

Class Actions Come to Poland: A New Risk for the Insurance Industry

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In July 2010, the Act on Pursuing Claims in Group Proceedings dated December 17, 2009 (Journal of Laws from 2010, No. 7, item 44) (the Act), went into force, introducing class actions into the Polish legal system. Although it is perceived as a step towards improving the efficiency of court proceedings and facilitating access to courts for people who cannot afford to start a lawsuit by themselves, the effects of the Act (in particular whether it will be the trigger of a revolution in the Polish judicial system and cause a flood of class action suits) remain to be seen. However, what is certain today is that new risks are faced by sectors susceptible to damages caused by hazardous products (eg the tobacco and pharmaceutical industries) or where relations with consumers are standardized on a mass scale (eg banks, developers, tourism). In both cases, insurers and reinsurers could be at risk either indirectly or directly.

With respect to liability regarding mass consumer services, the Polish judiciary has already developed quite extensive experience, and it does not seem that the Act's effect in this area will be great. However, unprecedented exposure for insurers and reinsurers may be connected with liability related to hazardous substances (which under Polish law are movables, animals and electric energy). Polish regulations are more restrictive for producers and importers than provided by EU regulations. The claimant does not have to prove either the dangerous feature of a specific product or the causal link between such property and the damage. The burden of proof is limited to the fact of incurring damage.

It is therefore worthwhile to examine the general features of class actions, as adopted in Polish law.

Pursuant to the Act, only a group of at least 10 people (there is no maximum limit of claimants) has the right to pursue claims under the regime of class actions. Unlike under American regulations Polish class actions are based on an "opt-in" model of participation, which requires (i) the claimants to be defined (not anonymous) and (ii) the claimants' unambiguous declaration of willingness to participate in the class action (made in front of the court). Once a suit is filed, it is announced in the press to enable all those interested to join the class. It should be noted that a class action does not exclude individual claims brought under the general regime of liability in force in Poland.

It is important to point out that class actions are not possible in all legal cases. The catalogue of claims covered by the Act is strictly limited to those that can be brought in connection with consumer protection and responsibility for damage caused by dangerous products and tortious acts (but excluding protection of personal rights). Additionally, the claims brought by the class must be of the same type, and the circumstances on which they are based have to be the same. Although employment-related issues were included in first drafts of the Act, the Polish legislature has ultimately excluded them.

As a measure of protection against the risk of "blackmailing" potential defendants by using the threat of instigating a class action, the Act provides for a guaranty deposit to secure the costs of the proceeding. At the request of the defendant, the court may oblige the claimants to deposit a sum equivalent to the estimated amount of costs to be incurred by the defendant, although it cannot be higher than 20% of the value of the damages claimed. However, in the course of the litigation the defendant may request an increase of the deposit. If the claimant does not satisfy the obligation of securing costs, the statement of claim will be dismissed.

Class actions are conducted by a representative appointed by the claimants. The representative may be a member of the claiming group or a municipal consumer ombudsman. It is important to note from the procedural point of view that the representative has to be represented by an attorney at law. The representative's obligations include: (i) agreeing on the rules for participation in the group and the remuneration of the attorney; and (ii) handling the proceedings under his/her own name but on behalf of all group members. Thus, members of the group are not party to the class action and do not take an active part in the proceedings.

One of the most important features of class actions in Poland is that all the group's members agree on the unified amount per person being claimed. Such an agreement may also diversify the amounts being claimed, provided that they are settled within subgroups of at least two persons.

The court fee in cases of property rights asserted in a group proceeding amounts to 2% of the value of the subject of litigation, but cannot be less than PLN 30 or more than PLN 100,000. (PLN 100,000 currently equals approximately USD 34,500 or GBP 22,000.) All members of the group initiating a class action contribute to this fee, which makes this kind of proceeding much cheaper than individual cases, where fees amount to 5% of the value of damages claimed and have to be borne by the claimant individually. However, contrary to individual claims, the Act does not provide for the possibility of being exempted from court charges (which is quite frequently applied in cases initiated by persons with low income).

Given the relatively short period of time since the Act became effective, it is difficult to estimate its effects. However the following difficulties regarding its application may be pointed out: (i) no mechanism has been developed so far relating to the gathering of future claimants having similar claims against an entity; (ii) the judiciary lacks experience in handling class actions, which may cause inefficiency in court proceedings; and (iii) unavoidable costs of court fees and attorneys' remuneration may discourage certain groups of potential claimants from joining a class action.

In practice, the first class actions have been filed by recent flood victims in Poland and by victims of medical malpractice. The damages claimed are respectively PLN 9.3 million (approximately USD 3.2 million/GBP 2 million). and PLN 75 million (approximately USD 26.1 million/GBP 16.5 million). Other class actions are being considered, although the obligation of the guaranty to secure costs seems to be an obstacle.

It is too soon to gauge the magnitude of exposure from class actions brought under the Act on insurers and reinsurers of Polish risks, but whatever the risk, it is one that has never before existed.

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