of the mass damage dispute is more important than receiving full compensation. However, there are indications that this may be the case. Research on the resolution of sexual abuse in the Catholic Church and youth care, for instance, shows that victims were satisfied with a financial settlement that did not fully cover the damages, provided the conditions for eligibility were accessible.[47]

7. Policy Implications

7.1. Introduction

From the preceding analysis, several conclusions can be drawn. The first conclusion is that the benchmark for determining the claims of victims in a collective settlement is the expected outcome of a proceeding for an individual victim (section 5.3.2). This means that if the decision in a proceeding is not scalable, it becomes more challenging to settle a mass damage dispute. In section 7.2, I discuss the cause of this and what measures (policy interventions) are possible to address it. By implementing these measures, it is also possible to address a finding based on empirical research, namely that the implementation of a compensation scheme can be burdensome for the victims and that they are insufficiently involved in the process.[48]

The second conclusion is that differing expectations of the parties involved regarding (a) the likelihood that the claim will be granted, (b) the average damage per victim, (c) the number of victims who will claim compensation, and (d) the legal costs both parties will incur, significantly impact the possibility of reaching a settlement (section 4.2 and 5.3). The more these expectations diverge, the lesser the chance of reaching a settlement. In section 7.3, I discuss what measures or policy interventions are possible to align the parties' expectations on these items.

The third conclusion is that defendants may have an interest in delaying the procedure to defer the problem, while victims have an interest in a swift resolution (section 6). In section 7.4, I discuss the options available to the legislator and the judiciary to expedite the resolution of mass damage disputes and make it less attractive for defendants to defer the resolution of the dispute.

Before delving into these suggestions, a few preliminary remarks are necessary. Firstly, the suggestions I make are based on the law and economics analysis I conducted. This analysis has inherent limitations, as briefly indicated above. Additionally, in my analysis, I made certain assumptions about the behaviour of the actors involved, without substantiating these assumptions with empirical research. It is quite possible that practice deviates from these assumptions. Secondly, I excluded some relevant actors from my analysis, such as potential third party litigation funders, the government, and regulators.[49] In practice, these actors also play a role in many mass damage disputes. Thirdly, I acknowledge that most of the suggestions I make also have drawbacks. A normative judgement is required to weigh the pros and cons of my suggestions against each other. This article is not the place to discuss these pros and cons, and it is also not always the case that the suggestions I make can withstand the confrontation with my own normative judgement. The purpose of making these suggestions is to show what policymakers – by which I mean the legislator and the judiciary – could do to encourage parties to settle their disputes more quickly. Finally, I realise that some of the suggestions I make are not fully based on the conducted analysis, but in part also on my experiences as a practicing lawyer.

7.2. Scalability of Determining Victims' Claims in a Collective Settlement

7.2.1. Introduction

As outlined in section 5.4.1, every collective damage settlement includes (at least) the following elements: (a) a calculation rule or algorithm used for determining the entitlement of an individual victim; (b) the data to be inputted into the calculation rule or algorithm; and (c) the determination of the claim. The rational choice model indicates that the outcome of a proceeding serves as the benchmark for the calculation rule in the collective settlement. The "outcome of the proceeding" used as a benchmark is, in practice, the (hypothetical) result of an individual victim's proceeding against the defendant. The reason why the outcome of an individual case serves as the benchmark is that, at least until now, there have been few, if any, rulings where the amount of damages in a collective procedure has been determined by courts. When damage assessment does occur in collective procedures, it is typically derived from the claim of an individual victim. This becomes problematic if the determination of an individual victim's claim is not scalable in a mass damage situation, where there are large numbers of individual victims.

47. Meldpunt Seksueel Misbruik in R.-K. Kerk in Nederland, *Verslag van werkzaamheden 2011-2018*, p. 9; Commissie-Samson, *Omringd door zorg, toch niet veilig: Seksueel misbruik van door de overheid uit huis geplaatste kinderen, 1945 tot heden*, report 8 October 2012.
48. Van Doorn 2024, par. 6.3 and 6.4.
49. What I also do not address are the implications of settling mass damage disputes for the judiciary as an institution. The settlement of mass damage disputes potentially (and sometimes already does, as seen in the Dexia case) places a significant burden on the capacity of the judiciary, which comes at the expense of other litigants who have to wait longer for their cases to be heard. What the judiciary may not always realise is the societal costs of individually processing the claims of victims in a mass damage case for other litigants.

The reasons why the determination of an individual victim's claim is not scalable can be varied. One reason could be that the legal rule in the benchmark proceeding is not sufficiently clear. This could involve a legal rule where the circumstances of the case play a role, or a "prima facie" rule, where exceptions are conceivable. In all these cases, there is no hard and fast rule that leads to a clear outcome of the benchmark proceeding.

A second reason why the legal rule is not scalable is when the facts needed to determine the legal rule cannot be easily established. This, can have various causes. Sometimes, the necessary facts are not readily available and need to be determined. Other times, retrieving the relevant facts can be challenging because they are not stored in automated databases or may no longer be accessible due to the passage of time. Additionally, the data on which the judge must base their factual findings may not be sufficiently reliable.

A third reason why a calculation rule is not scalable is that determining the claim may require an individual assessment, making it impossible to automate. This, too, can have various causes. One cause may lie in the law of evidence, which includes the right to present counter-evidence (e.g. Article 151(2) DCCP). Sometimes, facts must be assessed by an expert, for example in the case of damage scheduling in personal injury cases, after which the expert's opinion may still be subject to further debate in court. While this may be manageable for a few hundred or a few thousand victims, it becomes unworkable when the number of victims reaches tens of thousands. However, even with smaller numbers of victims, one may question whether the time and cost of an individual assessment of the victims' claims are proportionate. For the record, it should be noted that an individual assessment of the claim may be very important for some victims, as it provides the opportunity to tell their own story and can contribute to the perceived procedural justice. However, in other cases, victims may perceive it as burdensome.

7.2.2. Solutions to Achieve Decisions That Are More Scalable

Firstly, the courts, and in particular the highest courts, could recognise that decisions in mass damage cases require a different approach than decisions in individual cases and establish different rules for them. My suggestion is that courts should consider formulating procedural and substantive rules in a mass damage cases which would deviate from the 'normal law' in order to achieve a manageable and scalable outcome. This would relieve the judiciary from the constraints of a framework constructed by itself over years of jurisprudence. The main tasks of the highest courts are to promote legal unity and legal development. This entails ensuring consistency in its jurisprudence. However, this does not always work in mass tort cases because decisions in such cases require a higher level of abstraction and practical feasibility than decisions in individual cases.

Secondly, the courts hearing mass damage cases should consider whether each legal rule formulated by them is scalable, meaning that it can be used in a large number of cases, both in individual follow-up proceedings and in a collective compensation scheme or settlement. If the conclusion of this thought experiment is that the formulated legal rule is not scalable, then it is not suitable and should be replaced by another. Part of the test to determine whether the legal rule to be formulated by the judge is scalable is to examine whether the data needed to apply the legal rule is available. If this data is not available, then the judge would be better off formulating a different legal rule.

It will often be difficult for the courts to determine in advance whether a rule is scalable or not. The courts could address this by first giving a preliminary opinion and then asking the parties to comment on the scalability of the envisaged rule. Another option is to appoint an expert to advise the court. Alternatively, third parties could be given the opportunity to provide the court with information as *amicus curiae*. In countries where decisions of the highest court are preceded by an opinion from an advocate general, the advocate general can request information from experts and include it in the opinion. What is possible will therefore depend on the procedural law of the relevant jurisdiction. Where necessary, the law should be amended to make this possible.

The third thing the court could do is formulate hard and fast rules. Ultimately, it comes down to the willingness to make decisions. In this regard, I agree with the approach of the Amsterdam District Court in the diesel emissions case.[50] In a collective action, the court declared that consumers have the right to demand a price reduction from car dealers that is proportionate to the degree of deviation from what was agreed upon, namely €3,000 for a new car and €1,500 for a used car. I cannot assess whether these amounts are reasonable or whether the court was allowed to decide this way given the procedural debate, but I support the direction taken by the court. If this judgment becomes final, both Volkswagen and its dealers, as well as the approximately 100,000 victims, will know where they stand, and the dispute can be settled without the need for individual follow-up proceedings.

50. District Court Amsterdam July 14, 2021, ECLI:NL:RBAMS:2021:3617 (*Stichting Volkswagen Car Claim/Volkswagen c.s.*).

7.3. Different Expectations about the Net Outcome of the Procedure

The preceding analysis indicates that different expectations of the parties regarding the factors determining the net expected value of the proceedings significantly influence the likelihood of reaching a settlement. As these expectations diverge, the likelihood of reaching a settlement decreases. How can one ensure that the parties' expectations about these factors converge rather than diverge?

Naturally, parties can promote this by discussing and exchanging information, but prior to the proceedings, this can only be done voluntarily. The question is what the legislature and the judiciary can do to encourage parties to disclose their positions as early as possible in the proceedings and not withhold information from each other. What policy interventions are possible?

Firstly, it is desirable for the courts to be able to identify at an early stage of the proceedings what the main points of contention are which divide the parties and hinder a settlement. The nature of these points of contention depends on the specifics of each case. They could involve legal issues (such as whether the defendant acted unlawfully or whether the claim is time-barred), factual issues, or data regarding the size of the group of victims and the average extent of damages. To achieve this, it is necessary for the court to be able to take control of the proceedings. Where the current law impedes this, it is advisable to amend the law to provide courts with more tools for effective case management.

Secondly, it is important to nudge parties towards a collective settlement by ensuring consistency in case law. By this, I mean the following: If one party (typically the defendant) adheres to the current case law while the other party (the advocacy group) hopes that new arguments will lead to a better outcome, no settlement will be reached. In practice, victims and the claim organisations representing them are inventive and continuously devise new legal grounds for essentially the same claim. Even though the principle of *res judicata* does not preclude a fresh assessment of the claim, courts would be wise to stick to the established line whenever possible. Otherwise, disputes can drag on for decades.[51] This argument could indeed be seen as a typical defense standpoint. I understand that, but my plea for more consistency in decisions in individual cases brought in a mass damages context does not imply anything about the amount of compensation awarded to victims. In order to encourage collective settlements in mass damages cases, consistency in case law is crucial, not the specific amount of compensation awarded. If courts take into account that some victims might be somewhat undercompensated and therefore generously estimates the damages awarded, I have no issue with that. Furthermore, I would like to point out that the negative consequences of an individual approach (i.e. the significant delays it causes in resolving mass damages disputes) are passed on to other victims who might not want an individual treatment of their case at all.

Thirdly, one should avoid forum shopping. In mass damages cases, multiple courts may have relative jurisdiction, which allows plaintiffs and the claim organisation representing their interests to choose where to bring a lawsuit. This gives claim organisations and individual victims the option to approach a different court if they do not have sufficient success with the first court they approach. It goes without saying that the mere existence of this possibility can lead to differing expectations between parties regarding the outcome of the proceedings, thus hindering the establishment of settlements. The solution here is simple: ensure consistency. This means that coordination between the courts is necessary to guarantee that consistency. This can be done, for instance, by setting up pool of judges in which each court is represented by at least one judge who deal with mass damages cases. In the Netherlands this pool concept was successfully introduced in 2021 in insolvency cases with respect to the Dutch preventive scheme. Alternatively, the legislator could assign all mass damage cases to a single court. In the Netherlands, this was considered for WAMCA cases, but ultimately not implemented.

7.4. Acceleration of Mass Damages Procedures

In section 6, I outlined the various aspects of the time factor in mass damage disputes. One of the key lessons from the analysis is that defendants may have an interest in deferring the resolution of an issue if the internal discount rate they use for assessing investment opportunities is higher than the statutory interest rate. Financial incentives generally work well to bring about behavioral changes. This is especially true for defendants, who are often businesses driven by financial considerations. Financial incentives might include cost awards that cover the actual costs or increase the statutory interest rate. Another suggestion might be the introduction of a penalty or an increased cost award if a settlement proposal of the claim organsation is turned down by the defendant when the final judgment is less favourable for the defendant than the settlement proposal.The same logic could be applied to the plaintiffs, with an increased cost award if a settlement proposal of the defendant is turned down by the claim organisation and the final judgment is less favourable for the victims. The options which would make it possible to implement these incentives or which could be introduced by the legislator

51. An example from Dutch practice is the Dexia affair. Litigation over this matter began in 2001. The landmark decisions of the Supreme Court date back to 2008 and 2009. Fifteen years later, there are still hundreds of ongoing cases, with thousands more in the pipeline.

(including, more general ways to expedite proceedings), vary by jurisdiction. While more can be said about this, I will limit my remarks to this for the purpose of the present article.

8. Conclusion

In this article, I have analysed the factors influencing the settlement of mass damage cases using a law and economics model. This analysis demonstrates that even a model significantly simplifying reality can be useful. I then used the outcomes of this analysis to devise policy interventions that the legislator and judiciary could employ to promote the settlement of mass damage disputes, ensuring that victims receive compensation acceptable to them, the claim organisations, and the defendants, within a reasonable timeframe and at limited execution costs. These proposed policy interventions also have disadvantages. A normative judgement is required to assess whether the benefits outweigh the drawbacks. I have not delved into this in this contribution in detail, although I have occasionally touched upon it.

9. Conflicts of Interest

As attorney, I have previously primarily represented defendants, including Dexia in various proceedings referenced in this contribution. Currently, I serve as a board member of two claim organisations which are plaintiffs in WAMCA proceedings. Additionally, I am a member of an investment committee of a third-party litigation funder.

Adjudicating Asbestos Claims In California and England:

A Comparative Study

Jo-Lynne Lee[1]

Asbestos injury litigation is "the longest-running mass tort in U.S. history."[2] It has continuously and substantially impacted the California trial courts.[3] This study,[4] comparing the judicial approaches to asbestos litigation in England[5] and California was prompted by demographic data reflecting that despite the five-fold greater mesothelioma deathrate in Britain than in the U.S.,[6] the English courts devote dramatically less judicial time and resources to the management and resolution of asbestos claims than their counterparts in California.

Docket data reflecting the enormous resources expended on asbestos-related cases in California also suggest the utility of a comparative study. Asbestos-related claims comprise less than 1% of the civil dockets in California,[7] yet in those trial courts affected, there is one full-time judge solely dedicated to pre-trial management of these cases and additional judges called upon to try them.[8] If tried to verdict, asbestos jury trials in California can last four to six weeks. In England and Wales, a jury trial has never been held in an asbestos case; these actions are generally resolved at early stages in litigation. The approaches taken by courts in England and California differ at virtually every stage of the litigation process.

These differences may be instructive for courts dealing with other mass torts given that courts are keen to adopt practices from other jurisdictions (1) that make litigation more efficient, and (2) that encourage counsel to try tactics successfully used by others in their field. As one American attorney interviewed in this study observed, plaintiffs' counsel handling pharmaceutical cases will try strategies that worked well for them in tobacco cases; defense counsel who have succeeded in opioid cases with a particular approach will try to replicate that success in another

1. The author has been a Judge on the Alameda County Superior Court in California since 2002. Her tenure includes seven years managing all asbestos cases filed in Alameda County. In 2024, she was honored as Trial Judge of the Year by the Alameda-Contra Costa Trial Lawyers Association and by the San Francisco Chapter of the American Board of Trial Advocates.
2. Stephen J. Carroll, et al., *Asbestos Litigation*, RAND Institute for Civil Justice, 2005 monograph.
3. Cases filed in California see a select and smaller fraction of the asbestos cases filed in the United States. In 2022 only 6.5% of asbestos filings in the U.S. (3,550) were filed in Los Angeles, Alameda, and San Francisco counties, where the majority of such cases in California are filed. Despite small caseloads, California cases are more heavily weighted with the most serious asbestos injury (primarily mesothelioma) claims. KCIC, *Asbestos Litigation: 2022 Year in Review.* In 2023, mesothelioma cases made up 93.3% of asbestos actions filed in Los Angeles County and 89.7% of asbestos actions filed in Alameda County. KCIC, *Asbestos Litigation: 2023 Year In Review.*
4. This study was conducted by the author while a Visiting Fellow with the Commercial Law Centre, Harris Manchester College, Oxford University in 2023. The study was limited geographically and in scope. It was limited geographically to England and Wales and focused on California. Many laws, such as the constitutional right to jury trial, are not confined to California but enjoyed throughout the States and the typical asbestos complaint filed in California does not differ significantly from those filed in other jurisdictions in the U.S. There are, however, certain rules and procedures that may be unique to California. This study does not consider or address statutes and rules applicable in other states or in federal courts.
5. The term "England" in this article refers to England and Wales; it does not include Northern Ireland or Scotland.
6. "Asbestos consumption per head since the 1950s was similar in Britain and the United States for chrysotile and crocidolite but amosite consumption was about five times higher in Britain (figure 1). This seems likely to explain the fivefold greater mesothelioma deathrate in Britain than in the U.S.A." (Clare Gilham, et al., *Pleural Mesothelioma And Lung Cancer Risks In Relation To Occupational History And Asbestos Lung Burden,* Occup. Environ Med. 2016 May;73(5):290-9.doi: 10.1136/oemed-2015-103074. Epub 2015 Dec 29. PMID: 26715106; PMCID: PMC485597. Approximately 2,500 mesothelioma deaths are reported annually in both the United Kingdom and the United States. (Health & Safety Executive (HSE) 2023, www.hse.gov.uk. However, in 2022 the population of the United Kingdom was an estimated 67,508,936 compared to an estimated 333,287,557 in the United States.
7. Data provided by trial judges with asbestos dockets in Alameda, San Francisco, and Los Angeles counties. Asbestos cases filed in Orange and San Diego counties are transferred to the L.A. Superior Court for processing therefore the L.A. docket is not confined to Los Angeles but includes cases from these other counties. (Judicial Council Coordination Proceeding (JCCP LAOSD Asbestos Cases.)
8. Another measure of the disproportionate impact of asbestos filings in California is apparent from the judicial weighted caseload value for these cases, as compared to other civil cases. The case weights adopted in 2019 provide a case weight of 553 minutes for asbestos cases, while the case weight for other Unlimited Civil matters (i.e. cases claiming more than $25,000 in damages) is 115 minutes. (See, CA Govt. Code §69614(c)(1) and (3).)

client's product liability matter and trial courts often borrow what seems to have worked well for cases in one docket and use it in another. Because asbestos litigation has a long history and has consumed so much attention in medical and legal journals, it is often a resource from which other mass tort dockets draw.[9]

This comparative study suggests that English law and regulations, historical practice, and legal culture have enabled English courts to avoid the heavy burden placed on their California counterparts by (1) providing attorneys the means to realistically evaluate the value of the claim at an early stage in the litigation; and (2) requiring litigation be conducted cost-effectively. As discussed in the following pages, the key takeaway is that asbestos cases in England and Wales demand comparatively fewer court resources than in California because, in England and Wales:

- Jury trials are not held in asbestos cases.
- Complaints typically involve one or two defendants, generally an employer, and the causes of action asserted, and relief sought are accordingly more limited.
- In the event of an adverse judgment, the defendant in a mesothelioma case is jointly and severally liable.
- Parties are subject to various statutory pre-filing and pre-trial requirements, including an Order to Show Cause proceeding, which can result in an early, provisional judgment of liability and interim payment to the plaintiff.
- Absent leave of court, pretrial discovery is generally limited to exchanging documents and witness statements.
- Workers' compensation and other governmental programs exist in England and Wales that provide expansive benefits for occupational injury, particularly addressing the needs of plaintiffs (or their heirs) in asbestos cases.

This article starts with a brief discussion of the historical uses of asbestos and the spawning of asbestos litigation. With that background in mind, the article proceeds with a description of how English and California courts differ as to each of the practices bulleted above and the impact on ways that lawyers litigate these cases. In sum, the article proposes that the overall approach taken by the courts in England and Wales in the management of asbestos claims have eliminated the protracted litigation experienced by their California peers and consequent drain on court resources.

It is noted at the outset that adopting any of these English practices wholesale in an American court would likely come with compromises to principles deeply embedded in and considered core values of American jurisprudence, most notably the right to a jury trial and American discovery practice. This article seeks to navigate that complex terrain to determine changes in practice that might benefit California courts without undermining those core principles fundamental to the American judicial system.

1. Brief History of Asbestos and Its Relationship to Cancer

Asbestos is the collective name for a group of fibrous silicates divided into two groups that differ in mineralogical and chemical properties: amphiboles and serpentines. Amphiboles include crocidolite, amosite, anthophyllite, and tremolite. Chrysotile is the only serpentine. There has been and continues to be debate among some experts about the relative potency of chrysotile ("white asbestos"),[10] but it is acknowledged to be less potent than other types of asbestos insofar as inducing malignant disease. "Brown asbestos" (amosite) was the source of much asbestos utilized in Great Britain, whereas "white asbestos" (chrysotile) was the primary type of asbestos imported and used in the United States.

Due to its high durability, tensile strength, and heat resistance, asbestos was incorporated into many commercial products, including thermal insulation, electrical wiring, building materials, and friction products. Asbestos usage peaked in the 1950s, 1960s, and 1970s, which were considered the "golden years of asbestos production." Turner & Newall (later known as T&N), founded in 1871, was England's major asbestos manufacturer during these so-called "golden years" of asbestos production and use. At one point, Turner & Newall owned and operated 14 plants in Great Britain and was the most significant British employer in the asbestos industry. There were numerous asbestos victims who could link their diseases to exposure to asbestos dust at Turner & Newall. Consequently, it was sued in many cases filed in England.[11] During WWII, the U.S. military specified asbestos insulation in the construction of its ships and vessels. Insulators working on Navy vessels were subsequently determined to have suffered a high incidence of mesothelioma and other asbestos-related diseases. California cities that housed Naval shipyards, such as Oakland (Alameda County), Long Beach (Los Angeles County), and San Francisco, decades

9. See, e.g. Paul Carrington, *Asbestos Lessons: The Unattended Consequences of Asbestos Litigation*, The Review of Litigation Vol. 26:3 (Summer 2007); Zdrojeski, Silliman, and Scavone, *Is PFAS litigation the new asbestos docket?* Eversheds Sutherland "Insights" (May 11, 2023), www.eversheds-sutherland.com; Seaman and Arnold, *Insurers, Prepare For Large Exposures From PFAS Claim*. Law 360 U.K. (August 23, 2023), www.law360.com.
10. See, Clare Gilham, et. al., *supra* at 296; Bertram Price, *Projection of future numbers of mesothelioma cases in the US and increasing prevalence of background cases: an update based on SEER data for 1975 through 2018*, Critical Reviews in Toxicology 2022 Apr;52(4):317-324. doi:10.1080/10408444.2022.2082919. Epub 2022 Jul 19. PMID: 35852497.
11. Andrea Boggio, *Compensating Asbestos Victims: Law and the Dark Side of Industrialization*, pp. 81 82 (2013).

later became hotbeds of asbestos litigation. Most asbestos claims in California continue to be filed in these counties.

Scientific findings establishing a causal link between asbestos exposure and lung disease became the subject of articles in widely published newspapers and other media, beginning in the early 1960's. By 1985, the United Kingdom banned the import and use of "blue asbestos" (crocidolite) and "brown asbestos" (amosite) in England.[12] The use, supply, and import of all asbestos, including "white asbestos" (chrysotile), was banned in 1999.[13] However, even before these bans were implemented, Great Britain had enacted several pieces of legislation that recognized the occupational hazards of asbestos exposure.[14] Similarly, knowledge and concerns raised regarding the hazards of asbestos exposure led to legislation being enacted in the United States in the 1970s regulating asbestos use and handling, although the States did not totally ban the importation and use of chrysotile ("white asbestos") until 2024.[15]

Since the 1980s, due to legislation, litigation, and increased public awareness of its hazards, asbestos has been largely eliminated in most consumer products that in the past incorporated asbestos in their production and manufacture. Although asbestos is no longer ubiquitous, occupational exposure to asbestos remains a predominant cause of asbestos-related disease and the basis of most lawsuits in both the U.K. and the U.S. While these so-called "legacy" cases have declined over time,[16] there is still no immediate, discernable "light at the end of the tunnel." New pathways of asbestos exposure are being discovered, and new sources of asbestos exposure are being claimed.

1.1. Old Asbestos – New Exposure

In the U.K. there is a growing concern that persons working in, residing in, or otherwise occupying aging buildings, including schools, hospitals, and housing projects, are being exposed to harmful levels of asbestos. Britain's Health and Safety Executive (HSE) advises that: "Asbestos-containing materials (ACMs) were used extensively in the construction of schools and other public buildings from the 1950s until the use of asbestos in Great Britain was completely banned in 1999. Many school buildings constructed or refurbished during this period still contain a large amount of ACMs."[17] After WWII, the Consortium of Local Authorities Special Programme (CLASP) was introduced in England "...with the aim of developing prefabricated school buildings using a modular design around a steel framework. The open and light nature of these structures made them vulnerable to fire, so asbestos was extensively used within them for its fire-retardant properties."[18] Hence, there is concern that teachers and other school workers are at an increased risk of developing diseases from asbestos in deteriorating buildings in England.

1.2. A New Frontier – Talc Litigation

Talc and asbestos are naturally occurring minerals that can sometimes form so closely together that when talc is mined, the mining practices cannot keep them separated. Not every talc deposit is contaminated with asbestos, but according to some reports, those that are contaminated tend to contain highly carcinogenic forms of asbestos, such as tremolite or anthophyllite.[19]

In the United States, thousands of complaints have been filed against manufacturers, distributors, and sellers alleging their asbestos-containing cosmetic

12. The Asbestos (Prohibitions) Regulations 1985 banned the production and importation of crocidolite and amosite and use and supply of products containing these materials.
13. The Asbestos (Prohibitions) Regulations 1992 banned the importation of all amphiboles and use and supply of products containing chrysotile. The Asbestos (Prohibitions) Amendment) (No.2) Regulations 1999 banned the use, supply and import of all asbestos and asbestos-containing products, with a few exceptions.
14. The Asbestos Industry (Asbestosis) Scheme 1931 was the first in the world to recognize asbestos as an occupational hazard and to grant the right to compensation for victims of asbestosis. Administrative compensation for asbestos disease expanded in the aftermath of WWII as medical evidence of asbestos toxicity extended to mesothelioma and lung cancer. These diseases became eligible for compensation under the umbrella of Industrial Injuries Disabilities Benefit (IIDB), the current English workers' compensation scheme.
15. On March 18, 2024, the U.S. Environmental Protection Agency (EPA) announced a final rule to prohibit on going uses of chrysotile asbestos, the only known form of asbestos currently used in or imported to the United States. EPA News Release (March 18, 2024), https://epa.gov/newsreleases/search/press_office/headquarters-226129.
16. Between 1999 and 2023, overall mesothelioma death rates among males have declined precipitously. Among females the death rate increased peaking in or about 2017 and fell 11% in 2023. Wonder.cdc.gov.
17. *Asbestos In Schools*, HSE Report (Dec. 4, 2023), www.hse.gov.uk.
18. See e.g. Bethany Taylor, Angela Tod, Peter Allmark, *The hidden danger of asbestos in UK schools*, theconversation.com (April 19, 2023); Michael Savage, *The tragic cost of under investment: asbestos blamed fo 150 deaths of school and hospital workers in England*, The Guardian (16 Apr 2023). All-Party Parliamentary Group on Occupational Health and Safety, *Asbestos in schools: The need for action*, www.ucu.org.uk.
19. Michelle Whitmer, *Talcum Powder and Asbestos*, Asbestos.com, August 31, 2023, https:/www.asbestos.com/products/talcum powder/.
20. Johnson & Johnson recently entered into a settlement agreement with a consortium of 43 state attorney generals, including California, to resolve talc claims brought by these states for a total settlement of $700 million. This settlement does not affect the lawsuits brought by individual plaintiffs. San Francisco Daily Journal, June 12, 2024, www.dailyjournal.com.

talc products have caused mesothelioma and ovarian cancer.[20] According to at least one recent news report, it appears that talc claims are beginning to surface in England and Wales.[21]

Talc is also used in the manufacture of many other modern products. "Industrial" talc is found in paint and glazes (to improve texture and enhance matting and paint adhesion), the paper industry (to enhance printability and reduce surface friction) and in wastewater treatment plants to purify water. The list of "talc products" is long: ceramic toilets, sinks and tiles, clay, crayons, chalk, electrical cables, joint compounds, putties, and adhesives, plastic and rubber automotive parts, and rubber gloves, among others. While less publicized than cosmetic talc claims, claims of asbestos-related injury from industrial talc are a potential source of further litigation.[22]

2. The Right, or Not, to a Jury Trial

> *"What many of those who oppose the use of juries in civil trials seem to ignore is that the founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added to that of the judiciary." William Rehnquist*[23]

The right to a jury trial in a personal injury action is enshrined in both federal and California constitutions. Moreover, as Justice Rehnquist proclaims, it is a right that American lawyers and judges hold dear. Here, California and English judicial systems part in a significant way. In England and Wales, there is no constitutional right to a jury trial in all civil cases. The right is limited to a few causes of action,[24] and trial by jury in a personal injury action is disfavored.[25] As such, the vast majority of civil cases tried in England and Wales do not have a jury.[26] Thus, it comes as little surprise that counsel and judges in England consulted for this report confirm that a jury trial has never been held in an asbestos case filed in England or Wales. In contrast, court trials (trials to the court without a jury) involving asbestos claims in California – particularly claims of alleged mesothelioma or where punitive damages are sought – are practically unheard of.

Jury verdicts are notoriously difficult to predict. Only nine out of twelve sitting jurors are required to reach a verdict.[27] Success depends largely on unquantifiable (and often unknown) factors, such as the persuasiveness of the expert witnesses, the credibility of the parties, and the composition of the jury. For instance, in March 2023, after a six-week jury trial in Connecticut, a jury awarded $20 million to the estate of decedent, who died from mesothelioma.[28] In the same month, a South Carolina jury awarded a 36-year-old mother of two and her spouse $29.14 million for causing her mesothelioma due to asbestos exposure from talc in cosmetic products.[29] A month later, in April 2023, a defense verdict was secured in a wrongful death mesothelioma trial in King County, Washington, where the plaintiff sought $83 million in damages. One source to this study recounted his own experience in which he was involved in 26 asbestos cases tried between 2005 and 2011 before different juries in Illinois. The plaintiffs' claims were virtually the same in all cases (to wit, the defendant's alleged participation in a putative conspiracy to suppress health information concerning asbestos) and involved the same defendant. Hence, the defense and the evidence were almost identical in each case. The cases were brought by the same plaintiffs' law firm, and the defense attorneys were drawn from the same small group of lawyers. Putting aside three mistrials, 12 verdicts were for Plaintiffs and 11 for Defendant.[30]

21. Steve Boggan, *Your makeup may Be killing you like it's killing me: City high-flyer and mother of two Hannah was diagnosed with incurable cancer that she blames on the cosmetics she enjoyed since childhood*., Daily Mail.com, September 15, 2023, updated September 16, 2023.
22. The author presided over one such case filed in Alameda County Superior Court.
23. William Rehnquist, AZQuotes.com, Wind and Fly LTD, 2024. azquotes.com/quote/893006, accessed May 13, 2024.
24. The right to civil jury trial is reserved to causes of action for libel, malicious prosecution, and false imprisonment. Senior Courts Act 1981. Libel and slander were removed from section 69 of the Senior Courts Act 1981 by section 11 of the Defamation Act 2013.
25. In discussing the appropriateness of ordering a jury trial in a personal injury action, Lord Denning, delivering a judgment of the Court of Appeal in England, stated: "Let it not be supposed that this court is in any way opposed to trial by jury. It has been the bulwark of our liberties too long for any of us to seek to alter it...Whenever a man is on trial for serious crime, or when in a civil case a man's honour or integrity is at stake, or when one or other party must be deliberately lying then trial by jury has no equal...[But, owing to the technical expertise and experience needed in assessing damages] the judge ought not, in a personal injury case, to order trial by jury save in exceptional circumstances." *Ward v. James*, 1 QB 273 at 290 (1966).
26. Peter Duff, *The Limitations on Trial By Jury*, Revue Internationale de Droit Penal 2001/1-2 (Vol. 72), pp. 603-609, doi.org/10.3917/ridp.721.0603.
27. If a special verdict form is used, as is common in asbestos cases in California, jurors are queried on each element of each cause of action, among other possible questions. At least 9 must agree on an answer to each question posed but the same 9 or more people do not have to agree on each question posed. CA Civil Jury Instructions (CACI) 5012.
28. *Estate of Peckham v. Vanderbilt and DAP Inc.*, Connecticut Superior Court, Case No. 6088003-S.
29. *Sarah Plant v. Avon Products, Inc., et al.*, Richmond County Circuit Court, Case No 2022CP400126.
30. Several Illinois Court of Appeal opinions were issued arising out of this series of cases. See, e.g. *Rodarmel v. Pneumo-Abex*, 957 N.E.2d 107 (2011). Experience in other mass tort litigation is similar. In November 2023 a San Diego, California jury hit Monsanto with $332 Million Roundup verdict and in January 2024, there was a $2.25 billion verdict against Monsanto in Pennsylvania. But in March 2024, Monsanto scored defense verdicts on the same day in California and Pennsylvania. S.F. Daily Law

Knowing that a judge, not a jury, will determine the merits of an asbestos claim adds more certainty in assessing the value of a case, thereby enhancing the probability of settlement.

2.1. The Judicial College Guidelines

In addition to the outcome being determined by a judge, rather than a jury, the judiciary in England periodically issues Judicial College Guidelines, which provide useful data to litigants in assessing the settlement value of their cases. These Guidelines provide "high," "medium," and "low" numeric brackets for pain, suffering and loss of amenity (PSLA) damages[31] for all types of personal injuries and diseases, including mesothelioma, lung cancer, asbestosis, and pleural thickening.[32] While not mandatory and serving only as guidance that the judge can disregard, the Guidelines provide litigants with another tool for assessing the reasonable settlement value of specific asbestos injury claims.

Nothing close to the Judicial College Guidelines is available to litigants or their counsel in California. Indeed, while counsel and carriers in the U.S. keep track of settlements and verdicts rendered in their cases or reported in newspapers and legal journals, such information is not shared publicly, is incomplete, and cannot be considered by juries. The amount recovered by an asbestos plaintiff is not easily determined even where there has been a publicly recorded jury verdict. A jury verdict is not a "check in the mail" to the winning plaintiff. The jury verdict will not reflect what is recovered by a plaintiff from other sources and deducted from the award, such as pre-trial settlements paid by other named (but absent) defendants, and it will not reflect the attorneys' fees and litigation expenses that will be paid out of the award.

The lack of reliable historical data or information on past California verdicts and settlements may be one factor explaining why many of the most serious cases – such as claims filed by living mesothelioma victims – do not settle until the eve of trial which is when, some California plaintiff and defense counsel insist, is the optimal time that the "best" settlement demands or offers are made. Indeed, it is not uncommon in California for asbestos cases to reach global settlement after a jury panel has been summoned or even during trial.[33]

In sum, by providing some guidance as to damage valuations, and by eliminating unpredictable jury verdicts as a factor in the equation, the English courts reduce the drain on court resources by enhancing the probability of early settlements.

3. The Parties and the Complaints: England v California

3.1. The Parties – Employers and Everyone Else

Historically, asbestos exposure most frequently occurred in the workplace, often on factory premises, shipyards, or other work sites. But in the United States, employees injured on the job may not bring a civil action in court against their employer;[34] rather, these claims are resolved and compensated through workers' compensation systems created by each State. While a workers' compensation scheme exists in the U.K., it is not the exclusive remedy to employees seeking compensation, and it is not a bar to bringing a lawsuit in court. Once credible evidence of occupational asbestos exposure in a workplace is secured, there are few defenses to a finding of liability in England, given statutory and case law which hold employers and occupiers[35] responsible for ensuring a safe working environment. Hence, employers are the target defendants named in asbestos claims filed in English courts, and only one or two are typically named in a claim.

In contrast, in California (and elsewhere in the States), it is not unusual for 60 or more defendants to be named in an asbestos lawsuit.[36] The U.S. was reportedly the largest consumer of asbestos for much of the early 20th century as its rapidly rising population created an unparalleled demand for the construction of housing, public buildings, and roads. Because of the large number of uses of asbestos and its vast consumption in the U.S., the number of potential asbestos defendants available for suit has been equally large.

Journal (November 1, 2023); S.F. Daily Law Journal (March 8, 2024).

31. General damages for PSLA are only one component of damages assessed. Other damages that can be awarded include costs of medical treatment, aids and appliances, care, loss of income to the anticipated date of death, replacement services and "lost years."
32. *Judicial College Guidelines* 16th Ed., Ch.6, Section (C).
33. It should be noted that there are apparently some "repeat" defendants who have agreements with certain plaintiff counsel to settle early in a case, when possible. Also, American defense counsel contacted for this study have remarked that where numerous insurance carriers may be involved in the defense of a party, the logistics of coordinating and obtaining settlement authority from all carriers at risk can delay the time when defense counsel can be ready to discuss settlement.
34. See, California Labor Code section 3200 et seq.
35. Occupiers Liability Act 1957, s.1(1). The Act establishes a uniform duty towards all lawful visitors, thus abolishing the distinction between contractors, licensees, and invitees. The duty is defined as "a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. *Ibid.* s.2(2).
36. Over the 10-year period from 2014-2023, the average number of defendant company entities named on complaints was 67, KCIC, *Asbestos Litigation: 2023 Year In Review;* see also, C. Ann Malk, *The Asbestos Over-Naming and Trust Transparency Problem: A Philadelphia Case Study*, U.S. Chamber of Commerce, Institute for Legal Reform (March 2024).

Certain major U.S. corporations prominent in the so-called "asbestos industry" have been driven into bankruptcy and consequently plaintiffs' lawyers in America have sought out more and more peripheral defendants to take their places. Indeed, by the late 1990s, " non-traditional defendants accounted for around 60% of asbestos expenditure...[I]t is likely that most companies that manufactured a product containing even the slightest trace of asbestos will be brought into the litigation."[37] One U.S. Bankruptcy Court, noting several factors that make asbestos tort litigation unique, found "[t]he Complaint in the typical asbestos lawsuit names 30 to 100 defendants. In any such case, there are the primary "targets" and many lesser defendants. The plaintiff may not even have exposure evidence for some of the defendants." *In re Garlock Sealing Technologies, LLC.*, 504 B.R. 71, 83 (2014).[38]

3.2. The Causes of Action – Product Liability

Although product liability is well established in English common law and statute,[39] this cause of action is not commonly asserted in asbestos claims filed in England. One observer explains: "The major obstacles to asbestos product liability claims in the U.K. are seemingly more practical than legal. It seems reasonable to suppose that a key reason why such cases have rarely been seen in the asbestos context is that the logistical difficulties and costs of bringing such claims are likely to be far greater than those expected in a more typical employer's or occupier's liability claim. The volume of disclosure in a product liability case would be on a much larger scale, and the trial of the action would almost inevitably take much longer. These additional difficulties have undoubtedly encouraged individual claimants and their lawyers to consider, where possible, alternative causes of action. This, in turn, perhaps [has] reinforced the perception that asbestos litigation in the U.K. is about employers and occupiers but not manufacturers."[40]

In sum, "...asbestos victims' cases [in England] have been facilitated by rather straightforward proof of liability due to the fact that the employers' duty to control asbestos dates back to 1931. Occupational exposure cases are legally straightforward and comparatively easier to try than ...product liability cases in the United States." [41]

However, should "talc" cases get traction in England, query to what extent it would alter the current asbestos litigation landscape. Asbestos exposures in cosmetic talc cases are not generally work-related; rather the victims are consumers who have purchased off-the shelf talc products, such as baby powder. In the U.S., the causes of action commonly alleged include (strict) product liability, negligence, misrepresentation, fraudulent concealment, and punitive damages. Alleged conspiracy is also added at times. Targeted defendants include all in the chain of distribution (i.e., talc suppliers, baby powder and cosmetics manufacturers, supermarkets, drug stores, and other distributors and retailers). As such, there are different insurance policies than the employer liability policies currently in play and a different cast of insurance carriers on the risk.

Moreover, the "presumption" of liability somewhat enjoyed by claimants in cases involving work site exposure against employers[42] does not apply in most talc cases. Defendants vigorously dispute the presence of dangerous levels of asbestos in their talc products, or that talc causes asbestos-related diseases. The science is relatively new and evolving and opinion evidence as to causation is hotly disputed.

3.3. The Claims for Relief: Punitive Damages

While English law permits a plaintiff or claimant in a personal injury action to obtain punitive damages where egregious conduct is proved, claims for punitive damages are not generally asserted in asbestos claims initiated in England. As described by one writer: "Although there has always been an undoubted jurisdiction to award them, for nearly forty years after the House of Lords gave judgment in *Rookes v. Barnard*, they had languished in a recondite backwater of the law."[43] In *Rookes v. Barnard*, (1964)

37. U.K. Working Party, *U.K. Asbestos – The Definitive Guide* (2004).
38. See also, Lester Brickman (2005) *Ethical Issues in Asbestos Litigation,* 33 Hofstra Law Review, Article 2.
39. The Consumer Procedure Act (CPA) §2(1) provides that "where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage. Subsection (2)(2) and (2)(3) of the CPA applies to "producers" i.e., manufacturers, importers, suppliers, or any person putting his name on the product or using a trademark or other distinguishing mark in relation to the product. However, this statute has limited utility in asbestos related actions, in particular, for mesothelioma claims. First, the CPA applies to products supplied after March 1, 1988, which post-dates the ban on the importation and supply of asbestos products in the U.K. Second, there is a 10-year "hard stop" which bars any claim brought more than 10 years after the supply of a product. *Limitation Act 1980 s.11A(3)*
40. Henry Steinberg, et al., *Asbestos: Law & Litigation*, (2nd Ed.), pp.247-266. One notable exception is the Concept 70 litigation (*Concept 70 v. Cape Intermediate Holdings Ltd.*) in which a group of insurers who had settled employers' liability claims over a prolonged period sought contributions from the manufacturer of asbestos products in a number of sample cases. After a six-week trial in 2017 the case settled. Mr. Steinberg was trial counsel in that action.
41. Andrea Boggio, *Compensating Asbestos Victims: Law and the Dark Side of Industrialization*, *supra* at p.87.
42. The Asbestos Industry (Asbestosis) Scheme 1931 "created a statutory duty of care towards employees and created a presumption that asbestosis was occupational whenever exposure had been protracted for more than five years."*Id. at p.76.*
43. Andrew Tenttenborn, *Punitive Damages – A View From England*, 41 San Diego L. Rev. 1551, 1552 (2004).

AC 1128 (HL), Lord Devlin, giving the leading opinion, stated that punitive damages were an anomaly in that they not only injected an inappropriate penal element into the civil law but imposed a penalty on the defendant without the due process safeguards inherent in criminal law. Further, he wrote, that even when such damages were available in respect of a given tort, they should be given only (1) where there was oppressive, arbitrary, or unconstitutional conduct by a government servant acting in that capacity; or (2) where a tort was committed with the deliberate intent that the profits from it would exceed any compensation payable to the claimant."[44] According to counsel and judges consulted in this study, punitive damages have never been awarded in any asbestos case ever filed in England or Wales.

In contrast, in California (and other states) punitive damages are almost always pleaded in asbestos complaints and defendants have been hit with multi-million-dollar punitive damage awards. Although these so-called "blockbuster" damage awards (or so-called "nuclear verdicts") may be anomalies[45] and are sometimes substantially reduced by judges (or even rejected),[46] the mere prospect of such an award, coupled with its unpredictability [47] and the fact it is generally not covered by insurance,[48] substantially increases the time and energy spent by counsel working on these cases. The scope of discovery in California is considerably widened when punitive damages are alleged because of the enhanced burden of proof for recovery - clear and convincing evidence as opposed to a preponderance of the evidence[49] - which in turn requires evidence of despicable conduct, fraud, or a conscious disregard for the safety of others. This discovery goes well beyond case-specific facts; plaintiffs are entitled to discover what the defendant company knew, or should have known, about the hazards of asbestos and how they responded to such knowledge, if at all.[50] Such a discovery can easily cover decades of activity before the date of exposure alleged in the complaint at issue and will include "state of the art" evidence, or more precisely, the state of scientific knowledge during the relevant period of exposure and internal company documents.[51]

To what extent talc cases could alter present litigation strategies and practices in the U.K. is unknown. In this regard, the following observation may be noteworthy:

> *"Although jury determination of punitive damages is almost universal in the United States...in England the prevalence of the jury in this area has caused some disquiet. As a result, in its 1997 Report, the Law Commission expressed the very strong view that the law [in England] should be changed so that in the future, even where the actual trial on liability and (non-punitive) damages was by a jury, all questions of punitive damages – both whether they should be awarded at all, and if so how much – should be decided by the judge alone. The reasoning of the Law Commission was essentially that, though punitive damages were a desirable part of the courts' armory, awards should show both moderation and consistency; and that juries could not be trusted to provide either."*[52]

44. In Kuddus v. Chief Constable of Leicestershire [2002] UKHL 29; [2002] 2 A.C. 122, the House of Lords held that the "cause of action test" (i.e. was the tort at issue one for which exemplary damages had been awarded prior to *Rookes*, to wit, pre-1964) should be removed. The removal of the cause of action test in *Kuddus* meant that exemplary damages could be awarded for any tort provided the facts fell within the *Rookes v. Barnard* categories. Clerk & Lindsell on Torts 24th Ed., UKBC-CLERKLI 458603340 (2023).
45. One commentator has recently noted the increased frequency and value of 'nuclear' jury verdicts (i.e. those that exceed $10 million) in mass tort litigation. "In review of almost 1,400 nuclear verdicts from 2010 to 2019, an analysis found that almost a quarter of these verdicts were comprised of product liability cases (involving prescription drugs, medical devices, automobiles, herbicides, talcum powder, tobacco and asbestos claims.)." , Kathrin Hashimi, *The Evolving Landscape of Complex Litigation: Case Management, Technology and Security,* DRI For the Defense (October 24, 2023), digitaleditions.walsworth.com/publications/?.
46. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580-82 (1996) and *State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408 (2003), the U.S. Supreme Court struck down very large punitive damages on due process grounds. In the *State Farm* case it was suggested that it would be difficult for a ratio between actual and punitive damage in more than single figures to pass muster. In *McNeal v. Whittaker, Clark & Daniels* 80 Cal.App.5th 853, 880 (2022), a California appellate court struck down a $3 million punitive damage award made by a jury and among other findings, opined that the scientific and medical link between talc and mesothelioma was not discovered before 1994.
47. See, Benjamin J. McMichael & W. Kip Viscusi, *Bringing Predictability to the Chaos of Punitive Damages*, 55 Arizona State Law Journal 471 (2023).
48. *PPG Industries, Inc. v. Transamerica Ins. Co.*, 20 Cal.4th 310 (1999).
49. CA Civil Code §3294.
50. "A recent study conducted by IMS Consulting & Expert Services measuring safety levels of jury-eligible respondents found that 83% agreed that medical devices and pharmaceuticals should be accompanied by warnings about every potential risk or side effect, no matter how remote or tangential." , Kathrin Hashimi, *The Evolving Landscape of Complex Litigation: Case Management, Technology and Security,* DRI For the Defense (October 24, 2023), digitaleditions.walsworth.com/publiscations/?.
51. Additionally, Plaintiff is entitled to discovery reflecting defendant's financial condition if punitive damages are claimed because the jury determines "[i]n view of [the] defendant's financial condition, what amount is necessary to punish [defendant] and discourage future conduct?" Judicial Council of California Civil Jury Instructions (2024 edition), CACI No. 3947. However, pre-trial discovery into a defendant's financial condition is not permitted without court order. CA Civil Code §3947.
52. Andrew Tenttenborn, *Punitive Damages – A View From England,* supra at 1569; *Aggravated, Exemplary and Restitutionary Damages* Law Commission Report [1997], note 4, p. 124.

4. Joint and Serveral Liability

In the landmark case, *Fairchild v. Glenhaven Funeral Services Ltd*. (2002) UKHL 22; [2003] 1 A.C. 32, the English courts recognized an exception to traditional tort law in mesothelioma cases, holding that claimants need only establish that defendant's exposure conduct was a "material factor in increasing the risk" of the claimant's developing mesothelioma.[53] After *Fairchild*, the question arose as to whether defendant's liability was limited to the amount by which the particular defendant had increased the risk to the claimant. In *Barker v. Corus UK Ltd*. [2006] UKHL 20 at [47], Lord Hoffmann speaking for the court, proposed that: "A defendant is liable for the risk of disease which he himself has created and not for the risks created by others, whether they are defendants, persons not before the court or the claimant himself." However, the holding in *Barker* was quickly reversed by Parliament, after vociferous complaints from claimants and counsel, lobbying by trade unions, asbestos support group charities and others, and presentations to a Subcommittee of an All-Party Parliamentary Panel tasked to highlight problems in this field. The enactment of the Compensation Act 2006 now provides that a "responsible person" is liable "in respect of the whole of the damage caused to the victim" irrespective of asbestos exposure from any other source and is jointly and severally liable with any other responsible person. The Act's impact was significant. Now, mesothelioma claimants in England need not name *all* potential responsible parties; it is sufficient if one or two named defendants are found liable, in which case they will be jointly and severally liable for all of the claimant's damages.[54]

In contrast, under California workers' compensation law, most claims arising from an occupational injury or disease cannot be pursued by an employee against the employer in a civil action; such claims are diverted to an administrative body whose laws and procedures are governed by Workers Compensation statutes enacted by individual states.[55] Consequently, it is exposure to asbestos products, both in and outside the workplace, that are the basis of claims brought in California courts, and damages are apportioned among those determined to have been a substantial factor in increasing the plaintiff's risk of developing mesothelioma (or other asbestos-related cancer). Lord Hoffman may have been stymied in his efforts in England, but his pronouncement in *Barker* is consistent with the law in California. As a result, attorneys in California are incentivized to name all those believed to have some responsibility, no matter how small, for exposing the plaintiff to an increased risk for the development of plaintiff's mesothelioma.[56]

5. Pre-Trial Proceedings: the Mesothelioma List and OSC Procedure

> *"The underlying approach to asbestos claims places the doing of justice, at a speed and with improved efficiency, at the forefront; formalities of procedure take second place if they interfere with that." Master Victoria McCloud.*[57]

In 2002, a specialist "Mesothelioma List"[58] was set up at the Royal Courts of Justice (RCJ) in London to address the unique needs of asbestos-related disease claims. A Senior Master and a small number of specialist Masters (all High Court judges who deal with all aspects of the claim) hear and preside over the majority of asbestos claims filed in England and Wales. This is because it is the preferred venue of asbestos counsel due to the expertise of the Masters in this area of the law and the establishment of unique case management procedures and practices the RCJ have developed to minimize costs and promote settlement (see *Yates v. Commissioners for Her Majesty's Revenue and Customs* [2014] EWHC 2311).

Most noteworthy of the procedures available to the Masters handling matters on the Asbestos List is the ability to issue an Order To Show Cause requiring a defendant, at an early stage of the litigation, to "identify the evidence and legal arguments that give the defendant a real prospect of success on any or all issues of liability." (CPR 3DPD 6.1) This procedure was apparently initiated from the court's experience that in 95% of the asbestos cases before it, there was no realistic prospect of a defense and unmeritorious defenses were delaying resolution.[59] The standard used by the RCJ judges in deciding whether to

53. A similar standard was applied in California in *Rutherford v. Owens-Illinois, Inc.* 16 Cal.4th 953 (1997). Per *Rutherford*, a California jury is instructed that a plaintiff may establish causation if the evidence supports a reasonable medical probability that the alleged exposure was a *substantial* factor contributing to the plaintiff's risk of developing cancer. (Judicial Council of California Civil Jury Instructions (2024 Edition) (CACI) 435).
54. Note, in Heneghen v. Manchester Dry Docks Ltd. (2026) EWCA Civ 86 – a case of exposure to asbestos leading to lung cancer, rather than mesothelioma – the Court found that the right approach to damages was one of apportionment between the multiple defendants in proportion to the increase in risk for which each was responsible.
55. There are some exceptions to the general rule. See, Labor Code section 3600 et seq.
56. See, The Insurance Company of the State of Pennsylvania v. Equitas Insurance Ltd. (2nd.Circuit May 23, 2023) Docket No. 20-3559-cv for a recent federal appellate opinion comparing English and American tort and insurance law, including discussion of the *Fairchild* and *Barker* cases.
57. *Yates v. Commissioners for Her Majesty's Revenue and Customs* [2014] EWHC 2311.
58. The procedures adopted in the list are not limited to mesothelioma but include all other types of asbestos-related actions. Thus "Mesothelioma List" is somewhat of a misnomer. T*he Queen's Bench Guide – A Guide to the working practices of the Queen's Bench Division within the Royal Courts of Justice* 2021 at para 9.16."
59. See, Henry Steinberg, *Asbestos: Law & Litigation, supra* at Chapter 16 for a detailed description of the Pre-Action Protocol for Disease & Illness Claims, Practice Direction 3d-Mesothelioma Claims, and the Show Cause Procedure.

grant a provisional judgment of liability is: "..for the Claimant to adduce credible evidence in support of his case, and it is only if he does so that the Defendant becomes subject to an evidential burden to show cause. It is further agreed that the correct test is not whether the Defendant's case is likely to succeed at that but only whether it has some chance of success, and that the prospects are not fanciful."[60] If the defendant fails to convince the court that there exists a meritorious defense and a real prospect of prevailing in the case, judgment is entered on liability in favor of the claimant, with only damages left to be determined. An interim payment is made to the claimant for damages and costs is assessed at this time. (CPR 3DPDI 1; Protocol, 16-023-16-029). Thus, in England and Wales, an asbestos trial may often be confined to quantum.

While there have been instances when trial courts in the States and, notably in federal court, have issued Orders to Show Cause in asbestos litigation, these OSC proceedings were directed at complainants, not defendants.[61] The objective was to rid overwhelming dockets of suspected frivolous or fraudulent claims, not to provide information or advance settlement of meritorious claims.

The identification of those claims that, based on an objective review of the evidence by a judge or other neutral, are likely to prevail on the issue of liability is an exercise generally undertaken at settlement conferences. This is a much more complex process than in England, given that in any one complaint, there are multiple parties, causes of action, and applicable laws that must be considered before a global settlement is finally reached.

6. Disclosure Versus Discovery: England Versus California

6.1. Sequence and Timing

The English courts have promulgated a Pre-Action Protocol for Disease & Illness Claims (the "Protocol"), which sets out what must be done *before a claim is filed in the court*.[62] The aim is to promote: (1) more contact between parties; (2) better and earlier exchange of information; and (3) better investigation by both sides with the objective of putting parties in a position where they may be able to settle as fairly and early without litigation and enable proceedings to run efficiently, if litigation becomes necessary.[63] Counsel are required to investigate and obtain all relevant evidence prior to filing a claim.[64] Claimants must serve a Letter of Claim upon a proposed defendant as soon as "sufficient information is available to substantiate a realistic claim" and "to provide sufficient information for the defendant to commence investigations and to place a broad valuation on the risk."[65] This requires providing a detailed summary of the facts,[66] a work history,[67] identification of documents not already in the defendant's possession,[68] whether a claim is made against any other potential defendant, and the identity of any known insurer.[69] A claimant may request occupational records, including health and personnel records, from a potential defendant before an action is filed. The potential defendant must acknowledge the Letter of Claim within 21 days, identify relevant insurers within 30 days, and send a "reasoned" response within 90 days. This timeline can be advanced in a mesothelioma claim or other asbestos injury with a shortened life expectancy. Additional instructions specific to mesothelioma cases are also provided, including that an "early notification letter" be sent before the Letter of Claim. The intent is to give defendants a "heads up" that the case requires urgency and to immediately commence investigation.[70]
In the event there is no resolution, and a claim form is issued, "Particulars of claim" must be contained in or served with the claim form. It must include a factual statement, the law on which the claim is based, the value of the claim, and the requested relief. In cases involving living mesothelioma claimants, the claim must be marked so as to put the Court and parties on alert that this action may require urgency.

California has no equivalent pre-action disclosure requirements in statute or case law. Rather, California only provides for "pre-suit discovery" where necessary to preserve evidence or to perpetuate testimony in anticipation of a future lawsuit. C.C.P. §2035.010(a); *Orr v. City of Stockton*, 150 Cal.App.4th 622, 631 (2007). This pre-action tool cannot be used to determine the existence of a cause

60. *Silcock v. HM Revenue and Customs* [2009] EWHC 3025 (QB) at [9]; see also, *Austin v. Plumb Future Systems, Ltd.* [2013] 7 WLUK 598.
61. See, e.g. *In re Garlock Sealing Technologies,* 504 B.R. 71 (2014); *Cottle v. Superior Court*) 3 Cal.App.4th 1367 (1992). California judges consulted in this study do not report that their asbestos dockets are today cluttered with wholly frivolous or fraudulent asbestos complaints. To the contrary, in 2022 70% of all asbestos cases filed in California were mesothelioma claims, cases with significant stakes. KCIC, *2022 Asbestos Litigation Report*.
62. The Protocol, introduced into the. Civil Procedure Rules (CPR) in 2003, applies to all personal injury claims where the injury is not the result of an accident. They are given force by the Practice Directions on Pre-Action Conduct (the "Practice Directions") which became effective April 2015. The Directions emphasize that the Protocol should assist settlement of the claim without the commencement of proceedings; to save expense and deal with the case in ways which are proportionate to the amount of money involved to the importance of the case; to the complexity of the issues, and to the financial position of each party and with the aim of allotting an appropriate share of the court's resources, while considering the need to allot resources to other cases.
63. Protocol, ¶1.2
64. Protocol, ¶6.7
65. Protocol, ¶6.8
66. Protocol, ¶6.2
67. Protocol, ¶6.5
68. Protocol, ¶6.6
69. Protocol, ¶6.7
70. Appendix D of the Protocol provides a standard format letter with the minimum information that the early notification should include.

of action or defense (C.C.P. §2035.010(b); cannot be used to identify persons who might be made parties to the action (C.C.P. §2035.010(b); and cannot be used to obtain collateral information that would be inadmissible in a future court case. *Hunt-Wesson Foods, Inc. v. Stanislaus County,* 273 Cal.App.2d 92, 98 (1969) Thus, it is extremely limited as a tool for pre-action discovery.[71] Absent the rare instance of a pre-suit discovery petition being granted, the exchange of facts or evidence between parties in California does not commence until a complaint is filed in court and parties have appeared.

While California case law has always held that a complaint[72] must provide the defendant in California with "notice of the issues sufficient to enable preparation of a defense,"[73] asbestos complaints with multiple named defendants and causes of action have in the past rarely provided case-specific facts concerning each named defendant sufficient to "enable preparation of a defense." Instead, an asbestos complaint would typically identify defendants by category (e.g., manufacturer, supplier, premises owner, retailer, etc.), and for each cause of action asserted, it would contain general, often conclusory allegations as to all the defendants within a specified category.[74]

There are recent changes to the discovery rules in California that attempt to tackle the ambiguities and delays that in the past placed obstacles to quickly obtaining basic information about a case. For complaints filed on or after January 1, 2024 all parties must now provide "initial disclosures within 60 days of a demand by any party of the following: (1) names and contact information of persons likely to have discoverable information and the subjects of that information; (2) all documents or things the disclosing party has in its possession or control that may be used to support claims or defenses; (3) any contractual agreement or insurance policy with potential coverage and (4) any material contractual terms under which a person may be able to satisfy a judgment or to indemnify or reimburse for payments made to satisfy a judgment. C.C.P. §§ 2016.090 and 2023.050.

Notwithstanding these recent reforms to the discovery rules in California, as one critic has opined, a notable difference between English and American litigation practice remains, to wit, "...the custom of the former of not bringing suits unless the claimant, without further discovery, can establish a *prima facie* case."[75]

6.2. Scope of Discoverable Evidence

In California, the scope of permissible discovery is broad. (*Williams v. Superior Court*, 3 Cal.5th 531, 540 (2017); *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* 148 Cal.App.4th 390, 408 (2007). "[A]ny party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter ...if the matter either is itself admissible or appears reasonably calculated to lead to the discovery of admissible evidence." (C.C.P. §2017.010). Indeed, the drafters of the Discovery Act rejected the narrower standard of "relevant to the issues" in favor of "relevant to the subject matter" involved in the pending action.[76] While a California judge has the discretion to limit the scope of discovery, the standard applied is whether the burden,[77] expense, or intrusiveness of the discovery "clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." (C.C.P.§2017.020(a)). The Supreme Court in *Greyhound Corp. v. Superior Court,* 56 Cal.2d. 355 (1961) established guidelines for exercising this discretion, stating that the judge should construe disputed facts liberally in favor of discovery and reject objections, such as hearsay, that only apply at trial. Importantly, the court concluded a "fishing expedition" was not a ground for objection to the requested discovery.[78] (*Id*. at 383-385).

There are six authorized discovery methods available to California litigants: oral and written depositions; interrogatories to a party; inspections of documents, things, and places; requests for admission; demands for physical and mental examinations; and simultaneous exchanges of expert trial

71. See, *Edwards v. Centex Real Estate Corp*., 53 Cal.App.4th 15, 34, n.9 (1999); *Hunt-Wesson Foods, Inc. v. County of Stanislaus, supra; Block v. Superior Court,* 219 Cal.App.2d. 469, 477-78 (1963).
72. Code of Civil Procedure (C.C.P.) §425.10.
73. *Doe v. City of Los Angeles* 42 Cal.4th 531, 549-550 (2007).
74. The practice of "over-naming" encountered in asbestos cases, has been the subject of criticism. See, Mark A. Behrens and Christopher E. Appel, *Over-Naming Of Asbestos Defendants: A Pervasive Problem In Need of Reform,* Mealey's International Arbitration Report, March 24, 2021. To address the problem some states in the U.S. have enacted legislation requiring that at an early stage in the litigation, asbestos personal injury claimants provide detailed facts that "provide the basis for each claim against each defendant." For example, A.R.S. § 12-783 requires plaintiffs in Arizona file a sworn statement within 45 days after any asbestos action is filed that identify as to each named defendant, the asbestos product at issue, the specific location and manner of exposure, the dates of exposure, the witnesses to exposure, and the plaintiffs' supporting documents, among other facts.
75. Geoffrey Hazard, *From Whom No Secrets Are Hid,* 75 Tex.L.Rev. 1665, 1681 (1998).
76. Reporter's Note to former C.C.P. §2017(a), renumbered as C.C.P. §2017.010.
77. Note, the party resisting discovery must present evidence specifically quantifying how the discovery sought is "unduly burdensome;" it is not sufficient that the discovery was of a "shotgun" nature. *West Pico Furniture Co. v. Superior Court*, 56 Cal.2d 407, 417-419 (1961); *Cembrook v. Superior Court,* 56 Cal.2d 423, 428 (1961).
78. However, in *Tyla v. Superior Court*, 55 Cal.App.4th 1379, 1386 (1997), the Court reminded counsel that fishing permits are required for a fishing expedition and "as with a fishing license, the rules of discovery do not allow unrestricted access to all species of information." In that case certain questions were deemed impermissible because they violated the plaintiff's constitutional right to privacy.

witness information.[79] This discovery is self-executing. *Clement v. Alegre*, 177 Cal.App.4th 1277, 1280 (2009). A judge does not consider either the propriety of a party's discovery demand or the adequacy of a party's response unless a dispute arises that the parties cannot resolve themselves. (*Sinaiko Healthcare Consulting, Inc. v. Pacific Consultants, supra* at 408.) The Discovery Act requires parties to meet and confer before involving the court, and most motions must be accompanied by a declaration describing the reasonable and good-faith efforts that were made to resolve the dispute informally.

The central precept in California is to keep judges out of day-to-day discovery by requiring the parties to conduct discovery and resolve disputes with minimal judicial involvement. (*Fairmont Ins. Co. v. Superior Court* (2000) 22 Cal.4th 245, 249.) While a laudable goal, asbestos litigation, as practiced, generally requires significant court involvement in discovery disputes, notwithstanding the meet and confer process, which can itself be a source of additional delay when not conducted in good faith. This is because, in contrast to England and Wales, in California, the prosecution and defense of asbestos claims, particularly where punitive damages are sought, compel parties to delve into the records of a company's historical knowledge, manufacture, distribution or use of asbestos; conduct intensive review of a plaintiff's (or the deceased's) medical records and employment history; retain expert witnesses to perform tests or inspections, including at times genetic testing; and to obtain and examine expert witnesses to opine on causation and damage issues.

Notably, the term "discovery" is not used in England. Rather, parties are entitled to "disclosure" of relevant documents prior to filing a claim, and in a case involving mesothelioma, substantial further disclosure is required at the first case management conference if, as discussed above, an Order to Show Cause is sought. Other tools for discovering evidence, such as the six provided for in California's Code of Civil Procedure, are only available, if at all, upon leave of court. English judges tend to have a much narrower view of the scope of permissible discovery than their American counterparts. In a comparative review of civil litigation in the U.S. and other countries, the author opined: "[T]he number of discovery mechanisms available to the American lawyer as a matter of right, the degree of party control over discovery, the extent to which liberal discovery in the United States has become what almost looks like a constitutional right, and the massive use of discovery of all kinds in a substantial number of cases surely sets us apart." He notes that the House of Lords regards the U.S. discovery process akin to a "fishing expedition" and "an abuse of court process."[80]

6.3. Oral Depositions

As in other areas of civil practice, the English courts recognize that standard procedures for obtaining evidence may not suit asbestos claims requiring urgency, such as in the case of a living mesothelioma claimant with limited life expectancy. In such a case, the court will allow - in fact will encourage - parties to take a pre-trial deposition of a living claimant (CPR r.34.8(2)(3). The examination is usually held before a court-appointed examiner (CPR r.34.15) at the date, time, and place set forth in the court's order and conducted in the same manner as if the witness were giving evidence at trial.[81] The examiner does not have the power to rule on any objection to a question posed at the deposition or to require a witness to answer. The examiner only has the power to express an opinion as to the validity of the objection and record it in the deposition; the court will ultimately decide the issue. (*R v. Rathbone Ex p. Dikko* [1995] QB 630.) The deposition is recorded, transcribed and made available to the judge at the final trial. (CPR 3DPD 8).[82] Depositions in California are recorded and often videotaped, but, in contrast to England, they are generally scheduled and conducted without court involvement. (C.C.P.§2025.310 et seq.) This discovery tool is not readily available or used for other witnesses or parties in England. Instead, counsel in England rely upon written witness statements and documentary evidence to prepare their case for trial.

In California, parties may notice and take the depositions of all pertinent witnesses so long as the witness likely possesses information "calculated to lead to the discovery of admissible evidence." In asbestos litigation, this almost always includes taking the deposition of the Person Most Qualified" (PMQ) to testify as to specified topics based upon information "known or reasonably available to" the deponent designated by the corporate/business entity defendant as its "Person Most Qualified." (C.C.P. §2025.230). Courts have construed this provision to require a PMQ designee to educate himself or herself as to available information as to specified topics or issues that are called out in the deposition

79. CA Civil Discovery Act; C.C.P. §2016 et. seq,
80. Stephan N. Subrin, *Discovery in Global Perspective: Are We Nuts?* 52 DePaul L. Rev 299 (2002); https:via.library.depaul.edu/law-review/vol52/Iss2/4. (Internal citations and footnotes omitted.)
81. Depositions taken to preserve testimony for trial is similarly provided in California. C.C.P. §2025.620(d).
82. Describing oral depositions in England, one observer has noted that counsel at the deposition, in contrast to being in court, are not robed thus "tends to a low-key advocacy style shorn of drama. As such it tends to obtain the best possible evidence from those who may be in acute physical pain. It is to be welcomed." Henry Steinberg, *supra* at p. 530. In contrast, in response to complaints about the conduct of oral depositions of plaintiffs suffering from mesothelioma by defense counsel in these cases, the California legislature added a provision to the Civil Procedure Act mandating that depositions of plaintiffs with a shortened life expectancy of less than 6 months may not exceed 7 hours. The court may grant up to additional hours if the court finds it is fair to do so and it will not endanger the plaintiff's health. C.C.P. §2025.295.

notice by reviewing company records and speaking to witnesses with knowledge. Since PMQ witnesses are often asked to provide information as to what the company knew about the hazards of asbestos in past decades, much of their testimony at deposition will be based upon hearsay rather than personal knowledge. This hearsay evidence[83] may become admissible as a party admission at the time of trial.[84] PMQ depositions are often difficult to schedule and timely complete given a long list of topics that the PMQ must typically be qualified to answer and the number of witness and attorney schedules that must be coordinated to find mutually agreeable dates. Thus, in addition to disputes over written discovery, California judges are routinely called upon to resolve disputes regarding the permissible scope of PMQ depositions and document production.

6.4. Discovery in Talc Cases

As discussed above, talc cases have expanded the borders of discovery due to the causation disputes common in these cases. In contrast to products such as asbestos insulation, brake pads, or joint compound, where asbestos was intentionally added or incorporated into the product (and identified as an ingredient in manufacturer's formulas or specifications or on product labels), there can be considerable dispute as to whether the bottle(s) of baby powder or other cosmetic talc product purchased by the plaintiff actually contained asbestos-contaminated talc. Discovery efforts in California may, for instance, require locating, securing, and testing vintage bottles of baby powder or talc samples in the possession of talc suppliers, [85] digging up decades-old sales records or receipts, and scouring out-of-print periodicals and newspapers for advertisements containing alleged misrepresentations or failures to disclose. In contrast to past cases where pleural mesothelioma (a cancer involving the lining of the lungs) and lung cancer are prominent diseases seen among claimants, talc complaints include many suffering from peritoneal mesothelioma (a cancer affecting the lining of the abdomen) and ovarian cancer. Causation is hotly disputed by defendants, who have implicated genetic disposition or other causes for the development of peritoneal and ovarian cancer. Disputes involving the discovery of genetic material or to compel genetic testing – not only in talc cases - are increasingly confronting California judges.

7. Compensation and Benefits

7.1. Compensation and Benefits – England

In England and Wales, there are several government regulatory systems that provide compensation and benefits to persons suffering from injury, illness, or disability.[86] Industrial Injuries Disablement Benefit (IIDB), essentially a workers' compensation system,[87] provides weekly or monthly payments to employees or former employees who were injured or contracted disease while at work. Supplementing the IIDB, are schemes specifically addressing compensation to victims of asbestos exposure: (1) Pneumoconiosis Workers' Compensation (PWC provides a one-off statutory lump sum payment to persons disabled due to asbestos exposure at work; (2) 2008 Diffuse Mesothelioma Scheme (provides funds to mesothelioma victims who do *not* qualify for a payment under PWC) and (3) Diffuse Mesothelioma Payment Scheme 2014 (enacted via The Mesothelioma Act 2014, DMPS is a scheme "of last resort" for those who are unable to take civil action against their employer because the employer no longer exists, and the employer's liability insurer cannot be traced. This is separate from the 2008 scheme, which continues to operate.)[88]

The DMPS Annual Review publishes statistics on the number of applications received, success rates, and payments made.[89] "Between April 2014 and February 2015, the Scheme regulations specified that successful applicants be paid an amount equivalent to 80% of the award that they could typically expect to have received had their claim been successfully pursued through the civil courts system. In February 2015, the Scheme's tariff payments were increased so that successful applicants who had been diagnosed on or after February 10, 2015, were awarded 100% of the award that they could typically expect to have received had their claim been successfully pursued through the civil court system." The aver-

83. *Ramirez v. Avon Products*, 87 Cal.App.5th 939 (2023).
84. *Greenspan v. LADT, LLC.*, 191 Cal.App.4th 486, 523-524 (2010).
85. See, *Hatcher v. Albertsons et al*, Alameda County Superior Court case no. 22CV021209 in which discovery disputes involving production of talc samples in defendants' possession are addressed in motions and orders filed in this pending action.
86. There are other government benefits available in the U.K. to injured persons that are not addressed in this paper. They include: (1) Employment and Support Allowance (ESA) – a benefit available to support of people under State Pension age who can do some (permitted) work; (2) Personal Independence Payment (PIP) – a payment and attendance allowance for people who have difficulty moving around or looking after themselves; and (3) Attendance Allowance (AA) – a benefit for people who are at or above State Pension Age.
87. "Although not technically a workers' compensation system, it is functionally equivalent. It is a non-means tested benefit, that is, the earnings or other income of the asbestos victim affects neither the claimant's eligibility nor amount awarded." Andrea Boggio, *Compensating Asbestos Victims: Law and the Dark Side of Industrialization, supra,* p.75.
88. It is exclusively for victims where mesothelioma was diagnosed after July 25, 2012. Diffuse Mesothelioma Payment Scheme: annual review 2021 to 2022, published 24 November 2022. To be eligible, the claimant must: (1) not be entitled to a payment under the 1979 Pneumoconiosis Act; (2) have not been given a payment for the disease from an employer, a civil claim, or elsewhere; and (3) is not entitled to compensation from a Ministry of Defence scheme.
89. Diffuse Mesothelioma Payment Scheme: Annual Review 2021 to 2022, 24 November 2022).

age (mean) award from 2019 through 2022 was about £144,000.[90]

A commentator discussing asbestos products litigation in England has observed: "...asbestos claims in England and Wales are most notable for their rarity. The historical explanation for this is to be found in the twin development of employers' liability claims at common law and statutory claims under the Workmen's Compensation Acts. The wellspring for each was the existence of an employment contract. The dominance of employers' liability claims for asbestos-related illness has been cemented over the court of time through a combination of the increasingly sophisticated statutory regulation of employers, a claimant-friendly approach to the interpretation of employer's liability insurance policies, and the availability of claims against the insurers of defunct companies."[91]

7.2. Compensation and Benefits – California

In the United States, the primary path for an asbestos claimant's compensation is personal injury litigation.[92] However, there are two major exceptions: Neither the potential claimant's employer nor an entity that has filed for bankruptcy protection may be sued in a civil action. Instead, with a few exceptions, claims for compensation from an employer are handled through the workers' compensation system, and claims for compensation from an entity in bankruptcy are made to one or more applicable asbestos bankruptcy trusts.

7.3. California Workers' Compensation

Like IIDB, workers' compensation is a no-fault[93] program that provides benefits, such as the cost of medical treatment and lost wage replacement, to employees injured or disabled in the course of employment. However, in contrast to England, this benefit is in exchange for mandatory relinquishment of the employee's right to sue his or her employer. Compensation is limited; it does not include damages for pain and suffering or punitive damages, and replacement income may only provide partial compensation. The trade-off between assured, limited coverage and lack of recourse outside the workers' compensation system is known as "the compensation bargain."

Workers' compensation is a form of insurance. Employers in California are required to obtain worker's compensation insurance to cover potential claims due to injury on the job and unlike IIDB, the employer and its workers' compensation insurance carrier are involved in the processing of the claim. The insurance company bears all discovery costs related to the workers' compensation claim. If the claim is accepted, the carrier will be responsible for paying medical costs. This can be a one-time "cash out" payment or, an "open" award that will cover future medical treatment as required due to the injury. If the discovery cannot be completed in time, the claim will be denied. If a claim is denied, the claimant files an Application for Adjudication of Claim, which is heard by a worker's compensation judge and proceeds much like a civil court case.

Mesothelioma and asbestos-related cancers are considered permanent disabilities for workers' compensation ratings. A "disability rating" is a percentage of loss due to the illness (it can theoretically be anywhere from 1% to 100%) and factors in age, occupation, and disease rating. (The disease rating is based upon the American Medical Association (AMA) guide and is set forth in a published schedule.) A finding of 100% total permanent disability, for instance, would result in an award of the workers' disability rate per week for life. A claimant may challenge his or her total disability rating by presenting expert testimony. Compensation obtained in a civil court serves as a credit on the workers' compensation award. Hence, defendants in the workers' compensation case hope a civil action is resolved first. The court and workers' compensation cases are not coordinated; a workers' compensation award will have no impact on the civil case.[94] Interestingly, plaintiff counsel in a civil action will often seek disclosure of defendants' workers' compensation claims history to establish a defendant company's actual notice of the hazards of asbestos in its workplace(s) prior to the exposure that is the subject of the instant action before the court. The permissible scope of such discovery and/or whether and to what extent such evidence will be admitted at trial are subjects heavily litigated in asbestos cases filed in California.

90. Diffuse Mesothelioma Payment Scheme Annual Statistics April 2014 to March 2021 (TML), 29 November 2021. The range of award specified in the Judicial College Guidelines for mesothelioma during this time frame was £50,000 - £1.4 million.
91. James Beeton, *Asbestos Product Litigation*, 2021 Journal of Personal Injury Law, J.P.I. Law 2021, 1, 17-24.
92. However, persons disabled because of an asbestos-related disease or condition may be eligible for certain governmental assistance such as federal Social Security Disability Insurance (SSDI) or Supplemental Security Income (SSI) payments. Additionally, there are a various programs providing services or benefits to disabled persons in California (e.g., the Assistant Living Waiver (ALW) and the In-Home Supportive Services Plus (IHSS-Plus) Waiver.) The legislation creating these programs are not directed at assisting victims of asbestos exposure. They each have specific, sometimes stringent, eligibility criteria. These programs and their potential benefits are beyond the scope of this study and are not addressed here.
93. Labor Code §3600 (a).
94. Although an employers' liability for contributing to the damages may be considered by a jury when allocating damages if the defendant on trial has met its burden of proof supporting the employer's contributory negligence or fault.

7.4. Asbestos Bankruptcy Trusts

In the U.S., as is the case in England, there is no recourse in the courts for those injured from asbestos exposure where the responsible entity is no longer in business, and there is no available insurance coverage for the loss. In England, as noted, Parliament has stepped in with various government compensation schemes, some funded by Employer Liability insurers. In the States, it is the private sector, rather than the government, that developed a response to the problem with the creation of "asbestos trusts."[95]

In 1982, the Johns-Manville Corporation and affiliated entities sought relief from asbestos litigation by filing for reorganization under Chapter 11 of the United States Bankruptcy Code.[96] Under the reorganization plan, a trust was formed to assume all of Manville's asbestos-related liability, including future unknown claims. (See. *Matter of Johns-Manville Corp.* 68 B.R. 618 (*Bankr.S.D.N.Y. 1986*), *aff'd. 78 B.R.* 407 (S.D.N.Y. 1987), *aff'd sub nom. Kane v. Johns-Manville Corp.*, 843 F.2d. 636 (2d. Cir. 1988). Upon consummation of the Plan, the Trust became the exclusive entity from which to seek compensation for existing and future asbestos health claims caused by exposure to Johns-Manville products.

The Manville Trust suffered severe cash flow problems in the first few years of its existence, in part due to unrealistic, overly optimistic estimates of future claims and costs, and within two years of operation, it was in danger of running out of funds to make promised payouts or to even continue in existence. (*Ibid.*) That crisis was ultimately overcome after significant intervention by the courts and, ultimately, the cooperation of counsel, leading to modifications to the Plan. A Johns-Manville Asbestos Trust continues to operate as of today.

The establishment of asbestos trusts under a Chapter 11 bankruptcy was codified by Congress in 1994. (11 U.S.C.A. §524(g).). Since then, dozens of other companies with heavy asbestos liabilities have filed for Chapter 11 protection,[97] and while each asbestos trust may differ regarding eligibility requirements, necessary documentation, or processing protocols, most are modeled on the Manville Trust.

Each trust has trust distribution procedures (TDP) that govern its administration and establish the process for assessing and paying claims. A payment schedule is set for each type of disease, and an established percentage is paid to a successful claimant.[98] The percentages established will change periodically, sometimes annually, to adjust for market fluctuations, the number of pending claimants to the trust, the estimated number and value of future claims, and other factors. A claim is paid out in capped yearly installments to avoid exhaustion of trust funds.

According to a U.S. Government Accounting Office (GAO) Report issued in 2011, about 100 companies had declared bankruptcy, at least partially due to asbestos-related liability, as of that date. It further found 60 asbestos trusts in existence with $37 billion in assets and that about 3.3 million claims, valued at about $17.5 billion, had been paid by these trusts.[99]

A RAND report examining asbestos trusts found that the payment percentage in twenty-six trusts they studied ranged from 1.1 percent to 100 percent, with a median of 25%. The GAO review of TDPs in 2011 also concluded that payment percentages paid by trusts ranged from 1.1 % to 100%, and the median payment percentage across trusts was 25%. In other words, the assets available to some of the trusts allowed them to pay only a very small proportion of the value assigned to the claim, while other trusts were fully funded and able to pay the entire amount.

Despite the claim that billions of dollars are available to claimants from the 60 or so asbestos trusts in existence, some trusts pay only pennies on the dollar or, at best, 25% of the scheduled value of the disease at issue. Thus, the total amount recovered by any one claimant may be relatively modest, even where a single claimant can obtain awards from multiple different asbestos trusts.

7.5. Comparing English and American Compensation Systems

One commentator discussing asbestos products litigation in England has observed:

> *"...asbestos claims in England and Wales are most notable for their rarity. The historical explanation for this is to be found in the twin development of employers' liability claims at common law and statutory claims under the Workmen's Compensation Acts. The wellspring for each was the existence of an employment contract. The dominance of employers' liabil-*

95. They are also referred to as mesothelioma trust funds. Section 425 of the Companies Act 1985 establishes something akin for reorganized distressed companies in the U.K. See, John Townsend, *Schemes of Arrangement and Asbestos Litigation: In Re Cape plc,* 70 Modern Law Rev. 837-847 (Sep. 2007); https:/www.jstor.org/stable/4543172.
96. *In re Joint Eastern and Southern Districts Asbestos Litigation (" Asbestos Litigation I"*), 129 B.R. 710 (E.D.N.Y. 1991), vacated 982 F.2d 721 (2d Cir. 1992), modified on rehearing, 993 F.2d 7 (2d Cir. 1993) relates in detail the tortured history of the Manville trust experience.
97. See, Written Statement of Lester Brickman (Feb. 4, 2015) Hearing on H.R. 526*: Furthering Asbestos Claim Transparency (FACT) Act of 2015* before the U.S. House Committee on the Judiciary, Subcommittee on Regulatory Reform, Commercial and Antitrust Law.
98. *Id.*, GAO Report at p. 12.
99. *The Role and Administration of Asbestos Trusts*, GAO Report to the Chairman, Committee of the Judiciary, House of Representatives, September 2011,

> *ity claims for asbestos-related illness has been cemented over the court of time through a combination of the increasingly sophisticated statutory regulation of employers, a claimant-friendly approach to the interpretation of employer's liability insurance policies, and the availability of claims against the insurers of defunct companies."*[100]

Compared to that reported by the English DPMS in 2015, it is questionable whether a claimant in California can obtain compensation and benefits from Workers' Compensation or from asbestos trusts that would be equivalent to 80% or 100% of an award that the claimant might expect to receive after successfully pursuing a claim through the civil court system in California. However, this is somewhat speculative as it is difficult to ascertain the plaintiff's net recovery in California from a combination of workers' compensation payments, asbestos trust awards, and monies obtained after filing a lawsuit. There are several reasons why this is so.

First, plaintiffs' attorneys in California generally operate under contingency fee agreements in which their fees are a percentage (generally at least 25%) of the settlement achieved or a percentage (generally about 40%) of a successful verdict after trial. The actual percentage taken for attorneys' fees in any specific case may vary, and it is generally not public knowledge.

Second, California plaintiffs may seek compensation from one or more asbestos bankruptcy trusts in addition to filing a court case. The number and identity of each bankruptcy trust where a claim has been made and the amounts paid to that individual by each trust, if any, may not be public record; to obtain that information requires a separate inquiry into each trust where a claim was made and possibly a court order.[101] There is no central depository for this data, and data is not shared among and between trusts.[102]

Third, the amount paid in a settlement by any specific defendant is generally subject to a confidentiality agreement between the parties and not public knowledge.

8. Concluding Remarks

Several years ago, California Judge Richard Seabolt (ret.) briefly described participating in a "Legal London" program during which he and about sixty other California litigators attended court proceedings and met with English judges, barristers, and solicitors. After listing some of the differences he observed between England and California, he noted that, unlike the blindfolded Lady Justice holding the scales of justice commonly seen in America, the statue of Lady Justice standing atop Old Bailey is not blindfolded. "On reflection, this difference might be symbolic of a slight but fundamental difference in the core values of our respective systems. Our system places tremendous emphasis on 'due process' and on assuring a process that is 'fair' – hence the blindfold. In contrast, the [English] system seems to me to place somewhat more emphasis on seeking 'truth' – hence the fully sighted statue of justice."[103]

Judge Seabolt's observation of a difference in certain core values held by the English and American judicial systems is, to some extent, borne out by the findings in this study. While difficult to generalize, it appears to one coming from California that the English judiciary provides litigants and their counsel a greater ability to realistically evaluate the value of their cases as they emphasize the litigant's duty to provide full and early disclosure of facts and evidence supporting claims at early stages of the litigation. This contrasts with California where, despite decades of litigating asbestos cases, there remain many inherent uncertainties built into the litigation process that make it difficult to assess the value of a case accurately and objectively, including, importantly, the threat of a jury trial, which is invariably demanded in asbestos cases. Despite this reality, the findings set forth above, suggests that there are practices from "across the pond" that might be applicable to other jurisdictions, such as California, for lessening the uncertainties in the litigation process - and burdens placed on trial courts processing these cases - without sacrificing core values held by the court system.

100. James Beeton, *Asbestos Product Litigation*, Journal of Personal Injury Law, J.P.I. Law 2021, pp. 17-24 (2021).
101. According to the GAO report, *supra*, only one out of 47 trust annual financial reports reviewed, contained claimant names and amounts paid to these individuals. Of the 52 trust TDPs GAO reviewed, 33 (64%) included sections relating to protecting the confidentiality of claimant's information and these sections often stated that the trust would only disclosure information to outside parties with permission of the claimant or in response to valid subpoena." GOA Report to the Chairman, Committee of the Judiciary, supra at p. 2.
102. "It is not possible to use trust-level data to determine the number of trusts providing payments to the same individual or the amount the trusts together pay to an individual claimant." RAND, *Asbestos Bankruptcy Trusts,* reporting on analysis of 26 active trusts (out of 54) set up through 2009.
103. Richard Seabolt, *Legal London and the Courts of England,* California Litigation, Vol 19, No. 2, p.47 (2006).

Navigating Current Issues and Future of Collective Redress:

Key Takeaways from the 2024 Global Class Actions and Mass Tort Conference

Justyna Niemczyk[1]

On 23 and 24 May 2024, the Perfect Law *Global Class Actions and Mass Tort Conference* took place in London. This year's conference attracted a diverse group of practitioners, judges, economists and litigation funders from Europe, North America and Australia. Over two days, attendees could choose from 18 panel sessions covering topics such as certification conditions and the restriction of collective actions through contractual clauses. This report discusses takeaways from several particularly interesting sessions relating to the collective litigation landscape in Europe, settlements, and data protection mass claims.

1. European Collective Redress Landscape

While North America and Australia have long-established collective redress systems, most European countries are still in the process of developing their class action frameworks. The UK is often seen as a leader in this respect, although most of the actions filed in that jurisdiction are opt-in cases. The need for implementation of the Representative Actions Directive (RAD) has compelled EU countries to design and introduce their collective action regimes, with the majority of the countries choosing for an opt-in system. Only a handful of jurisdictions like the Netherlands, Portugal and Slovenia embraced opt-out actions.

The first panel of the conference featured representatives from England, the Netherlands, France, Italy and Germany, who discussed the current state and avenues for collective litigation in their respective countries. Within that group, only the Netherlands and England allow for collective claims for damages on an opt-out basis,[2] with the others following the opt-in model.

Speakers from the Netherlands, Germany, and France highlighted various challenges associated with the collective redress regimes in their respective countries. For instance, the German member of the panel noted that collective actions in Germany have not proven to be particularly successful, citing issues surrounding the implementation of the RAD and the conflicting interests of, for example, major corporations and litigation funders. She also pointed to the 10% cap on third party funding introduced by the German legislator, noting that it is below the market. In her view, the low cap is expected to result in external funders not investing in collective actions in Germany as their return, taking into account the cap and the opt-in nature of the proceedings, will not be attractive enough.

The Dutch panellist explained that the RAD which was implemented in the Netherlands a few years after the introduction of the Dutch collective actions opt-out regime (WAMCA) in January 2020, imposed some stricter admissibility requirements regarding, for instance, third-party funding, than those originally set by the WAMCA. It prohibits companies from funding actions against their competitors, possibly necessitating a market analysis to determine competitive relationships. This, according to her, could lead to even longer discussions at the admissibility stage, and consequently, delays.

The Italian and English perspective was more optimistic. While there are still a number of issues that Italy needs to grapple with, particularly related to funding, progress is being made. The representative

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2. However, note that the statutory opt-out regime in England and Wales is restricted to competition claims before the Competition Appeals Tribunal.

from England disagreed with the sentiment that Europe is not as proactive and committed to collective redress as, for instance, the US. Instead, he argued that Europe is currently experiencing a real movement to make collective redress a viable part of the European legal landscape, as exemplified not only by the RAD, but also by other EU legislation – the AI Act, the Product Liability Directive and the Corporate Sustainability Due Diligence Directive.

Interestingly, and perhaps also rather surprisingly, the success of class action regimes is often measured by reference to statistics as it was done during the panel. During the panel, one of the speakers compared the value of the collective actions in the United Kingdom and the Netherlands. He noted that despite its nascent opt-out regime for damages claims, the Netherlands is catching up very quickly and is recognized to be an attractive jurisdiction to bring collective actions, especially in the context of privacy-related cases. This view was countered by the Dutch panellist who had a different view on the statistics from the Netherlands. She noted that the 2021 collective redress regime allowing for opt-out compensation claims has not increased the overall number of collective actions compared to the old regime (which permitted only opt-out declaratory actions). She then further explained that only approximately ¼ of the currently pending actions is for damages, arguing that the Netherlands still has a long way ahead to match some of the jurisdictions with more established collective redress systems.

While the numerical data discussed by the panel provides a useful reference point, it does not necessarily reflect the true success of a collective redress regime. The real measure of effectiveness arguably lies in whether individuals who previously lacked access to justice are now able to bring their claims. Therefore, it is important to look beyond statistics and consider how these regimes impact accessibility and fairness within the legal system – something that the participants will hopefully be able to discuss during one of the upcoming conferences.

2. Certification Requirements

Following a brief introduction of a number of class actions regimes, the second panel of the conference focused on certification requirements (also known as *admissibility requirements* in Europe) in the US, England and Wales and the Netherlands.

The certification requirements – that is, certain conditions that a class representative or claim organisation must satisfy for the action to proceed to a substantive assessment – are not very strict in England and Wales and the US. A judge from the Competition Appeals Tribunal (UK) who was on the panel explained that its collective redress regime is very simple in this respect and certification requirements are fairly light-touch. In the US, the key question is whether the class representative can adequately protect the interests of the class. Although the judge representing the US considered that certification is relatively easy to attain in the US, the American courts also scrutinize the law firm involved in the action to assess its suitability. It is the judge who will ultimately decide whether the proposed law firm should indeed be appointed as "class counsel". In connection with this assessment, some of the relevant considerations examined by the courts are the experience and resources of a law firm. As a result, a few of the most experienced law firms dominate the class actions space, making it very difficult for other law firms or younger lawyers to get involved.

In contrast to England and Wales and the US, the Netherlands introduced more specific certification requirements under the WAMCA – some of which are more substantive in nature and others which are focused more on the governance of the claim organization initiating the action. The claim organization's role is akin to that of the class representative or lead plaintiff in the US. These organizations are typically professional and are in charge of decision-making on behalf of the class. The Dutch member of the panel explained that courts in the Netherlands generally start with the assumption that the claim organization is indeed a good representative, but they can nevertheless be critical in assessing whether the organisation meets the relevant requirements. In principle, the purpose of the certification requirements in the Netherlands is twofold – in addition to safeguarding the interests of the class, they are also meant to protect the defendants from frivolous claims. Although the law includes a provision for this, judges do not apply it in practice.

The audience learned that some of the more substantive discussions regarding certification in the Netherlands relate to whether the claims for immaterial damages are sufficiently similar across the purported class and whether the claim organization can sufficiently safeguard the interests of the represented group. Regarding the former point, the courts have yet to develop a consistent standard – so far, the Netherlands has seen different decisions, such as in the case against *TikTok* where immaterial damages claims were deemed too different to be assessed in a collective setting and in the so-called breast implant case in which the court deemed immaterial damages claims admissible. Regarding safeguarding of interests, one of the primary concerns is whether the claim organization is sufficiently independent from the funder. While there is a general consensus that third-party funding plays an important role, the courts find it important to examine the degree of influence that third party funders have over the proceedings. This is why Dutch courts developed a practice of reviewing the funding agreements and sometimes even requesting amendments. Similarly, third-party funding is a subject of discussion in England and Wales, where – as explained by the judge on the panel – the sentiment is also that lack of funding

is a critical constraint to bringing collective claims. English courts understand that funders have a role in the system and that they are looking for a return on their investment. At the same time, if the drawdown of the award by the members of the class is 50% or less, it is considered a "bad sign", as the involvement of the class in the proceedings is important. In this context, he emphasized that unclaimed funds should not be distributed to the lawyers or funders, but rather to charity.

After exchanging comments about their respective regimes, the panellists were asked about any unintended consequences of their systems. For the US, the examples of such unintended consequences include the multiplication of actions against the states, which has led to resistance and subsequent legislative intervention aimed at limiting who can bring such actions. Furthermore, the judge on the panel representing the US noted that the regime does not contribute to creating a body of case law that can be applied in other cases because the vast majority of cases end up being settled. The design of the Dutch regime, on the other hand, was said to have unintended consequences for the so-called "idealistic" or public interest claims. Some of the WAMCA certification requirements do not necessarily align well with such actions. For instance, it may be difficult for an organization to show it has sufficient support of the represented group (which is one of the relevant requirements) if the group has no realistic way of showing its support. Despite this consequence, Dutch courts have shown that they are prepared to adopt a pragmatic approach and ignore or put less weight on certain provisions in such matters. Nevertheless, there is no formal ground for this approach. Finally, an issue for England and Wales – albeit not in the context of collective actions but rather follow-on proceedings – is the difficulty of trying individual cases related to a single infringement. The claimants who bring those actions may have incompatible interests, for instance, if they are at different levels of the supply chain. Trying these cases separately is not entirely efficient and makes it difficult to produce consistent case law.

The panellists' insights showed that certification for an entity or individual representing the interests of the class in the US and England and Wales may appear easier compared to the Netherlands. Despite the Dutch regime's clearly laid out list of certification requirements, it is still maturing, and courts are grappling with how exactly to apply these standards and how much weight each should carry. Consequently, case law at the level of first instance courts remains inconsistent. Although there is a trend towards a more lenient application of these criteria, possibly drawing inspiration from the US model, the discussion during the panel highlighted the nuanced nature of certification. While the US standard of "adequacy" may seem simpler than the extensive WAMCA requirements, other safeguards and scrutiny mechanisms may balance the process. Comparing different regimes might seem like comparing apples to oranges, but this broader, comparative perspective is crucial for improving collective redress systems and ensuring the protection of all parties involved.

3. Refining Settlements

The participants of the conference subsequently turned their attention to a panel discussing settlements in the US, Canada, Australia and the Netherlands. The three former jurisdictions are well-known for high-profile settlements, while the Netherlands, with its WCAM regime for collective settlements,[3] is unique in Europe in that it offers an avenue for reaching binding (international) opt-out settlements, similar to those in the common law jurisdictions represented on the panel. The WCAM regime is often misunderstood by non-Dutch lawyers who believe it provides for any easy way to reach pan-European settlements. A Dutch judge who was a member of the panel noted that this is more nuanced and even though a number of large settlements involving investors from outside of the Netherlands have been concluded in some specific cases, the WCAM settlement procedure may be less feasible in some instances.

The panel had an interesting discussion on who is responsible for making sure that the individuals bound by the settlement get the best possible deal, given the multitude of involved interests. In common law jurisdictions like the US, Canada, and Australia, there is a distinct role for an objector or contradictor. This individual or entity represents the interests of the class and presents their views on the settlement to the court. The objector acts as a critical check, ensuring that the proposed settlement is fair, reasonable and adequate for all class members. This adversarial process allows the court to hear diverse perspectives and make a more informed decision regarding the approval of settlements. While the benefits are clear, the panellists have also discussed the other side of the coin – the so-called "professional objectors" seen in the US, who file meritless claims or challenge settlements as a matter of principle, of-

3. Not to be mistaken for the act allowing collective opt-out actions for compensation to be brought, i.e. the so-called WAMCA discussed above.

ten aiming to extract a pay-off in exchange for withdrawing the objection.

In contrast, the Dutch system places the responsibility of guarding the interests of the class directly on the judge. In the Netherlands, it is the judge who reviews the proposed settlement to ensure it meets the necessary standards of fairness and adequacy for the class members. The judge's role is to scrutinize the settlement independently, occasionally considering issues which have not been raised by the class and its representative, nor by the paying party.

This raises interesting questions about the effectiveness and efficiency of these differing approaches in safeguarding the interests of class members and ensuring just outcomes in collective redress actions, although the panel did not reach a clear conclusion on this topic.

4. Privacy Class Actions and Quantification of Alleged Damages

The second day of the conference began with two panels dedicated to data protection mass claims. Featuring speakers from Europe and the US, these panels provided the audience with insights into the different issues faced on the two continents.

The differences primarily arise from the varying data privacy governance. Europe benefits from the General Data Protection Regulation (GDPR),[4] which came into effect on 25 May 2018. The GDPR grants rights to data subjects and imposes consistent obligations on companies offering goods and services to European data subjects. In contrast, the US, with its longer history of class actions, has confronted numerous privacy issues earlier, particularly regarding how to actually bring them before the courts. While some legislation is present, there is no federal statutory right to protect individuals' data. This absence has led to creative approaches using various state-level legislations, and often applying very old laws to modern technology.

The panellists recognized that the GDPR has an indirect influence on the US as well, because some companies choose to follow the practices and the solutions they have developed to comply with the GDPR in their global business. On the other hand, the US judges who are typically the first to hear the cases, may also shape the operations and compliance of tech companies through their judgments.

Regardless of some differences, both the US and Europe face a fundamental challenge in privacy class actions: quantifying the alleged damages. The audience learned about various creative approaches to damage quantification in the US, such as using the price of data on the dark web as reference and the potential to use a "broad brush" approach by the judges. Claim organizations in Europe, particularly in the Netherlands, UK and Portugal, which have seen the majority of privacy-related actions, struggle with the quantification of (material and non-material) damages as well. One the panellists discussed the value of data at length, arguing that monetary compensation for data privacy violations should be feasible in a collective setting. She provided examples of potential methods for quantifying damages, such as using the advertising income.

Notably, the examples from both the US and EU contexts hinge on the idea that data has economic value to individuals. A representative of Euroconsumers in Italy, pointed this out and explained that the EU system is compensatory and focuses on the change in the financial situation of data subjects, rather than the hypothetical value of data. He noted that there is no viable market for consumers to sell their individual data. In his view, the quantification of alleged (non-material) damages in collective actions for alleged privacy violations has not been adequately addressed by the claimants' bar yet, particularly in light of the recent case law from the Court of Justice of the European Union, which requires proof of damages (*Natsionalna agentsia za prihodite*). This proof is contingent on the individual circumstances of each data subject, necessitating a different approach in a collective setting. He concluded this requires further exploration.

It remains to be seen whether this key issue of quantification will be resolved and if so, how. Nevertheless, given the fundamental nature of this question, it will certainly be interesting to see how the approaches adopted in the EU and US will evolve, underscoring the importance of dialogue between practitioners, judges and other parties to collective actions.

5. Conclusion

Despite the diversity of topics covered during the conference, a common theme emerged: the need for continued dialogue and collaboration among practitioners, judges, and economists. The insights ex-

4. Or in the case of the UK, the Data Protection Act 2018 and the "UK GDPR", i.e. the GDPR provisions retained in domestic law.

changed by the attendees highlighted the importance of learning from different legal frameworks and experiences to enhance the effectiveness and fairness of collective redress systems globally.

Looking ahead, it will be fascinating to observe how the European collective redress regimes – sometimes already more advanced than they are given credit for – mature, and how the discussion on key topics, such as admissibility and damages, evolves.

Country reports

England and Wales, France, Germany, Italy, The Netherlands, Portugal, Spain, Switzerland

England and Wales

Anna Dannreuther, Gladuela Lawrence

Case law

Commission Recovery Limited v Marks & Clerk LLP & Another [2024] EWCA Civ 9

On 18 January 2024, the Court of Appeal ("**CoA**") handed down its judgment in *Commission Recovery Limited (Respondent) v Marks & Clerk LLP & Another (Appellant)* ("**M&C**"); unanimously upholding the High Court's decision to permit the claim to proceed as a representative action on an 'opt-out' basis pursuant to Civil Procedure Rule ("**CPR**") 19.8 (Representative parties with same interest).[1]

The group litigation regime in England and Wales is relatively well established for 'opt-in' actions (including by way of Group Litigation Orders). The process for 'opt-out' actions is now welcomingly gaining traction. A move in this direction was delivered in *Marks and Clerk.*

The case concerned allegations of non-disclosure of commission arrangements between IP firms and a renewal service provider. The crux of the appeal concerned the application of CPR 19.8 and whether it was appropriate for the Respondent to act as a representative. The Respondent had been incorporated in 2019 as a vehicle for bringing these claims.

The Respondent had defined class members as current and former clients of M&C (i) that had a direct contractual relationship with M&C (ii) that were subject to its standard terms of business, and (iii) in respect of the renewal of whose IP rights CPA (a renewal service provider) made payments to M&C.

The question was whether there was one or more issues common to all members of the class. The Respondent's case was that M&C's standard terms (which all class members had signed up to) were sufficient to establish that M&C owed each member a duty to act on a non-conflicted or disinterested basis. It argued that all that was needed to establish a breach of duty was receipt of an undisclosed commission. That was the stated common liability issue.

The Court considered that this was an issue which arose across the class and in which all members had the same interest. It did not matter that if the Respondent obtained a declaration (i.e. that receipt of disclosure amounted to a breach of duty), that would not resolve all the issues in the case including on liability. The Court considered that other issues (such as the defences of limitation and informed consent that required an individualised assessment) could be dealt with outside of the representative action format.

The Court further found there was no material conflict of interest between class members and therefore they had the 'same interest' in the same pursuant to CPR 19.8(1). Of further note, the Court did not look favourably on the Appellant's attempt "to prevent the litigation being taken forward at all"[2] in seeking a direction that the Respondent may not act as a representative (that is, by not proposing any alternative representative or case management structure). It considered the representative mechanism preferable to leaving class members to pursue claims individually, particularly as the individual amounts claimed were likely to be small.

The matter is now listed for a trial early next year. The dismissal of the appeal and upcoming initial trial will undoubtedly cause claimants and defendants alike to eagerly watch for judicial direction. The result of which being a surge in "opt out" representative actions, not least in other secret commission claims.

1. https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19#19.6
2. Para 75, [2024] EWCA Civ 9

Various Claimants v Mercedes-Benz Group Ag & Others [2024] EWHC 695 (KB)[3]

This case concerns the so-called 'Dieselgate' emissions claims. The High Court has been tasked with case managing thirteen sets of group litigation against different car manufacturers (now known as the 'Pan-NOx Litigation'). Further to the President of the King's Bench Division's letter and the order, arising from *Various Claimants v Mercedes-Benz Group AG* [2023] EWHC 3173 (KB), for the parties to make joint submissions as to case management proposals of the Pan-NOx Litigation, the case management hearing was heard in the week commencing 11 March 2024. The Court's subsequent judgment praised the parties for their "significant degree of co-operation".

The Court first grappled with the Defendant's application to restrict the use of disclosed documents, pursuant to CPR 31.22. Under this rule, documents referred to at hearings held in public may be used for purposes other than the proceedings themselves (known as 'collateral use'). The Defendant argued that permitting collateral use of the documents they had disclosed in the case would damage their "commercial interests through (mis)use of sensitive commercial information by competitors and imitators". The Court dismissed the application noting there was little force as to why they should depart from the open justice principle, which demands that documents read or referred to in a public hearing be available to the public unless there are good reasons otherwise. The Defendants also argued that their application should succeed because otherwise it would frustrate pending proceedings in Germany, where the documents are deemed 'confidential'. The Court found that it could take this as a factor into account, but that the English courts could not restrict the principle of open justice by reference to purported confidentiality protections in foreign jurisdictions.

The second issue the Court addressed was security for costs. The court declined to order disclosure of various funding agreements, which the Defendants said they required for security for costs applications. The Court effectively postponed the issue to be dealt with, if still pursued, at an upcoming costs management hearing. In so doing, the Court gave an early affirmative indication as to its disclosure. Additionally and notably, the Court indicated that consideration of submissions from the party against whom a security for costs application is made would be necessary.

Morris & Others v Williams & Co Solicitors (a Firm) [2024] EWCA Civ 376[4]

On 18 April 2024, the Court of Appeal ("**CoA**") handed down its judgment in *Morris & Other v Willimas & Co Solicitor* ("**Morris**"). The case concerned circumstances in which multiple claimants should be permitted to bring their claim using one claim form and therefore one set of proceedings.
The case concerned CPR rule 7.3, which reads:

> *"A claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings."*

And CPR 19.1, which reads:

> *"Any number of claimants or defendants may be joined as parties to a claim."*

The question was whether a 'real progress' test that had to be met before multiple claims could be put on the same claim form pursuant to CPR r 7.3. The 'real progress' test was whether there were likely to be common issues of sufficient significance that their determination would constitute real progress towards the final determination of each claim in a set of claims.

The CoA held that CPR 7.3 and 19.1 "mean what they say … there is no test beyond the words of 7.3" and therefore the appropriate test to be applied in such circumstances is one of *convenience* only. The claimants may "use a single claim form to start all claims which can be conveniently disposed of in the same proceedings".[5] The court will determine what is convenient according to the facts of every case. Further, the CoA helpfully clarified that "the current CPR does not restrict the flexibility of 19.1 and 7.3 by imposing a requirement that one or more issues has to be common to or bind all or even most of the other parties".[6]

The judgment is extremely informative and distils the regime of group litigation well. It traces group litigation back to its origins in the 1893 Rules of the Supreme Court and how the procedural rules have evolved to the current regime pursuant to CPR 19.[7] The CoA reiterated that the old regime of a single writ (now claim form) allowed multiple claimants to bring claims, *inter alia*, where "some common question of law or fact" arose. It suggested that the Civil Procedure Rule Committee consider whether this should be a requirement for multiple claimants to claim in the same claim form under CPR r 7.3.
The CoA considered *Abbott v Ministry of Defence* [2023] EWHC 1475 (KB) (*Abbott*). The CoA held that whilst *Abbott* had reached the correct conclusion in permitting the claimants to use a single claim form, the appropriate test was one of "convenience" and "*Abbott* was wrong to suggest that 7.3 required the court to apply the real progress test, the real significance test or a requirement that the determination of common issues in a claim by multiple claimants under 19.1 would bind all parties."

3. https://www.bailii.org/ew/cases/EWHC/KB/2024/695.pdf
4. https://www.bailii.org/ew/cases/EWCA/Civ/2024/376.pdf
5. Para 63
6. Para 51
7. www.justice.gov.uk/courts/procedure-rules/civil/rules/part19

Legislation

Litigation Funding Agreements (Enforceability) Bill

The bill that sought to address the consequences of the *Paccar* judgment has now been dropped in the run-up to the UK election on 4 July 2024. The Litigation Funding Agreements (Enforceability) Bill sought to "restore the position to that which prevailed before the [*Paccar* decision], that LFAs are not DBAs and hence are enforceable by amending the definition of a DBA in section 58AA(3)(a) of the Courts and Legal Service Act 1990".[8] As a result of Parliament being dissolved pre-election, the bill is currently not moving forward.

In *Paccar* the Supreme Court held that litigation funding agreements ("**LFAs**") pursuant to which the funder was entitled to a percentage of any damages obtained were in fact damages-based agreements ("**DBAs**"), and had to comply with the formal requirements of DBAs to be enforceable. The practical effect was that many LFAs were rendered unenforceable.

Civil Justice Council – Review of Third-Party Litigation Funding

The Civil Justice Council ("**CJC**") has confirmed that it has accepted the Government's invitation to review the litigation funding sector.[9] The CJC's announcement also confirmed that the aim is to provide an interim report by summer 2024 with the full report following by summer 2025 ("**the Review**").

The CJC's Review will be based on its function to make civil justice more accessible, fair and efficient.

The Review will provide advice and where appropriate, will make recommendations for change.

The scope of the Review is:

1. to set out the current position of third party funding ("**TPF**");
2. to consider access to justice, effectiveness, and regulatory options;
3. to make recommendations.

In making any recommendations for reform the below, amongst other things, will be considered:

1. whether, how and by whom should TPF be regulated;
2. whether and to what extent a TPF's return should be capped;
3. the court's role in controlling the conduct of litigation supported by TPF, including the protection of claimants within such litigation;
4. whether TPF encourages collective action.

France

Maria José Azar-Baud

Case law

The second half of 2023 was a relatively uneventful period for the French group action. In the judiciary, whilst no new proceedings were initiated, two decisions were handed down and an important settlement has been reached by a consumer association and a bank, for the compensation of clients of the latter.

Amnesty International et al. v. French State of October 11, 2023[10]

The *Conseil d'Etat* rejected the group action filed by several associations and NGOs acting in the so-called "racial profiling" case. The plaintiffs had asked that the State be ordered to take measures to put an end to identity checks considered discriminatory.

While acknowledging that such checks do exist and constitute a breach of the prohibition on discriminatory checks, and accepting that the practice was not isolated, the *Conseil d'Etat* did not accept that it was "systemic" or "widespread".

The *Conseil d'Etat* also stressed that it was not the role of the administrative judge to take the place of the public authorities in determining public policy, or to enjoin them to do so. In fact, the plaintiff associations were calling for "a general redefinition of the policy of identity checks to repress delinquency and prevent disturbances to public order", through measures such as amending the Code of Criminal Procedure, creating a specific regime for minors and setting up an independent supervisory authority, the introduction of a control receipt and the systematic drafting after each control operation of a report to be forwarded to the public prosecutor, the redefinition of relations between the police and the public, and improved consideration of discrimination issues in the training, assessment and control of officers.

UFC v. Canal Plus case of November 14, 2023[11]

The Versailles Court of Appeal upheld the admissibility of the group action against Canal Plus. This action, initiated by the UFC association, was aimed at the condemnation of what the plaintiff described

8. bills.parliament.uk/publications/54764/documents/4594
9. www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/current-work/third-party-funding/
10. CE 11 octobre 2023, n° 454836, lire en ligne: https://www.conseil-etat.fr/actualites/controles-d-identite-discriminatoires-la-determination-d-une-politique-publique-ne-releve-pas-du-juge-administratif?fbclid=IwAR3dMjlGGmA3_Ay5ctSUsZjnBfy5J0xrKkpkO41F9fgzogbQ1o6zKh4qdFA
11. CA Versailles, 1re ch. 2e sect., 14 nov. 2023, n° 22/07502. Lire en ligne : https://www.doctrine.fr/d/CA/Versailles/2023/CAPFD176B05DD2631D1594D

as forced sales. According to the plaintiff, the defendant had increased the price of its subscriptions during the contractual period, and deducted sums by way of subscription without having obtained the express prior commitment of its customers.

On November 25, 2022, a *Conseiller de la mise en état* of the *Tribunal judiciaire de Nanterre* had already rejected the defendant's objection to the nullity of the summons and ruled that the action was admissible. Before the Court of Appeal, Canal plus argued that the association had recognized the cessation of the alleged damage and therefore had no direct and personal interest in bringing the action. After noting that no waiver on the part of the association could be found in the documents submitted to the court, the Court recalled that "the association's action is not aimed at obtaining recognition of a right of its own, but is brought, through a group action, for the sole purpose of obtaining compensation for economic damage suffered by consumers forming an identified group". It was therefore not necessary to investigate the existence of the association's direct and personal interest.

Collective Settlement: CLCV against BNP Paribas

On January 1, 2024, CLCV (Consommation, Logement et Cadre de vie - Consumption, Housing and Living Environment), a nationally approved consumer protection association, announced that it had reached an out-of-court settlement with BNP Paribas Personal Finance for the approximately 4,400 customers who had taken out the Helvet Immo mortgage contract.[12]

Marketed in 2008 and 2009, this contract provided for the loan of a sum in Swiss francs, repayable in euros.

It was the subject of criminal proceedings, in which CLCV has been a civil party since 2015. A ruling by the Paris Court of Appeal was handed down on Tuesday November 28, 2023.

CLCV had also launched an action for the cessation of unfair terms in 2017, notably concerning indexation on the Swiss franc, as well as a group action in 2016.

Under the terms of the agreement reached, BNP Paribas Personal Finance undertakes to offer a solution to all borrowers within the next few months. According to media reports, between 400 and 600 million euros will have to be disbursed to compensate the bank's customers.

This agreement would also put an end to the group action currently underway between the two parties.

Fédération métallurgie CGT v. Safran Aircraft Engines

On March 14, 2024, within the context of an appeal by CGT (Confédération générale du travail), the Paris Court of Appeal[13] upheld the decision of the judge of first instance[14] that had rejected a discrimination-related group action brought by the union CGT against Safran Aircraft Engines.

On May 28, 2017, Fédération métallurgie CGT filed a group action against Safran Aircraft Engines for acts of discrimination committed against union representatives working for the company.

The CGT claimed to have observed "for a long time that holders of a CGT mandate within SNECMA union were discriminated against, in terms of their career development and consequently in terms of their remuneration". Despite several collective agreements designed to limit the trade union discrimination observed in the company, the latter continued, which gave rise to individual actions before the labor courts, resulting in settlements for the award of damages. Notwithstanding, considering that the discrimination had not ceased, the Union - CGT - engaged the group action before the Paris judicial court.

The latter ruled on December 15, 2020 on the claim for cessation of the breach and compensation for damages, rejecting the Union's claim for breaches prior to November 20, 2016, the date on which the discrimination group action was introduced by the French lawmaker.[15] The Court relied on a strict interpretation of the principle of non-retroactivity of the law and refused to take those breaches into account, even if their effects had continued after that date. The Court therefore limited its assessment of discrimination to the period between November 20, 2016 and March 30, 2018. However, it considered such a period as "obviously too short to allow for the necessary consideration of a plurality of periodic deadlines in terms of salary increases or career advancement or evolution". Hence, the Court dismissed the CGT's claims and rejected the proposals of the Défenseur des droits, who had intervened in the proceedings as amicus curiae.

According to the judgment of March 14, 2024, the appeal of the CGT relied mostly on facts predating the group action's entry into force, and subsequent elements were insufficient to attest to the reality of the discrimination.

UFC-Que choisir v. Natixis Investment Managers International[16]

12. https://www.clcv.org/banque/credits-immobiliers-helvet-immo-accord-entre-clcv-et-bnp-ppf
13. CA Paris 14 mars 2024, n° 21/0700. Lire en ligne : https://www.doctrine.fr/d/CA/Paris/2024/CAPBD55E7F01092E8BE916Cs
14. TJ Paris, 15 déc. 2020, RG 18/04058.
15. TJ Paris, 15 déc. 2020, RG 18/04058.
16. TJ Paris 3 avr. 2024, n° 18/02914. Lire en ligne : https://www.doctrine.fr/d/TJ/Paris/2024/TJP872B9F8D7085B6E59F62

On April 3, 2024, the *Tribunal Judiciaire de Paris* rejected the group action brought in March 2018 by the consumers' association UFC-Que choisir against Natixis Asset Management (now Natixis Investment Managers International).

The association alleged the investment bank had committed various breaches in the management of formula funds. In particular, Natixis had provided "incomplete, inaccurate and misleading" information on how the value of the funds was calculated and had levied undue charges on consumers. Despite a conviction by the *Authorité des marches financiers* (AMF), upheld by the *Conseil d'État*, the court ruled that the action was inadmissible without ruling on Natixis' failings.

On the one hand, the court noted the dissimilarity of the situations, as some funds had matured while others had not. As a result, the margin charged was not the same and could not be calculated uniformly. On the other hand, the court also ruled that the financial product in question did not qualify as a service within the meaning of Article L623-1 of the French Consumer Code which only foresees the group action for the sale of goods or provision of services. Indeed, according to the court, Natixis' main obligation in the context of these formula funds was an obligation to pay, not an obligation to perform. As these funds were based on the guarantee that a predefined financial objective would be met at maturity, the company had no obligation to manage them, as it was simply required to return the capital invested, subject to a possible mark-up. There would therefore be no continuous administration of the capital entrusted to the company, as in a guided management contract for example, but rather two separate payment obligations, one performed by the consumer at the start of the contract, and the other by the professional at the end.

Despite current legislation tending to broaden the scope of the group action, the courts still seem to favor a strict interpretation of the notions of "provision of service" and "similarity". This dissonance can only be resolved with the completion of the proposed law.

Association aide aux victimes des accidents du médicament (AAAVAM) et al. v. Bayer HealthCare SAS

The French Supreme Court *(Cour de cassation)* clarified the powers of the *juge de la mise en état* to order medical expert appraisals in the context of a "health" group action.

On May 2, 2024, the French Supreme Court declared Bayer HealthCare's appeal in cassation inadmissible. The appeal had been raised in the context of the group action brought by the *Association aide aux victimes des accidents du médicament* (AAAVAM) et al. against the laboratory.[17]

This is a very interesting decision, in that it confirms that the pre-trial judge (*juge de la mise en état*), even if he declares himself incompetent to rule on dismissals in favor of the judicial court, can order medical expert appraisals in individual cases. Such expert opinions are essential to enable the trial court to rule on the admissibility and liability of the defendant.

In this case, the pre-trial judge had declared himself incompetent in favor of the court to rule on the objections raised by Bayer and ANSM, and had ordered an expert opinion.

Bayer then applied to the First President of the Court of Appeal for leave to appeal against this order. As a reminder, "Articles 150 and 272 of the French Code of Civil Procedure (CPC) provide that no appeal may be lodged against an order by which the first president of a court of appeal rules on a request for leave to appeal against a judgment ordering an expert opinion. This rule may only be departed from in cases of abuse of power".

Bayer therefore lodged an appeal with the French Supreme Court against a potential abuse of power by the trial judge, who had allegedly committed a denial of justice: firstly, by not ruling on the objections raised by the defendant, and secondly, by ordering medical expert appraisals in relation to the individual cases presented in support of the action.

Through a reading of the Public Health Code (Articles L. 1114-1, L. 1143-1, L. 1143-2, L. 1143-3), Chapter I of Title V of Law no. 2016-1547 of November 18, 2016 on the modernization of justice for the 21st century and the Code of Civil Procedure, the parliamentary work of Law no. 2016-41 of January 26, 2016 on the modernization of our healthcare system, and in particular through Report no. 2673 made on behalf of the National Assembly's Social Affairs Committee, submitted on March 20, 2015, the Supreme Court recalls that:
- "the procedure will take place in two phases: in the first phase, the judge hearing the claim will have to ensure its admissibility, establish the liability of the producer, supplier or user of the health product, and define the criteria enabling users to join the group action...".
- As the text does not designate a specific jurisdiction, the judge seized must be the one with territorial and sectoral jurisdiction (judicial judge when the allegedly responsible party is a private person, administrative judge when it is a public person).
- The judge hearing the case can order any investigative measure, including medical expertise. And according to Article 849-2 of the Code of Civil Procedure, issued from the same decree, the claim (for a group action) is lodged, investigated and judged ac-

17. Cass. civ. 2e, May 2, 2024, Appeal no. 22-10.480). https://www.courdecassation.fr/decision/66332ca4cbff4d0008b074b9

cording to the rules applicable to ordinary written proceedings (...).

And the Supreme Court ruled that the action was inadmissible on the grounds that:

> *"(...) when an action on the merits is brought before the judicial court, it is up to the president, pursuant to Article 779 of the Code of Civil Procedure, to refer cases that are not ready for trial to the pre-trial judge, who, according to Article 789, 4°, of the same code, has sole jurisdiction, when the claim is presented after his appointment, to order any investigative measure."*

Consequently, "... in the event that an action on the merits is brought, and he is designated, the *juge de la mise en état* is competent, in the first phase of the group action, to order an investigative measure, which must, at this stage, be limited to technical points likely to enlighten the judge on the merits on questions relating to the question of the liability of the producer, supplier or user service provider of the health product, to the definition of the connecting criteria enabling users to join the group action, and to the damages likely to be compensated."

Legislation

The long-awaited draft law to implement the Representative Actions Directive, adopted by the Assembly in March was heavily modified by the Senate in February 2024; a *Commission mixte paritaire* has to decide the matter now.

The French proposal of law on the legal framework for group actions (n°420, registered in the Senate on March 9, 2023) implementing the Representative Actions Directive

Adopted by the Assembly and pending before the Senate, the draft is to be considered as the implementation of the European Representative Actions Directive (Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions to protect the collective interests of consumers and repealing Directive 2009/22/EC, hereinafter the RAD) but it goes beyond the scope of the latter.

The draft bill enlarges the domain of the group actions regime as it exists today in France and will enact a truly trans-substantive mechanism, hence larger than the European one covering only consumer protection. Moreover, the group action arising out of the bill will not only be able to be brought on behalf of natural persons but will also encompass legal ones having suffered damage whose common cause is the same breach or a breach of the same nature of legal or contractual obligations by professionals, be they private or public entities. The enlargement is to be seen in the purposes of the group actions which, as the RAD does, will target cessation, compensation or both.

It also extends the number of entities who will be able to bring a group action. Aside from the classic approved associations, those regularly created and having existed for two years, ad hoc ones who represent 50 natural persons or five legal persons (private and public), and unions will be able to engage group actions as well as qualified entities listed by the European Commission. The Public Prosecutor's Office may act as lead plaintiff in a group action to put an end to the breach and can intervene as an added party in any group action.

The plaintiffs engaging a group action will need to produce a sworn statement from their legal representatives to the effect that they are pursuing a non-profit-making aim.

There is a very problematic provision related to third party funding that might entail problems of interpretation. Indeed, it is provided that the third parties who provide the parties with funding, except if they themselves suffer damage caused by the alleged breach by the defendant, cannot have an economic interest in the initiation or outcome of the action or be competitors of the defendant. Whilst not-for-profit funding does exist, one cannot imagine that the lawmaker's intention was to refer to that situation. Instead, we can hope the clumsy wording encompasses for-profit third-party funders who, as stated by the RAD, cannot be the competitors of, nor those dependent on, the former.

A new provision in the draft relates to group actions of a serious nature, whereby the judge may decide that the advance of costs relating to the investigative measures he orders shall be paid for, in whole or in part, by the State. Furthermore, if the claim is rejected and the action brought was neither reckless nor fraudulent, the judge can order the costs, in whole or in part, to be borne by the State.

To carry a cross-border group action, it is stated that the minister responsible for consumer affairs will issue an authorization to legal persons who comply with the requirements set forth by the RAD (twelve months of actual public activity, a legitimate interest in protecting the interests of consumers, non-profit making, not insolvent, independent and transparent).

If a French judge has justified doubts about compliance with Article 10(1) and (2) of the RAD, the judge may order a claimant bringing a representative action, falling within the scope of the same Directive and seeking redress, to produce a financial overview listing the sources of funds used to support the action.

According to the draft, an out-of-court request before engaging the action is mandatory for group

actions based on discrimination. Aside from this sector, those having standing to sue in a group action can also engage in mediation on behalf of the group concerned by the practice. Any agreement should be approved by the judge.

Group actions shall be brought before specially designated judicial tribunals.

The proceedings follow the same patterns as currently; that is, they are structured in three phases:
- admissibility and liability;
- late opt-in (as the victims only join if they want to benefit from the decision that is already final); and
- enforcement.

The enforcement can take place through one of the two procedures available:
- an individual procedure, whereby each victim willing to join addresses a request to the defendant or to the claimant considered as having a mandate thereof and the defendant must comply on an individual basis. Victims who are not compensated can seize the judge having handed down the liability decision;
- a collective procedure for the liquidation of damages, whereby the plaintiff is allowed by the judge to negotiate with the defendant the means to enforce the decision on liability.
-The agreement thereof is subject to approval by the judge who scrutinizes it to ensure compliance with the interest of the victims.
- If no agreement is concluded, the matter shall be referred to the judge within the time limit set out in the first paragraph of [Article 1er *duodecies*] for the purpose of liquidating the remaining damages.

A national register of group actions will be created and held by the minister of justice.

Last, the same draft creates a civil penalty for intentional misconduct causing serial damage when the author of the damage deliberately committed a fault with a view to obtaining an undue gain or saving, and the breach has caused damage to several natural or legal persons in a similar situation. The penalty, which is not insurable, should be proportionate to the seriousness of the offence committed and the profit that the offender has derived from it. If the perpetrator is an individual, this amount may not exceed twice the profit made. If the perpetrator is a legal entity, this amount may not exceed 3% of average annual sales, excluding taxes, calculated over the last three financial years prior to the one in which the fault was committed. When a civil penalty is liable to be combined with an administrative or criminal fine imposed for the same acts, the total amount of fines imposed should not exceed the highest legal maximum.

The French proposal of law on the legal framework for group actions (n°64 amended by Senate on February 6, 2024)

In February 2024, significant amendments to the draft were introduced by the Senate.[18] While maintaining some aspects described above, the trend of this latest version is towards the tightening of standing requirements and scope, namely of class actions in the health domain and discrimination, and rejection of the civil penalty, for example.

The National Assembly and Senate did not digress on the use of the opt-in mechanism for class actions, nor on the provision for the implementation of a public register for those actions. Following the Representative actions directive, the Senate has also maintained the ability of associations to bring cross-border representative actions, in addition to the creation of the specialized judicial tribunals to hear claims.

However, concerning standing, compliant with the Representative actions directive, *associations agréées* require 12 consecutive months of public activity (as opposed to the 2-year rule for regular creation adopted by the Assembly), the same specific statutory purpose as previously, with new criteria of transparency and independence, and must not be subject to insolvency proceedings. Importantly, unlike the Assembly draft, ad hoc associations are not given the opportunity to exercise the group action. In addition to health matters, breaches of labor law under the Labor Code are excluded from the proposed unified regime, except for specific matters, such as discrimination at work.

Further, the latest amendment requires prior formal notice addressed to the potential defendant, and the action cannot be commenced for four months following receipt. Third-party funding provisions are expanded upon in two main ways. Associations may only receive such funding 1. if it is not intended to (or in fact) prejudicially influences the conduct or bringing of the action, and 2. if the funding is published according to decree rules.

18. Draft n°64 : https://www.senat.fr/leg/tas23-064.html.

Germany

Maximilian Silm

Case law

Although German law provides only limited options to pursue mass claims, over the last ten years specialised litigation vehicles have emerged an increasingly popular business model to pursue hundreds or even thousands of individual claims in German courts. In particular, litigation vehicles specialised in bundling and pursuing cartel damages claims[19] have brought actions each seeking up to hundreds of millions of euros in total. Supported by litigation funders, these vehicles' business model frequently entails collecting and bundling claims from purported victims of the cartel via fiduciary assignments under German law.[20]

The question whether such business models providing class action-like legal services are permissible before German courts is heavily debated. The focus of the debate centres on the German Legal Services Act (*Rechtsdienstleistungsgesetz*, RDG), according to which respective activities of litigation vehicles must be explicitly allowed and – with the exception of certain privileges and legal permissions – services may only be provided following such authorisation.[21] Violations of the RDG[22] in conjunction with Sec. 134 German Civil Code (*Bürgerliches Gesetzbuch*, BGB)[23] result in the legal services agreement being ineffective and the underlying assignment of claims may ultimately be void.

Courts of first instance for cartel damages claims continue to demonstrate a unified position by regularly rejecting the permissibility of business models arising in the context of cartel damages law (as well as in other areas of law).[24] While various legal issues surrounding such business models are still unanswered and related judgments by panels responsible for tenancy law,[25] insolvency law[26] and diesel disputes[27] at the Federal Court of Justice only relate to the specific business model of the individual case at hand,[28] it is evident from them that all business models discussed before the Federal Court of Justice to date have been permitted and ruled as (still) being in compliance with the RDG. This seems to indicate that the highest German court for civil matters is generally in favour of class action-type mass proceedings in Germany. However, it has not yet had the opportunity to deal with a cognate business model in a case centred on cartel damages claims (except for one very special appeal brought by an association of interest[29]).

This will change in the near term as the Munich Higher Regional Court recently set aside the frequently cited Munich Regional Court's[30] dismissal of the action brought by Financialright in the trucks litigation.[31] It granted leave to appeal on the points of law to the Federal Court of Justice, which the defendants recently lodged.[32] In addition to these general developments, there have been several other decisions handed down in recent months taking an alternative approach.

19. These include CDC Cartel Damage Claims, Financialright Claims and Themis (today: Gesellschaft für Forderungsmanagement mittelständischer Spediteure (GeFoS) mbH).
20. Sec. 398 BGB: "*A claim may be transferred by the obligee to another person by contract with that person (assignment). When the contract is concluded, the new obligee takes the place of the previous obligee.*"
21. Sec. 10 (1) No. 1 RDG: "*Natural and legal persons and companies without legal personality registered with the competent authority (registered persons) may provide legal services in the following fields on the basis of special expertise: 1. Collection services.*"
22. Legal or debt collection services may violate Sec. 3 RDG if they go beyond this authorisation. In addition, Sec. 4 RDG establishes the principle that legal services are not allowed if they are incompatible with the provider's other service obligations (in particular in the event of any conflict of interest).
23. Sec. 134 BGB: "*A legal transaction that violates a statutory prohibition is void, unless the statute leads to a different conclusion.*"
24. LG Munich (37 O 18934/17) – 7 February 2020 = EuZW 2020, 279 (*trucks cartel*), judgment set aside; LG Hannover (18 O 50/16) – 4 May 2020 = NZKart 2020, 398 (*sugar cartel*); LG Hannover (18 O 34/17) – 1 February 2021 = NZKart 2021, 195 (*sugar cartel*); LG Stuttgart (30 O 176/19) – 20 January 2022 = NZKart 2022, 222 (*logs cartel*); LG Stuttgart (30 O 17/18) – 28 April 2022, for full text see: www.juris.de/r3/document/NJRE001504543 (*trucks cartel*); cf. LG Dortmund (8 O 7/20 (Kart)) – 13 March 2023 = NZKart 2023, 229 (*logs cartel*); cf. Mass Claims Journal 2021 Nr. 1, Country Report on Germany, p. 78; Mass Claims Journal 2021 Nr. 2, Country Report on Germany, p. 144.
25. BGH (VIII ZR 285/18) – 27 November 2019 (*LexFox I*) = BGH NJW 2020, 208; BGH (VIII ZR 130/19) – 8 April 2020 (*LexFox II*) = NJW-RR 2020, 779; BGH (VIII ZR 120/19) – 6 May 2020 (*LexFox III*), for full text see: www.juris.de/r3/document/NJRE001424823; BGH (VIII ZR 45/19) – 27 May 2020 (*LexFox IV*) = NZM 2020, 551; BGH (VIII ZR 129/19) – 27 May 2020 (*LexFox V*) = ZIP 2020, 1619; BGH (VIII ZR 121/19) – 27 May 2020 (*LexFox VII*), for full text see: www.juris.de/r3/document/NJRE001430246; BGH (VIII ZR 128/19) – 27 May 2020 (*LexFox VIII*) = ZIP 2020, 2191; cf. Mass Claims Journal 2021 Nr 1, Country Report on Germany, p. 78.
26. BGH (II ZR 84/20) – 13 July 2021 (*Airdeal*) = BGH NJW 2021, 3046; cf. Mass Claims Journal 2021 Nr. 2, Country Report on Germany, p. 144.
27. BGH (VIa ZR 418/21) – 13 June 2022 (*Financialright I*) = BGH NJW 2022, 3350; BGH (VIa ZR 184/22) – 10 October 2022 (*Financialright II*) = VuR 2023, 25; BGH (VIa ZR 162/22) – 24 October 2022 (*Financialright III*) = VIA 2024, 35.
28. BGH (VIII ZR 285/18) – 27 November 2019 (*LexFox I*) = BGH NJW 2020, 208; BGH (II ZR 84/20) – 13 July 2021 (*Airdeal*) = BGH NJW 2021, 3046; BGH (VIII ZR 279/21) – 30 March 2022 = BGH NJW-RR 2022, 1092; BGH (VIa ZR 418/21) – 13 June 2022 (*Financialright I*) = BGH NJW 2022, 3350.
29. BGH (KZR 73/21) – 26 September 2023 (*sugar cartel*) = BGH NJW 2024, 354; see below fn 33.
30. LG Munich (37 O 18934/17) – 7 February 2020 (*trucks cartel*) = EuZW 2020, 279.
31. OLG Munich (29 U 1319/20) – 28 March 2024 (*trucks cartel*) (not published), cf. becklink 2030346 - beck-online; see below fn 39.
32. www.verkehrsrundschau.de/nachrichten/transport-logistik/lkw-kartell-sammelklage-von-financialright-claims-jetzt-vor-dem-bgh-3514755.

Decision of the Federal Court of Justice of 26 September 2023[33]

In a decision rendered in September 2023, the Cartel Panel held assignments of purported cartel damages claims in connection with the sugar cartel to an association of medium-sized breweries to be compliant with the RDG and repealed a decision of the Karlsruhe Higher Regional Court.[34]

The Federal Court of Justice ruled that the legal services provided by the association were privileged in accordance with Sec. 7 (1) No. (1) RDG[35] and did not require separate authorisation. Pursuant to this provision, legal services provided by associations founded to protect a common interest of their members are permitted, provided that the legal services are within the scope of the association's statutory tasks and are not exceedingly important compared to the fulfilment of its other statutory tasks. The purpose of the association, organised as a limited partnership, was to promote and support the visibility and competitiveness of small breweries, including the joint procurement of sugar for its members. According to the Court, this purpose covers the legal action and the fact that the association also pursued commercial interests did not prevent the association from being classified as an association within the meaning of Sec. 7 (1) No. (1) RDG. The Federal Court of Justice has thus gone against the trend towards an overly restrictive interpretation of Sec. 7 RDG, interpreting the statute broadly[36] in view of the constitutionally protected freedom to exercise a profession[37] and guarantee of property.[38]

Decision of the Munich Higher Regional Court of 28 March 2024[39]

In its ruling issued in March 2024, the Munich Higher Regional Court concluded that Financialright's purported damages claims in connection with the trucks cartel were covered by the authorisation as legal services provider under the RDG. In order for the assignment of the claims to be void, the Court (based on judgments of the Federal Court of Justice) ruled that authorisation must have been clearly exceeded, which the judges found was not the case with Financialright's activities in the particularly complex area of cartel damages claims, in which foreign laws also have a bearing on legal actions. The Court underlined that the risk of a complex legal situation should not be imposed on the assignors. Separately and based on the specific circumstances at hand, the Court ruled that Financialright was not obliged to produce the litigation funding agreement, which the truck manufacturers had requested on the grounds that financial dependence on a litigation funder and its probable rights to influence decisions and activities of the litigation vehicle result in a conflict of interest with the assignors.

An appeal already lodged with the Federal Court of Justice[40] will now give the Federal Court of Justice and its Cartel Panel the opportunity to examine and comment on the permissibility of assignment models in connection with cartel damages claims and to provide further guidance for pending and future cases.

The Dortmund Regional Court's 13 March 2023 Request for a Preliminary Ruling[41]

In March 2023, the Regional Court of Dortmund referred a matter in connection with the logs cartel to the European Court of Justice for a preliminary ruling. The Regional Court essentially seeks to clarify whether EU law[42] prohibits an interpretation of the laws of a Member State according to which the pursuit of bundled cartel damages claims on the basis of fiduciary assignments is impermissible.

The underlying facts concerned 32 sawmills which assigned their purported cartel damages claims to a legal service provider. The claims allegedly arose from the purchase of logs at allegedly inflated prices due to the logs-cartel. As several regional courts had done in the past, the Court took a critical view of the assignment of cartel damages claims to legal services providers, based on the provisions of the RDG. The Court doubts, however, whether the impermissibility of such business models is compatible with the principle of effectiveness under EU law and the principle of effective legal protection.[43]

33. BGH (KZR 73/21) – 26 September 2023 (*sugar cartel*) = BGH NJW 2024, 354.
34. OLG Karlsruhe (6 U 56/20 (Kart)) – 17 November 2021 (*sugar cartel*) = NZKart 2022, 289.
35. Sec. 7 (1) No. 1 RDG: "*Legal services provided by professional associations or other associations founded for the protection of common interests and their associations within the scope of their statutory tasks for their members or for the members of the associations or institutions belonging to them are permitted, provided that they are not of overriding importance in relation to the fulfilment of their other statutory tasks. The legal services may be provided by a legal entity that is the sole beneficial owner of the associations or organisations referred to in sentence 1.*"
36. BGH (KZR 73/21) – 26 September 2023 (*sugar cartel*) = BGH NJW 2024, 354; LG Munich (37 O 18934/17) – 7 February 2020 (*trucks cartel*) = EuZW 2020, 279; cf. Mass Claims Journal 2021 No. 2, Country Report on Germany, p. 144.
37. Art. 12 (1) Basic Law of the Federal Republic of Germany (*Grundgesetz*, GG): "*All Germans shall have the right freely to choose their occupation or profession, their place of work and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law.*"
38. Art. 14 (1) GG: "*Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.*"
39. OLG Munich (29 U 1319/20) – 28 March 2024 (*trucks cartel*) (not published).
40. www.verkehrsrundschau.de/nachrichten/transport-logistik/lkw-kartell-sammelklage-von-financialright-claims-jetzt-vor-dem-bgh-3514755.
41. LG Dortmund (8 O 7/20 (Kart)) – 13 March 2023 (*logs cartel*) = NZKart 2023, 229.
42. Art. 101 of the Treaty on the Functioning of the European Union, Art. 4 (3) of the Treaty on European Union, Art. 47 of the Charter of Fundamental Rights of the European Union and Art. 2 No. 4, Art. 3 (1) of Directive 2014/104/EU.
43. LG Dortmund (8 O 7/20 (Kart)) – 13 March 2023 (*logs cartel*) = NZKart 2023, 229.

The hearing at the European Court of Justice took place on 7 May 2024 (C-253/23).[44] The parties were joined by the German Federal Cartel Office and the European Commission. First Advocate General of the European Court of Justice Szpunar announced his closing statements for 19 September 2024.

Decision of the Dusseldorf Higher Regional Court of 10 August 2023[45]

While the Dusseldorf Higher Regional Court, in a decision rendered in August 2023, did not deem the activities of a legal services provider in the context of the diesel emission matter to be in breach of the RDG, it did develop an additional approach focussing on the question of the consequences of potential breaches of the RDG for the assignors' claims. Although this decision is not related to cartel damages claims, the Court's additional approach may also be of relevance for this kind of proceedings. The Court ruled that, in principle, the validity of the assignment to the legal services provider was irrelevant to the suspension of the limitation period of the underlying claims. Rather, an action filed by the litigation vehicle suspended the limitation period in favour of the assignor even if the assignment of the claims turned out to be ineffective.[46] According to the ruling the crucial factor was whether the assignor demonstrated its willingness to pursue legal action in a sustainable manner by joining the action of the legal service provider. The latter was deemed to be the case as the litigation vehicle had declared its intention to sue for the assigned claims, and both the vehicle and the assignors had assumed that a decision could and would be taken by the Regional Court.[47]

The Court also held that the provisions of Sec. 404 et seq. BGB, which serve to prevent a debtor's defences from deteriorating as a result of the assignment of claims, also support the idea of a suspensive effect in benefit of the assignor. It took the view that a refusal to suspend the limitation period would seriously harm the interests of the assignor, as the limitation period would possibly expire before a final decision on the validity of the assignment had been made.[48]

Italy

Anna D'Agostino

Case law

Genitori Tarantini v. Ilva

Following the entry into force of the class action reform in Italy,[49] the Italian Code of Civil Procedure now contains a provision (Art. 840-*sexiesdecies*, c.p.c.) which makes it possible to obtain an injunction against unlawful conduct that harms homogeneous rights. The present case, *Genitori Tarantini v. Ilva*,[50] is probably one of the most important class actions in Italy, due to the complexity of the situation – which is reflected in the (recent) developments at the national and European levels – and the fundamental importance of the interests and rights at stake.[51] The class action for injunction was brought in July 2021 by ten members of the association *Genitori Tarantini* (Parents from Taranto) and a child suffering from a rare genetic disease, against the *Ilva* steelworks,[52] one of the largest steel plants in Europe, located in the coastal city of Taranto (Puglia). The plaintiffs demanded the suspension of activities in the *Ilva*'s hot zone until they comply with industrial emission standards, the closure of the coke ovens, and the preparation of an industrial plan to reduce polluting emissions.

Background

The class action comes many years after the first reports of *Ilva*'s impact on the environment and human health.[53] Over the years, *Ilva* has been responsible for pollution caused by the transport of raw materials from the port to the factory, with toxic powders deposited on the seabed and on the roads used for transport, above-ground storage, and production itself, releasing dioxins and other pollutants into the surrounding area. Scientific reports have

44. https://eur-lex.europa.eu/legal-content/ENG/TXT/PDF/?uri=CELEX.
45. OLG Dusseldorf (6 U 133/22) – 10 August 2023 = MDR 2023, 1518.
46. OLG Dusseldorf (6 U 133/22) – 10 August 2023 = MDR 2023, 1518.
47. OLG Dusseldorf (6 U 133/22) – 10 August 2023 = MDR 2023, 1518.
48. OLG Dusseldorf (6 U 133/22) – 10 August 2023 = MDR 2023, 1518.
49. *Legge 12 aprile 2019, n. 31*, *Disposizioni in materia di azione di classe*, available at: https://www.normattiva.it/uri-res/N2Ls?urn.
50. Technically, it is not the association *Genitori Tarantini* that filed the action, since it did not have the legal standing on its own. The legal initiative was brought by some of its members, and it can be considered an example of 'public interest litigation'. See A. Maglica, "Public End through Private Means: A Comparative Study on Public Interest Litigation in Europe." *Erasmus L. Rev.* 16 (2023): 71.
51. These include the right to health, the right to serenity, and tranquillity in the conduct of life, but it is also one of the few class actions brought in Italy that also has an environmental protection component. Other interests are also at stake that appear as diametrically opposite in the case at hand to those just mentioned: the safeguard of employment and the right to free economic activity.
52. Historically, *Ilva* S.p.A. was a major Italian state-owned steel company. Due to environmental and financial challenges, the company faced significant changes in ownership and management. As of now, the term "*Ilva*" is still commonly used to refer to the steelworks, but the company is also referred to as "*Ex-Ilva*" (former *Ilva*) to acknowledge that the steelworks are no longer under the same ownership and management as they were during the peak of *Ilva*'s operations.
53. The previous class action regime did not allow for the assertion of interests other than those of consumers. Some European countries still have a class action system limited to consumer disputes.

shown that mortality rates from cancer, cardiovascular, and respiratory diseases are higher in the Taranto area than in the rest of the region.

In 2019, the European Court of Human Rights found that the Ilva steelworks had a significant negative impact on the environment and affected the health of local residents.[54] Although measures to reduce the adverse environmental impact have been included in the permit conditions since 2012, the deadlines for their implementation have been repeatedly extended and the Italian government has introduced special legislation to allow the plant to continue operating. This may be explained, though not justified, by *Ilva*'s impact on the Italian economy: it currently employs more than 10,000 people and has an annual turnover of €6 billion. Located in a city in the south of Italy, the plant has also represented hope for increased development and employment opportunities in the region.[55] Its closure would have disastrous consequences, including shrinking GDP and employment and increasing Italy's dependence on foreign steel.

However, *Ilva* may provide an example of how freedom of economic activity cannot override other fundamental rights. The 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' of the Human Rights Council of the UN General Assembly includes the city of Taranto among the "sacrifice zones".[56] These are some of the most polluted and hazardous places in the world, illustrating egregious human rights violations, particularly of poor, vulnerable, and marginalized populations.

Class action for injunction (2021) and damages (2022) before the District Court of Milan

The first hearing of the action was held before the District Court of Milan (*Tribunale di Milano*) in March 2022.[57] Under Art. 840-*sexiesdecies* (Collective action for injunction), the plaintiffs requested the closure of the area in order to prevent the aggravation of the damage. Conditional upon the rejection of this request, the applicants requested the court to enforce the right to climate, ordering a strict plan to reduce emissions of greenhouse gases of which *Ilva*'s plants are the largest emitters in Italy. Asserting the protection of the homogeneous rights of residents of Taranto and neighbouring municipalities, who are allegedly seriously affected by the production activity of the steelworks, the applicants requested the enforcement of the protection of their right to health and their right to serenity and tranquillity in the conduct of their lives. These rights are allegedly currently and permanently infringed by the conduct of the *Ilva* steel plant which exposes residents to risks of oncological pathologies or diseases. The applicants have not asked the court to ascertain the causal link between specific pathologies and the polluting emissions of the steelworks, but the elimination of the current "unfair exposure to risk".

During the hearing, the plaintiffs added further elements to their application. These include an amendment to the Italian Constitution.[58] Constitutional Law no. 1 of February 2022 amended Art. 9 and Art. and 41 (economic initiative) of the Constitution, recognizing an explicit emphasis on environmental protection. Art. 41 now stipulates that economic initiative may not be conducted in a way that is harmful to health and the environment and that the law shall determine the programs and appropriate controls so that public and private economic activity may be directed and coordinated for environmental purposes.

In 2022, the applicants also complemented the class action for injunction relief with a class action for damages. The action was signed by 136 adults and one child from the crisis area. Under Italian class action legislation, class actions for injunctive relief and class actions for damages are treated separately. The hearing on the admissibility of the class action

54. In *Cordella and Others v. Italy* - 54414/13 and 54264/15, Judgment 24.1.2019, the European Court of Human Rights unanimously established Italy's responsibility for failing to adopt the necessary administrative and legal measures to de-pollute the affected area and to provide individuals with an effective domestic remedy to challenge the dangerous and uncertain status quo, in violation of Arts 8 and 13 of the European Convention on Human Rights.
55. See L. E. Perriello, "The Case of the Ilva Steel Plant. A Never-Ending Battle between Health, the Environment and Employment." *Civil Courts and the European Polity. The Constitutional Role of Private Law Adjudication in Europe*. Bloomsbury Publishing, 2023. 213-225.
56. See 'Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment', 12 January 2022, available at: https://www.srenvironment.org/sites/default/files/Reports/2022/A_HRC_49_53_AdvanceEditedVersion.pdf. In the Report, "sacrifice zones" are defined in para 29: "[T]he continued existence of sacrifice zones is a stain upon the collective conscience of humanity. Often created through the collusion of Governments and businesses, sacrifice zones are the diametric opposite of sustainable development, harming the interests of present and future generations. The people who inhabit sacrifice zones are exploited, traumatized and stigmatized. They are treated as disposable, their voices ignored, their presence excluded from decision-making processes and their dignity and human rights trampled upon. Sacrifice zones exist in States rich and poor, North and South (...)", and para 46: "[S]acrifice zones represent the worst imaginable dereliction of a state's obligation to respect, protect and fulfil the right to a clean, healthy and sustainable environment." Para 45: "The Ilva steel plant in Taranto, Italy, has compromised people's health and violated human rights for decades by discharging vast volumes of toxic air pollution. Nearby residents suffer from elevated levels of respiratory illnesses, heart disease, cancer, debilitating neurological ailments and premature mortality."
57. The District Court of Milan, commercial section, has jurisdiction since it is where the opposing companies have their registered offices.
58. *Legge costituzionale 11 febbraio 2022 n.1 recante "Modifiche agli articoli 9 e 41 della Costituzione in materia di tutela dell'ambiente"*. The constitutional law adds to the Constitution an explicit reference to environmental protection, through amendments to Arts. 9 and 41.

for damages was due to take place on 18 April 2024,[59] but was ultimately canceled.[60]

Ilva and Others, C-626/22

In October 2022, the District Court of Milan stayed the proceedings and lodged a request for a preliminary ruling[61] to the Court of Justice of the European Union concerning the interpretation of Directive 2010/75/EU on industrial emissions. The Court referred three questions to the ECJ concerning the interpretation of European legislation on pollutant emissions from industrial plants in relation to Italian regulations. The three questions referred to the ECJ are the role of the health risk assessment in the Integrated Environmental Authorisation (IEA) release and review procedure; the set of harmful substances that must be taken into account for the release and review of the IEA; and the timeframe for the adjustment of industrial activities carried out to the requirements of the Integrated Environmental Authorisation. It seeks to ascertain the importance of certain information on the impact of the steelworks on human health and information on certain emissions and whether it is permissible to repeatedly extend the deadline for the implementation of certain permit conditions.

On 14 December 2023, Advocate General Juliane Kokott delivered her Opinion in the *Ilva* and Others case.[62] The AG proposed that the ECJ interprets the Directive as follows: When authorizing an installation and reviewing a permit, all pollutants that are likely to be released in relevant quantities and the effects on human health must be taken into account. If, despite the application of the best available techniques, the environmental pollution caused or expected to be caused by the installation leads to excessive harm to human health, additional protective measures must be taken. If these are not possible, the installation cannot be authorized. In that regard, the protection of human health could also justify considerable economic disadvantages. In particular, environmental pollution that violates the fundamental rights of those affected by impairing human health cannot be tolerated, as the ECtHR held in the *Ilva* steelworks case. Permit conditions that were necessary to ensure compliance with predecessor directives from 30 October 2007 and compliance with the Industrial Emissions Directive from 7 January 2014 should have been applied without further delay from the entry into force of the permit and must continue to be applied. A postponement is only possible in exceptional circumstances, for example, if the Commission has adopted a new decision on the best available techniques.

The judgment of the Grand Chamber of the Court of Justice is scheduled for 25 June 2024 and could be of fundamental importance. *Ilva* may not be able to continue production activities without authorization that complies with European directives. Plants may be closed or shut down until legality is restored.

The Netherlands

Machteld de Monchy, Tim Kluwen[63]

Case law

Amsterdam District Court 10 January 2024, ECLI:NL:RBAMS:2024:83 – TikTok

This is a further judgment in the collective action brought by claim organisations SOMI, STBYP and SMC against TikTok. In its interim judgment of 25 October 2023, the court found some clauses in the funding agreements of STBYP and SMC to be incompatible with the requirement that the claim organisation should have sufficient control over its claim (see our Country Report in *Mass Claims* 2023/2). Both organisations were given the opportunity to amend their agreements, which they did. In this judgment, the Amsterdam District Court ruled that the amended agreements satisfied the control requirement and declared the organisations admissible in respect of some of their claims in accordance with the judgment of 25 October 2023.

The new WAMCA rules for collective actions provide that the court should appoint an exclusive representative from among the admissible claim organisations. The court held that article 1018e(1) DCCP lists conditions that it should take into account in doing so, but that these conditions are not exhaustive. In this case, the court also took the following factors into account for all claim organisations: in-house knowledge of and experience with data protection laws and regulations; other work on behalf of the persons for whom they advocate; support from civil society organisations; funding; independence; specialist knowledge and experience of the lawyers; and knowledge of and experience with the WAMCA. Relying on article 1018e(4) DCCP, which allows for more than one exclusive representative, the court appointed STBYP as exclusive representative for minors and SMC as exclusive representative for adults.

The court then determined what the collective claims entail and established the narrowly defined group that would be bound to the outcome of the

59. https://lespresso.it/c/opinioni/2024/2/25/i-genitori-che-riscrivono-la-storia-di-taranto-cosi-abbiamo-portato-ilva-davanti-alla-corte-di-giustizia-ue/50114
60. This may be due to the present financial and administrative situation of the company.
61. Request for a preliminary ruling from the Tribunale di Milano (Italy) lodged on 3 October 2022 – C. Z., M. C., S. P. and Others v Ilva SpA (in extraordinary administration), Acciaierie d'Italia Holding SpA, Acciaierie d'Italia SpA (Case C-626/22) ECLI:EU:C:2023:990.
62. Opinion of Advocate General Kokott delivered on 14 December 2023, available at: https://curia.europa.eu/juris/document/document.jsf.
63. The authors or their colleagues are involved in some of the cases featured in this country report.

collective action (subject to opt-out for group members residing in the Netherlands and subject to opt-in for group members residing abroad). The court held that the content of the claims comes down to all admissible claims brought by one or more of the claim organisations, except where claims are incompatible. The court also held that the claims are deemed to have been brought against all TikTok defendants, unless the content of a claim dictates otherwise (see also the court's correction with regard to this decision in its judgment of 21 February 2024, as available in the collective actions register). Based on STBYP's claims, the court listed all admissible claims.

The court established two narrowly defined groups: underage TikTok-users (represented by STBYP) and adult TikTok-users (represented by SMC). In defining the groups, the court took into account that its judgment of 9 November 2022 on its international jurisdiction means that the narrowly defined groups can, as far as the GDPR-related claims are concerned, consist only of persons who had their habitual residence in the Netherlands on 9 November 2022. Regarding the tort claims, the narrowly defined groups can consist only of persons who had the centre of their interests in the Netherlands whilst using TikTok's services. Furthermore, for reasons of practical workability and to avoid potentially complicated demarcation discussions, the court limited the narrowly defined groups to users with (habitual) residence in the Netherlands on 9 November 2022. The court also held that it is a requirement that users used TikTok's services after 25 May 2018 (the day the GDPR entered into force) and no later than 9 November 2022.

Finally, the court proposed an opt-out/opt-in notice for the parties to comment on; asked parties to comment on a settlement period; and gave the exclusive representatives the opportunity to inform the court if they wished to supplement the grounds of their claims. The central register for collective actions shows that all three claim organisations have lodged an interim appeal following this judgment.

Amsterdam District Court 28 February 2024, ECLI:NL:RBAMS:2024:1119 – Trucks

This is a further judgment in the *Trucks* competition litigation, concerning the first batch of proceedings. In its judgment of 15 May 2019 (ECLI:NL:RBAMS:2019:3574), the Amsterdam District Court had ordered the claimants to provide concrete information for each buyer as to when and from whom trucks were obtained, and of what brand these were. The aim was to require the plaintiffs to substantiate each individual truck transaction as far as possible. In this latest judgment, the court ruled on whether the claimants had met the burden of proof required for a referral to proceedings to determine the amount of damages.

The court found that all claimants, to a greater or lesser extent, had complied with the court's order for further substantiation and that the truck manufacturers had subsequently mapped the information submitted. The court considered that a further written round was necessary to give the claimants an opportunity to comment on and, where necessary and possible, supplement the information provided by the truck manufacturers. The court noted its intention for the claimants to substantiate (with documents) as well and as concretely as possible, all truck transactions for which they claimed compensation, in order to make the scope of the claims as clear as possible and to enable the truck manufacturers to know what they have to defend against. The court did not rule on (i) what information claimants should provide as a minimum and (ii) what a failure to meet this threshold would mean in terms of referral to the proceedings to determine the amount of damages. The court simply ordered the claimants to provide all available information on the truck transactions and suggested that the damages could be determined in these proceedings, rather than referring the case to separate proceedings for that purpose.

Invoking the so-called *Masterfoods*-defence, the truck manufacturers had asked the court to stay the proceedings until the EC decision had become irrevocable with respect to Scania. The court noted that both Scania's appeal at first instance to the General Court and its appeal at second instance to the ECJ have been dismissed. It considered that, although an appeal on points of law only was still possible, there was no longer any reasonable doubt as to the validity of the Scania decision and therefore no reason to stay the proceedings.

Amsterdam District Court 20 March 2024, ECLI:NL:RBAMS:2024:1512 – KLM/Fossielvrij

In its judgment of 7 June 2023 (ECLI:NL:RBAMS:2023:3499), the Amsterdam District Court held that Fossielvrij was admissible in its collective action against KLM for alleged greenwashing through misleading marketing statements on KLM's website, social media and the radio. Applying article 1018e(2) DCCP, the court in this judgment first decided on what the claim entails, mainly by referring to the wording of the claims brought by Fossielvrij. It then considered the merits of the claims.

KLM had disputed that Fossielvrij had a sufficient interest in its claims, because KLM no longer used the marketing statements in question. However, the court found that Fossielvrij had a sufficient interest in seeking clarification as to when a marketing statement was misleading and that a court decision on the statements made was essential to that end. After setting out the rules applicable to the claims (largely derived from the Unfair Commercial Practices Directive and subsequent guidance from the European Commission), the court stated that it was important to consider whether these statements were true. In addition, it was relevant if the information provided

or expressly not provided was misleading. In this respect, the context in which the information was provided or not provided was relevant, the court added. The court also noted that KLM is free to inform consumers about its CO_2 reduction ambitions and to advertise flying. The use of the term "sustainable" in this context is not in itself unacceptable, but KLM should be clear about what this means in a particular case. After an individual assessment of each marketing statement, the court found that fifteen out of nineteen statements were misleading because KLM relied on vague and general statements about climate benefits, failed to provide sufficient evidence for its claims, painted a picture that was too good to be true, made statements that were untrue, and led consumers to believe that they could have a direct impact on the climate impact of flying, when in fact they could not.

These statements were all made because they were likely to influence consumers' decisions. It must therefore have been reasonably foreseeable to KLM that these statements would disrupt the economic behaviour of its customers. The court therefore found that these statements constituted an unfair commercial practice. However, the claims requesting a prohibition on making these statements and for the removal of the statements failed because KLM had already ceased to make these statements. The claim for rectification also failed because Fossielvrij had not made it clear that these statements were still influencing consumers' decisions. In this regard, the court also took into account the fact that this case was expected to get plenty of coverage in the media.

The Hague District Court 20 March 2024, ECLI:NL: RBDHA:2024:3734 – RBV/State (Schiphol)

In our previous Country Report (see *Mass Claims* 2023-2) we discussed the interim judgment of the District Court of The Hague of 15 November 2023, in which the court declared RBV admissible in its collective action under the WAMCA against the Dutch State. In this new judgment, the court ruled on the merits of the case. Essentially, the dispute centres on the question of whether the Dutch State, in establishing and enforcing rules and legislation concerning Schiphol Airport, has infringed article 8 ECHR by failing to take sufficient account of the interests of persons affected by noise and sleep disturbance in the vicinity of the airport and its approach routes.

By way of introduction, the court noted that partly conflicting interests are involved in the creation of laws, regulations and policies concerning Schiphol Airport, and that the State enjoys a wide margin of discretion in weighing all these interests and making political choices between them. Within the framework of constitutional relations, it is for the organs of the State, including the government and parliament as co-legislator and controlling power, and not for the courts, to weigh up and test the desirability of these political and policy choices. The role of the civil courts is therefore limited to assessing whether the State is acting unlawfully in drafting and implementing the laws and regulations, the court held.

In considering the claims, the court started from the premise that the air traffic to and from Schiphol Airport, as permitted by the State in the present situation, constitutes an interference with the rights of a (very) large group of persons protected by article 8 ECHR. However, the court added that this does not mean that such interference also violates article 8 ECHR, since the rights enshrined in this provision are not absolute: in the circumstances referred to in article 8(2) ECHR, citizens must tolerate certain forms of interference with their rights, provided that other interests of greater weight are at stake. Where the State has struck a 'fair balance' between the different interests, despite the interference, there is no breach of article 8 ECHR.

Granting most claims, the court ruled that in this case the interference with the private lives of people living around Schiphol Airport lacks a legal basis and a fair balance between the various interests. The court declared that the State had failed to (i) strike the correct balance of interests required by article 8 ECHR between the interests of those who benefit from air traffic to and from Schiphol Airport and the interests of those who suffer serious nuisance and sleep disturbance as a result (inter alia by giving priority to the hub function of Schiphol Airport and by using of outdated measuring points and statistics) and (ii) provide citizens with practical and effective legal protection against serious nuisance and sleep disturbance. The court therefore ordered the Dutch State to enforce applicable law and regulations and establish a form of practical and effective legal protection that is accessible to all seriously inconvenienced and sleep disturbed people, both within twelve months of the service of the judgment.

Amsterdam District Court 27 December 2023, ECLI:NL: RBAMS:2023:8425 – Google (Play Store)

This is an interim judgment in the collective action brought by Stichting App Stores Claims (ASC) against several Alphabet/Google entities (Google). ASC claimed to represent all private and business users resident or domiciled in the Netherlands who have a smartphone or tablet with an Android operating system and who had bought an app or made an in-app purchase with it through the Dutch version of Google's Play Store, Google's online store where paid apps or in-app purchases can be bought. In short, ASC alleged that Google has an economic dominant position with the Play Store, which it abuses by charging an excessive commission of generally 30% on each purchase made in the Play Store. In this judgment, the Amsterdam District Court ruled on its international and local jurisdiction; the appli-

cable collective action rules; some of the admissibility requirements; and the applicable law.

The court held that it had international jurisdiction. ASC had served several Alphabet/Google entities, based in the Netherlands, Ireland, the United Kingdom and the United States. On the basis of article 4(1) Brussels I Regulation, the court accepted jurisdiction over the entities based in the Netherlands. Regarding the other entities, the court accepted international jurisdiction on the basis of article 7(2) of the Brussels I Regulation in respect of the entities established in Ireland, and on the basis of article 6(e) DCCP in respect of the entities established in the United Kingdom and the United States. The court also decided that it had local jurisdiction on the basis of article 7(2) Brussels I Regulation and article 102 DCCP with respect to the claims for the users domiciled in the court's district, while for the claims of other users the parties agreed during the hearing on a choice of court for the Amsterdam District Court.

The court had to rule on the applicable collective action rules, because the new rules of the WAMCA (which allow collective actions for damages) only apply to events giving rise to damages that took place on or after 15 November 2016, whereas Google argued that the relevant event took place before that date. Referring to ECJ case law on competition law infringements, the court held that the WAMCA applied to these proceedings, because Google's alleged infringement was an alleged single and continuous infringement that had already taken place in 2013 and that Google had chosen to continue after 15 November 2016.

Applying the admissibility requirements of the WAMCA to ASC and its claims, the court found that some of the requirements had been met and that the parties indeed agreed that they had been met. Four admissibility issues were then discussed between the parties: whether ASC was sufficiently representative; whether ASC had sufficient resources and control over the action; whether ASC lacked a profit motive; and whether ASC had made sufficient attempts to consult with the defendants to reach a settlement. With regard to the profit motive, the court found that it followed from ASC's articles of association and its explanation during the hearing, that it did not have a profit motive. ASC also complied with the consultation requirement, the court found, even with respect to the defendant companies that ASC had not invited to consultation. The court found that these companies were all part of the same group and that all defendants were assisted by the same lawyers, so that the interests of the companies that were not invited were not prejudiced. In reaching this decision, the court also found that a consultation invitation to these companies would not have led to a different outcome of the consultations. With regard to representativeness and funding, the court found that it lacked the information to reach a decision on these points and ordered ASC to provide more information on its constituency and the registration process and to submit its litigation funding agreement with an explanation.

Finally, in the event that ASC is declared admissible in this collective action, the court already determined the applicable law. Applying the Rome II Regulation, the court ruled that it would apply Dutch law to assess the merits of the claims.

Amsterdam Court of Appeal 18 June 2024, ECLI:NL:GHAMS:2024:1651 – Salesforce and Oracle

This is a judgment on appeal in the collective action brought by claim organisation The Privacy Collective ("**TPC**") against Salesforce and Oracle. In these proceedings, TPC brought an appeal against the judgment by the Amsterdam District Court of 29 December 2021 (ECLI:NL:RBAMS:2021:7647), declaring TPC inadmissible in its claims due to a lack of representativeness. The Court of Appeal overturned this judgment and ordered a case management hearing to discuss the further course of the proceedings.

The court first addressed the preliminary question whether a claim organisation is required to fulfill the admissibility requirements at the time the claims are brought (*ex tunc*), or at the time of the hearing (*ex nunc*). The court decided that the review of the admissibility requirements should be done *ex nunc,* and made reference to the general rule under Dutch procedural law. The court subsequently applied this standard to the admissibility requirements.
The court first assessed the admissibility requirements regarding governance and funding and held that TPC fulfills these requirements. On governance, the court considered sufficient that TPC's management board and supervisory board were complete at the time of the hearing and that the competence of the board members was not disputed by defendants. On funding, the court deemed sufficiently plausible that the interests of the funder and TPC are parallel, and did not order TPC to produce the funding agreement in these proceedings.

The court further ruled that TPC's damages claims satisfy the similarity requirement. The court first established that the GDPR does not allow for punitive damages and requires that actual losses are demonstrated. The court considered that while there may be significant differences between individual cases within TPC's constituency, these circumstances should not in itself lead to inadmissibility of the claims for immaterial damages at this stage as the differences may be overcome in a collective action by dividing TPC's constituency in classes. According to the court, this discussion should take place in the merits phase.

Regarding representativeness, the court held that the law does not set a numerical criterion for the amount of support that a claim organisation needs to receive. In order to meet the repetitiveness

requirement, the court considered sufficient that a non-negligible number of persons support TPC's claims. According to the court, TPC has shown such support with statements by various (claim) organisations and the number of likes given by individuals on TPC's website.

Finally, the court assessed whether TPC has appropriate and effective mechanisms for participation in decision making by its constituency. The court held that TPC fulfills this participation requirement by informing its constituency through its website and its newsletter and by keeping in touch with its constituency through other organisations and its sounding board group.

Portugal

Fernando Aguilar de Carvalho, Constança Borges Sacoto[64]

Case law

Portugal has been one of the most active European jurisdictions in terms of collective redress in the past few years, thanks to the favourable legal framework provided by the 1995 Class Actions Act, which is based on an opt-out system, granting legal standing for independent consumer associations to pursue consumer and competition related claims, combined with the transposition of the Damages Directive in 2018, through Law-Decree 23/2018, of 5 June ("**Portuguese Private Enforcement Act**").

Following the first private enforcement claims in the Trucks Case in 2019, the next years brought with them a steady flow of dozens of class actions, some of which with claims of several billion euros, with two recently incorporated consumer associations, *Ius Omnibus (2020)* and *Citizens' Voice (2021)*, doing most of the heavy-lifting, with the support of third party funders, but with longstanding consumer champion *DECO - Associação de Defesa dos Consumidores* (a member of Euroconsumers) also being active in the field.

As a result, courts have been very busy, with some very interesting decisions being issued. Below we share some of those decisions issued since January 1st 2023, most of which however are still not final and await judgment on appeal.

EC Case AT.39824 - Trucks (Santarém First Instance Court)

During 2023 a total of 5 verdicts were issued by the first instance Competition Court of Santarém, with 4 decisions[65] mostly in favour of the claimants, with 15.4% overcharge compensation being awarded and 1 decision[66] acquitting the defendants, following the *Traficos Manuel Ferrer* judgment, because the plaintiff did not discharge its burden of proof regarding damage suffered, by not providing any expert valuation report.

So far, in 2024 another 3 judgments were issued by the first instance Competition Court of Santarém.

The first judgment[67] deviated from *Traficos Manuel Ferrer* and adjudicated in favour of the claimant despite it not having presented an economic report on assessment of harm. The court did not award a specific amount of damages or percentage of overcharge, ordering the liquidation of damages in separate enforcement proceedings, up to a maximum of 20% of the purchase price of the vehicles, based on the claimant's prayer for relief.

The second judgment[68] was partially in favour of the claimants, with a 5% overcharge being estimated by the Court pursuant to article 17(1) of the Damages Directive and article 9(2) of the Portuguese Private Enforcement Act, after setting aside both the claimants' and the defendant's expert valuation reports.
Finally, the last judgment[69] was also partially in favour of the claimant, with a 5% overcharge being estimated by the Court, which then also estimated that 40% of such overcharge would have been passed on by the claimant, finally awarding damages of 3% of the purchase price of the trucks.

This last decision is noteworthy for two main reasons. First, it also deviates from the *Traficos Manuel Ferrer* jurisprudence that the Santarém Court had previously followed, estimating damages despite the claimant in this case not having provided any expert valuation report on damages. Second, it also estimates partial pass on, based mostly on economic theory and the fact that when it comes to pass-on the information asymmetry is against the defendant.
All of these decisions have been appealed to the Lisbon Appeal Court and are therefore not final.

Citizens' Voice vs Prio (Aveiro First Instance Court)

A class action filed by Citizens' Voice against Prio Energy, S.A. (a petrol company) for alleged breach of consumer law was dismissed by the first instance court due to claimants' lack of legal standing, for not meeting the minimum legal threshold of 3.000 registered members of the association, which is a requirement for consumer associations to have nation-wide representation according to article 17(2) of Consumer Defense Law.

This is an argument that has been raised by the de-

64. The authors or their colleagues are involved in some of the cases featured in this country report.
65. Case files no. 54/19.6YQSTR which has meanwhile been partially confirmed by the Lisbon Appeal Court as mentioned below, 4/20.7YQSTR, 22/19.8YQSTR and 9/19.0YQSTR.
66. Case file no. 64/19.3YQSTR.
67. Case file no. 67/19.8YQSTR.
68. Case file no. 5/20.5YQSTR.
69. Case file no. 58/19.9YQSTR.

fendants in most of the class actions filed in Portugal by both Citizens' Voice and Ius Omnibus (which meanwhile reports having reached the 3.000 member threshold), but this is the first time a court has accepted and upheld such argument, dismissing the claim for claimant's lack of legal standing without going into the merits.

Citizens' Voice has appealed the first instance court's judgment. A decision from the Court of Appeal is expected to be issued in the last quarter of 2024.

EC Case AT.39824 - Trucks (Lisbon Appeal Court)

During 2023 the Lisbon Court of Appeal issued two judgments on appeals filed against verdicts issued by the Santarém Competition Court in the trucks litigation.

The first one[70] revoked the decision of the first instance court which had awarded damages based on 15.4% overcharge, which had been established through judicial presumption and ordered the first instance court to reassess the facts regarding damage, causality and quantification. For this purpose the Court of Appeal ordered the performance of an audit by a panel of three experts to establish the existence and quantification of harm. This proceeding is currently pending again before the first instance court.

The second one[71] partially revoked the first instance decision, which had awarded a 15.4% overcharge, setting a 5% overcharge based on judicial estimation pursuant to article 17(1) of the Damages Directive and article 9(2) of the Portuguese Private Enforcement Law. The Appeal Court dismissed both parties' expert reports on quantification of harm, but concluded that based on the nature and duration of the cartel as described in the EC Decision, an overcharge on sale prices can be established, with the court then further finding that it was practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available, thus resorting to the abovementioned estimate, referring, amongst other decisions, to the recent CAT judgment in the Royal Mail case.

Ius Omnibus vs Meliá (Lisbon Appeal Court)

The Lisbon Court of Appeal confirmed a judgment from the Santarém Competition Court, which awarded Ius Omnibus's claim for access to documents and information pursuant to article 5 of the Damages Directive and article 13 of the Portuguese Private Enforcement Act. The case was filed by Ius Omnibus as a private enforcement class action on behalf of Portuguese consumers for access to information, based on an EC Decision sanctioning Melia.

Despite the decision no longer being subject to ordinary appeal, Melia's extraordinary appeal against this verdict was meanwhile allowed by the Supreme Court, which declared that the absence of precedent and relevance of the matter justified its intervention. The Supreme Court has furthermore allowed Meliá's request for a referal to the European Court of Justice, where the case is currently pending.

Ius Omnibus vs NOS (Lisbon Appeal Court)

The Lisbon Court of Appeal confirmed a first instance ruling, which had dismissed Ius Omnibus's class action against NOS Comunicações, one of the largest Portuguese telecoms, for allegedly collecting payments via the digital WAP billing mechanism in breach of consumer law. The first instance court had declared that the collective claim filed by Ius Omnibus was inadmissible, because there were no diffuse or individual homogenous interest at stake.

Citizens' Voice vs FNAC (Supreme Court)

The Supreme Court overruled a decision by the first instance court, which had dismissed a class action filed by Citizens' Voice against Fnac, for allegedly reducing the warranty period for batteries or chargers from three years to six months, which would supposedly be contrary to consumer law. The first instance court had decided to dismiss the claim outright, for it being highly unlikely for this claim to succeed, since it concluded by searching Fnac's terms of service on its website that the claim was meritless.

Citizen's Voice appealed directly to the Supreme Court of Justice (a *per saltum* appeal, i.e. there was no intervention of the Appeal Court before getting to the Supreme Court, because the appeal was only on matters of law and not facts of the case) which concluded that the information posted on Fnac's website alone cannot form the basis of the decision on the merits of the claim and ordering the case to proceed.

Citizens' Voice vs Activo Bank (Supreme Court)

The Supreme Court, in a *per saltum appeal*, confirmed the decision of the first instance court which had dismissed Citizens' Voice's class action against Activo Bank, an online bank, for allegedly not providing its clients monthly extracts free of charge. The first instance court had dismissed the case due to lack of homogeneity of the interests of the class and inadmissibility of the class action. The first instance court further concluded that the case should be dismissed outright, for lack of grounds, pursuant to a provision of the Portuguese Class Actions Act which provides that class actions shall be dismissed by the court *in limine* if it finds, after consulting the Public Prosecutor, that the case is manifestly unlikely to succeed.

DECO vs Volkswagen Group (Supreme Court)

In June 2023, the Supreme Court of Justice confirmed the ruling of the Lisbon Appeal Court which had dis-

70. Case file no. 12/19.0YQSTR.L1.

71. Case file no. 54/19.6YQSTR.L1 mentioned above.

missed a class action filed by DECO against the Volkswagen Group in the wake of the *Dieselgate* case.

The Supreme Court of Justice found that DECO lacked legal standing because the relief sought (*v.g.* the Defendants should be ordered to repossess the cars or alternatively repair them, whenever possible) did not confine itself within the realm of collective redress, but rather crossed over to that of individual claims, which is inadmissible in a class action.

Spain

Paul Hitchings, Cristian Gual Grau[72]

Case law

Trucks

As referred in our December 2023 report, in June and October 2023, the Spanish Supreme Court (the "**SSC**") handed down several judgments that represented the first decisions on the follow-on actions initiated in Spain against the truck manufacturers sanctioned by the European Commission in the Decision dated 19 July 2016 (Case AT.39824-Trucks) (the "**2023 SSC Judgments**"). These judgments resolved the first claims filed in the truck litigation (the so-called "first wave" of cases), discarding expert reports consistent only in meta-studies; but agreeing to award, as a general rule, an overcharge equivalent to 5% of the acquisition price based, among other reasons, on the fact that at the time when these actions were filed the rejection of these type of expert reports had not yet become widespread.

On March 14, 2024, the SSC issued eight new judgments[73] (the "**2024 SSC Judgments**"). These are relevant for two main reasons: (i) because, unsurprisingly, they confirm many of the main legal arguments that were already addressed in the first set of decisions; but (ii) because this time the SCC was dealing with a set of cases coming from a group of claimants using an expert report that had usually been regarded as somewhat more sophisticated that those dealt with in the 2023 SSC Judgments. It was crucial to see how the SSC would approach this situation, either deferring to the assessment made by the lower instances or moving a step forward and providing its own assessment about the methodology and content of said reports. The cases were vastly representative of thousands of other claims across the Spanish jurisdiction.

The SSC concluded that the expert report analyzed is still insufficient to adequately quantify the amount of harm. The SSC based its decision to conduct a reassessment of the evidence examined by the Courts of Appeal on the mass-litigation phenomenon in which these claims are being developed; particularly, on the need for the court's response to substantially identical claims to be uniform, in accordance with the principle of equality enshrined in article 14 of the Spanish Constitution.

It rejected the synchronic methodology followed by the experts primarily because it found that that the markets and products used for this exercise were not sufficiently comparable. It also criticized the fact that the report relied on gross prices without justifying why an analysis on said prices would be directly applicable to final prices, the data gathering and selection by the experts and the use of what were regarded as inconsistent variables in the regression models between the affected market and the comparison market. The SSC also rejected a second diachronic methodology that was also used by these claimants and experts due to imbalances in the distribution of prices by brands and periods, and errors in the data recording.

That criticism did not lead, however, to the rejection of the claims. Building upon on its 2023 Judgments, the SSC concluded that the claimant's had fulfilled a sufficient evidentiary effort that would allow the Courts to resort a judicial estimation of the harm that was once again at 5% of the purchase price of each truck. For what is worth, the SSC reiterated, as it had done in the 2023 SSC Judgments, that parties can prove that damages were higher (in the case of the claimant) or lower (in the case of the defendant).

In the months following these judgments, there has been an adjustment in the judicial response provided by courts (at both first and second instance) across the Spanish jurisdiction, aimed at correcting the existing disparity in the assessment of expert reports. Nearly all courts are converging in their approach to judicially estimate the harm at a 5% overcharge. It remains to be seen whether this tendency will impact other claimants and reports that are currently being litigated and regarding which no response by the SSC has yet been obtained.

Cars

In the follow-on litigation concerning the Spanish automotive distribution cartel sanctioned by the CNMC (Case S/0482/13: Automobile Manufacturers), thousands of judgments have already been issued by commercial courts, with rulings from up to twenty Courts of Appeal: A Coruña, Alicante, Asturias, Bizkaia, Córdoba, Granada, La Rioja, Granada, Las Palmas de Gran Canaria, León, Madrid, Mallorca, Murcia, Oviedo, Palencia, Palma de Mallorca, Pontevedra, Soria, Valencia, Valladolid & Zaragoza.

So far, general success rate has been about 50% of dismissals and 50% of partial upholding, following

72. The authors or their colleagues are involved in some of the cases featured in this country report.

73. First Chamber Judgments n.º 370/2024, 372/2024, 373/2024, 374/2024, 375/2024, 376/2024, 377/2024 and 381/2024 of 14 March.

SSC Judgments (that is to say, awarding a 5% of overcharge as a general rule).

However, three recent developments have occurred that could significantly affect the future of this litigation. These developments relate to the statute of limitation of the claim for damages, the ability of the defendants to put forward a better-founded alternative quantification of the damage through their own expert report and the filing of different class actions against the Original Equipment Manufacturers (OEMs) by the *Organization of Consumers and Users* (OCU) and a massive claim by Cartel Damages Claim (CDC).

(i) Statute of limitations

The recent Judgment of the Court of Justice (Grand Chamber) of April 18, 2024, in the case Heureka Group a.s. vs. Google LLC, establishes the parameters for determining the *dies a quo* (further to the Judgment of the Court of Justice of June 22, 2022, in the case of Volvo/Daf Trucks): *(i)* the conduct must have ended, *(ii)* the publication of the EU decision can be understood as a reasonable moment to have access to the relevant information and *(iii)* there is no need that the Decision is final.

Prior to this Judgment, there was no consensus on the date to be taken into consideration for the *dies a quo*, due to the discussions on whether or not the decision should be final. According to the Judgment, defendants have an additional ground to argue that the *dies a quo* shall be set at the latest on the publication date of the resolution (September 2015), since at that moment affected parties had all the information necessary to initiate the action. Considering said *dies a quo* and the temporary criteria considered by the Volvo/DAF Trucks Judgment, a one-year limitation period would apply, and therefore the action would have expired, at the latest, on September 15, 2016.

Despite the recent date of this judgment (April 18, 2024), the number of commercial courts considering the action as time-barred (in the absence of out-of-court claims) is significantly increasing, and even some Courts of Appeal have already issued judgments ruling that the claims are time-barred, such as the Court of Appeal of Alicante[74].

(ii) Better-founded alternative quantification

Following the SSC Judgments (mainly 2024), some of the defendants have started to openly offer an alternative (and better-grounded) quantification of the damage.

Recently, multiple Commercial Courts and several Courts of Appeal[75] have accepted the results of the econometric analyses presented by the defendants as better-founded alternative quantifications, on the grounds that they are in line with the margins of the dealers provided in the Resolution, which quantify the damage at a lower overcharge percentage than the generally awarded 5%.

(iii) Class actions by OCU and massive claim by CDC

To date, the OCU has announced to have filed 6 different class actions[76], and possibly a 7th one[77], against the OEMs that were sanctioned by the CNMC. These class actions have been served in different courts in Madrid, Valladolid, Barcelona, Pontevedra and Valencia, among others. Some of them have already been served to the defendants, whilst others are pending to be served.

Due to the difficulties allegedly encountered in the preliminary proceedings (*diligencias preliminares*) filed by OCU requesting Directorate General of Traffic (DGT) and the Spanish Tax Administration Agency (AEAT) to provide information on data relating to purchasers of vehicles from February 2006 to August 2013, OCU alleges to be litigating on behalf of undetermined consumers (according to art. 11.3 of the Spanish Procedural Act).
These proceedings are being handled by the current regulation of the class action in Spain and the understanding of the system together with the effects of the decision to be considered by the courts will have a great impact in the overall litigation.

On the other hand, CDC has also filed a claim seeking the compensation of thousands of vehicles of different OEMs, by virtue of an assignment of credits.

Milk

As flagged in our December 2023 report, the decisions from the Spanish National Markets and Competition Commission ("**CNMC**") fining the dairy industry in 2019 were appealed before the National Court (*Audiencia Nacional*).

On February 21, 2024, the National Court adjudicated the appeals filed by the companies filed by the CNMC, dismissing entirely several appeals; and partially upholding the appeals filed by Danone, Capsa and Lactalis. The National Court determined that the CNMC had incorrectly applied the concept of a single and continuous infringement, and as a result, certain periods of the infringement considered in the appealed decision had expired.
With regards to the damages litigation resulting from the CNMC's decisions, to date, all lawsuits have been ultimately dismissed by various commercial courts, including those in Barcelona, Lugo and Oviedo. The primary rationale for these dismissals

74. Judgment 276/2024, of 23 may, of Court of Appeal of Alicante (8th Section).
75. Judgment 140/2024, of 20 may, of the Court of Appeal of Valencia (9th Section) and Judgment 469/2024, of 2 may, of the Court of Appeal of Murcia (4th Section).
76. See here: https://www.ocu.org/organizacion/prensa/notas-de-prensa/2024/cartelcoches110424
77. See here: https://carteldecoches.ocu.org/faq

is the statute of limitations. According to these decisions, the statute of limitations is of one year and that the *dies a quo* is established on the date of the first decision by the CNMC, despite this decision being annulled by the National Court on procedural grounds. There are currently no rulings from provincial courts concerning the challenges filed by claimant's against said dismissals.

Consumer banking litigation

The Ninth Chamber of the CJEU issued two judgments, on 25 January 2024[78] and on 25 April 2024,[79] concerning the limitation period for actions seeking the restitution of sums paid under a contractual term declared to be unfair ("**Action for Restitution**)".

Specifically, the CJEU addressed several preliminary questions to ascertain the *dies a quo* (the starting point) of the limitation period for the Action for Restitution. This issue is particularly contentious and pivotal in Spanish consumer banking litigation since one of the main defense arguments used by defendants is to claim that the Action for Restitution is time-barred (especially in cases seeking the restitution of the sums paid for the so-called costs clause).[80]

In the 25 January 2024 ruling, the CJEU determined that the *dies a quo* of the limitation period for an Action for Restitution cannot be set on the date the term exhausts its effects (i.e., the date of the last payment of the costs). The Court also clarified that the rules governing the limitation period must account for the consumer's knowledge of its rights deriving from Directive 93/13 and that it "*cannot not be presumed that a consumer's level of information [...] includes knowledge of national case-law on consumer law, even if that case-law is well established.*"[81] The 25 April 2024 judgment determined that the *dies a quo* of the limitation period for an Action for Restitution should not be the date on which the national Supreme Court rendered a judgment in a separate case, finding a standard contractual term unfair. The Court also held in this last judgment that "*a limitation period which begins to run from the date on which the decision finding a contractual term to be unfair and declaring it void on that ground becomes final is compatible with the principle of effectiveness, since the consumer has the opportunity to become aware of his or her rights before that period begins to run or expires.*"[82]

While the response of Spanish courts to the CJEU's most recent decision remains to be thoroughly examined, it is anticipated that this ruling will increase the burden on defendants to demonstrate that Actions for Restitution are statute-barred. They will have to establish that the consumer seeking restitution "*was or could reasonably have been aware of that fact before the delivery of a judgment finding that term to be void.*"[83] Indeed, the 25 January 2024 judgment has already influenced claimants' strategies and the legal grounding employed by several Provincial Courts on this matter (as evidenced, e.g., by the judgments of the Provincial Court of Santander (2nd Section) of 16 April 2024,[84] and of the Provincial Court of Valencia (6th Section) of 22 April 2024.[85]

Legislation

Update on the Draft Law on Representative Actions for the Protection of the Collective Interests of Consumers

A further and hopefully final step was taken in the process of implementing the Representative Actions Directive[86]. On 12 March 2024, the Council of Ministers finally approved the Draft Basic Law (*Proyecto de Ley Orgánica*) on civil procedure efficiency measures and consumer collective actions (the "**Draft Basic Law**"). Published on 22 March 2024, the Draft Basic Law has been sent to Parliament for urgent approval amidst a substantial and ambitious set of procedural reforms of different nature.

In broad terms, the Draft Basic Law confirms the approach to set up an **entirely new and comprehensive regulation of collective actions**. It maintains the essence of what was foreseen in the Preliminary Draft (*Anteproyecto de Ley*) approved in January 2023, the key aspects of which were summarized in our May 2023 report. However, as also flagged in our December 2023 report, after the process came to a halt due to the call for general elections in July 2023 the newly-formed government published an advanced version of the Preliminary Draft with some modifications to reflect the feedback obtained during the public consultation phase.

The key aspects of the current Draft Basic Law on collective actions are as follows:

– **Two types of collective actions**: injunction actions and redress actions (which include compensation for damage caused by infringing conduct; repair and replacement of goods; price reimbursement or reduction; and contract resolution). These actions may be brought in respect of any type of infringement that has harmed the collective interests of consumers and may be domestic or cross-border depending on the country where the claimant entity is registered.

78. CJEU Judgment of 25 January 2024, C 810/21 to C 813/21. ECLI:EU:C:2024:81.
79. CJEU Judgment of 25 April 2024, C-484/21. ECLI:EU:C:2024:360.
80. As it is generally known the clause allocating the costs arising from the formalization of the mortgage loan agreement to the borrower.
81. Paras. 49 and 50 and 59, CJEU Judgment of 25 January 2024.
82. Para. 34, CJEU Judgment of 25 April 2024.
83. Para. 35, CJEU Judgment of 25 April 2024.
84. SAP Santander 258/2024, April 16, 2024. ECLI:ES:APS:2024:178.
85. SAP Valencia 171/2024, April 16, 2024. ECLI:ES:APV:2024:268.
86. Directive (EU) 2020/1828 of the European Parliament and of the Council on representative actions for the protection of consumers' collective interests

- **Standing to bring collective actions**: associations registered in the national or regional Registers of Associations and Users, the Public Prosecutor's Office, the Directorate General for Consumer Affairs, regional and local consumer protection bodies and designated authorised entities in other Member States have standing.
- **Jurisdiction** will lie with the **courts of first instance** of the defendant's registered address or, failing that, of one of its establishments.
- The Draft Basic Law maintains the **opt-out mechanism** as a general rule to determine the effects of redress actions on consumers. Under this system, these actions will bind all consumers, unless they expressly opt out of the action within the term for doing so set by the judge. Exceptionally, a court may use the **opt-in system**, in which case the results of a collective action will only bind those consumers who have expressly opted into the action. This system may only be used when it is advisable for the sound administration of justice and when the amount being claimed for each consumer is more than EUR 3,000. Under the Preliminary Draft, it would only have been possible to use the opt-in system when the amount claimed per consumer was more than EUR 5,000.
- The key part of the special procedure for redress actions will be the **certification stage**, in which the court will determine if the standing requirements are met (i.e. sufficient homogeneity and that the action is not manifestly unfounded) and verify that there is no conflict of interest created by a third party funding the collective action.
- In relation to funding, the Draft Basic Law is stricter than the Preliminary Draft in that it requires that the claim contain a **full declaration of all sources of funding** and that it **allows the judge to demand disclosure of the funding agreement** to verify that its terms do not involve a conflict of interest or are detrimental to the rights of consumers, in which case a **hearing** will be held that the parties and the funder must attend. In the event that the court considers that any of the conditions precluding the financing of the proceedings by third parties are met, it shall request the plaintiff entity to either modify its terms or waive it.
- The **certification order** must determine the conduct and the consumers affected by the process. The Draft Basic Law extends the period (between two and six months) that consumers have to opt-out (or, as the case may be, opt-in) of the collective action using an online platform. After this period, individual redress actions will not be admissible.
- **The procedural time limits** set out in the Preliminary Draft have, as a general rule, **been extended**. For example, in redress actions, the term to respond to a claim will be two months and the term to propose written evidence will be 20 days. In actions for injunctive relief (which will be handled in oral proceedings), the term to respond to a claim will be one month.
- The Draft Basic Law maintains the possibility of requesting **access to sources of evidence**, which, in essence, will be governed by the rules applicable to proceedings for damages claims for competition law infringements.
- Once a **redress settlement** has been approved by the court it will be binding on consumers who have not opted-out of the collective action. A settlement cannot be approved if it unduly harms consumers' rights, violates mandatory rules or is made subject to conditions that cannot be met.
- In contrast to the Preliminary Draft, the Draft Basic Law expressly provides that the judgment must include a ruling on **costs** per article 394 of the Civil Procedure Law.
- In terms of **compliance with and enforcement of a judgment** upholding a redress action, the Draft Basic Law **differs significantly** from what had been proposed in the Preliminary Draft in that it tasks the distribution to the consumers of the lump sum awarded in the judgment to a **liquidator** (as opposed to the claimant entity, as was the case in the Preliminary Draft). The liquidator must be an accounting expert with at least ten years' experience and will be chosen by the parties or, if they cannot reach an agreement, by the corresponding professional association (*colegio profesional*). Liquidators must have civil liability insurance and the legislation applicable to insolvency administrators will apply to them in the absence of more specific provisions on their role. All the other provisions on compliance with and enforcement of judgments are essentially the same, including the requirement that any excess funds be returned to the defendant after the consumers have been paid their compensation.
- The Draft Basic Law clarifies that the limitation period for individual actions that is suspended when a collective action is filed will begin to run again from the moment the consumer expresses his or her intention to opt-out of the collective action.

Switzerland

Patrick Honegger-Müntener

Case law

As noted in the previous Swiss country report,[87] in 2019 and 2020 the Swiss Federal Supreme Court dismissed two collective lawsuits arising from the Diesel emissions scandal, namely an association lawsuit ("*Verbandsklage*") for declaratory relief[88] and a bundled damages claims (assignment model), both brought by the Swiss Consumer Protection Foundation.[89] In the meantime, the Federal Supreme Court has also dismissed two individual actions based on tort law against the car manufacturer for lack of legally relevant damages.[90] In doing so, it refused to adopt the case law of the German Federal Supreme Court,[91] according to which an unintentional obligation constitutes a relevant damage under § 826 of the German Civil Code. In one of the judgments,[92] the Federal Supreme Court briefly mentioned the ECJ's Grand Chamber judgment in the Mercedes-Benz Group AG case[93] to which the plaintiff had referred. According to the ECJ's judgment, a purchaser of a vehicle equipped with a prohibited defeat device must have a right to "compensation [...] adequate with respect to the damage suffered", but the Federal Supreme Court did not consider this to be relevant for Swiss law.

Apart from that, as far as can be seen, no significant judgments have been issued. However, some new collective proceedings have been initiated and are still pending. Following the emergency takeover of Credit Suisse by UBS in March 2023, various shareholders filed lawsuits against UBS based on article 105 of the Merger Act,[94] claiming that the financial takeover conditions were unsatisfactory. An action under article 105 of the Merger Act is similar to a class action, as the plaintiff acts to a certain extent as a representative for all shareholders. Provided that the shareholders have the same legal status as the plaintiff, the judgment is also binding upon them. The Commercial Court of the Canton of Zurich has reportedly received more than 30 such actions, which are said to involve several thousand shareholders in total. The Commercial Court has now combined these actions into one single proceeding.[95] Also in connection with this takeover, the Federal Administrative Court has received several hundred appeals against the Financial Market Authority's ruling on the write-downs of AT1 bonds.[96] The courts will probably have to break new ground in these cases and it remains to be seen to what extent these proceedings will influence the discussion on collective redress in Switzerland.

Legislation

The previous Swiss country report[97] presented the Federal Council's legislative proposal and accompanying legislative report of 10 December 2021.[98] The proposal essentially provides for an extension of the scope of the rules on association lawsuits to include any private law violations, and, most importantly, to enable qualified entities to bring representative actions for compensatory relief. In principle, the proposal envisages an opt-in approach. Regarding collective settlements, however, the proposal also provides for an opt-out model.

After approximately two and a half years, the proposal is still in the National Council's Legal Affairs Committee ("*Kommission für Rechtsfragen des Nationalrats*") which has meanwhile deferred the decision whether it wishes to approve the proposal's introduction three times. In June 2022, the Legal Affairs Committee requested an in-depth regulatory impact assessment ("*Regulierungsfolgenabschätzung*") of the expected effects on companies and the economic costs; furthermore, it asked for a comparative report on possible alternatives to the proposal.[99] The regulatory impact assessment of 23 June 2023[100] concluded that the macroeconomic effects of the proposed legislation would likely be limited and that the broad mass of legally compliant companies would only be marginally affected. In July 2023, however, the Legal Affairs Committee requested a validation of the existing regulatory impact assessment through interviews with directly affected companies and an extended examination of possible safeguards to prevent misuse of the collective redress instruments.[101] Around 4,300 companies were surveyed for the ad-

87. Tanja Domej, Country report Switzerland, (2022) 2(1) Mass Claims Journal 68-70.
88. Federal Supreme Court, 8 February 2019, Case 4A_483/2018.
89. Federal Supreme Court, 16 July 2020, Case 4A_42/2020.
90. Federal Supreme Court, 9 May 2023, Case 4A_17/2023; 9 May 2023, Case 4A_18/2023; for a critical assessment, see Markus Vischer, BGer 4A_18/2023, Diesel-Abgasskandal: Auf der Suche nach dem Schaden, (2023) Aktuelle Juristische Praxis 1311-1320.
91. German Federal Supreme Court, 25 May 2020, Case VI ZR 252/19.
92. Federal Supreme Court, 9 May 2023, Case 4A_17/2023, consideration 7.2.
93. European Court of Justice, 21 March 2023, Case C-100/21.
94. Available at: https://www.fedlex.admin.ch/eli/cc/2004/320/de.
95. https://www.swissinfo.ch/ger/handelsgericht-z%c3%bcrich-fasst-anlegerklagen-zu-ubs%2fcs-fusion-zusammen/72679065.
96. https://www.srf.ch/news/wirtschaft/cs-uebernahme-durch-ubs-darum-geht-es-bei-den-milliardenklagen-gegen-den-bund.
97. See footnote 87.
98. On this proposal, see, e.g., Matthis Peter and Urs Hoffmann-Nowotny, Der ZPO-Revisionsentwurf zum kollektiven Rechtsschutz, (2022) Aktuelle Juristische Praxis 573–590.
99. The comparative report, authored by Eva Lein, is available at https://www.parlament.ch/centers/documents/de/rechtsvergleichende-studie.pdf.
100. Available at https://www.parlament.ch/centers/documents/de/rfa-schlussbericht.pdf.
101. Media release from the National Council's Legal Affairs Committee dated 04.07.2023 (available at https://www.parlament.ch/press-releases/Pages/mm-rk-2023-07-04.aspx).

ditional clarification published in February 2024,[102] the majority of which employed more than 100 employees. The results are largely in line with those of the regulatory impact assessment. However, following the recent judgment against Switzerland by the ECHR in the case *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*,[103] the Legal Affairs Committee sees a need for further clarification, particularly regarding legal standing of qualified entities and their funding. In April 2024, it therefore instructed the Federal Administration to explain the possible consequences of the judgment for collective redress instruments in Switzerland.[104] The proposal is therefore not expected to be debated in the National Council before autumn 2024.

102. Available at https://www.parlament.ch/centers/documents/de/Zusatzabkl%c3%a4rungen%20RFA_Ecoplan_Schlussbericht_23%2002%2024.pdf.

103. European Court of Human Rights, 9 April 2024, Case 53600/20 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*).

104. See media release from the National Council's Legal Affairs Committee dated 12.04.2024 (available at https://www.parlament.ch/press-releases/Pages/mm-rk-n-2024-04-12.aspx).