

Recent Developments of Collective Litigation in Latin America -Regional Report-

The Globalization of Class Actions Mini-Conference
Oxford University, December 12th 2008

*Manuel A. Gómez**

Introduction

The purpose of this brief report is to highlight the major events that occurred in some Latin American countries during 2008 regarding collective litigation. It focuses on new legislation enacted in the last year and key judicial decisions. More detailed and comprehensive national reports on Argentina¹, Chile², and Brazil³, as well as a general regional overview including these and other Latin American countries⁴ were prepared for the conference held in December of 2007 and should be used as background to understand this document.

New Laws: Argentine's Consumer Protection Act.

On April 7th, 2008, the Argentine Congress passed a comprehensive amendment to the Consumer Defense Act (*Ley de Defensa del Consumidor*)⁵ thus expanding the regulation of

* Assistant Professor, Florida International University College of Law, U.S.A. Please, send comments or questions to: magomez@fiu.edu.

¹ Hector A. Mairal, *Collective and Class Actions in Argentina, National Report*, The Globalization of Class Actions Conference Proceedings, December, 2007. Available at: http://globalclassactions.stanford.edu/PDF/Argentina_National_Report.pdf

² Martin Gubbins & Carla Lopez, *Class Actions in Chile, National Report*, The Globalization of Class Actions Conference Proceedings, December, 2007. Available at: http://globalclassactions.stanford.edu/PDF/Chile_National_Report.pdf

³ Ada Pellegrini Grinover, *The Defense of the Transindividual Interests: Brazil and Ibero-America*, The Globalization of Class Actions Conference Proceedings, December, 2007. Available at: <http://globalclassactions.stanford.edu/reports.html#brazil>

⁴ Manuel A. Gomez, *Class Actions, Group Litigation and other Aggregative Procedures in Latin America: A General overview*, The Globalization of Class Actions, (2009) *Annals of the American Academy of Political and Social Sciences* [forthcoming]. Electronic draft available at SSRN: <http://ssrn.com/abstract=1280940>

⁵ Law 26,361 B.O. April 7th, 2008. See, <http://www.mr.gov.ar/Documentos/varios/leydefensa.PDF> (last visited: December 7, 2008)

individual and collective rights, imposing limitations on abusive commercial practices, creating new categories of judicial remedies and increasing judicial intervention in consumer litigation.

Following, we describe some of the most important highlights of the new act.

Standing to sue and role of the Public Prosecutor

Article 52 recognizes standing to four different categories of public entities in addition to the own individual victims or groups of victims in bringing lawsuits based on violations to the Consumer Defense Act (CDA). These entities are: (i) Consumer and Users' Associations (CUA) duly incorporated and authorized pursuant to article 56 CDA; (ii) local and national consumer protection agencies; (iii) the Office of the Ombudsman (*Defensor del Pueblo*); and (iv) the Public Prosecutor's Office (*Ministerio Público*). Regarding the latter, its role goes beyond that of a party representative, as the law regards the Public Prosecutor's Office (PPO) as the guarantor of legality and public order, and gives it ample power to continue with the suit even if the plaintiff withdraws her claim or relinquishes interest in the action. Furthermore, the PPO is also given the authority to approve settlement in those cases in which the PPO is not acting as a party representative (art. 54 CDA).

The intervention of CUA on behalf of individuals or groups of consumers is conditioned upon judicial approval (art. 52 CUA). In order for the judge to grant approval, CUA has to fulfill the requirements set forth in articles 56 and 57 CDA which list the only permitted activities that CUA may perform (art. 56), and bar them from engaging in political activism (art. 57, b CDA), from receiving contributions from private, public, domestic or foreign companies (art. 57, c CDA), and from seeking profit through their activities (art. 57, b CDA). Given these limitations, funding is obviously a problem for CUA as they depend almost exclusively on government

support to operate, and the public resources set aside for them are generally scarce.⁶ In addition, it could also be argued that their dependence on public resources hinders the CUA's autonomy.

Punitive Damages

Perhaps the most important innovation of the CDA is the possibility of awarding punitive damages -also called "civil fines" (*multas civiles*)- in both contractual and non-contractual disputes (Art. 52 bis CDA). The law gives ample discretion to the judge in determining under which circumstances she may impose punitive damages, but caps them to \$AR 1,500,000⁷ (article 47, b CDA), regardless of the amount awarded for compensatory damages. No other parameters are set forth in article 52 bis, thus leaving the further development of punitive damages to the courts.

Waiver of court costs for plaintiff

Another feature of the CDA is the benefit given to all plaintiffs, regardless of their socio-economic status or need, to litigate *in forma pauperis* (art. 55 CDA), and therefore being exempted from court costs, witness and expert fees. In addition, plaintiffs who litigate IFP are also exempted from liability regarding attorney fees, but defendants are not, thus making litigation high-risk for the latter, and significantly inexpensive and low-risk for the former. Even though the rationale behind this benefit has been to facilitate consumer access to the court

⁶ See, Resolución 105/2005 - SCT - Asígnanse las contribuciones financieras previstas en el Artículo 62 de la Ley N° 24.240 a Asociaciones de Consumidores inscriptas en el Registro Nacional de Asociaciones de Consumidores. http://www.puntoprofesional.com.ar/P/0414/SCT_105-05.HTM (Dec. 7, 2008)

⁷ Approximately, US\$ 433,026 or GBP 294,455 as of Dec. 7th, 2008.

system, it has also been criticized for encouraging abusive filing of claims and for creating imbalance among the parties.⁸

Settlement and opt-out

Pursuant to art. 54 CDA any proposed settlement has to be approved by the judge with the favorable opinion of the Public Prosecutor's Office, unless the PPO is already intervening as a party representative, in which case, only the judge's opinion is necessary.

In collective or class litigation, the settlement approval order shall include mention to the possibility for class members to opt-out, but the law does not establish any concrete mechanism by which the court should allow class members to exercise this right (e.g. public notice including term to opt out), thus leaving it entirely to the judge's discretion. Once approved, the settlement has *res iudicata* effects upon the parties and class members who did not opt-out.

The judge is also given ample discretion to create a system for the disbursement of settlement monies, and to create sub-classes or sub-categories of plaintiff, if necessary. The judge is also the settlement fund manager, and is granted authority to allow individual claimants to continue their claims separately if the settlement agreement only includes compensation for collective harms.

Judicial Decisions

1. Brazil

Substantial award vacated in Tobacco Litigation on due process grounds

On November 12th, 2008, the Seventh Civil Chamber of the Court of Appeals for the State of Sao Paulo vacated the largest award rendered to date in a class action claim filed by the

⁸ See, Mairal at 22.

Association for the Defense of Smokers' Health (*Associação de Defesa da Saúde do Fumante*, ADESF) on behalf of all Brazilian smokers against the subsidiaries of Phillip Morris and British American Tobacco. The lower court award, rendered in 2004, had ordered the defendants to pay R\$ 30 billion⁹ in damages to all Brazilian smokers (R\$ 1,000¹⁰ per person per year she had smoked¹¹). The Court of Appeals, which has consistently rejected this type of claims, vacated the award on grounds that the lower court had violated the defendants' due process guarantee by not allowing them to produce expert evidence during the trial. The case was remanded to the lower court for production of new evidence and new decision on the merits. The judgment, which comes as no surprise given that no Brazilian court of appeals has confirmed yet a favorable award to claimants, represents an important setback for plaintiffs who during thirteen years of litigation sought to obtain indemnification for moral and material damages attributed to the use of tobacco products in Brazil. It is expected that the lower court will take years before rendering a new decision.

Punitive character of moral damages award

On September 17th 2008, the Sixth Civil Chamber of the Court of Appeals for the Mato Grosso State handed down a novel decision that broadened the notion of moral damages to include those of punitive nature, in an individual consumer claim filed against a telephone company. After finding that the service provider had inflicted harm on the consumer's credit history, the court awarded moral damages which a large amount was set in order to deter the defendant from pursuing a similarly pernicious course of action in the future, rather than to

⁹ Approximately, US\$ 12.2 billion or GBP 8.2 Billion as of Dec. 7th, 2008.

¹⁰ Approximately, US\$ 407 or 274 GBP as of Dec. 7th, 2008.

¹¹ The court assumed that each victim had smoked during an average of ten years.

compensate the victim for the actual harm suffered, thus giving way to the possibility of awarding punitive damages in Brazil.

The plaintiff, an individual who was included in a list of delinquent debtors by error, and which caused significant damage to his credit score and relationships with other providers was awarded R\$ 41,500 in compensatory damages, and R\$ 9 million in moral damages, which the court established by taking into account “the punitive character of the award, whose goal is to intimidate the agent, deterring him from incurring in the same conduct again”.¹²

Moral damages are a form of compensation allowed in most Latin American countries for those who have suffered mental anguish, degraded reputation, emotional injury or social humiliation. Moral damages are not punitive in nature, but judges have a significant degree of discretion in determining their amount, as the plaintiff needs only to prove the defendant’s breach of duty (not the actual damage), as opposed to the case of economic damages in which the victims also need to prove and quantify the extent of the actual harm.

In the aforementioned September 17th decision, the Brazilian judge exercised his discretion when broadening the award to a high enough amount which in addition to compensate the victim for his suffering, would also “intimidate the defendant, and deter him from incurring again in a similar harmful conduct”.

Brazilian courts, as well as their counterparts throughout Latin America, have traditionally rejected the possibility of awarding damages that go beyond the actual compensation for an actual harm, and have often considered exemplary damages to contradict public policy. Proponents of consumer legislation reform and class actions in Latin America have advocated for the adoption of statutes providing for punitive damages, with no success to

¹² See, Sexta Camara Cível do Tribunal de Justiça de Mato Grosso, Recurso de Apelação Cível Nro. 86538/2008 at 1.

date. While it is true that the September 17th decision does not embrace the traditional notion of punitive damages, at least it devises a creative way to expand the notion of moral damages in order to produce a similar deterrent effect of punitive damages. We have yet to see if other courts will follow this trend.