A Comment on the EU's Working Paper: "Towards a Coherent European Approach to Collective Redress"

May 10, 2011 by Sean Wajert

Earlier this year, the Commission Staff of the European Union issued a Staff Working Document seeking public comment on the topic "Towards a Coherent European Approach to Collective Redress."

In an individual capacity, your humble blogger joined some other lawyers in providing comments recently.

As readers of *MassTortDefense* may know, collective redress -- aggregate litigation -- is not a novel concept in the European Union. Existing EU legislation and international agreements require Member States to provide for collective injunctive relief in certain areas. All Member States have procedures in place which grant the possibility of certain injunctive relief to enjoin some allegedly illegal practices. In the area of consumer law, as a result of the Directive on Injunctions, consumer protection authorities and consumer organizations have standing to seek an injunction regarding practices that allegedly breach national and EU consumer protection rules in all Member States. In the area of environmental law, the Aarhus Convention requires Member States to ensure access to justice against infringements of environmental standards. All Member States have implemented this by introducing some form of collective injunctive relief, whereby non-governmental organizations are given standing to challenge certain environmental administrative decisions.

In our comments, we warned that experience with overly robust collective redress procedures in some jurisdictions (such as the class action procedures as implemented in some courts in the United States) reveals significant risks inherent in such actions. These risks include the ability of collective actions to result in lengthy and costly litigation; their ability to trample the right of the entity accused of unlawful practices to a fair adjudication of the allegations; and their ability to actually encourage abusive, spurious, and non-meritorious complaints because of the economic incentives they provide. [Readers in the U.S. are well aware of the "Field of Dreams" effect- "if you build it they will come."] In particular, the EU needs to guard against “lawyer-created” litigation that is fueled by the prospect of large fee awards rather than a significant injury.

Any proposal for a holistic European approach towards collective redress actions thus must be analyzed in the context of not only the potential utility of collective actions but also the substantial risks they create. Collective redress, if ever widely adopted, should be limited to where the same breach of EU law harms a large group of citizens and businesses, and individual lawsuits and other legal remedies are demonstrated not to be an effective means to end ongoing unlawful practices or to obtain compensation for the harm caused by these practices.

Any European approach to collective redress must, as paramount concerns, preserve the parties' rights to a fair trial or adjudication of the factual and legal issues, and not create any untoward economic incentive for the bringing of abusive claims. While various procedural and substantive safeguards might be adopted to help avoid abusive collective actions, including those inspired by some aspects of the existing national judicial redress systems in the EU Member States, those may not be sufficient to the task. That is, the unavailability of punitive damages or the unavailability of contingency fees for claimant attorneys, while extremely important, may not alone sufficiently decrease the risk of abusive litigation and unfairness to an extent compatible with the European legal tradition and fundamental justice.

What may also be required are clear limitations with regard to standing to bring a collective redress action, should the decision be made to move the proposal forward. The risk of abuses and unfairness can relate in some measure to the role of the sophisticated and entrepreneurial plaintiff's class action bar. In many jurisdictions, they serve not as "gatekeepers" to screen out frivolous claims and pursue meritorious actions, but as the "promoters" of claims. Quite often, they create claims out of whole cloth, seek out the plaintiffs to nominally prosecute the class action, while they fund the litigation, and manage the cases. If the decision is made to move forward with European collective redress actions -- despite the substantial risks they present-- one important way to preserve the balance between preventing abusive and unfair litigation, and ensuring the effective access to justice for EU citizens and businesses, is to create a system that does not rely on the private bar in the first instance. Thus, any new EU collective redress system should be handled by public bodies exclusively. Individuals and private organizations representing those who are allegedly harmed by illegal conduct on a mass scale would have the ability to petition the public body to screen the allegations, bring the action, and obtain proper compensation for the damages they suffered following successful litigation.

Public bodies may be in the best position to overcome cross-border issues and coordinate the relevant actions. The alleged injuries that have arisen in an increasingly inter-connected European market are a primary reason an EU-wide collective redress system has become a focus of discussion. The use of public bodies would allow for consistent rules for choosing the appropriate venue in which to bring the collective redress actions. The use of designated public entities is also one method of controlling the potentially crippling costs of discovery associated with class actions in some countries. Should the decision be made to move forward with more systematic, broad collective redress, despite its many risks, this proposal may offer a way to address some of the specific concerns that cross-border collective redress actions present, while also adhering to the EU's core legal principles.