

## **Class Actions in Colombia (2015)**

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### **Introduction**

Group litigation procedures were first adopted by the 1991 Colombian Constitution. There are two types of these procedures: (i) group actions and (ii) popular actions. Both are defined by Articles 88 and 89 of the Constitution.

**Art. 88** defines popular actions as legal mechanisms for “the protection of collective rights and interests, related to patrimony, public space, security, public health, administrative moral, the environment, the free enterprise, and other related issues.” Popular actions were designed by the Constituent Assembly as mechanisms to prevent major harms to the public interest and the environment. Their nature is not compensatory or reparatory but preventive.

**Art. 89** defines group actions as legal mechanisms “originated in harms inflicted on a plural number of individuals.” The Constituent Assembly considered group actions as mechanisms used collectively by groups of individuals already harmed. Contrary to popular actions, group actions are not preventive. Their nature is compensatory, after the occurrence of a harm inflicted on a group of clearly identified individuals.

### **Legal Framework**

Art. 88 of the Constitution incited Congress to pass a law where the procedure and scope of group and popular Actions is defined. Only in 1998—seven years after the enactment of the 1991 Constitution—Congress enacted Law 472 of 1998, where the procedure and scope of group and popular actions is defined.

### **Scope**

The scope of the procedure is trans-substantive, yet Law 472 of 1998 includes a list of collective rights and interests which can be protected using group and popular actions. Among those, we find the following: “the enjoyment of healthy environment”, the “rational use of environmental resources”, “public health and security”, “consumers’ rights”, “the right to be safe from foreseeable natural disasters”, among others.

### **Standing**

Law 472 of 1998 tried to reduce barriers of access to group and popular actions. Both types of actions are open to any citizen whose claim can be supported by the Ombudsman’s office or the Public Prosecutor’s office. The formal requisites to file these actions are minimal. Law 472 established that group and popular actions were not subsidiary to or dependant of any other type of legal/administrative procedure.

## **Remedies**

Remedies for popular actions are mostly injunctive and declaratory. Since the nature of popular actions is preventive, they were not conceived as mechanisms to obtain monetary compensation. However, Law 472 of 1998 introduced “monetary incentives” for the plaintiff or plaintiffs. This point was hotly discussed by Colombian scholars. Some considered that monetary incentives for popular actions contradicted the aim of preventing harm to public interests. Others considered that they incentivized public interest litigation. Finally, in 2011 the Colombian Constitutional Court considered that monetary incentives for popular actions ran contrary to the intent of the 1991 Constitution (C-630/11). Therefore, since 2011 plaintiffs in cases of popular actions cannot demand monetary compensations.

Contrastingly, remedies for group actions are mostly compensatory. This is reasonable; insofar as group actions are mechanisms used by a “plural number of individuals” to demand compensation after harm has been inflicted.

## **Opt-in or opt-out**

Since popular actions are preventive, any person can file a popular action demanding the protection of a collective right. The same is true for an interested threatened by the government or a private party. For instance, even if I do not reside near the Magdalena River, I can file a popular action demanding that the government stops the extraction of oil at the Magdalena river’s basin, etc.

The case of group actions is more interesting. Scholars have debated whether group actions resembled American class actions and their opt-out rules. There are several Constitutional Court rulings discussing this point (C-569/04, for instance). However, in 2008 the Constitutional Court defined a procedure for group actions that strongly resembles the American opt-out rule. In ruling C-116/08 the Court concluded that the representative of the class or group of individuals was not forced to obtain the formal “go” from the class or group members. According to the Court, the representative of the class can file a group action that represents the interests of at least 20 people (we do not know how the Court came up with this figure). It is not necessary, according to the Court, that the individuals represented in the action manifest their willingness to be part of the legal procedure. It is only necessary that the representative identifies the names and personal info of those individuals represented. The Court where the action is filed, then proceeds to notify to all individuals represented that they are part of a group action. Once notified, the individuals can opt-out of the group action. If they remain silent, it is inferred that they want to be part of the group action.

## **Funding and financing**

Monetary incentives are no longer allowed in case of popular actions. Third party litigation financing in popular actions is defined by article 24 of Law 472 of 1998 in succinct terms. According to article 24, “any person, both natural and legal, can cooperate with popular actions, before the first instance ruling is handed down. Civil society organizations, the

Ombudsman Office, the Public Prosecutor's office, can also cooperate with popular actions."

Adverse payments in case of popular actions is defined by article 38 of Law 472 of 1998. According to article 38, "the judge can only force the plaintiff to pay costs, fees and other emoluments caused to the defendant in cases in which the action was filed on bad faith or impertinently. In cases of bad faith, the judge can impose a fine up to 20 times the current level of the minimal income..."

In the case of group actions, adverse payments and lawyers' fees are defined in article 65 of Law 472 of 1998. The same rules on bad faith and temerity used for popular actions apply for group actions.

The law establishes some rules to "divide", among the members of the groups, the monetary compensation included in the court's ruling. Article 65 establishes that "the liquidation of the lawyers' fees should amount to 10% of the compensation estimated for each member of the group."

#### **Data**

There is a lack of good governmental data. However, some scholarly studies offer interesting data.

A paper by Londoño (2010) analyzed a sample of 5,146 popular actions handed down by the Highest Administrative Court (Consejo de Estado). Londoño found that popular actions are mostly used for the protection of the environment (1,178 cases) and public health (930 cases). Another study by the Ombudsman office found that, in the case of group actions, during the period 1999-2009, 32% of the group actions handed down by the Consejo de Estado were filed in order to protect the environment; 29% were filed to protect consumers' rights, and 12% were filed to prevent a natural or human-made disaster.

About the outcomes. According to Londoño, only 8.5% of the cases of group actions were decided in favor of the plaintiff. A study by the Ombudsman office found that popular actions litigation has slowed down since 2010 (after the Constitutional Court removed monetary incentives for popular actions' plaintiffs). For instance, in Colombia's largest city (Bogotá) in 2010 there were 1,024 popular actions. In 2011, only 359 were filed.

However, we do not know the aggregate numbers of cases of group and popular actions filed in Colombia since 1991.