

P.R.I.M.E. Finance

Panel of Recognized International Market Experts in Finance



New Trends in Financial Disputes

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Agenda

I. Introduction

II. Class Actions in the US

III. Class Actions in Europe

- a) Netherlands (WAMCA)
- b) EU (Draft EU Representative Actions Directive)
- c) Switzerland (Draft Amendment of Civil Procedure Code)

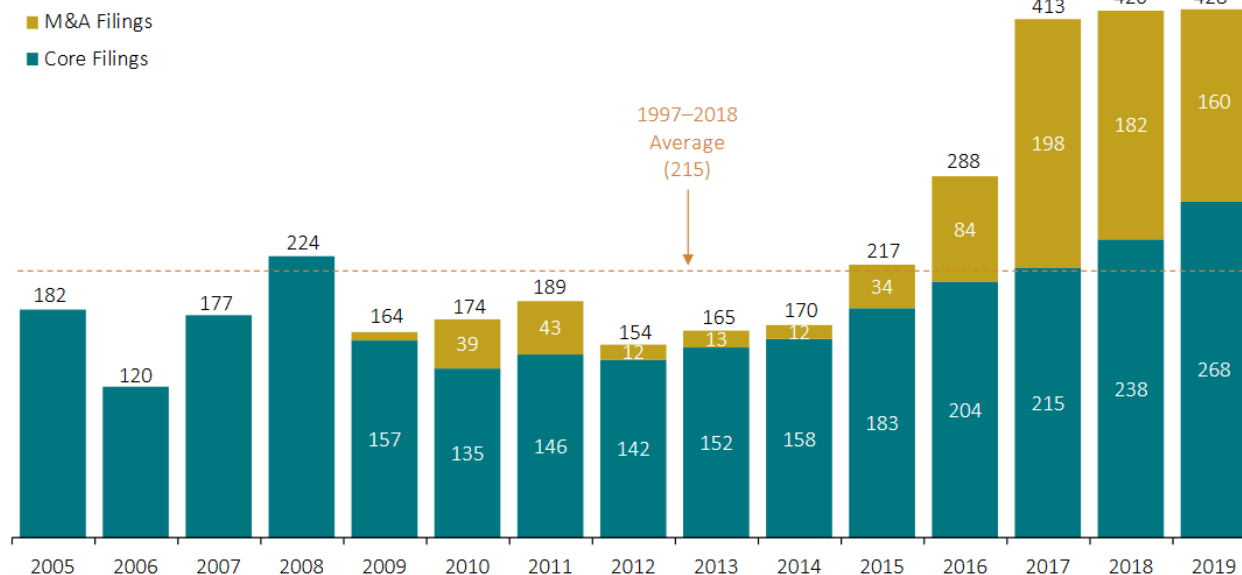
III. Conclusion



The Use of Class Actions is Still Increasing in the US...

Trend in US Securities Class Action Filings

Figure 4: Class Action Filings Index® (CAF Index®) Annual Number of Class Action Filings 2005–2019



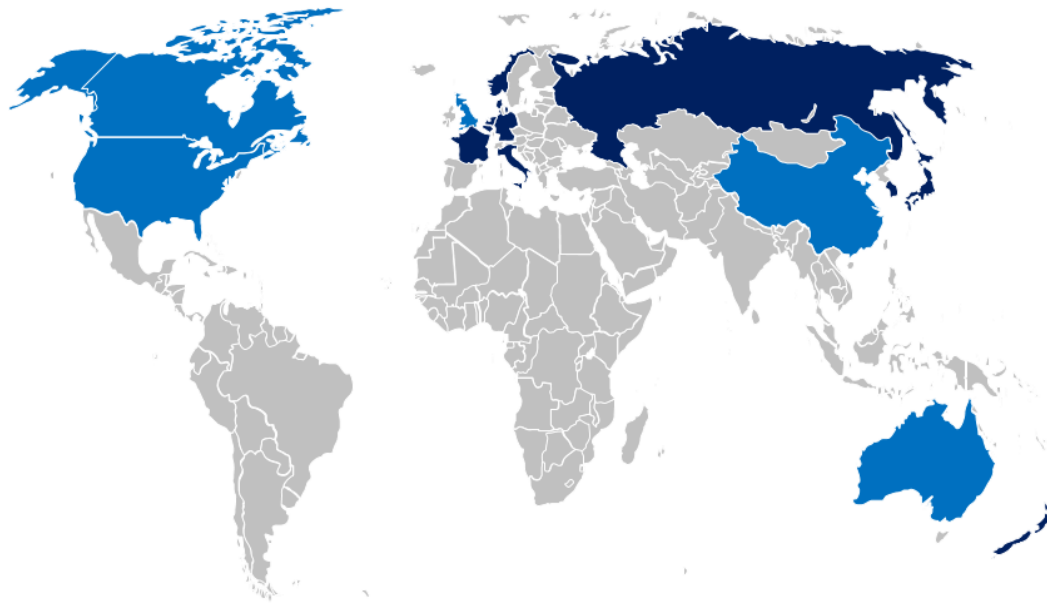
Note: This figure begins including state 1933 Act filings in the annual counts in 2010. Parallel class actions are only reflected as a single filing.

Source: Cornerstone Research; Securities Class Action Filings – 2019 Year in Review, <https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2019-Year-in-Review>.



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...and Considered Beyond Established Regimes...



Established regimes

Australia, Canada, China, UK, US



Evolving regimes

Belgium, Denmark, France, Germany (no genuine class action regime yet), Italy, Poland, Russia, The Netherlands, Norway, Japan, New Zealand, South Korea



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...Levelling the Playing Field for Consumers Beyond Common Law Territory

- European jurisdictions have long refrained from adopting collective redress mechanisms.
- However, in recent years, European consumers have been affected by corporations' non-compliant behavior resulting in mass consumer damages, such as the aftermath of the 2007/08 financial crisis or more recently the VW Dieselgate.
- For claimants to pursue claims through individual litigation has shown to be neither effective nor efficient.
- Consequently, not only common law, but also an increasing number of civil law jurisdictions show a new support of collective redress mechanisms.



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The US Class Action: The Concept

- Originating in the mid-1960s, the class action evolved in the US as the premier collective redress mechanism, creating extensive case law along the way. It is estimated that more than 10,000 new class actions are filed each year in federal and state courts.
- In a typical class action, a plaintiff sues one or several defendant(s) on behalf of a group (called class) to obtain class-wide relief for a wrongdoing that the defendant(s) purportedly committed.
- However, a case does not become a class action until a state or federal court certifies the class as such ("class certification").



The US Class Action: Definition of Class

- To assert their claims on behalf of a class, the lead/named plaintiff must define the class that they seek to represent.
- The class definition must be sufficiently precise so that the court can determine who qualifies and who does not qualify as a member of the class.
- In a class action, all plaintiffs suffered the same injuries.
(For example, if a corporation is not timely disclosing an event affecting its share price, all people who bought securities during the “delay period” have suffered damages and would be eligible to become a member of the class.)
- By contrast, in a mass tort case, the injuries suffered by the plaintiffs, although maybe somewhat similar, are often wide ranging and more individualized.
(For example, the claims brought against Monsanto for its herbicide containing chemicals linked to cancer, whereby the damages are different for each person.)



The US Class Action: How is a Class Certified?

- A lead/named plaintiff files a case and requests class certification.
- The court must then decide whether the case is class action eligible. If all conditions are fulfilled, the court grants class certification.
- The court further determines by what means class members are notified and may opt-out of the class. Each plaintiff then has the right to decide whether they want to pursue their claim as part of the class or not.
- Only after the class is certified and established, the court will then look at the merits.



The US Class Action: How is a Class Resolved?

- Practice shows that the plaintiff has a huge leverage after the class is certified, as in 95% of all cases the parties settle before the judge looks at the merits.
- Note that any settlement needs the approval of the court.
- Once the settlement is approved, the class members may decide to opt-out of the class and thereby not be bound by the settlement terms.
- Overall, the US class action system seems to have developed a viable collective redress mechanism with adequate checks and balances.



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The Dutch Representative Collective Action: New Legislation Introduced (WAMCA)

- On 19 March 2019, the Dutch Senate approved the Dutch Act on Collective Damages in Class Actions and Class Action Register effective 1 January 2020 (“Wet Afwikkeling Massaschade in Collectieve Actie” (WAMCA)).
- The WAMCA introduces an option to claim monetary damages in a “US style” class action.
- Dutch plaintiffs are by default considered members of the class and may opt-out, while plaintiffs not domiciled in the Netherlands may opt-in.
- An Exclusive Representative can be appointed if there are more than one collective action organizations wishing to bring an action for the same circumstances on similar points of law and of fact.



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Class Actions also for the European Union?

- On 11 April 2018, the Commission adopted its proposal for a directive on representative actions for the protection of the collective interests of consumers (**Draft EU Representative Actions Directive**), and repealing Directive 2009/22/EC.
- As part of the Commission’s “New Deal for Consumers”, its goal is to empower consumers and strengthen the single market. All European consumers shall fully benefit from their rights under Union law.



The Draft EU Representative Actions Directive: Key Features (1 / 2)

- Member States may establish administrative or court procedures to resolve disputes between consumers and companies.
- Limited pre-trial discovery type document production shall be available.
- Claims are brought by a qualified entity.
- Member States may choose to implement an opt-in or an opt-out mechanism.



The Draft EU Representative Actions Directive: Key Features (2/2)

- The qualified entity and the defendant can request for a settlement approval by the court or administrative body.
- The class members are notified appropriately according to Member State law about the settlement, resolution decision or interim measures.
- If no settlement is reached, the court or administrative body renders a judgment or resolution decision.



The Draft EU Representative Actions Directive: Key Issues

- The matter of a claim is limited to an exclusive list of EU regulations or directives explicitly named in the Draft EU Representative Actions Directive.
- Notably, the following regulations and directives are not included in the list, and therefore claims cannot be brought in connection with the:
 - Market Abuse Regulation (MAR);
 - Market Abuse Directive (MAD II);
 - Pan-European Personal Pension Products (PEPP) Regulation.
- Finality of settlements or judgments/resolution decisions across the EU is unclear, due to potentially different opt-in/opt-out Member State rules.



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Ongoing Swiss Legislature

Failed Proposal in the Financial Services Act (FinSA)

- The preliminary version of the draft Financial Services Act, published in June 2014, contained collective redress mechanisms.
- Following strong opposition by the business industry during the consultation process, however, in the final draft published in November 2015, there was nothing left of the originally intended improvements with regards to collective legal protection.

Proposed Revisions to the Civil Procedure Code (CPC) to Strengthen Group Actions

- In the draft CPC of 2 March 2018, two revisions are proposed by the Swiss Federal Council to strengthen group action:
 - 1) Amendment of Group Actions through an Organization (“Verbandsklage”) to also allow for Reparatory Actions
 - 2) Introduction of a Novel Group Settlement Method (“Gruppenvergleichsverfahren”)



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Conclusion

- Collective redress mechanisms can reduce inefficiencies of the legal system:
 - On the one side, adopting a collective redress mechanism is in line with legislators' general efforts to strengthen consumer protection, allowing for economically sustainable and efficient pursuit of claims.
 - On the other side, defendants have an interest in resolving the case and move on, instead of dragging on a mass of individual claims over years.
- If designed carefully, a collective redress mechanism can level the litigation playing field for mass damages between consumers and companies.
- After years of skepticism, various European countries, as well as the EU, seem to have finally recognized the benefits of collective redress mechanisms, with legislation getting more and more traction.



Thank you

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