

An Update on Class Actions and Litigation Funding in Poland

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I. CLASS ACTIONS

According to the data published by the Polish Ministry of Justice, as of July 19, 2011, i.e., roughly one year after the Polish class actions procedure came into force, 40 class action complaints were filed in various courts. Of those, 23 have been disposed of (which, given the framework of the law, presumably means they were dismissed on formal grounds) and 17 are still pending.³ Furthermore, anecdotal data and early assessment by lawyers both suggest that the purported class actions in their vast majority name as defendant the Polish Government (the State Treasury) rather than private businesses.⁴ The range of grievances claimants hope to have redressed by courts through class actions is extremely broad.⁵ Early examples of such initiatives include: a class of car importers who paid undue excise tax;

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³ Marek Nieduzak, *Pozwy grupowe po pierwszym roku funkcjonowania [Group proceedings after the first year of implementation]*, Report by Helsinki Foundation of Human Rights, <<http://www.hfhrpol.waw.pl/legislacja/images/stories/file/Marek%20Nieduzak%20%20Postepowanie%20grupowe%20po%20pierwszym%20roku%20funkcjonowania.pdf>> (last access date: November 14, 2011), at 6 (citing a letter of July 27, 2011 by Ms. Grażyna Kołodziejaska, Director of the Department of Courts of General Jurisdiction in the Polish Ministry of Justice [*Dyrektor Departamentu Sądów Powszechnych Ministerstwa Sprawiedliwości*] sent in reply to the Foundation's query on the matter).

⁴ See, e.g., Katarzyna Sobczak, *Pozwy zbiorowe – mity i rzeczywistość [Class actions – myths and reality]*, Kancelaria, February 2011, at 28. The author, citing also other lawyers, claims 70% of the class actions filed to date were directed against the State Treasury and the remaining 30% – against private corporations. It is not clear, however, how the author reached this determination.

⁵ In Poland, the Government enjoys no sovereign immunity vis-à-vis its citizens (including also domestic legal persons). The right to redress of injuries caused by any department, agency or instrumentality of the central or local government is provided by Article 77 the Polish Constitution of 1997. In its seminal decision of December 4, 2001, SK 18/2000, Journal of Laws No. Dz.U.01.145.1638, the Constitutional Tribunal ruled this right to mean that every person has a private cause of action against the Government and, furthermore, interpreted the Constitution to mean that the Government's liability does not require that the injured party show negligence or culpability of the person acting under the color of law. Indeed, under the current law and precedent there is no need even to name a specific person whose action caused the injury as long as the plaintiff is able to demonstrate (a) causation in fact between her injury and an action – or failure to discharge certain legal duty, including the duty to issue rules and regulations required under an act of the Parliament – of some entity considered a part of the Government; and (b) that the action or inaction in question constituted a law infringement. The Government is not shielded by any form of qualified immunity, such as, e.g., the requirement that the alleged violation pertain to a “clearly established” law (cf *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). This exposes the Government to a broad range of claims, including those relying on incompatibility of acts of the Parliament and/or lower-level rules and regulations with the Polish Constitution or the *acquis communautaire* of the EU.

flood victims claiming that the government failed to maintain anti-flood facilities with due care (certification granted by the court of the first instance, appeal pending); a union of local municipalities (powiaty) suing the Government for failure to issue a regulation under which municipalities charge vehicle registration fees; a suit by a group of hepatitis-B carriers for negligence against the Government as the owner of a public hospital. The wave of such lawsuits is rising rapidly and has a potential to generate large and substantively diverse classes.

1. BRE Bank – class certification upheld

Some background information:

The case is the result of a long dispute between BRE Bank (specifically - its retail outlets MBank and MultiBank) and some of its customers who have mortgages in Swiss Francs. The mortgage agreements signed between 2005 and 2006 had a clause which enabled the Bank's board to decide when and by how much to adjust interest rates. However, there were no clear criteria for justifying the change itself, nor for how large the change should be. The result was easy to predict: whenever the primary interest rate set by the Swiss National Bank went up, MBank was very quick to adjust its mortgage rates. But when the reference rates went down, the bank was in no hurry and then the decrease was likely less than the decrease of the bank's cost of financing in CHF.

This clause was seen as unfair by many customers. They started organizing into Internet groups and forums.⁶ Several groups of 'the cheated' were formed, and negotiations with the bank began. Over 1500 customers decided to settle with the bank and signed new agreements. Some, however, were not satisfied and demanded refund of money overpaid.⁷

In 2010, a number of those customers represented by the Regional Consumer Ombudsman brought a class action before the Regional Court of Łódź. This was the first case where the Consumer Ombudsman took the leading role (the Polish Class Action Law of 2010 allows only a Regional Consumer Ombudsman or a class member to be class representative). Initially the class consisted of 12 consumers, and at the moment it contains over 800.⁸ Their claim involves liability only (and more specifically – the court is

⁶ The groups started organizing a black PR campaign, distributing bumper stickers and even arranging for cars to drive across major cities dragging platforms with large billboards placed on them, expressing their opinion of the bank and its practices. The main slogan of the group was "Nabici w MBank" a pun which can be translated as "Duped into MBank". Thereafter, the groups have been repeatedly referred to in the media as "nabici" (the "duped" or "cheated").

⁷ It appears MBank employed a tactic similar to that used by many defendants in the United States. The bank, using a highly visible PR campaign, decided to divide potential plaintiffs into "reasonable" and "squabbling" clients, offering to convert loans into new ones with a different rate-adjustment formula. It is not clear whether concluded settlements expressly prevent settling mortgagees from suing the bank for past overcharges.

⁸ The number should be considered very high. It is worth noting that the MBank plaintiffs are a somewhat unique, self-selected crowd. MBank was, and perhaps still remains, leader of online banking in Poland. It has virtually no physical branches or customer service centers, with all business being transacted online or by phone. It had a strong appeal to a specific group of clients: usually young, well-educated, with a high level of computer literacy and

asked to interpret the contractual clause in which the bank promises to change the interest rates according to the Swiss interest rates, but subjects these changes to the board's decision).

The bank questioned the certification decision of the Regional Court of Łódź on several formal grounds. The most potentially substantial argument was that the Consumer Ombudsman for the Warsaw region should not represent consumers resident in other regions of Poland. This argument was rejected, and it is thought that the decision will assist in other actions where consumer ombudsmen were so far refusing to take on class actions because it was not clear whether they could represent consumers from regions other than their own.

In October 2011 the certification decision in a class action against BRE Bank was upheld by the Łódź Appeals Court. The action was brought last year by the class representative – the Regional Consumer Ombudsman for Warsaw, initially representing 12 class members. The certification decision was challenged by the defendant on a number of issues, primarily that the Regional Consumer Ombudsman for Warsaw should not have represented consumers who are resident outside Warsaw.

The law firm acting for class members is Wierzbowski Eversheds (they agreed to act in the case on the condition that at least 90 people join the class, which happened relatively quickly after the case was brought).⁹

They have concluded a very interesting fee arrangement with the class representative.¹⁰ The arrangement does not include any form of contingency fees (allowable under the new Class Actions Law of 2010). Indeed, they require all class members to pay the fee upfront.

Depending on the moment of joining the class, the fee ranges between 1000 PLN and 2000 PLN (plus 45 PLN for disbursements and plus 22 % VAT).¹¹ If the case reaches an appeal stage, a further, smaller amount is required. There are a number of interesting issues and questions involved in this fee arrangement:

- Eversheds explain within the text of the agreement¹² that the basic fee per class member, as set by the law firm, is 1000 PLN + 45 PLN for disbursements + VAT, and the higher amounts were set to encourage people to join in early. The firm promises to donate the difference between the basic fee and the higher, "penalty" fee actually paid by those who joined later to the organization which offers free legal advice and assistance (Foundation for University Legal Assistance Bureau);

freedom to communicate over the Internet, the "cheated" had a high potential to organize and fund themselves using modern means of communication, including online banking.

⁹ Interestingly, Wierzbowski is not a plaintiff law firm. By Polish standards, they are a mid-sized firm with a strong base of corporate clients.

¹⁰ The Supreme Court recently confirmed that the class must be represented by a professional attorney – also when the class representative is the Regional Consumer Ombudsman (the Supreme Court resolution of July 13, 2011, III CZP 28/11).

¹¹ On 2 November 2011, the exchange rate between PLN and the Euro was 1PLN = 0.23 Euro.

¹² The agreement is available online at: http://eversheds.pl/u_files/Grupa%20na%20Bank_Umowa%20miedzy%20Kancelaria%20i%20Reprezentantem%20Grupy.pdf (last access date: November 14, 2011).

- Also within the text of the agreement there is a justification for setting the fee per member at the amount requested by Eversheds. The firm calculates the average value of a claim (being an average overpayment of 400 PLN for 14 months = 5,200 PLN), and refers to the Regulations of the Minister of Justice of 2002 on the barristers' fees and on the solicitors' fees.¹³ The Regulations set tariffs for lawyers' fees for cost-shifting purposes.¹⁴

The MBank case is a good illustration of early dilemmas and uncertainties which both the class representative and class counsel must face when trying to organize the class and fund the case.

The first hurdle is the decision what cause of action the class should pursue: Eversheds, like the majority of other class action pioneers in Poland, chose to sue not for damages, but for a liability-only declaratory judgment binding the defendant vis-à-vis all members of the class. There are two good reasons supporting their choice. One is the requirement set forth in Article 2 of the new Class Actions Law of 2010 that in a class action for damages all individual claims be "standardized" ("ujednolicone"), with the option to "standardize" claims within subclasses of two plaintiffs or more. This rule proved highly controversial: many lawyers believe courts would interpret it as meaning that all claims must be equal,¹⁵

¹³ Regulations of the Minister of Justice of 28 Sept 2002: W sprawie opłat za czynności adwokackie oraz ponoszenia przez Skarb Państwa kosztów nieopłaconej pomocy prawnej udzielonej z urzędu (*on the remuneration of barristers' services and on the payment by the State Treasury of the costs of unpaid legal assistance nominated ex officio*); and w sprawie opłat za czynności radców prawnych oraz ponoszenia przez Skarb Państwa kosztów pomocy prawnej udzielonej przez radcę prawnego ustanowionego z urzędu (*on the remuneration of legal advisers' services and on the payment by the State Treasury of the costs of legal assistance given by a legal adviser nominated ex officio*), published in Dziennik Ustaw (Journal of Laws) no 163, items 1348 and 1349.

¹⁴ Generally, the primary purpose of the Regulations is a limitation on the cost-shifting rule: they set forth "minimal rates" for attorneys' fees, which in fact are maximum rates of legal fees payable by the losing party. The rate invoked by Eversheds appears spurious, as it has absolutely no bearing on the attorney-client relationship and parties are free to set any fee they wish, both higher and lower than the maximum rate shiftable to the losing adversary. In practice, the Regulations are often invoked as authority by lawyers trying to convince the client that they charge at par with, or below, the "minimum" statutory rate. It is also interesting to remark that the "average benefit" per plaintiff of PLN 5,200, more of a conjecture than a provable calculation, conveniently falls just above the threshold of PLN 5,000, below which the statutory maximum subject to shifting is PLN 600. Furthermore, the issue of cost shifting when a conditional fee agreement is concluded has not been resolved in the new Class Actions Law. Thus it is unclear whether the normal tariff would still apply for cost-shifting purposes.

¹⁵ Cf Niedużak, *supra* note 3; Andrzej Kubas & Rafał Kos, *Opinia w sprawie projektu ustawy o dochodzeniu roszczeń w postępowaniu grupowym [Opinion regarding the draft bill of the Class Actions Law]* of October 20, 2009, (druk sejmowy nr 1829), <[http://orka.sejm.gov.pl/RexDomk6.nsf/0/E1FDADC36EC70640C1257654003818FC/\\$file/i2199_09A.rtf](http://orka.sejm.gov.pl/RexDomk6.nsf/0/E1FDADC36EC70640C1257654003818FC/$file/i2199_09A.rtf)> (last access date: November 14, 2011), at 4 (authors, opining at the request of the Parliamentary Bureau of Analysis, expressed their concern that „difficulties with standardizing claims as to the amount ... will be the most frequent cause for limiting the class lawsuits to requests of a declaratory relief and using such declaratory judgment establishing only the defendant's liability in general as a predicate in subsequent lawsuits brought individually by class members"). See also M. Domagalski, *Pryśka mit pozwów zbiorowych [The myth of class action shatters]*, Rzeczpospolita of August 26, 2010, at 1C (quoting Marcin Kosiorkiewicz, attorney representing the class of individuals flooded by allegedly negligent opening of a pound lock on the river Dłubnia, as saying that, in his opinion, the "standardization" requirement means that claimants must agree to give up on any demands in excess of the amount which may be reasonably claimed by all class members).

which would likely disqualify most cases for damages, in particular mass tort claims.¹⁶ A related concern appears to be the fear that judges, when faced with the prospect of quantum determination, possibly different for each class member, would be more inclined to decline certification.

Second hurdle has to do with the costs of litigation and, again, uncertainties about the interpretation of the new Class Actions Law of 2010 in connection with general rules of civil procedure.

Perhaps the most important funding issue pertains to the court filing fees (for a broader discussion, see Section II *infra*). The uncertainty becomes particularly salient in cases where, as in the MBank case, plaintiffs seek a declaratory relief only. In such cases, one additional challenge is figuring out what value is being claimed – for the purposes of calculating the court filing fees, as well as convincing class members that the legal fees requested are reasonable.

As far as the filing fee is concerned, it is far from clear how the value per plaintiff should be calculated or, for that matter, whether it should be applied to each class member or to the class as a whole. Here, the role of the Regional Consumer Ombudsman gains prominence: in their agreement with the MBank class members, Eversheds makes it clear they expect the class to be generally exempted from court filing fees because the class is represented by the Ombudsman.¹⁷ But they are quick to hedge themselves by making plaintiffs contractually obligated to pay whatever sums the court may order, in case their interpretation of the law proved incorrect.¹⁸ It appears that the relationship between the representation by Ombudsman and the class-wide costs exemption was recognized by the defendant, whose appeal against the class certification focused in large part on challenging the Ombudsman's standing.

¹⁶ In informal conversations, several Polish trial lawyers expressed the view that the rule would also prevent them from bringing a class where damages could be determined per some basis unit. For example, in a securities class action, the court could calculate damages per share and then multiply such "unit damages" by the number of shares held by each individual plaintiff. But the lawyers doubted that judges would agree to follow such procedure. The law states that the court, when awarding damages to the class, must specify the amount attributable to each member of the class or subclass, but it does not specify any particular technique for doing so (Article 21.2 of the Class Actions Law).

¹⁷ The rule invoked had been introduced before the Polish Class Action Law of 2010 was passed. It provides that the Regional Consumer Ombudsman, in cases concerning protection of individual consumer rights, is exempted from court costs. Whether this means that all members of a class represented by an Ombudsman are also exempted remains to be settled by future case law. The flipside of this line of interpretation is that the obligation to bear court costs becomes limited to the class representative only. When the class is represented by an Ombudsman, it sounds like good news. But when the representative is a private actor, a centralized responsibility does not seem very attractive to the representative.

¹⁸ See section 3.3 of the Eversheds agreement, *supra* note 12, which states that „Because under this Agreement Article 96.1(11) of [the Court Costs Act, *infra* note 63] is applicable, the [class representative] is exempted from court costs. However, in case the Court imposed on Class Members an obligation to pay any fees in connection with the Proceeding, [Eversheds] shall coordinate the process of remitting such payments by Class Members to the Court.” It remains unclear how the process of collection of the charges imposed by the court would look like and what would happen if some of the class members failed to pay, given that the law grants the representative no power to expel members from the class. Eversheds tries to deal with such eventuality by contract, giving itself, as per Section 6.2 of the agreement, the right to terminate, without notice, the agreement with a class member who “materially hinders” the case. Whether such termination would indeed result in exclusion from the class is unclear.

When it comes to convincing the class about the benefit of opting in (and paying legal fees to the class counsel) a formally more convenient lawsuit for a declaratory judgment may have a limited appeal for potential plaintiffs. Eversheds explains that “if the case ends with a positive result for the class members, each of you will receive the interpretation of the [mortgage loan] agreement binding to you and the bank”. It is not clear whether class members do in fact realize that they pay for a lawsuit giving them an “interpretation”, and what practical benefits such interpretation is going to have. After all, it is one thing to pay someone to recover money; paying for an outcome which provides no gain without additional action (and investment) is a different business. In the MBank case, it is too early to know how the class members will react to the outcome they paid for (assuming they prevail). But some of the questions they were asking the class counsel in past talks seem to suggest that many of them expect Eversheds to make the bank pay money.¹⁹

The intangible benefit a declaratory relief may bring to class members seem to have a profound effect on the counsel’s preference to receive remuneration in advance. It makes little sense to take the case on contingency, if the lawsuit does not seek any damages. This logic is apparent in the Eversheds agreement with the class, where plaintiffs are required to pay a fixed fee up front.

Another explanation of why the advance, lump-sum remuneration scheme is rational, from the counsel’s point of view, is supplied by the fact that, as a general rule, plaintiff can fire her attorney at any time, and the Class Actions Law does not contain any rule excluding said prerogative. Eversheds clearly allows for such eventuality in its agreement with the class.²⁰ But as MBank plaintiffs are required to pay attorneys’ fees when joining the class, there remains little incentive to terminate the agreement later.

2. PZU Życie, T-Mobile and Eller Service: following in regulator’s footsteps

PZU Życie and its peculiar definition of cardiac arrest

¹⁹ Among other things, members asked: “Can the law firm make us an offer comprising ... bringing the case to the end, i.e., after a positive decision in the last instance, causing that we get money back from the bank. My question is mainly about this last point. After the case is won, what to do next?”; “What are the chances that the bank, despite losing the lawsuit, will ... refuse to give us our money back? I mean the possibility that the calculation of the amount due will be questioned or there will be no such model (if the court decision does not provide us with one), or the bank will interpret the decision in a different way or use some other legal loophole?”; “How to avoid a situation that, even though we have won, to us, there is no real effect, i.e., we cannot get our money back nor change the way the bank calculates future mortgage payments?”; “After we win the case, will we need to file a separate lawsuit against the bank to receive overpaid interest and have the interest rate decreased?”; “If the law firm wins with BRE Bank, will the result be an automatic return of the overpaid interest for the plaintiff, as well as automatic reduction of interest...? If not, what additional procedures would be required?” “Will the [court] decision be ... either a win or a loss, or can it be something in between, e.g., “100%, but not more than PLN 8,000 per person”...?”. The whole thread (in Polish) can be viewed online at: <<http://nabiciwmbank.pl/index.php?PHPSESSID=3df6cbc45de3a4f917311757232cd802&topic=2046.0;wap2>> (last access date: November 14, 2011).

²⁰ Section 6.1 of the agreement gives each class member the right to fire the class counsel. In such case, under Section 6.3, class counsel would have the right to demand „such portion of the remuneration or reimbursement of costs as may be due as of the termination date”.

Over 100 customers of PZU Życie (the life insurance arm of the largest insurance group in Poland) whose claims for heart attacks were denied brought a class action on 14 June 2011 to the Regional Court in Warsaw.

The general conditions of the insurance agreements which PZU offered to their customers contained a clause which defined a heart attack in certain, very specific, medical terms. However, after interventions by consumers and the Insurance Ombudsman, the Office for the Protection of Competition and Consumers examined the clause, asked medical experts for advice, and declared that the definition of heart attack was too restrictive and did not take into account current medical knowledge. As such, in the Office's opinion, the insurer violated laws on fair competition by misleading consumers about the actual scope of the coverage offered. PZU Życie appealed against the decision and, as of the date of this report, the appeal is still pending.

Following the Office's ruling, some of the 2100 customers whose claims for heart attacks were denied felt they were entitled to receive compensation (the Office for the Protection of Competition and Consumers does not have the power to offer compensation to victims of the clauses it deems unfair or to order such compensation to be paid by entrepreneurs who used the clauses, since due process requires that a private claim for damages be heard and decided by court).²¹

The class containing an undisclosed, likely small,²² number of customers of PZU is organized by a private individual who established a website for the purposes of the action.²³ It is not clear on what terms members of the PZU Życie class are represented. The class action webpage informs that the "total value of claims as of the complaint filing date amounted to PLN 91,446". The class, therefore, appears to sue for damages, but it is not clear how their claims were plead and in particular how the plaintiffs attempt to deal with the "standardization" requirement mentioned above.

PTC's unwanted texts

Another case involved a lottery organized by ERA (presently, T-Mobile Poland), one of the leading cell phone carriers in Poland, entitled "Have you become a millionaire today?". The carrier's customers claimed they were charged for participation in the lottery against their will.²⁴ In response to numerous

²¹ On web forums which were set up to discuss the situation, people denied a payout spoke of their disappointment: 'the state budget gets 4 million, we get nothing'. There were suggestions that part of the fine ought to be used for compensating victims of wrongdoing.

²² The webpage, apart from claiming that the number of plaintiffs is sufficient to meet the numerosity threshold, i.e., 10 persons, does not mention any higher number, as did plaintiff forums in the MBank case.

²³ The webpage is: <http://zbiorowepozwy.org/en/web/pzu-zycie/>. Registration is required for the forum access. It is not readily apparent who is the site owner. According to the webpage's Whois record and publicly available profiles, its registrant is neither a lawyer, nor a class member, but a young IT manager and a full-time employee in a telecom company. He tries to build an online community promoting various issues which may be converted into class actions, and sign members of such groups. In addition, the webpage offers "free", and not uncontroversial, advice on class actions.

²⁴ The ad was formulated as follows: "ERA: The time has come! You can win PLN 1,000,000 today, from ERA! Send a free text "YES" to 8007! Texts to 8007 are free! T&C: 100m.era.pl PLN 4.88/day". Every prepaid and postpaid subscriber of the network was eligible to play, with the promotional advertisement suggesting that participation

complaints, the Office of Electronic Communications (Urząd Komunikacji Elektronicznej), the telecommunication regulator in Poland, commenced a regulatory proceeding. It decided that PTC's actions resulted in the "reduced degree of legal protection afforded subscribers and end users in relations with the telecommunications operator" and they "constituted an unlawful infringement of individual right to privacy ... forcing [consumers] to receive unwanted messages". Because the violation involved over 1.7 million clients of the carrier, the Office reasoned, PTC should pay an administrative penalty of ca. PLN 5 million.²⁵

After the regulator's decision, affected subscribers started organizing themselves online. In an effort which appears to follow the same *modus operandi* as the one used by the PZU Życie plaintiffs, i.e., creating an online community of potential plaintiffs via a webpage dedicated to class action topics, with a private individual acting as group organizer.²⁶ Despite a very large pool of potential plaintiffs, it seems the lawsuit was never filed. A possible explanation may be a relatively low benefit per plaintiff and the operator's response aimed to appease angered subscribers.²⁷

Eller Service's "free trial"

Eller Service was offering webhosting and file exchange service, www.pobieraczek.pl. It lured many Internet users with a promise of a "free trial" for ten days. Users registering with the service were required to give their personal information and accept the provider's general terms and conditions. The terms stated that by registering users entered into a one-year contract terminable within the first ten days. Failure to cancel the service in time locked the consumer in for a whole year and obligated him to pay monthly fees. Many consumers took the "free trial period" to mean they are not bound by contract

was free and referring consumers to general terms and conditions of the game, available online. Consumers complained that the terms were 15 pages' worth of small-print legalese they did not understand, and that it would take "a whole day to read them". In particular, consumers were surprised to learn that the "free" text message (or pressing "1" when receiving an automated call) was, under the terms and conditions set by the carrier, tantamount to giving consent to said terms, and to authorizing the operator to charge a daily fee of PLN 4 + VAT. Moreover, many subscribers complained they were "treacherously attacked" by unwanted calls generated by an automated calling system. Furthermore, after 100 days of the lottery, apparently no subscriber won the main prize. Many, however, received rather impressive phone bills. See *Abonenci szykują pozew zbiorowy przeciwko sieci ERA [Subscribers prepare class action against ERA network]*, Wieszjak.pl, <<http://prawa-konsumenta.wieszjak.pl/konsument-telekomunikacja/270628,Abonenci-szykują-pozew-zbiorowy-przeciwko-sieci-ERA.html>> (last access date: November 15, 2011).

²⁵ See *Nałożenie kary pieniężnej na PTC [Financial penalty imposed on PTC]*, <http://www.uke.gov.pl/uke/index.jsp?place=Lead01&news_cat_id=468&news_id=7025&layout=3&page=text> (last access date: November 15, 2011) (the announcement contains the official communiqué of the regulator and the grounds for the decision). See also *UKE: 5 mln zł kary dla PTC, operatora sieci T-Mobile i Heyah [OEC: PLN 5 mil. fine for PTC, T-Mobile and Heyah operator]*, Forsal.pl, <http://forsal.pl/artykuly/535988,uke_5_mln_zl_kary_dla_ptc_operatora_sieci_t_mobile_i_heyah.html> (last access date: November 15, 2011) (giving a comprehensive summary of the regulatory proceeding).

²⁶ The site is www.pozywamy-zbiorowo.pl. Joining the community requires registration: users must give their first and last name, screen name, sex, age and a valid email address. The site owner posts at the forum apparently using his real name and picture.

²⁷ Online threads dedicated to the „ERA lottery fraud” topic indicate that PTC, while denying any wrongdoing and directing customers to a third party organizing the lottery, offered complaining clients substantial free air time packages. See, e.g., online discussion at <http://www.pozywamy-zbiorowo.pl/networks/items/show.2854>.

until they sign up with Eller after trying the service. After Eller started sending notices demanding payment, the Office for the Protection of Competition and Consumers became inundated with complaints from users who felt “tricked”. The office, after inquiry, issued a decision finding the practices of Eller Service unlawful and ordered that the company immediately cease such practices and pay a fine of ca. PLN 250,000.²⁸

As in the other cases described above, online forums of discontented clients began to mushroom. Particularly active is the owner of the webpage mentioned in connection with the PTC texts case who started signing consumers willing to participate in a class action against Eller Service. The effort was publicized by media advising readers on “who can join the class action of the pobieraczek.pl users and who helps organize the victims”.²⁹ The organizer, who would presumably act as the class representative, promises to have the lawsuit filed if at least 100 persons join the class. As of the date of this report, the signing still continues.³⁰

The three examples described in this section seem to have share several properties. First, they all began after the appropriate regulator issued a decision finding a business entity in the wrong and imposing a fine. Presumably, such finding both makes it easier for future plaintiffs to show liability (the court, although formally not bound by the regulator’s findings, is likely to give deference to well-argued administrative decisions) and gives encouragement to those hesitating whether to sue by signaling that there is a good case to be made.

Second, all three cases involve extensive use of online tools and social media as means to bring potential plaintiffs together and make the lawsuit conditional on certain minimum class numerosity, closely tied with the issue of funding, which, at least in part, class members are expected to provide upfront. This usually makes it difficult to rally a high enough number of people or yields a small class, with a low participation rate. One hypothesis explaining this trend may be informed by what appears a typical

²⁸ See *Kosztowne pobieranie [Expensive downloading]*, <http://www.uokik.gov.pl/aktualnosci.php?news_id=588> (last access date: November 15, 2011) (presenting the Consumer Ombudsman’s position that offering free products or services for which consumers in fact must pay constitutes unfair business practice); and *Pobieraczek.pl złamał prawo [Pobieraczek.pl broke the law]*, <http://www.uokik.gov.pl/aktualnosci.php?news_id=1970> (last access date: November 15, 2011) (describing the decision by Office for the Protection of Competition and Consumers, and its consequences for consumers).

²⁹ See, e.g., Małgorzata Kryszkiewicz, *Będzie pozew zbiorowy przeciwko portalowi Pobieraczek.pl [There will be a class action against the pobieraczek.pl website]*, *Dziennik Gazeta Prawna* of July 27, 2011, <http://prawo.gazetaprawna.pl/artykuly/534236,bedzie_pozew_zbiorowy_przeciwko_portalowi_pobieraczek_pl.htm> (last access date: November 15, 2011).

³⁰ The organizer provides registered users with details about the lawyer who would represent the class, proposes to have the plaintiffs divided into five different subclasses, depending on factual circumstances, and spells out all litigation costs class members are required to cover. He also lists all documents joining members must send to him. Each joining plaintiff is required to pay a modest sum of ca. PLN 30; in addition, class counsel would receive 5% of the recovery (if any). The deadline for joining the class, as set by the organizer, is November 30, 2011. After the initial two months, 36 persons decided to join – far less than the total of all Elle Service consumers, and a small fraction of the registered users of the class action webpage.

consumer behavior: people, although generally supportive of consumer class actions, choose the “wait and see” tactic, especially when participation would depend on paying upfront.³¹ Another explanation can be found in the approach taken by the class organizers: they are clearly unwilling to take too much risk or make a substantial investment in building a large inventory of cases. Moreover, the case aggregation is done by non-lawyers who subsequently cooperate with attorneys acting in their traditional capacity, i.e., providers of legal services rather than American-style legal entrepreneurs.

Testing substantive boundaries of the new law: cases of MTK hall collapse, Sandomierz flooding and firefighters’ overtime

One important property of the Polish Class Actions Law of 2010 is the fact that it is not cross-substantive. Pursuant to Article 1.2 of the Law, the procedure applies to “claims seeking consumer protection, claims concerning liability for defective products and claims in tort, excluding claims for protection of personal rights”. The scope of application – the outcome of a lengthy back-and-forth between pro-business lobbies on one side and trade unions, consumer organizations and politicians willing to benefit from the popular agenda on the other – leaves plenty of room for judicial interpretation. Early cases suggest that plaintiffs, perhaps unsurprisingly, look to interpret the new law expansively, whereas judges’ response is mixed.

The MTK hall collapse case

On January 28, 2006, the hall of the International Trade Fair in Katowice hosted an international exhibition of carrier pigeons. Over 700 exhibitors and enthusiasts gathered inside. In the middle of the exhibition, the hall’s roof, covered with an unusually thick layer of wet snow, collapsed. The accident’s toll was 65 deaths and 170 persons with injuries of different severity. Victims were both from Poland and other European countries. After over two-year long investigation, in June 2008, the public prosecutor indicted 12 persons, including the architects who designed the building and board members of Międzynarodowe Targi Katowickie (MTK), the company operating, and responsible for maintenance of, the fair hall. Criminal proceedings still continue. The collapse is considered the single largest construction-related catastrophic event in Poland’s history.³²

16 victims of the tragedy decided to bring a class action. as defendant they named not the MTK as operator of the collapsed hall, but the Government (as the building’s owner). They alleged negligence in

³¹ The Eller Service class organizer is clearly among the proponents of this hypothesis. In the comments posted on the website, he does not hide disappointment with the community response to his efforts and tries to provide an explanation: “Supposedly I know why this is happening... Many people think that: -- they would need to schlep to the court, which is not true; -- after “we” win, even if [they] did not participate in the lawsuit, [they] would rely on our win and automatically, whack-smack, all done and solved! That’s utter nonsense!”.

³² See, e.g., Józef Krzyk, Przemysław Jedlecki & Marcin Pietraszewski, *Największa polska katastrofa budowlana. Polska w żałobie [The largest Polish construction catastrophe. Poland in mourning]*, *Gazeta Wyborcza* of January 30, 2006, <<http://wiadomosci.gazeta.pl/wiadomosci/2029020,114883,3137361.html>> (last access date: November 15, 2011) and Marcin Pietraszewski, *Szefowie MTK wyjdą z aresztu [MTK bosses to leave prison]*, *Gazeta Wyborcza* of March 6, 2007, <<http://wyborcza.pl/1,76842,3965494.html>> (last access date: November 15, 2011).

the exercise of owner's supervision and failure by construction administration inspectors (for whom the Government is vicariously liable) to properly discharge their duty of regulatory supervision.³³ On April 1, 2011, the Regional Court in Warsaw dismissed the case and refused to certify the class. The court distinguished between those plaintiffs who raised claims in tort regarding property damaged or lost and those with personal injury claims. According to the court's interpretation, only the former can be pursued as a class action, since personal injury claims, even if plead as claims in tort, must be qualified as claims for protection of personal rights. Since only five among the plaintiffs raised the type of claims the court found admissible, the class numerosity was found to be below the statutory threshold.³⁴ Plaintiffs challenged the decision, but on September 30, 2011 the Appellate Court in Warsaw dismissed their appeal, holding that the Regional Court's argumentation was correct and claims of class members did not meet the commonality test.³⁵ The decision is final, but appealable to the Supreme Court, and class counsel already declared his intention to ask the Supreme Court for *certiorari*.³⁶

Sandomierz flooding case

Spring of 2010 was tough on residents of Sandomierz: thawing snow caused the Vistula River to overflow its banks. Water broke through neighboring anti-flood embankments; as a result, over 5,000 people found their homes and businesses under water.³⁷

After the flood, a group of 17, comprised of individuals as well as local businesses, sued the Government (represented by three different administrative governmental bodies) together with two localities under the Class Actions Law. Plaintiffs demand ca. PLN 9 million in damages. Their complaint alleges that the

³³ A number of individual lawsuits have been filed in connection with the MTK collapse, and some of them are still pending. What appears to have prompted the class action is a decision by the District Court in Chorzów, subsequently upheld by the Regional Court in Katowice, which held the Government (i.e., the State Treasury) jointly and severally liable with the operator on the theory of the owner's negligence in supervision. In spite of this decision, the Government did not admit liability vis-à-vis other victims and refused to even commence settlement negotiations. See *Skarb Państwa nie chce ugody z poszkodowanymi w MTK* [The State Treasury does not want to settle with MTK victims], wprost.pl of October 8, 2009 <<http://www.wprost.pl/ar/174546/Skarb-Panstwa-nie-chce-ugody-z-poszkodowanymi-w-MTK/>> (last access date: November 15, 2011).

³⁴ See *Sąd odrzucił pozew zbiorowy poszkodowanych w katastrofie hali MTK* [The court dismissed the class action complaint by injured in MTK catastrophe], Dziennik Gazeta Prawna of April 8, 2011, <<http://www.gazetaprawna.pl/wiadomosci/artykuly/503535,sad-odrzucil-pozew-zbiorowy-poszkodowanych-w-katastrofie-hali-mtk.html>> (last access date: November 15, 2011).

³⁵ See *Odrzucenie pozwu zbiorowego ws. katastrofy hali MTK – prawomocne* [The class action complaint on MTK hall catastrophe final], Rzeczpospolita of September 30, 2011, <<http://www.rp.pl/artykul/725389.html>> (last access date: November 15, 2011).

³⁶ The decisions of both courts may prove controversial. Their broad interpretation of "claims for protection of personal rights", a term of art, seems to be at odds with the Supreme Court's long-established case law, which qualifies personal injury claims as claims in tort.

³⁷ See, e.g., *Wisła zalewa Sandomierz. Zamknięty most* [Vistula floods Sandomierz. Bridge closed], Gazeta Wyborcza – Kielce of May 19, 2010, <http://wyborcza.pl/1,75248,7903347,Wisla_zalewa_Sandomierz_Zamkniety_most.html> (last access date: November 15, 2011).

government failed to exercise due care in upkeep of embankments and melioration infrastructure, and was negligent in organizing and executing the rescue operation after the flood occurred.³⁸

The Regional Court in Kraków, after hearing the parties on May 20, 2011, approved the class action. The court dismissed all objections made by defendants: that there is insufficient commonality in fact among the claims; that plaintiffs rely on different legal theories; and that claims are not “standardized”. In the court’s opinion, all claims are sufficiently similar, because they all share common factual and legal basis, i.e., the same acts of negligence or failure to exercise due care are alleged by all plaintiffs.³⁹

Furthermore, the court dismissed defendants’ motion that class members pay a bond securing defendants’ costs. The court held that “in the light of the losses incurred by the plaintiffs, to burden them with a bond would be unjustified”.⁴⁰ Anecdotal information suggests that a number of flood victims wait until certification becomes final before they join the class action.⁴¹

Firefighters overtime case

A burgeoning conflict, likely to turn into a class action lawsuit very soon, is the firefighters case. Suffering from permanent underemployment, for years the State Fire Service (Państwowa Straż Pożarna) required that its people put in extra hours. In Poland, from the legal standpoint, being a firefighter is not a regular employment: it is a state force, like the police or the customs and border protection guards. Service members are not subject to the rules of the Labor Code, which means a firefighter must carry out his duties beyond the regular hours when so required by his superior.⁴² Things changed, however, after Poland joined the EU and became subject to the community *aquis*, including

³⁸ The class is represented by one of Poland’s top litigation law firms, Kubas, Gaertner & Kos from Kraków, with professor Andrzej Kubas named as class counsel. Among other things to its credit, the law firm had been asked by the Parliament to make a recommendation on the Class Actions Law before the act was passed (*see supra* note 15). Like Eversheds, Kubas has an extensive trial experience, and his clients list contains a number of large corporations. The terms of Kubas engagement as class counsel are not publicly available.

³⁹ See Jarosław Sidorowicz, *Sąd się zgodził. Będzie zbiorowy proces o powódź* [The court agreed. There will be a class action about the flood], *Gazeta Wyborcza – Kraków* of May 20, 2011, <http://kielce.gazeta.pl/kielce/1,35255,9634357,Sad_sie_zgodzil_Bedzie_zbiorowy_proces_o_powodz.html#ixzz1dppxA7B3> (last access date: November 15, 2011); and *Sąd przyjął pozew zbiorowy powodźnian* [The court accepted the class action by flood victims], *Rzeczpospolita* of May 20, 2011 <<http://www.rp.pl/arttykul/92106,661391-Krakowski-sad-przyjal-pozew-zbiorowy-powodzian.html>> (last access date: November 15, 2011).

⁴⁰ *Id.* The grounds of the bond decision seem to be something of a shortcut: under the Class Actions Law, the test is the likely amount of costs and expenses the defendant would need to incur to defend his case, and perhaps also the likelihood that, on the face of the case, the class would prevail. In no way does the bond decision depend on the class members’ financial situation or the losses they allegedly incurred. Nevertheless, the decision may be indicative of the judges’ willingness to decide security bond motions primarily on equitable grounds.

⁴¹ The decision, if upheld by the Appellate Court, will likely be highly precedential: flood victims from other cities sued, or contemplate suing, the Government as separate classes. One development to watch as the flood victims case develops is whether courts, like in the United States, would seek to centralize (“MDL”) those classes into one, so as to avoid conflicting decisions in related cases.

⁴² Servicemen and servicewomen have a limited right to strike; they are hierarchically subordinated to their superiors and must obey orders; they must be ready to redeploy to a different location; and, in emergency cases, they must not refuse to carry out duties outside of their regular service time, place or scope. On the other hand, services of force members are hard too terminate. Furthermore, they usually enjoy special privileges and benefits, in particular when it comes to housing, social and medical insurance, and pension plans.

the EU law on excessive working time.⁴³ A new law was passed and the firefighters' average weekly working time has been limited to 40 hours, subject to "extension" in emergency situations of up to additional 8 hours, within the reference period of 6 months.⁴⁴ The "extension hours" did not qualify as "overtime", however: courts, including the Supreme Court, repeatedly refused to award firefighters extra money for extra time on the job.⁴⁵ Under pressure of the firefighters' labor unions, the Parliament amended the law, so that, from the beginning of the year 2011 going forward, the service members would receive compensation for the time in excess of 40 hours; the new rules, however, apply only prospectively.⁴⁶

Presently, 30,000 firefighters, represented and organized by labor unions, demand to be paid for what they believe are overtime hours beginning from 2005. They calculate that, jointly, they are owed 3,750 years' worth of free time or pay in compensation of 10 million overtime hours. They want to sue the Government under the new Class Action Law of 2010 and prepare a lawsuit.⁴⁷

The case, even if it fails to reach the court, seems important for several reasons. First, it is an example of another mode of class aggregation, i.e., through labor unions. The approach may prove more effective in signing people than online forums or even local communities impacted by a common harm.⁴⁸ Second, as is apparent from the recent amendment of the firefighters law, organized groups of interest may want to achieve their goals by using class actions in parallel with political process. Third, the case demonstrates how different groups attempt avail themselves of the new law in matters apparently not conceived by the lawmaker. In particular, the Class Actions Law does not apply to labor cases; nevertheless, firefighters claim their lawsuit should be allowed, because they are not subject to the labor law regulations, and their claims rely on the theory that the Government's actions constituted a

⁴³ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, Official Journal L 299 , 18/11/2003 P. 0009 – 0019.

⁴⁴ Article 35.1, Ustawa o Państwowej Straży Pożarnej [*Act on the State Fire Service*] of August 24, 1991, consolidated text: the Journal of Laws No. Dz.U.09.12.68, as amended.

⁴⁵ Courts held that there was no statutory rule giving firemen the right to additional compensation for the "extension hours". The courts refused to apply (by analogy) rules regulating terms of regular employment. See, e.g., the Supreme Court resolution of March 18, 2008, II PZP 3/08, OSNP 2008/17-18/249.

⁴⁶ Article 2 of Ustawa o zmianie ustawy o Państwowej Straży Pożarnej [*Act amending the act on the State Fire Service*] of October 29, 2010, the Journal of Laws No. Dz.U.10.239.1589. Under the amendment, firefighters are entitled to receive overtime back pay only for the second half of the year 2010.

⁴⁷ Leszek Kostrzewski, Piotr Miączyński, *Strażacy szykują pozew zbiorowy przeciwko straży pożarnej* [*Firefighters prepare a class action lawsuit against the fire service*], *Gazeta Wyborcza* of July 1, 2011, <http://wyborcza.biz/biznes/1,101562,8918283,Strazacy_szykują_pozew_zbiorowy_przeciwko_straży_pożarnej.html> (last access date: November 16, 2011).

⁴⁸ In the past, unions showed prowess as lawsuit organizers when enforcing what is commonly known as the "Law 203", a rather clumsily written act passed after a severe strikes which gave every employee of the public healthcare system a raise of PLN 203 in the first year of the law's operation (hence its popular name). The act did not mention who should be responsible for bearing the financial burden of the raises, which led to a huge legal war, as evidenced by several decisions handed down by both the Supreme Court and the Constitutional Tribunal. Subsequently, thousands of lawsuits were brought by medical personnel represented by labor union lawyers.

law infringement, i.e., they sue in tort.⁴⁹ The unions, clearly understanding that the scope of application of the new law may be too narrow for their preference, have already taken action outside of the courts system: they want to amend the Class Actions Law, and to that effect they recently submitted a draft bill to the General Inspector of Labor (Główny Inspektor Pracy).⁵⁰

II. COSTS AND FUNDING OF LITIGATION

Costs of civil litigation: the somewhat English rule

In Poland, costs of civil litigation generally follow the English rule (“loser pays”). Those costs can be divided into three broad categories: (a) attorneys’ fees; (b) costs of evidence proceedings and case management (such as costs of expert opinions and testimonies; cost of translations; reimbursement of costs of travel and lost income incurred by witnesses; costs of public announcements; etc.); and (c) filing fees.

Attorneys’ fees are contractually agreed between the attorney and her client. However, the fees payable by the losing party are limited by statute.⁵¹ Those highly itemized rates depend on the type of proceeding, its subject matter and (usually) value. The court, especially in complex or work-intensive cases, may apply a multiplier between 1 and 6 to the rate, although it rarely does. The costs of evidence proceedings and case management are, again, payable pursuant to statutory rates which the court has discretion to reduce.⁵²

When it comes to the second component, the court filing fees, as a general rule (subject to countless exceptions), the plaintiff suing for money or specific performance of economic value must pay 5% of the value claimed, however, not less than PLN 30 and not more than PLN 100,000. In case of a class action, the filing fee is 2%, again subject to the PLN 100,000 ceiling.⁵³ It is not clear whether the fee is assessed

⁴⁹ Cf *Günter Fuß v Stadt Halle*, Judgment of the European Court of Justice (Second Chamber) of November 25, 2010, Case C-429/09, in which the Court decided the case of a German firefighter seeking reparation for the losses resulting from the Germany’s infringement of the EU law on working time.

⁵⁰ See, e.g., *Pracownik łatwiej odzyska zaległą pensję* [Employee will have easier to get back pay], Dziennik Gazeta Prawna of March 2, 2011, <http://praca.gazetaprawna.pl/artykuly/491924,pracownik_latwiej_odzyska_zalegla_pensje.html> (last access date: November 16, 2011); and Mateusz Rzemek, *Pozwy zbiorowe dla pracowników* [Class actions for workers], Rzeczpospolita of March 2, 2011, <http://archiwum.rp.pl/artykul/1027529_Pozwy_zbiorowe_dla_pracownikow.html> (last access date: November 16, 2011).

⁵¹ The Regulations, *supra* note 13.

⁵² The statutory rates have a critical impact on experts. On the one hand, statutory rates keep the costs of expert opinions in check and help to prevent expert wars. On the other, they cause a negative selection among experts whose time the market appreciates most (such as certified public accountants or IT specialists).

⁵³ Article 13, *Ustawa o kosztach sądowych w sprawach cywilnych* [Act on court costs in civil matters] of July 28, 2005, consolidated text: Journal of Laws No. Dz.U.10.90.594, as amended. Article 126(2) § 1 of the Polish Code of Civil Procedure of November 17, 1964, Journal of Laws No. Dz.U.64.43.296 (consolidated text), as amended (“**Polish CCP**”), expressly provides that the court shall not take any action in the case filed with it unless and until filing fee due has been paid.

per class as a whole or, alternatively, it is payable by each class member – the distinction becoming of key importance whenever the aggregated value of all claims is large enough to trigger the ceiling fee.⁵⁴ The courts, at least in some cases, seem to follow the familiar fee assessment practice developed in cases involving joinder of parties, and calculate the fees per each plaintiff. Others interpret the law to mean that one fee should be set for the entire class.⁵⁵

Things get even more confusing when the plaintiff sues for a declaratory relief concerning economic rights (i.e., rights, either tangible or intangible, which have some value measurable with money). Under established precedent, the value claimed should be determined as the value of the right or benefit plaintiff would receive if she sued for damages or specific performance in respect of the subject of the claim brought.⁵⁶ In cases where it is impossible or impracticable to determine such value at the outset of the litigation, the court can order that the plaintiff pay a “temporary fee”, which in an individual case can be anything between PLN 30 and 1,000 and in case of a class action – between PLN 100 and 10,000 (again, it is not clear whether the fee should apply to each class member or the class as a whole). There is no authority that would provide judges with guidelines on how such temporary fees should be set, thus ensuring their predictability.⁵⁷

What makes budgeting of a lawsuit particularly difficult are the rules of procedure which grant the judge a broad discretion when dividing the costs after the case has been decided. One rule says that in

⁵⁴ For instance, if the class has 1,000 members with claims of PLN 10,000 each, the total value claimed is PLN 10,000,000. If the cap of PLN 100,000 applied to that aggregate, the class would pay the ceiling fee (because 2% of the total value claimed exceeds the ceiling). In such case, effective filing fee per class member would be $10,000,000 : 100,000 = \text{PLN } 100$, or 1% of the value claimed per plaintiff. If, however, the cap applied to each class member separately, then each plaintiff would pay PLN 200, or 2% (because the individual fee of PLN 200 is far less than the statutory cap of PLN 100,000). For the class as a whole, the sum of individual fees yields a fee of $1,000 \times \text{PLN } 200 = \text{PLN } 200,000$, twice as much as when the fee was calculated for the class in its entirety.

At the other end of the spectrum, if the same class brought instead small claims of, say, PLN 100 each, then the filing fee per class would be $2\% \times (1,000 \times \text{PLN } 100) = \text{PLN } 2,000$, which gives PLN 2 per plaintiff. If, however, the fee were calculated individually, then the individual fee would amount to PLN 30 (i.e., the floor fee) and $1,000 \times \text{PLN } 30 = \text{PLN } 30,000$ for the entire class, 30% of the aggregate value claimed.

The above tedious (although fairly simple) computations show how the arithmetic of court fees may impact the plaintiffs' (and class counsel's) decisions when it comes to selection of cases to be brought as well as structuring of legal fees.

⁵⁵ Things even more complex when one notes that the fee should be somehow applied to the plaintiffs who want to opt-in after the class has been certified by the court, but before it is finally closed. On the one hand, the filing fee, as the name suggests, must be paid at the filing stage. On the other hand, it seems against the spirit of the law, and the general rule obligating every plaintiff to pay a filing fee, to allow members joining the class at a later stage to “free ride”. Those concerns, the argument goes, suggests the filing fee should be applied to each plaintiff individually.

⁵⁶ E.g., if the plaintiff sues for the declaratory judgment establishing that defendant is liable to pay her certain sum of money, the value thus claimed is deemed the same as if the plaintiff demanded payment. *See, e.g.*, decisions of the Supreme Court of April 19, 1989, II CZ 59/89 and of July 9, 2009, II PK 240/08.

⁵⁷ The difficulties with such legal setting are readily apparent: if the class comprises plaintiffs with claims of unequal value, the requirement to determine the value claimed for each plaintiff individually (in a declaratory judgment suit brought precisely for the purpose of avoiding the issues different claim values may cause) could easily turn the case into a procedural nightmare. A simplified approach of having the fee calculated based on some average value would result in some plaintiffs subsidizing others, a solution that may be controversial both for judges and the subsidizing class members.

“particularly justified circumstances” the court may order that the losing party pay only a part of the costs or that it does not pay costs at all.⁵⁸ As it happens, courts routinely find there are some “particularly justified circumstances” in the cases they hear, particularly when the plaintiff is an individual of limited means suing a corporation or when she “had no way of knowing whether the defendant is liable” because of difficult questions in fact or law.⁵⁹

Another difficulty stems from the plaintiff’s obligation to name the value claimed at the outset of the case. Often the task that is not easy, but, nevertheless, such determination is necessary for the complaint to be well plead.⁶⁰ The court cannot award more than the value claimed, so the plaintiff usually asks for more than what she realistically hopes to recover. However, the value claimed is the baseline for determining in what percentage each party won the case: the plaintiff who “overshoots” too much will be deemed to have won only in part and will recover a corresponding percentage of the costs incurred.⁶¹

Therefore, the higher the actual legal fees and the more uncertain the case outcome, the more it is likely that the final distribution of litigation costs would deviate from the English rule in the direction of the American rule.

State Treasury: the largest third-party funder of litigation

In order to properly understand the strategic decisions Polish plaintiffs and lawyers face when preparing a “business plan” for a civil litigation, as well as the properties of the Polish market for third-party funding, it is absolutely crucial to take stock of two systemic peculiarities. First, the largest third-party funder of litigation in Poland is the State Treasury. Second, lawsuits against insurers, a large class of

⁵⁸ Article 102 of the Polish CCP. The court’s judgment in that matter is rarely changed on appeal (because the appellate court applies the abuse of discretion test).

⁵⁹ See the Supreme Court decisions of February 3, 2010, II PK 192/09 (unpublished); December 20, 1979, III PR 78/79, OSPiKA 1980/11/196; August 29, 1973, I PR 188/73, OSNCP 1974/3/590; and July 4, 1974, I CZ 88/74 (unpublished).

⁶⁰ For the court, the value claimed is the point of reference when checking whether the filing fee has been paid in the proscribed amount. Whenever the plaintiff is required to indicate the value claimed, but fails to do so, the court will dismiss the case (without prejudice) (Article 126(1) of the Polish CCP). Polish courts show extreme formalism in those matters. One famous example was a case when an attorney filed an appeal and paid the fee calculating the exact percentage of the value claimed (PLN 10,681.03) without rounding it up (i.e., PLN 10,682). The Appellate Court dismissed the case, and because the proscribed filing period lapsed in the meantime, the appellant had no opportunity to pay the missing PLN 0.97 and refile. The Supreme Court upheld the ruling and, moreover, held that the attorney may be liable for malpractice, since he failed to properly calculate the filing fee (the Supreme Court ruling of May 30, 2007, I CZ 48/07 (unpublished)).

⁶¹ For instance, if the plaintiff sues for PLN 1,000, but recovers only PLN 600, she is deemed to have won the case in 60%. This means the plaintiff would then be entitled to have 50% of her attorneys’ fees paid by the defendant while paying 40% of the attorneys’ fees of the defendant (both subject to the applicable statutory cap). All other costs of the litigation, including filing fees paid by the plaintiff at the beginning, would be divided pro rata and one of the parties would be required to pay the net sum to the other. Even if the plaintiff reduces her claim before the final decision is made by the court, the initial value claimed would still be considered for the costs determination, and the reduction would be deemed a partial withdrawal of the claim (i.e., a loss in such part).

cases considered by private third-party funders in other cases, are effectively funded in part by the defendant.

The role of the State Treasury of the third-party funder results from the power of the court to grant the plaintiff a full or partial exemption from the obligation to pay “court costs”,⁶² if she can demonstrate she is unable to cover them. The exemption covers not only the filing fee, but also subsequent costs of litigation.⁶³ In practice then, even a partial exemption usually means that the totality of the future, uncertain costs of litigation beyond the sum ascertained by the court as the plaintiff’s contribution, is being borne (temporarily, and perhaps permanently) by the Government.⁶⁴ In theory, the court must make a ruling on costs, including the “court costs” of the whole litigation and respective attorney’s fees paid by the plaintiff and the defendant (subject to the statutory cap) in its final decision. What it means in practice is that if the Government-sponsored plaintiff wins, the costs of litigation are payable by the defendant, i.e., the plaintiff receives an interest-free credit. If the plaintiff loses, the court often orders that the plaintiff be not encumbered with costs, i.e., in the aftermath, the case is co-funded by the Government and the defendant. This includes cases when the plaintiff sues the Government – that is, the Government funds cases against itself.

The “exemption regime” weighs heavily on the plaintiffs’ decision to bring cases as class actions, where the filing fee is 2% of the value claimed instead of the regular 5%. But what seems like an attractive “quantity discount” rate may in fact work as a disincentive, because the lower filing rate also means the plaintiffs cannot apply for the costs exemption. And the 2% plus the uncertain future costs of evidence proceedings and case management is decidedly more expensive than litigating for free.

As far as insurance cases are concerned, the key characteristic of the Polish insurance system is the insurer’s obligation to pay “undisputed part of damages” following the claim adjustment process.⁶⁵ Such

⁶² Those costs may include all cost categories mentioned earlier: the court filing fees; costs of evidence proceedings and case management; and attorneys’ fees, provided the judge, on plaintiff’s motion, orders that she be assisted by a public defense attorney. Such attorney, per the court’s order, is selected by the local bar from among the local bar members after considering the substantive specialization required. The attorney may refuse representation only in special circumstances. He is paid by the Government pursuant to statutory rates which in most cases are far lower than market rates for the job assigned.

⁶³ In case of natural persons, the test for granting the exemption is whether the plaintiff can pay court costs without harm to the necessary upkeep of himself and his family (Article 102 of the Act of July 28, 2005 on court costs in civil matters, Journal of Laws No. Dz.U.10.90.594 (consolidated text), as amended, hereinafter, the “**Court Costs Act**”). Legal persons can be exempted if they satisfy the court that they do not have sufficient funds to pay the costs (Article 103 of the Court Costs Act). Charitable organizations, as well as other public organizations whose statutory purpose is protection of consumers, science, education, culture, sports, or another similar public good, may be exempted, at the court’s discretion, in their own matters related to the public good they seek to protect (Article 104 of the Court Costs Act). The Government is always exempted from court costs in full (Article 94 of the Court Costs Act).

⁶⁴ The Court Costs Act grants judges a broad discretion in structuring the exemption; the court can exempt the plaintiff from paying a specific sum, specific percentage of costs or certain itemized costs. Courts almost never use those powers, however, and continue to rule in line with a long-existing practice, i.e., they grant exemptions either in full or in part by *de facto* exempting the plaintiff in full beyond a lump-sum contribution.

⁶⁵ The law states that the insurer must pay within 30 days from the receipt of the policyholder’s notice that an insurance event occurred or within 14 days from the date when it became possible for the insurer to establish its

payouts discourage pre-trial settlements and provide claimants with resources necessary to cover costs of living and fund litigation for additional damages. In effect, insurance plaintiffs sue their insurer with that insurer's money. Oftentimes, they are also co-funded by the Government, should a costs exemption be granted.

Third-party funding: opportunities mainly for commercial funders

The strong role of the Government in funding private cases and, additionally, the insurance regime currently in place, make the Polish legal market less attractive for consumer third-party funding. Business-wise, a more promising alternative could be to fund commercial cases, which appear to grow both in number and value along with the Poland's GDP. However, private funding is usually confidential, especially when the funded case goes to arbitration instead of a court of law. Disclosed instances of such funding remain scarce.

One known case is the story of Wirtualna Polska ("Virtual Poland", "WP"), one of the oldest and most popular Polish web portals (www.wp.pl).⁶⁶ In 1995, about the time when Poles started discovering the world wide web, four Polish entrepreneurs founded an Internet startup offering a number of functionalities, somewhat similar to Yahoo or AOL. As the site grew in popularity, third-party investors rushed in. In 2001, when the dotcom bubble in the United States was already bursting, Poland's leading telecom operator, Telekomunikacja Polska (TP S.A.), purchased control over WP, keeping the funders in charge of the company's day-to-day operations. The share purchase agreement provided that TP S.A. would immediately acquire a majority stake (for a sum reported to be in the range of a few million dollars), and the funders would remain in the company as minority shareholders (with the aggregate holding of ca. 20%). The agreement granted the funders a put option on the remaining shares, exercisable at a future date, with the share price dependent on the number of unique users WP would have at the time of sale. In 2003, when the funders decided to sell, market conditions worsened significantly, but the number of users went through the roof, and so did the minority holding price, which TP S.A. refused to pay. As the conflict among shareholders grew, WP started losing financial liquidity and in April 2004 declared bankruptcy. In consequence, two funders sold out for much less than the price under the put option. The remaining two funders sued the telecom in arbitration.

The minority shareholders got backing from an American hedge fund specializing in distressed assets, Elliot Associates, who immediately hired one of the largest Polish law firms to represent the funders in

liability (Article 817 of the Polish Civil Code). Insurers are liable to pay statutory interest on sums unreasonably withheld and risk regulatory penalties for protracted adjusting of claims.

⁶⁶ Currently Alexa ranks WP as seventh most popular site in Poland, third among Polish sites (excluding global powerhouses such as Google, Facebook and YouTube). See <<http://www.alexa.com/topsites/countries/PL>> (last access date: November 16, 2011).

arbitration. The case was confidentially settled, with the settlement value reported in the range of PLN 220 million. Elliot is reported to have received “almost half” of the settlement’s total.⁶⁷

BTE Insurance – new form of litigation funding in Poland

BTE insurance in Poland has been very limited until now. It was only offered as part of motor insurance policies, covering traffic accidents. The Polish insurance market is still quite immature, and insurance covering litigation expenses in general was unknown. While motor insurance is compulsory, it is relatively easy to offer a litigation expenses insurance as part of it. On the other hand, it was difficult to imagine that a large enough pool could be established for an insurance product of a more general nature to actually be financially feasible.

The situation is now changing. In October 2011 the Barristers’ Council and Concordia Insurance signed an agreement specifying conditions for their cooperation in popularizing such BTE insurance as a stand-alone policy covering litigation in various areas of law including tort, contract, family law, property law, real estate disputes, inheritance and trust advice, employment law, tax law and even criminal law. The policies are to be relatively cheap (depending on coverage between tens to a few hundreds PLN per month) and available to all.⁶⁸

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⁶⁷ See Aleksander Piński & Michał Adamczyk, *Miliony w sieci [Millions on the web]*, Wprost No. 16 of 2006, <<http://www.wprost.pl/ar/?O=89269&pg=3>> (last access date: November 16, 2011) (summarizing the story of WP); Anna Meller, *Wirtualna Polska ogłosiła upadłość, portal będzie dalej funkcjonował [Wirtualna Polska declared bankruptcy, portal to continue]*, Internet Standard of April 9, 2004, <<http://www.internetstandard.pl/news/65541/Wirtualna.Polska.oglosila.upadlosc.portal.bedzie.dalej.funkcjonowal.html>> (last access date: November 16, 2011) (reporting on WP’s bankruptcy); Anna Meller, *Jacek Kawalec: Wirtualna Polska to szkoła przetrwania [Jacek Kawalec: Wirtualna Polska is a survival camp]*, <<http://www.internetstandard.pl/news/69665/Jacek.Kawalec.Wirtualna.Polska.to.szkoła.przetrwania.html>> (last access date: November 16, 2011) (interview with one of the founders before the conflict ended); and Marek Druś, *TP SA zawarła ugodę z akcjonariuszami Wirtualnej Polski [TP SA settled with shareholders of Wirtualna Polska]*, Puls Biznesu of July 22, 2005 <<http://www.pb.pl/1402872,91684,tp-sa-zawarla-ugode-z-akcjonariuszami-wirtualnej-polski>> (last access date: November 16, 2011) (reporting on the settlement and its terms).

⁶⁸ Whether the new insurance takes off remains to be seen: given that ca. 80% of Polish individuals do not use legal assistance in any matter, unless they are absolutely compelled to do so, BTE insurance is both a challenge and an opportunity for the market. See Joanna Sędek, *Ubezpieczenie ochrony prawnej szansą na częstsze korzystanie z pomocy adwokata [Insurance for legal protection as chance that advocate’s services would be used more often]*, Press release of the Supreme Council of Advocates, <<http://www.adwokatura.katowice.pl/wiadomosci-adwokatury-szczegoly/items/ubezpieczenie-ochrony-prawnej-szansa-na-czestsze-korzystanie-z-pomocy-adwokata.html>> (last access date: November 16, 2011).