

Update on Group Litigation in Switzerland (December 4, 2009)

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There is little that has changed since my original 2007 report. However, two developments are worth mentioning:

First, as I indicated in my report for 2008, the two houses of the Swiss legislature adopted a final version of the new Federal Code of Civil Procedure on December 4, 2008. On April 16, 2009, the deadline for a popular referendum against the new Code passed without a referendum request. The new Code is therefore scheduled to go into effect in January of 2011.¹ As one may recall from my original 2007 report, the Code does not envision the adoption of a class action device since many of the chief players involved in drafting the Code were forcefully opposed to such an idea. Even the established device of the association suit in administrative proceedings (*Verbandsbeschwerde*) came under attack by the Liberal Democrats, who had been able to put an initiative on the ballot that would have significantly limited the *Verbandsbeschwerde*. As I indicated in my report last year, however, the Swiss populace rejected that initiative on November 30, 2008, thus leaving the *Verbandsbeschwerde* intact.

Second, quite in contrast to the general rhetoric against class actions, there are a couple of narrow specialized areas in which a limited class-action-like device has been developed. In my 2007 report, I mentioned the introduction of representative litigation for minority shareholders in cases of mergers and acquisitions in the 2003 Mergers and Acquisitions Act (pp. 36-37). More recently, the judiciary has adopted a similar device in the area of health insurance: According to Article 56(2) of the 2005 Federal Health Insurance Act, both patients and medical insurers have a claim against physicians for “inefficient treatment,” which is defined as treatment that was either unnecessary given the needs of the patient or unreasonably expensive (including failing to pass discounts on drugs and medical procedures on to the patient). Nothing in that provision mentions the possibility of group litigation. However, health insurers are obligated to keep statistics to promote treatment efficiency. They do so through *Santésuisse*, a trade association. *Santésuisse* has accordingly been collecting information on treatments ordered by Swiss physicians and has started suing physicians who have ordered treatments significantly beyond the norm in the name of all health insurance companies that have ever paid bills of the physician in question.

In a decision of June 9, 2008, the Insurance Court of the Canton of Zurich upheld this practice. In that case, *Santésuisse* had sued in the name of 35 health insurers and was awarded a judgment of Sfr. 232,224.- (roughly \$225,000) for overpaid fees, to be distributed among the insurers at a later time. According to the Court, prior consent of the

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¹ For more on the new Code, see Samuel P. Baumgartner, *Civil Procedure Reform in Switzerland and the Role of Legal Transplants*, in *THE FUTURE OF CATEGORIES, CATEGORIES OF THE FUTURE* (Janet Walker, Oscar Chase & Barry Leon eds., forthcoming).

insurers was not needed since *Santésuisse* had been given a power of attorney to bring such suits in its bylaws. Moreover, it was not necessary to determine ahead of time which insurer had paid how much in the time period in question so as to permit effective and timely relief. Such a determination of each exact debt was further immaterial for the defense of the physician since it did not matter to him which insurer had ultimately paid which bill. After all, according to the Court, the physician needed to defend not individual bills, but rather against the general charge of an across-the-board overtreatment of patients. Consequently, the Court also saw no problem in the practice of averaging overpaid fees of the defendant to be equally distributed among the absent plaintiff insurers. In an “unpublished” decision of May 8, 2008,² the Swiss Supreme Court, too, supported the practice of representative litigation by *Santésuisse*. In a brief paragraph, the Swiss Supreme Court laconically concluded that Article 56(2) of the Health Insurance Act provided a sufficient legislative basis for this type of litigation.

² On published “unpublished” decisions of the Swiss Supreme Court, see my 2007 report at fn. 158.