EUROPEAN
Justice Forum

European Justice Forum (EJF) Key Messages[1]

I EJF seeks a balanced Consumer Redress System for the Benefit of Consumers and Society as a whole

- EJF favours rapid resolution of claims that have merit and equally rapid dismissal of claims that have no merit.
- Collective litigation is slow; complex; costly; and risky. It does not serve consumers well.
- Europe has well established settlement and alternative dispute resolution systems. Europe also has many examples of public regulators or ombudsmen who can influence the parties to resolve their disputes by agreement rather than litigation.

II Collective Litigation threatens Society and does not serve Individuals well

- Countries that rely on collective litigation face significant unintended consequences to their society.
- Collective litigation has driven companies out of business, destroying employment, pensions and investments.
- It can be a major disincentive to investment. For example, in 2007, Mayor Bloomberg and Senator Schumer published a report on the decline in competitiveness of the New York capital markets. They identified the litigiousness of the U.S., exemplified by the threat of class actions, as a major factor in deterring companies from raising capital in New York.[2]
- According to one estimate the cost of tort litigation in America is about US$250bn (Euros 198bn) per year, or $825 (Euros 651) per person.[3]

[1] *The European Justice Forum (EJF) is a coalition of businesses, individuals and organisations that are working to promote fair, balanced, transparent and efficient civil justice laws in Europe. EJF is seeking to ensure that the legal environment in Europe protects both consumers and businesses alike. For further information please see our website: http://www.europeanjusticeforum.org or contact the EJF Secretariat at info@europeanjusticeforum.org*

[2] M R Bloomberg and C E Schumer, *Sustaining New York's and the US's Global Financial Services Leadership*.

[3] 2007 Update on *US Tort Cost Trends*, (Tillinghast-Towers Perrin 2007).

- In major European countries, tort litigation already costs an average of just under 1% of GDP. In America, it costs 2% of GDP. The difference in cost is in part driven by class actions.

- Individual litigants are often left with inequitable and/or very modest (if any) compensation.

- Litigation is typically an inefficient way of compensating individuals. For example, a recent legislative proposal in the Scottish Parliament proposes that individuals with pleural plaques should be able to claim compensation through the Courts[4]. The compensation envisaged is on average £6,000 (Euros 7,800), but the anticipated overall cost per application is £20,000 (Euros 26,000). In other words, the costs would be twice the amount of compensation.

- The administration of a large class creates inequitable distribution of awards that often fails to reach all members. According to one study of insurance class actions, the average case paid benefits to only 45% of the estimated number of class members with the typical case having only a 15% claiming rate.[5]

- The biggest beneficiaries of collective actions are often the law firms that finance the litigation and turn it to their own benefit.

- The same study of insurance class actions[6] concluded that the mean and median attorneys' fees and expenses were 50% of the total award, and in a quarter of the cases studied, the amount was closer to 75%.

- It is easy to assume that the US Class Action system is a "toxic cocktail of ingredients" all the ingredients of which must be present to cause abuse. In fact, even if elements that characterise the US system are excluded (such as punitive damages; opt-out actions; jury trials; and the lack of a user-pays rule) are excluded from a European system, for the reason given below, abuse is likely.

- The core issue is funding. Consumers cannot afford the cost and very few Governments will provide the funding, which leads to private funding through plaintiff law firms and process financing companies that only undertake the risk if the financial incentive to do so is sufficiently attractive, which creates entrepreneurial behaviour and abuse.

- Accordingly, to avoid abuse from elements of the US Class Action system and the risk of duplicating its entrepreneurial market for class actions, it is important to implement more safeguards than the US has in place for its own system.

III Industry wants to see Fair Play

[4] Scottish Pleural Plaque Bill 2008. Pleural plaques are a non-disease condition which causes no physical harm to the individual but is an indication that the individual may in the past have been exposed to asbestos.
[5] RAND Study, *Insurance Class Actions in the United States*, April 2007.
[6] Ibid.

- Reputable companies want a level playing field. They do not want rogues or crooks to gain unfair advantage by failing to make good any damage done.

- Successful companies depend on the strength of their name. They invest in Corporate Governance. When mistakes are made, they need to make amends to protect their reputation.

- Formal litigation may be needed as a last resort when issues cannot be resolved through other means, but in most circumstances it should not be necessary because reputable companies will seek to avoid reputational damage and litigation by making voluntary restitution.

IV Alternatives to Litigation have been shown to Work

- Each Scandinavian country has the means for collective litigation, but disputes are typically resolved by agreement. The Ombudsman brings the parties together and encourages voluntary agreement. In Finland, collective litigation cannot be brought by consumers except through the ombudsman, and this gives a good measure of protection to all parties.

- In Holland, major disputes worth Euros 1.5bn have been resolved under the Dutch Financial Settlement Law. The Court makes sure the settlements have been properly reached and are fair. It then endorses them and ensures finality. No proceedings can again be started regarding the settled dispute.

- In the UK, all public regulators have a legal obligation to try to ensure compensation for those who suffer loss as a breach of regulations. For example, as a result of OFCOM's action, television companies made voluntary restitution for those who incurred cost by competing in phone-in competitions after the competition result had been decided.[7]

- After regulatory action in Portugal, mobile phone customers who had been overcharged were compensated by the phone companies voluntarily providing free phone usage over a weekend.

- Such solutions are quick and simple to obtain and provide immediate compensation at minimal cost to the consumer.

V Minimum Safeguards for Collective Litigation

- If collective litigation is unavoidable, there must be safeguards to avoid abuse.

- The Court should refuse to hear collective litigation unless it is clear that all means of voluntary settlement and other alternatives – including action by relevant public authorities – have been exhausted.

[7] Regulatory sanctions and Enforcement Act 2008.

- If an individual has a complaint which is significant enough to be funded on its own, that case should not be consolidated with others in collective litigation. Instead, it should be heard as a separate case so that all relevant factors can be individually and properly considered.

- All litigants must consciously agree to be represented in any litigation (the opt-in approach) and must express their intent by a deadline prior to resolution of the merits. There should be no so-called "opt-out" actions where individuals are involved in litigation without their knowledge or agreement.

- Funding must be carefully controlled. There should be a reasonable cap on lawyers' fees, the German tariff system providing a good precedent. In particular, there should be no contingency fees. These act as a strong profit motive to plaintiff law firms and encourage litigation.

- The existing rule that the loser must pay the winning side's costs should be maintained. This discourages unmeritorious actions.

- Courts should rigorously examine whether the 'class' of claimants have the same cause of action and potential claims. There should be no false classes.

- The EU should not expand discovery processes into countries that do not already have such procedures. In all countries there need to be effective measures against "fishing trips" to obtain evidence from the other party and thereby pressure that party into settlement in order to avoid unreasonable costs.

- The purpose of the litigation should be to obtain compensation. This means that there must be no punitive damages.

- Cases should not be tried in front of juries, since this is liable to evoke sympathy verdicts.

- Litigation must not be permitted on matters already resolved by settlement or any other means.

- The most important safeguard of any fair collective redress model must prevent so-called "blackmail settlements" that force defendants to forgo meritorious defences out of fear that they will not get a fair hearing on the merits when considering the risk of the damages.

- The safeguards described above will help prevent the development of Courts or jurisdictions analogous to what has been termed "judicial hell-holes" in the US.

VI EJF's Recommendations

- It is essential that policy is directed at the resolution of and redress for only those disputes that have merit and where wrong-doing has taken place. There is an ever-present risk that discussions about collective redress begin to assume that all consumer complaints deserve redress. It is important to note that this is far from the case. The Danish ombudsman finds that some 40% of the disputes brought to

him disappear after discussion with the parties results in the consumers taking a different view of their rights and withdrawing their complaint.

- Where there is merit to the complaint, all sides should recognise that disputes are best resolved by settlement. Litigation should be a distant last resort, and if it is to be used, it must be subject to safeguards as set out above.

- Settlement of meritorious complaints should be encouraged by ombudsmen, sectoral regulators and/or other public authorities. As illustrated above, such public enforcement can provide quicker, fairer and more cost-effective solutions than litigation.

- The involvement of such public authorities early on should help prevent polarisation of disputes. It can also help deter weak or meritless claims.

- Public authorities should be involved as facilitators of settlements where there has been wrong-doing. They should not be judge or jury, and they must not misuse their influence. Public authorities must follow appropriate rules to ensure fairness and due process.

- Where there has been wrong-doing and there is a need to achieve redress, the Courts should preferably be involved not as a forum for litigation, but to encourage settlement and in so doing to ensure proper procedure is followed; that no party or public authority abuses its position; that the settlement is fair. "Fairness" includes an assessment of the merit of the original complaint, consideration of whether there actually was wrong-doing by the defendant, and ensuring that blackmail settlements are not allowed. Where redress is appropriate, the Court can also give finality to the matter. By endorsing agreed settlements as the end of the matter, the Courts can prevent further disputes arising over the same matter. The Dutch settlement Law gives a practical example of how this can work.

Annex
The cost of excessive litigation in USA

Data from USA illustrates these trends and the vast and wasteful costs that such a system imposes on that economy:

1. US Tort Costs in 2006 were estimated at $247bn, which was approximately $825 per person of the US population.[8]

2. There is evidence that CAFA legislation and other developments at State Level have helped mitigate the growth of class action suits. Indeed, the Tillinghast Towers Perrin report quoted above recorded in 2006 the first decrease in tort costs since 1997. Costs in 2006 fell by 5.5% compared to 2005. However, up to 2006, recent years have seen significant increases in tort costs. The growth of tort costs in 2003 was 5.7%; in 2004 it was 5.5%; and in 2005 it was 0.5%. Looking ahead, Tillinghast forecast that tort costs will grow by 2.5% in 2007 and by 4.5% in 2008 and 2009[9].

3. A US federal government analysis in 2002 concluded that excessive tort litigation costs in 2000 were an $87 billion drag on the national economy.[10] The study estimated that the impact of wasteful legal expenditures equated to a 1.3% tax on consumption, or a 2.1% tax on wages.

4. Over the past 56 years, direct tort costs in the US grew more than 100-fold from less than $2 billion in 1950 to $247 billion in 2006, while GDP has only grown by a factor of 45. The 2007 figure equates to a "litigation tax" of $825 per person, compared to $12 in 1950, and is equal to just under 2% of the Gross Domestic Product of the United States. Nearly one in six jury awards is now $1 million or more. Over 7% of businesses experienced a liability loss of $5 million or more during the past five years.[11]

5. In 2005 the annual tort cost for small US businesses was $98 billion. This equates to $20 per $1,000 of revenue. Small businesses bear 69% of US business tort liability but take only 19% of revenues. They pay $20 billion of their tort costs out of pocket, as opposed to through insurance.[12]

6. A survey of 500 U.S. CEOs by the Conference Board found that lawsuits caused 36% of their companies to discontinue products, 15% to lay off workers, and 8% to close plants.[13]

7. A Gallup survey of U.S. small businesses found that 26% of owners said that fear of liability kept them from releasing new products, services or operations to the market.[14]

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[8] 2007 Update on *US Tort Cost Trends*, (Tillinghast-Towers Perrin 2007).
[9] Ibid.
[10] *An Economic Analysis of the U.S. Tort Liability System*, (US Council of Economic Advisers, 2002).
[11] 2007 Update on *US Tort Cost Trends*, (Tillinghast-Towers Perrin 2007).
[12] *Tort Liability Costs For Small Business* (US Chamber Institute for Legal Reform, 2007). Small businesses are defined here as those with less than £10 million annual revenues and at least one employee in addition to the owner. The tort cost increased 13% from 2002 to 2005.
[13] Ibid.
[14] National Small Business Poll (National Federation of Independent Businesses, 2002).

8. US corporations paid $2.5 billion to shareholders to settle securities class actions in 2005.[15] Settlements in securities cases have grown successively over the past decade: in 735 cases between 1997 and 2005, the total settlement amount was $26 billion.[16] This would have yielded plaintiffs' lawyers' fees $7.8 billion assuming the average 30% contingency fee is assumed.

[15] L E Simmons and E M Ryan, *Post-Reform Act Securities Settlements: 2005 Review and Analysis* (Cornerstone Research, 2006).
[16] Ibid.