DAC BEACHCROFT

Social Inflation: A thematic and jurisdictional guide

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Introduction

What do we mean by 'social inflation'?

Social inflation has become a familiar expression to those handling insurance claims. It is often traced back to Warren Buffett over 45 years ago, accompanying a warning to Berkshire Hathaway shareholders that costs in the insurance sector were expected to rise. He identified one of the causes as social inflation, which he stated was "a broadening definition by society and juries of what is covered by insurance policies."

Social inflation is now recognised as a trend of rising insurance claim costs due to social, political, legal and economic developments. In 2020, Darren Pain of The Geneva Association stated that "social inflation refers to all ways in which insurers' claims costs rise over and above general economic inflation, including shifts in societal preferences over who is best placed to absorb risk."

This wider rise in claims costs is often referred to as claims inflation. Lloyd's defines claims inflation as "the change in claims cost of a like-for-like policy over time." It goes on to explain that it is the sum of:

- Economic inflation – changes in claims costs as captured through published economic indices relevant to an insurer's mix of business;
- Excess inflation - changes in claims costs beyond what is captured in economic indices, including factors specific to a insurers' business, such as supply chain disruptions, new types of claim and demand surges; and
- Social inflation – sometimes referred to as a subset of excess inflation, relating to changes in claims costs as a result of societal trends.

In recent years, a new description of 'legal system abuse' has been employed for those impacts traditionally associated with social inflation. This term, or the similar 'litigation abuse', may carry more negative implications, focusing on the more controversial elements included in discussions around social inflation, particularly in the United States, including plaintiff tactics "to initiate more lawsuits, drive up litigation expense costs and settlements for defendants, and secure higher verdicts."

For consistency, we use the term 'social inflation' throughout this guide.

As a phenomenon associated with the United States, many of the key factors driving social inflation derive from the litigation environment there. The impact of those factors on the insurance claims environment will differ across jurisdictions. This guide considers the different factors both thematically and by jurisdiction, and what they mean for the insurance industry.

What drives social inflation?

Key factors driving social inflation include:

Collective redress mechanisms

Litigation funding

Emerging risks

Public sentiment

Nuclear verdicts

Claimant strategy

You can read about each of these in more detail under the headings that follow.

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Collective Redress

The use of collective redress mechanisms to bring claims on behalf of large groups or classes of individuals means more claims, more claimants, increased litigation funding, increased claims costs and the potential use of these mechanisms in relation to emerging risks. It is arguably the most significant influence on social inflation.

An additional consideration is whether opt-in or opt-out mechanisms are used. Opt-in actions require potential claimants to be proactive, whether joining or issuing proceedings themselves, or authorising a representative to act on their behalf. Opt-out actions allow a single party to act on behalf of a defined class, with any decision binding on any other party affected by the action, unless they choose to opt-out to preserve their own rights to pursue the claim.

The use of an opt-out mechanism is perceived as being more attractive to consumer organisations, litigation funders and claimant law firms, despite an opt-in procedure offering greater efficiency.

The United States, England and Wales and the Netherlands are particularly influential when considering social inflation and these jurisdictions have established collective redress mechanisms. The US and England and Wales have diverse mechanisms which create options for plaintiffs/claimants, and the Netherlands has a well-established regime which was a stimulus for the introduction of the Representative Actions Directive in the European Union.

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United States, England and Wales and the Netherlands

In the United States, there are collective redress mechanisms across state and federal jurisdictions. US federal class litigation is regulated by Rule 23 of the Federal Rules of Civil Procedure to ensure that class actions are certified only where appropriate. Many states have enacted analogous rules to Rule 23. The Class Action Fairness Act expanded the jurisdictional reach of federal courts over class actions and mass actions. Mass actions involve one hundred or more individual plaintiffs and common questions of law or fact but are not classified as class actions. These can be brought in federal courts despite the prerequisites for federal jurisdiction not being met. The use of the multidistrict litigation (MDL) procedure is another mechanism, allowing civil actions in different federal districts which involve one or more common questions of fact to be consolidated, along with the use of bellwether trials. To give a sense of the sliding scale of MDL, the 3M Combat Arms Earplug Product Liability litigation had a total of just under 277,000 actions pending in December 2023, with the National Prescription Opiate Litigation having over 3,000 actions pending.

In England and Wales, both opt-in and opt-out actions are capable of being pursued across a range of collective redress mechanisms:

- Group litigation orders manage multiple claims having common or related issues of fact or law. These are opt-in actions.
- In representative claims, one or more claimants represent other claimants with the same interest. These are opt-out actions.
- Competition Appeal Tribunal collective proceedings deal with alleged breaches of competition law. These can be opt-in or opt-out actions.
- Multiple joint claims allow multiple claimants to use a single claim form in the same proceedings. These can be defined as opt-in actions.

In the Netherlands, the Dutch Act on the Collective Settlement of Mass Claims (WCAM) introduced the concept of collective settlements into Dutch law in 2005. This was superseded by the Dutch Act on the Redress of Mass Damage in Class Actions (WAMCA) which came into force on 1 January 2020. WAMCA altered the landscape of class actions by allowing a representative entity filing an action on behalf of a group of injured persons to seek damages in a collective action, thus establishing both the liability of the party causing the damage and the compensation in a single lawsuit.

The European Union

There has been uneven implementation of the Representative Actions Directive (RAD) in Member States to date. The RAD covers representative actions, which are defined as an action "for the protection of the collective interests of consumers that is brought by a qualified [representative] entity as a claimant party on behalf of consumers to seek an injunctive measure, a redress measure, or both."

The RAD does not prevent Member States from adopting or retaining measures "for the protection of the collective interests of consumers at national level".

Collective redress via a representative entity can either be undertaken on a domestic or cross-border basis. Where a representative entity brings a representative action in a Member State other than that in which it is designated, that representative action should be considered a cross-border representative action. Where a qualified entity brings a representative action in the Member State in which it is designated, that representative action should be considered a domestic representative action, even if that representative action is brought against a trader domiciled in another Member State and even if consumers from several Member States are represented within that representative action. The RAD establishes a clear designation process for those representatives permitted to bring cross-border representative actions and leaves the question of designating domestic representative entities to the Member State in question.

The table on pages 6 and 7 summarises the current position at the time of writing.

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Jurisdiction	RAD implemented	Opt-in or opt-out?	Types of action covered by implementing legislation	Other collective redress mechanisms?
Germany	Yes	Opt-in	The legislation expands the new procedure to a wider range of infringements than those listed in Annex 1 of the RAD, including general tortious actions.	Prior to the implementation of the RAD into German law, other collective redress procedures were available in Germany. Since 2018, the 'model declaratory action' has allowed consumer protection associations to file lawsuits on behalf of multiple individuals who have suffered similar harm from the same defendant. The model declaratory action was retained by the implementing legislation and can be brought as an alternative to a claim for compensatory redress. A model declaratory action is an opt-in model and can be brought by a qualified entity and allows courts to make a declaratory finding regarding the potential liability of a defendant. Individual claimants must pursue their claims individually thereafter.
Italy	Yes	Opt-in	Designated qualified entitles are able to bring representative actions relating to infringements of European Union law as defined within Annex I of the RAD, as set out in Annex II-septies of the Italian Consumer Code.	Class actions (referred to as 'collective proceedings') were first introduced into Italian law in 2007 and are unaffected by the transposition of the RAD into Italian law. These actions can be brought independently by each member belonging to the class or by non-profit organisations or associations against companies or entities managing public services or public utilities. The non-profit organisations or associations must have statutory objectives which include the protection of the individual rights in question. The remedy sought in these actions could be compensatory or injunctive, and an action is not limited by the subject matter.
Republic of Ireland	Yes	Opt-in	Designated qualified entities will be able to bring representative actions relating to infringements of European Union law as defined within Annex I of the RAD.	Currently, there is no formal procedure for bringing class actions in Ireland. Multi-party litigation tends to be dealt with by test cases, where numerous claims arise from the same set of circumstances but only one single test case is run. This acts as a precedent for the remaining cases.
France	No. A draft bill is working its way through the French legislative process.	Opt-in	The proposed bill will allow designated qualified entities to bring representative actions as defined by Annex I of the RAD and merge all the existing group action legal frameworks into one single framework, enlarging the scope of application of the French collective redress mechanisms to all fields for all damages adopted.	French law currently provides for an opt-in group action procedure, which was introduced into French law (Law 2014-344) in March 2014 to cover consumer affairs. The procedure has gradually been extended to health products, environmental matters, personal data protection and discrimination suffered at work or in obtaining an internship or a job. The most recent group action was introduced in 2018 for compensation for collective damages suffered by consumers during the rental of a property. Group actions may only be brought before the civil courts currently.

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Jurisdiction	RAD implemented	Opt-in or opt-out?	Types of action covered by implementing legislation	Other collective redress mechanisms?
The Netherlands	Yes	Opt-out	All types of actions may be brought under the Netherlands collective redress regime following the transposition of the RAD reflecting the position prior to implementation. Actions can be brought for infringements of European Union law as defined within Annex I of the RAD including all securities claims, product liability claims, claims resulting from data breaches and (follow-on) damages claims against infringers of EU competition law.	WAMCA entered into force on 1 January 2020. WAMCA altered the landscape of class actions by allowing a representative entity filing an action on behalf of a group of injured persons to seek damages in a collective action, thus establishing both the liability of the party causing the damage and the compensation in a single lawsuit. Since June 2023, and the transposition of the RAD, an amended version of WAMCA has applied.
Spain	No. A draft bill is working its way through the Spanish legislative process.	Opt-out	The draft bill confirms that Spanish implementation of the RAD will not be limited to infringements of European Union law as defined within Annex I of the RAD but will extend to any infringement in which the collective rights and interests of consumers have been harmed.	There are existing mechanisms to defend the collective interests of consumers. Currently there is a system of collective actions, where consumers or consumers' associations are entitled to claim compensatory damages. This system is used infrequently. Collective actions pursued under the existing mechanisms have focused on litigation regarding financial products sold by banks to consumers and the private enforcement of competition law (e.g., claims for damages against the so-called "truck cartel"). The draft bill would implement a specific, unified system for bringing class actions via a new Title IV to Book IV of the Code of Civil Procedure, replacing the current articles in respect of existing mechanisms.

The ongoing domestic implementation of the RAD has raised discussion about the potential for pan-European representative claims, particularly on an opt-out basis. The rules on jurisdiction and enforcement of judgments within Europe are governed by the Brussels I Regulation. However, in the case of cross-border representative actions, the Directive prescribes that they can only be brought on an 'opt in' basis, which will restrict the impact of such claims and prevent pan-European opt-out actions. Representative entities must establish the jurisdiction of the court where they seek to bring a claim. Together with the introduction of the right to disclosure of funding arrangements by the Directive, in accordance with national rules, claimants will favour jurisdictions with more flexible procedures. In addition, as noted during our section on public sentiment, the willingness of claimants to pursue such actions will also depend on existing cultural issues.

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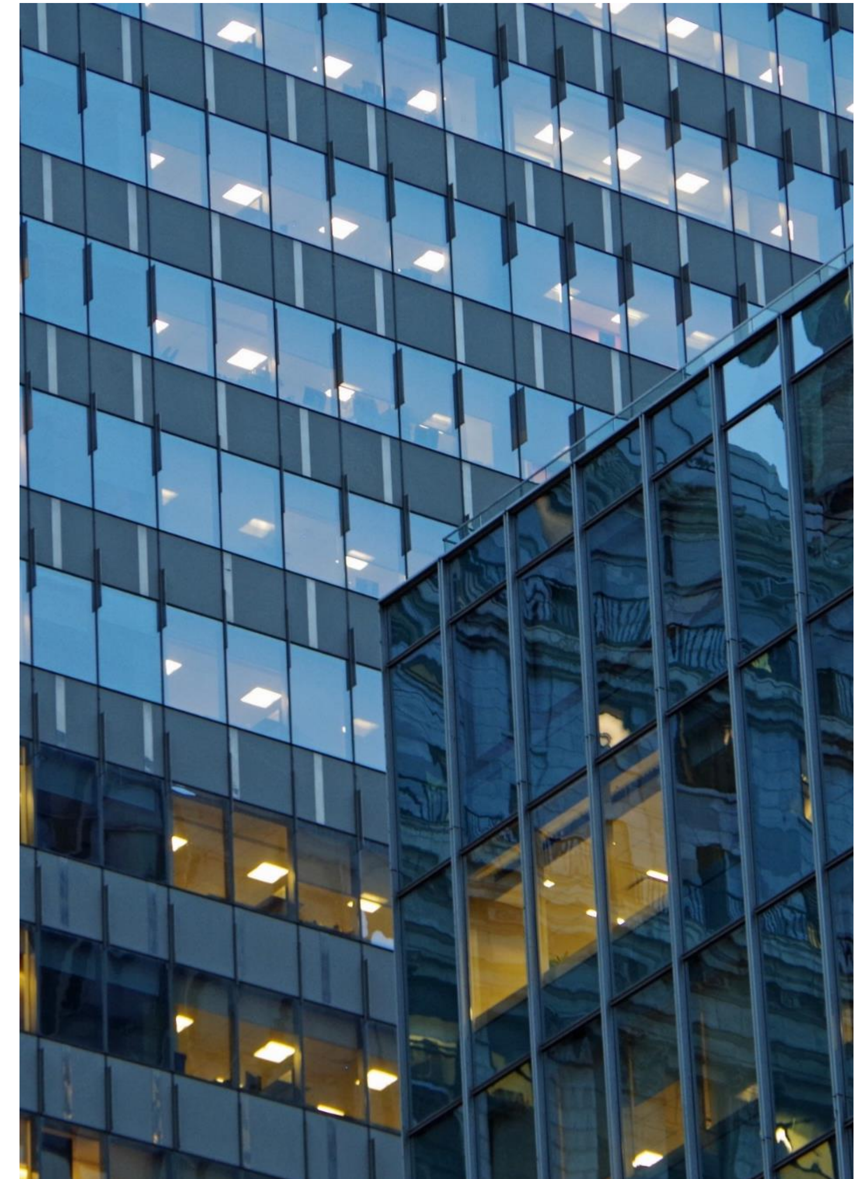
Other jurisdictions

Collective redress is permitted in Australia through opt-out class action regimes existing at both State and Federal levels. Australia is considered a plaintiff-friendly jurisdiction and one of the most active class action markets in the world. The threshold requirements to commence a class action call for seven or more parties with the same action, arising out of the same or related circumstances and including one substantial common issue of fact or law. There is no class certification process meaning that defendants can face multiple class actions arising from the same or similar allegations.

Singapore has a form of representative action which allows one or more persons to represent a group of persons with a common interest in proceedings. Representative bodies can only bring actions on behalf of a class of persons such as consumers if the representative body or the representing person(s) has a common interest with the members of the class. However, the use of this mechanism is uncommon. There is currently one high-profile representative action brought against a Singapore-incorporated blockchain company, Terraform Labs, by 376 claimants who claim to have been fraudulently induced into investing in the tokens sold by the blockchain company. If successful, this may pave the way for more such lawsuits in the future.

Looking to Latin America, in Argentina, the Consumers Protection Law allows certain persons to bring consumer claims before courts on behalf of a class of consumers, including an affected person in the class or consumers' associations. The interpretation of individual and collective rights was considered in the landmark Halabi ruling, which established the requirements for a collective action, including the definition of the class, factual cause of loss, damage sustained and a suitable representative. In Halabi, the Supreme Court applied an opt-out mechanism.

In Mexico, three types of group action are permitted, with the opt-in/opt-in mechanism dependent on the type of action used. Group actions can be pursued by federal bureaus such as the Consumer Protection Bureau, a common representative of at least thirty claimants, not-for-profit civil associations and the Mexican Attorney General.



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Litigation Funding

Litigation funding involves a third-party financing some or all the legal expenses associated with a legal dispute in exchange for a share of any proceeds recovered. There is no doubt that the use of litigation funding is increasing worldwide, but it is less clear whether that translates directly into increased costs and awards for insurers. It is argued that the growth of litigation funding affects social inflation in a number of ways:

- Driven by the availability of procedures for collective redress, litigation funders are open to funding a wide range of claims and with more claimants involved.
- The presence of litigation funders drives increased frequency and severity of claims, including prolonged claims duration and increased legal expenses.
- Funders can 'invest' by funding large pieces of litigation and securing a percentage of any settlements/awards, which can materially affect settlement dynamics.

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Is litigation funding permitted?

The United States is identified as the centre of litigation funding worldwide. In 2021, Swiss Re identified that more than half of the $17 billion invested in funding was deployed in the United States. A 2023 survey relating to litigation finance stated that 39% of respondents had firsthand experience of working with a litigation funder. In addition, some US insurers offer 'judgment preservation policies' which allow "plaintiffs that win significant monetary judgments at trial, on summary judgment or in arbitration to lock in some or all of a damage award" while appeals are ongoing. Litigation funding is permitted for federal and state actions, but it should be noted that several states do not permit litigation funding, such as Alabama and Kentucky.

In the UK, the use of litigation funding continues to increase. Deminor Legal Funding estimated that the size of the UK funding market in 2023 was valued between £1.5 billion and £4.5 billion. Funders in the UK offer a range of services funding individual or group claims. In addition, alongside the more traditional funding models, some more novel approaches are being developed. Some funders are choosing to collaborate with legal firms, allowing the funding of claims portfolios directly. An example of this trend is the £450 million investment agreement between Gramercy and Pogust Goodhead, a UK-based firm using US-based experience in class actions.

In European nations, the third party litigation funding market remains significantly smaller than in the United Kingdom and the United States. However, the market is developing, and is expected to increase further as the impacts of national laws implementing the Representative Actions Directive are felt.

The Netherlands is the prototype for the use of litigation funding in Europe. With an established and mature class action system prior to RAD implementation, the Netherlands permits the use of third party funding. Major funders have been involved in Dutch collective redress actions for some time. In Germany, Italy, and Spain, litigation funding is permitted, not limited to certain types of claims and is growing in use. France is in a similar position, but its use is limited to international arbitration matters. In the Republic of Ireland, litigation funding is specifically limited to international commercial arbitration.

Looking to other jurisdictions worldwide, in Australia, there is a mature and valuable market for litigation funding, with no limitations on the types of claims that may be funded. Funding is most-commonly associated with use in insolvency-related and class action litigation.

In Singapore, the use of litigation funding is permitted in relation to international and domestic arbitration, mediation in relation to arbitrated disputes, court proceedings relating to arbitration, court proceedings in the Singapore International Commercial Court, and a range of claw-back court actions by liquidators in an insolvency context.

From a Latin American perspective, the use of funding is permitted in Mexico and Argentina and not limited to certain types of claims. In Argentina, contingency fee arrangements are valid, albeit regulated in accordance with the Attorneys' Fee Law meaning that a fee cannot ordinarily exceed 30% of the result of the lawsuit.

Current regulation

The United States, with its blend of federal and state regulation, offers a patchwork of requirements. There is no federal regulation of litigation funding or duty of disclosure in such regard in the United States, but disclosure can be compelled in accordance with local federal court rules in some instances. As noted above, some states do not permit litigation funding, and a number of states have enacted statewide legislation to respond to increasing litigation funding. Varying regulations have been enacted requiring:

- Funders to register with, or obtain a licence from, the state.
- Disclosure of the total amount to be repaid or limits on the annual fees that can be charged against the original amount provided to the plaintiff.
- Disclosure of parties with a right to compensation arising from the proceeds of an action.
- Increasing transparency in the use of funding.

England and Wales currently have a system of voluntary self-regulation, via the Association of Litigation Funders. This involves being a signatory to a code of conduct, which includes provisions in respect of capital adequacy, termination and approval of settlement, and control provisions preventing funders from compelling legal representatives to act in breach of professional duties. Current disclosure requirements in England and Wales depend on the action being pursued. Competition Appeal Tribunal certification procedures usually require the tribunal to review any funding agreement. More generally, there is no requirement for disclosure of funding agreements.

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There are no European Union-wide regulations or directives that control litigation funding. The Representative Actions Directive offers limited direction. Where a Member State's national law permits the use of funding in respect of domestic or cross-border representative actions, then any funding agreements must ensure:

- Funding by third parties that have an economic interest in the bringing or the outcome of the representative action for redress measures does not divert the representative action away from the protection of the collective interests of consumers – Article 10, paragraph 1.
- Funders (or other third parties) do not unduly influence the representative entity in a manner detrimental to consumer interests – Article 10, paragraph 2b.
- Representative actions are not brought against defendants that are competitors of the funding provider or on which the funding provider is dependent – Article 10, paragraph 2b.

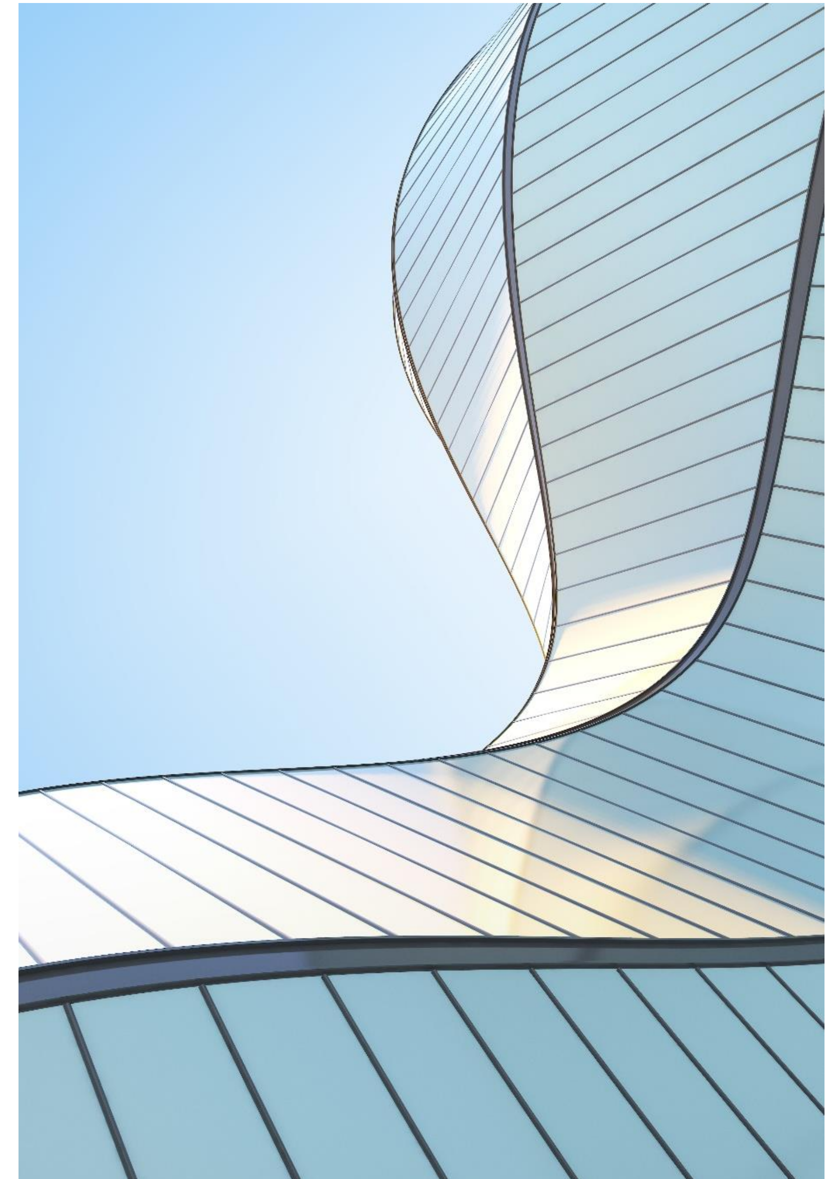
The representative entity must also disclose to the court or administrative authority a financial overview that lists sources of funds used to support the representative action – Article 10, paragraph 3.

For France, Italy, Germany, Spain, the Netherlands and Republic of Ireland, these requirements have been/will be implemented into national law. These requirements apply to any national law and requirements for funders.

In Mexico, there is no specific regulatory framework which limits the use of third party litigation funding nor is there any requirement to disclose the existence of a funding agreement.

In Australia, the Federal Government introduced regulations exempting third party litigation funders from the need to hold a financial services licence. Litigation funders are subject to oversight from the Australian Securities and Investments Commission, and the Association of Litigation Funders Australia has produced guidelines on best practice and behaviour to be observed by members. At state and federal level, funders are required to manage conflicts of interest and disclosure obligations.

In Singapore, funders are required to continue the principal business of funding dispute resolution proceedings, have set limits of share capital and managed assets. The Singapore Institute of Arbitrators (SIArb) also established guidelines in 2017 for funders with the aim of promoting best practice, expectations of transparency and accountability. The SIArb website has a list of those funders who support the funding guidelines, including major funders Woodsford, Burford Capital and Augusta Ventures Limited. The Professional Conduct Rules 2015 require disclosure of the funder's identity and address to the appropriate court/tribunal and other parties.



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What might the future hold?

In the United States, states will continue to legislate on issues such as disclosure/transparency as they deem necessary. From a federal perspective, the Protecting Our Courts from Foreign Manipulation Act of 2023 introduced as a bipartisan measure by three senators has not been heard in committee yet, but we expect that further discussions on regulating funding will continue. Concerns are also being raised about the litigation funding industry potentially operating as a sanctions loophole.

The litigation funding market in England is currently going through some uncertainty following the Supreme Court decision in PACCAR in July 2023. Legislative efforts to remove this uncertainty were disrupted by the July General Election, which resulted in the Litigation Funding Agreements (Enforceability) Bill not being passed. Future efforts to pass similar legislation can be expected. In addition, the Civil Justice Council has launched a review of the third party litigation funding market in England and Wales. An interim report is expected by summer 2024 with a final report following in summer 2025. The review may recommend greater regulation of litigation funding and amendments to the DBA Regulations to promote greater use by law firms.

For those jurisdictions in the European Union, litigation funding may be subject to European Union-wide regulation in the future, especially in light of the implementation of the Representative Actions Directive (RAD). The expected increase in the use of litigation funding has already prompted further discussion on future regulation. In September 2022, the European Parliament recommended the adoption of minimum standards to allow effective oversight of litigation funding including:

- The establishment of a system of authorisation for litigation funders.
- A fiduciary duty on funders, requiring them to act in the best interests of claimants.
- A requirement that funders cannot abandon funded parties at any stage in the litigation process.
- A requirement that funders are responsible for defendants' costs arising from unsuccessful litigation, preventing them limiting their losses.
- A requirement that at least 60% of any gross settlement is paid to claimants.
- Transparency regarding funders' involvement in proceedings, including disclosure of funding/funder details if requested by the court or the defendants.

In response, the European Commission has launched a mapping exercise which is being conducted by organisations including the British Institute of International and Comparative Law. The timetable for the completion of this exercise is unclear, but what is clear is that the European Union is likely to regulate litigation funding in some form. However, any regulation in Europe, when it comes, may be light touch, so as not to strangle the growth of mass actions for consumer claims now provided for by the RAD.

In 2023, the Irish Law Commission published a Consultation Paper on the law governing litigation funding in the Republic of Ireland and, following submissions from interested parties, a final report setting out conclusions and recommendations is expected soon.

In Australia, current state and federal practice notes offer guidance on managing conflicts of interest and disclosure, and there are no current suggestions that further regulation is imminent from government or financial regulators.

There are no indications that there will be further regulation of the litigation funding market in Singapore, Argentina and Mexico in the near future.

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Emerging Risks

Social inflation cannot occur without new and emerging risks. Without new and emerging risks, there would be no significant increase in litigation and the need for funding.

Emerging risks which can be said to contribute to social inflation do not apply uniformly across all jurisdictions. For example, liability litigation in relation to glyphosate weedkiller and opioids is frequently associated with discussions on social inflation. These risks have resulted in significant US class settlements in the hundreds of millions of dollars, and individual damages awards with outsized punitive damages awards. However, these risks have not translated from the US to Europe or other jurisdictions such as Australia yet (arguably due to the nature of the US litigation system). However, there are also risks emerging that are currently unique to the litigation landscape in Europe.

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PFAS, biometric privacy and social media addiction

The development of liability risks in the United States continues at pace. Litigation relating to PFAS through both environmental and product-related exposure is expected to increase, particularly as states and municipalities continue to regulate and pursue actions in relation to contaminated water. While the South Carolina multidistrict litigation continues, further individual claims for injury may follow dependent on the prevailing medical opinion.

In Australia, there have been a number of claims relating to PFAS including environmental exposure, although claims have typically settled prior to judgment meaning that there is currently a lack of definitive judgments on issues such as the types of injury and loss that can be attributed to PFAS contamination.

Biometric privacy has also been the subject of a flurry of actions in the state of Illinois. Alleged breaches of the Biometric Privacy Act have resulted in a number of significant settlements, including a $650 million settlement with Facebook, a $100 million settlement with Google and $92 million with TikTok. Although many states (including includes Arkansas, Arizona, Colorado, Maine, Maryland, Montana, Texas, Utah, Vermont, Virginia, and Washington) do not offer a private right of action, their state attorney may pursue any alleging breaches.

Social media addiction is also a heated subject in the United States, amid national security concerns over the ownership of TikTok. The ongoing multidistrict litigation in northern California against various social media companies, alleging that they designed their platforms to foster compulsive use by minors, will be followed with great interest.

Climate change, ESG, directors and corporates

A significant proportion of climate change actions are directed at trying to create legislative change or strengthening climate change responses, whether in US states (Held v Montana), the United Kingdom (Friends of the Earth Ltd and others v Secretary of State for Energy Security and Net Zero) or the Netherlands (Urgenda v State of the Netherlands).

However, directors and officers of companies will increasingly be expected to consider their companies' exposure to liability, physical and transitional risks associated with climate change. As an example, Singapore recently introduced local reporting standards for climate-related disclosures aligned with the International Sustainability Standards Board. Failure to comply with local standards and regulations will generate litigation.

In the Netherlands, the climate activist group Milieudefensie successfully pursued an action against Shell in 2021 which resulted in the company being ordered to reduce its carbon emissions. If a recently heard appeal is upheld, it will offer a blueprint for ongoing and prospective actions. Also in the Netherlands, the airline KLM was subject to a successful greenwashing action, which may encourage further claims.

In England, an unsuccessful 2023 derivative action brought by ClientEarth against the board of directors of Shell created discussion about whether climate change should be given greater prominence in directors' duties.

In France, there is increased pressure on companies to consider the implications of their business model with reference to climate change and ESG-related concerns. The French duty of vigilance places requirements on specified companies and groups in France, and this has been cited in a number of shareholder and activist-related actions commenced in France directed at corporate interests and their response to climate change.

In Australia, there have been a number of claims targeting corporations and governmental bodies, particularly in relation to resource and energy issues. This includes investor-led actions seeking to challenge corporate behaviour and challenges where government authorisations impact the environment and cultural heritage.

In the United States, a series of claims have been issued by states against fossil fuel companies alleging responsibility for actual and proximate contribution to climate change, with associated damages being sought for a fund to cover climate-related damage.

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Product liability claims

As products increase in complexity, the greater the risk of inherent defects generating litigation. Insurers should be mindful of developments and reported defects with products. The United States will continue to be a jurisdiction where product liability actions are pursued. A review of significant multidistrict litigation actions in the US demonstrates a wide range of product liability actions, such as the 3M Combat Arms Earplug Products Liability litigation, Polypropylene Hernia Mesh Products Liability litigation and Juul Labs, Marketing, Sales, Practices and Products Liability litigation.

In the European Union, proposals on product liability within the new draft Product Liability Directive (PLD) should be watched closely by insurers, particularly when considered alongside the implementation of the Representative Actions Directive. The PLD proposes a new approach on cyber-resilience, where companies will be liable for potential deficiencies in a product's cyber security and would also define "products" as including software, lowering the threshold for a defect in a product as well. Furthermore, the list of potentially liable subjects gets extended, including authorised representatives of the manufacturer, and, under strict conditions, fulfilment service providers and retailers and operators of online marketplaces as potential defendants. The PLD would open the possibility of representative actions in respect of product liability across the European Union.

In France, the Cour de cassation (Supreme Court) has handed down some noteworthy product liability rulings on defective products in recent years. In November 2023, it ruled that the victim of a defective product can seek compensation from the producer for its loss by choosing to invoke either the defect in the product or a fault committed by the producer, which gives the victim more time to take action (the limitation period being longer in cases of fault).

There have also been examples in the UK of large product liability claims, including group litigation orders in respect of metal-on-metal hip defects and PIP breast implants. Discussions around product safety and liability reforms in the UK have emphasised that any proposals should make it "easier for consumers to seek redress if they have been harmed by an unsafe product."

Data breaches and cyber risk

Actions relating to data breaches and breaches of privacy regulations continue to proliferate across the globe. The recent Change Healthcare cyber-attack in the United States already prompted a number of class actions, and discussions about consolidation and designation as a multidistrict litigation.

In the European Union, companies facing data breach claims under the GDPR will have been reassured by the Austrian Post decision in 2023, which confirmed that a breach of the GDPR does not automatically give rise to a right to claim damages. However, claims continue. In the Netherlands, several class action claims (under WAMCA) against various technology companies have been filed alleging breaches of GDPR. As none of these claims have reached a conclusion yet, it remains unclear whether the court will hold that an opt-out claim under WAMCA for breaches of GDPR is viable. In the Republic of Ireland, the recent decision of Nolan & Ors v Dildar & Ors also offers a reminder to company directors, and their insurers, that they may be held personally liable for data breaches that take place while conducting the company's business.

In Argentina, a draft bill to update the Argentine Data Protection Regulation will establish the obligation to notify security breaches to the data protection authority within 72 hours of becoming aware of it.

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Public Sentiment

Societal shifts in public sentiment over responsibility for certain risks form part of the discussion surrounding social inflation. The effect that public sentiment has on risk, the prospect of increasing liabilities and claims costs for insurers is again jurisdiction dependent.

Jury trials

Public sentiment in the United States can have a disproportionately large impact on civil claims. The availability of civil jury trials in the United States means outcomes can be influenced by personal bias, which may be triggered by a variety of factors:

- The wider economic climate and inequality of wealth create a desire to punish companies and award plaintiffs based on fairness rather than legal grounds.
- Increasing mistrust of large businesses and corporations.
- Younger generations involved in activism, relating to climate change and other social trends, may challenge certain behaviours or actions such as corporate mismanagement. Millennials and Generation Z have also been disproportionately affected by cost-of-living concerns and may hold negative perceptions towards organisations viewed as having deep pockets.
- Media coverage and advertising by plaintiff firms of 'nuclear verdict' sums, without qualifications about the likelihood of significant reductions on appeal, can lead the public to assume that such figures represent the status quo. Plaintiffs expect more and juries are likely to award more.

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Public policy

For other jurisdictions, perceptions of fairness and public sentiment may result in courts and legislatures being willing to expand liability in certain instances where public policy and access to justice dictates.

For example, in England and Wales, it could be argued that some COVID-19 business interruption decisions in favour of businesses were affected by considerations of public policy and 'fairness'.

Willingness to claim and the normalisation of litigation

The appetite of the public to pursue actions can give rise to increased claims numbers for insurers.

In the European Union, the Netherlands is identified as the poster child for collective redress with an established system in place for some time. This is borne out by the use of the WAMCA mechanism. The growing register of ongoing and settled WAMCA actions maintained by the Dutch government is evidence of this. The register demonstrates the diversity of actions which are being pursued and is indicative of an increasing understanding of the process amongst the Dutch population. The same contention can be made in England and Wales with the increasing number of Competition Appeal Tribunal actions being pursued.

The impact of the Representative Actions Directive (RAD) on claims numbers cannot be meaningfully measured yet, particularly as many Member States have yet to implement the RAD via domestic legislation. It is expected the representative action process introduced by the Directive will encourage more actions across a wide range of sectors. Whether those claims numbers will cause significant concern to insurers remains unclear. Jurisdictions such as Germany and the Netherlands already have a cultural association with the use of collective redress. We have already seen domestic representative actions commenced in Germany against Hansewerk Nature, EON and ExtraEnergie by the Federation of Consumer Organisations over energy prices. In contrast, existing collective redress mechanisms in countries such as France and Spain are rarely used, and therefore widespread use of the representative action may not be immediate.

In Australia, there is an established system for bringing class actions that is utilised widely. Combined with a strong culture of promoting access to justice, significant class action activity has been seen in relation to: mass consumer claims, securities actions, employment related actions (particularly for alleged wage theft and systemic underpayment), government related class actions, and financial product claims.

Activist litigation

As a factor also discussed under emerging risks, activist litigation is a strong reflection of public sentiment. While activist litigation does not necessarily compel changes to existing claims reserves for insurers, it highlights public sentiment and such actions can be indicative that claims in a particular area, particularly in the D&O arena, are likely to increase in the coming years.

In jurisdictions such as the Netherlands and England and Wales, there have been examples of derivative shareholder actions by non-governmental organisations seeking to compel net zero obligations, as opposed to claims for compensation or damages. The Milieudefensie action against Shell was a groundbreaking decision which ordered Shell to reduce group-wide CO2 emissions by 2030. This action has led to similar efforts in the UK in the recent Client Earth actions against the directors of Shell, albeit the Client Earth action has recently been refused permission to proceed.

Actions in the US are also of interest, whether the plaintiffs are states or municipalities pursuing fossil fuel companies. A series of claims has been issued by states and municipalities against fossil fuel companies alleging responsibility for actual and proximate contribution to climate change occurring in those location and seeking financial redress and coverage for climate-related damage.

Social deflation?

It might be argued that public sentiment has also played a role in reducing the risk of social inflation. The Republic of Ireland could be said to have seen a recent example of 'social deflation' aimed at reducing insurance claims costs as a result of public sentiment. The Irish Government set out various aims in its Action Plan for Insurance Reform in 2020. Some objectives were prompted by public perception of unmeritorious or unjustified personal injury claims, seeking reductions in liability costs and damages through existing and future legislation and regulation.

These changes are similar to those undertaken in England and Wales by the UK Government in applying a tariff to short-term whiplash injuries (with the aim of lowering motor premiums) and the introduction of widespread fixed costs reforms. This was in response to public and insurer sentiment in respect of a 'compensation culture', linked to allegations of unmeritorious and often fraudulent personal injury claims allied with excessive legal costs. Further measures are underway which may look to reduce insurer indemnity spend in dealing with low-value claims. Although excluded from the recent announcement regarding compulsory mediation in small claims, a successful pilot may look to include motor vehicle claims in the future, potentially reducing pressure on the court system further.

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Nuclear Verdicts

The term 'nuclear verdicts', or the alternative 'shock verdicts', is often used to describe civil jury verdicts awarding damages of $10 million or more in the United States, usually in relation to a single verdict (as opposed to the total sum agreed or awarded to a class or group of claimants which often far exceeds $10 million).

The outsized nature of nuclear verdicts, particularly when applicable to one claim, is identified as a key trigger for social inflation. These verdicts do not conform to any economic or inflationary standard, and therefore increase the risk of increased costs to insurers beyond what is expected.

As a distinctive US issue, it can be argued that nuclear verdicts have no inflationary impact for insurers in other jurisdictions. The availability of punitive damages both in Europe and globally is restricted or limited to narrow circumstances and types of claims. This issue, along with claimant strategy and public sentiment, clearly demonstrates the risk in conflating social inflation in the United States with its effect in other jurisdictions.

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The United States

Nuclear verdicts are often associated with the use of the civil jury, public sentiment arising therein, and strategies used by the United States plaintiff bar. These verdicts often involve the awarding of compensatory damages by a jury, accompanied by a punitive damages award, significantly exceeding the compensatory sum, usually aimed at punishing the wrongdoer and discouraging similar behaviour. Nuclear verdicts are not limited to specific types of risk either. Examples include:

- An award of $7.3 billion against the cable company, Spectrum, following the murder of a customer by a technician employee (reduced to $1.15 billion on appeal).
- A recent jury decision in Texas awarding $37.5 million following the wrongful death of a driver in a collision with a distracted truck driver.
- An order for Bayer to pay $2.25 billion in January 2024 to a plaintiff alleging that the company's glyphosate weedkiller was responsible for his non-Hodgkins lymphoma.

The application of punitive damages is not uniform across the United States, but those states where the risk of nuclear verdicts is heightened have been referred to as 'judicial hellholes' by defendant activists. Locations such as Georgia, the Supreme Court of Pennsylvania, Illinois (specifically Cook County), California, New York City, South Carolina (asbestos litigation), Michigan, Louisiana and St. Louis have been identified as such. Defendant activist groups, such as the American Tort Reform Association and US Chamber of Commerce Institute for Legal Reform, continue to push for widespread tort reforms in various US states to provide caps on non-economic and punitive damages.

Some commentators have noted that the characterisation of verdicts as 'nuclear' or 'shock' could result in plaintiffs being negatively affected in certain actions. In the case of Wakefield v Vi Salus, Inc. the U.S. Court of Appeals for the Ninth Circuit vacated a statutory damages award of more than $900 million under the Telephone Consumer Protection Act. The court held that an aggregate damages award may “in certain extreme circumstances” violate the Constitution even if the per-violation (individual actions) award would not.

Other jurisdictions

The issue of nuclear verdicts is rarely considered in other jurisdictions. Judgments or awards of nuclear or shock value are rarely seen, due to the absence of jury trials and/or the imposition of significant punitive damages beyond usual compensatory levels.

Those jurisdictions that do allow for the imposition of punitive damages usually place restrictions on the circumstances in which they can be awarded.

In England and Wales, punitive (or exemplary) damages in tort may be awarded but are available in limited circumstances. Similar limited applications are also seen in Europe. Germany and the Republic of Ireland allow for punitive damages (identified as exemplary damages in Ireland) in circumstances where the defendant's behaviour warrants deterrence and additional punishment beyond compensatory damages. The Netherlands allows for the award of 'immaterial damages' which is a form of non-material damage purely to compensate for the victim's distress, pain and suffering. These awards are not intended to function as a deterrent for future conduct or to punish the defendant as with punitive damages. In Italy, damages are typically compensatory. It has been established that punitive damages are compatible with Italian law, but only in circumstances where an Italian court is asked to enforce a foreign judgment. French and Spanish law does not allow for punitive damages.

In Australia, the use of civil juries is extremely limited, with the state of Victoria the sole jurisdiction where jury trials may be sought on application by one of the parties, subject to the discretion of the court. In any event, the awarding of punitive damages is very rare, with their availability in personal injury actions precluded by statutory intervention.

Argentina does not permit punitive damages in general civil litigation. However, punitive damages may be awarded for breaches of consumer law such as defective products. Punitive awards are made with reference to the cap of five million Argentinian pesos and the seriousness of the defendant's conduct .

The approach to punitive damages in Mexico has evolved following constitutional reforms in 2011, resulting in the recognition and incorporation of the concept of punitive damages into Mexican law. Although judgments of a high value are rare, they are increasing.

In Singapore, punitive damages are reserved only for 'outrageous breaches or conduct'.

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Claimant Strategy

When pursuing an action for compensation, claimants/plaintiffs and their representatives want to maximise their settlement sum or any judgment amount. In the United States, such strategy focuses on the use of civil jury trials. As mentioned elsewhere, while this strategy is a key element of social inflation in the United States, it is not applicable in the same fashion to other jurisdictions without civil jury trials and punitive damages.

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Plaintiff strategies in the United States

The plaintiff bar is aggressive and adept at developing strategies to maximise settlements and judgments in jury trials. Combined with availability of funding and savvy advertising, this has led to increasing numbers of claims with ever greater damages awards. The plaintiff bar is skilful in understanding public sentiment and prejudices, and how those might be used to increase damages awards. Terms such as 'nuclear verdicts', 'anchoring arguments' (using previous decisions as a reference point) and 'reptile theory' (leading a jury to a fight or flight response) have become commonplace amongst US insurers discussing the topic of social inflation.

A further discrepancy in the US is that conflicting expert evidence can be presented. For example, allegations that cancer is caused by the weedkiller Roundup have not been conclusively proven. Nonetheless, substantial damages (both general and punitive) have still been awarded to successful plaintiffs. Similar claims would be unlikely to succeed in European nations due to causation arguments.

Claimant strategies in other jurisdictions

In contrast, similar arguments and strategies cannot be said to be a cause of social inflation in the other jurisdictions discussed across Europe, Australia, Singapore, Argentina and Mexico. In respect of liability claims, claimants and their legal representatives are usually limited to claims seeking recoverable losses. Compensation for personal injury claims is linked to judicial guidance, judicial precedent, the use of actuarial tables and injury tariff systems as appropriate in that jurisdiction. Punitive or exemplary damages are prohibited or, where permitted, limited to exceptional circumstances, as set out under nuclear verdicts. Simply put, there can be no comparison between the strategies open to legal representatives in these jurisdictions and those available to legal representative in the United States.

There have been concerns that the involvement of litigation funders may impact settlement negotiations and claimant/plaintiff strategy, by seeking to prolong settlement discussions to increase returns and increase associated legal costs. These concerns may be overstated. Several US states have introduced legislation to prevent undue influence, and the prevention of undue influence also forms part of national regulation in other jurisdictions, as set out under litigation funding.

Claimant strategies also extend beyond monetary compensation to domestic or international legal reform or to establish how certain claims will be considered in the courts. This can create social inflation not by requiring insurers to immediately adjust their claims reserves, but by generating additional liability risks and claims in the medium to longer-term. Climate activist litigation is a good example of this, as discussed further under emerging risks and public sentiment.

The recent decisions in the European Court of Human Rights provides a current illustration. Three actions were considered with two dismissed. The third, Verein KlimaSeniorinnen v Switzerland, was successful. It did not result in direct financial costs to insurers or a large business. However, it did recognise that Article 8 of the European Convention on Human Rights encompasses a right for individuals to effective protection by state authorities from serious adverse effects of climate change on their life, health, well-being and quality of life. The implications of the decision are significant. National governments will now be considering this judgment with real care, as it undoubtedly puts wind in the sails of environmental groups looking to challenge domestic policy making. By explicitly recognising the link between climate change and breaches of rights protected by the Convention, the decision could present a turning point in the strength of rights based arguments brought in the right circumstances in England and Wales.

Forum shopping

The introduction of the Representative Actions Directive has raised questions of the prospect of forum shopping across Member States. There is currently a limited list of representative entities currently qualified to bring cross-border actions. This suggests there will be a lead-in period before we see significant numbers of cross-border actions and whether certain jurisdictions and types of actions will attract the interest of funders and legal representatives. This is discussed further under collective redress.

The continued lack of uniform implementation of the RAD across the Europe, and a lack of examples of claims being pursued, means that providing clarity on the effects of the RAD on forum shopping cannot yet be offered.

Jurisdictions

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United States

The United States is uniquely impacted by social inflation due to the nature of both the federal and state-level court systems.

Collective redress

Both state and federal courts have collective redress mechanisms. For a federal court to have subject matter jurisdiction, there must be either diversity jurisdiction (diversity amongst the parties), or a federal question jurisdiction (question of federal law). There are no limits on the type of redress that can be sought, such as monetary compensation, declarations or injunctions.

Each state has its own rules for collective redress, which are often fashioned on the federal rules. There may be limits to the types of recovery possible in state class actions.

Federal class actions are authorised and governed by Rule 23 of the Federal Rules of Civil Procedure, with 23(a) setting out the prerequisites for a federal class action:

- The class is so numerous that joinder of all members is impracticable.
- There are questions of law or fact common to the class.
- The claims or defences of the representative parties are typical of the claims or defences of the class; and
- The representative parties will fairly and adequately protect the interests of the class.

These federal class actions operate on an opt-out basis.

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The Class Action Fairness Act also expanded the jurisdictional reach of federal courts over class actions and mass actions. Mass actions involve 100 or more individual plaintiffs and common questions of law or fact but are not classified as class actions. These can be brought in federal courts despite the prerequisites for federal jurisdiction not being met.

In circumstances where a wide range of individual actions have been pursued, and a single class action is not possible, then multidistrict litigation (MDL) is an alternative route.

MDL may be commenced where civil actions in different federal districts "involve one or more common questions of fact such that the actions should be transferred to one federal district for co-ordinated or consolidated pretrial proceedings…" Cases are assigned as MDL by the Judicial Panel on Multidistrict Litigation, which will consider if there are issues of common fact between the parties and whether the parties and judicial system would benefit from the co-ordination of the actions. Following efforts by companies facing MDL, the US Judicial Conference's Committee on Rules of Practice and Procedure recently proposed providing judges with an initial case management roadmap. However, defendant efforts to require each plaintiff to establish they have factual support for the most basic elements of their claims have so far been unsuccessful.

Currently, the MDL process involves the selection of a small selection of 'bellwether' trials. Although not binding on the other individual actions within the MDL, a positive verdict for a plaintiff in a bellwether trial may prompt settlement negotiations. To give a sense of the sliding scale of MDL, the 3M Combat Arms Earplug Product Liability litigation had a total of just under 277,000 actions pending in December 2023. By contrast, the National Prescription Opiate Litigation has just over 3,000 actions pending.

The well-developed systems of collective redress in the United States generate additional claims as both plaintiffs and plaintiff attorneys are secure in using these procedures to bring claims.

Litigation funding

Litigation funding is permitted in the United States, and primarily used to fund plaintiff claims. These actions are attractive to funders; if successful, the funder will receive a proportion of the damages award. There is therefore an incentive for funders to ensure that settlements represent the financial maximum possible, creating greater returns for them.

The use of litigation funding is increasing, with a 2023 survey stating that 39% of respondents had firsthand experience of working with a litigation funder.

Litigation funding falls into two distinct categories, consumer and commercial. Consumer funding exists between an individual plaintiff and funder, for example to assist with the pursuit of a personal injury claim. Commercial arrangements exist between funders and law firms or corporations. Both enable claims that might not have ordinarily been pursued, increasing claims numbers and costs.

The growth of litigation funding has received congressional attention. Unsuccessful 2021 proposals requiring disclosure of funding agreements in respect of any class action or MDL were followed in September 2023 by the first ever congressional hearing on litigation funding. A bipartisan bill, the Protecting Our Courts from Foreign Manipulation Act 2023, was subsequently introduced, aiming to compel disclosure from any foreign person or entity participating as a litigation funder in U.S. federal courts.

A number of states have enacted statewide legislation to respond to increasing litigation funding. States such as Nevada, Nebraska, West Virginia and Tennessee require funders to register with or obtain a licence from the state.

Some states, such as Nebraska, also place disclosure requirements on the total amount to be repaid or limit the annual fees that can be charged against the original amount provided to the plaintiff (no more than 18% in West Virginia, 17% in Arkansas). Wisconsin and West Virginia have also introduced laws requiring the disclosure of parties with a right to compensation arising from the proceeds of an action.

Indiana and West Virginia have recently enacted legislation aimed at increasing transparency in the use of funding. A similar amendment to state law has been introduced in Louisiana. In Arizona, a house bill is progressing which would introduce new regulations for litigation funders including disclosure requirements, preventing influence of the litigation and excessive recovery from any award of settlements. The Litigation Investment and Safety Transparency Act was proposed in Florida but failed.

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By comparison, there is no federal duty of disclosure when a funding agreement is in place. Disclosure may be compelled in certain circumstances in accordance with local federal court rules. In New Jersey for example, parties must confirm a funder's name and address and if approval is required for litigation or settlement decisions. In April 2023, this led to the funders behind the Johnson & Johnson talcum powder MDL being disclosed. In September 2023, a Florida judge overseeing the 3M federal MDL prevented plaintiffs entering any funding agreements without judicial approval, to avoid 'predatory' funders offering advances on settlement sums.

It should be noted that some US states do not permit litigation funding. Alabama has previously held that a funding agreement was void on public policy grounds because the agreement was a "gambling contract . . . and its speculative characteristics make it closely akin to champerty". Kentucky is another state where funding agreements have been held to be inconsistent with public policy.

The litigation funding industry in the United States is robust yet faces challenges from insurers offering alternative means of funding legal actions. Insurers now offer judgment preservation policies which allow "plaintiffs that win significant monetary judgments at trial, on summary judgment, or in arbitration to lock in some or all of a damage award" while appeals are ongoing.

Overall, the United States houses a claims environment in which plaintiffs are increasingly comfortable seeking external financing.

Emerging risks

The United States is often at the epicentre of emerging litigation risk. Actions relating to exposure to glyphosate and associated opioid litigation continue, and the statistics report for MDL shows those actions proceeding within the US, and where further claims may arise, include:

- 3M Combat Arms Earplug Products Liability litigation
- Johnson & Johnson Talcum Powder Products Marketing, Sales Practices and Products Liability litigation
- Polypropylene Hernia Mesh Products Liability litigation
- Juul Labs, Marketing, Sales, Practices and Products Liability litigation
- Roundup Products Liability litigation
- National Prescription Opiate litigation
- NFL Concussion litigation

Insurers will need to be mindful of product liability risks which will inevitably arise through the development of new products, and data breach litigation as cyber-attacks become frequent. The recent attack on Change Healthcare has already prompted a number of class actions. Recent reporting on these actions suggests that the company is seeking to have the actions consolidated and designated in Tennessee as MDL.

The issue of biometrics is also of interest to those pursuing and funding class actions. The state of Illinois has recently found itself at the centre of a flurry of actions alleging breaches of the state's Biometric Information Privacy Act. The Act protects consumers and employees in Illinois from the misuse of their biometric data by companies by requiring that written consent be obtained. There have been a number of significant settlements, including a $650 million settlement with Facebook, a $100 million settlement with Google and $92 million with TikTok. Texas has also concluded a $1.4 billion settlement with Meta relating to the state's Capture or Use of Biometric Identifier Act. Further actions are ongoing and expected. Looking to other states, the California Consumer Privacy Act took effect in March 2023, but it could not be enforced until March 29, 2024. However, this is still being appealed with the California Supreme Court. It is also worth noting that most of the state laws regarding biometrics do not have a private right of action, it is for their state attorney general to pursue. This includes Arkansas, Arizona, Colorado, Maine, Maryland, Montana, Utah, Vermont, Virginia and Washington.

Another developing risk is that of social media addiction. Currently, there is a sole MDL relating to adolescent addiction and personal injury caused by social media being pursued in the Northern District of California. The MDL consolidates hundreds of actions brought on behalf of children and adolescents alleging that several social media companies (Facebook/Instagram, YouTube, TikTok and Snapchat) designed their platforms to foster compulsive use by minors, resulting in a variety of harms. In the event that a major jury-led decision finds on behalf of a plaintiff or number of plaintiffs, then further actions may follow. Claims within the MDL seeking to hold Meta CEO Mark Zuckerberg responsible under a 'nascent theory of corporate officer liability' remain in play too.

Staying with the theme of technology, video game addiction lawsuits are also being filed in the United States. Efforts to centralise the actions in MDL similar to the social media claims have so far failed due to the identification of substantial differences in the various actions by the MDL panel. Nonetheless, these actions are increasing in number.

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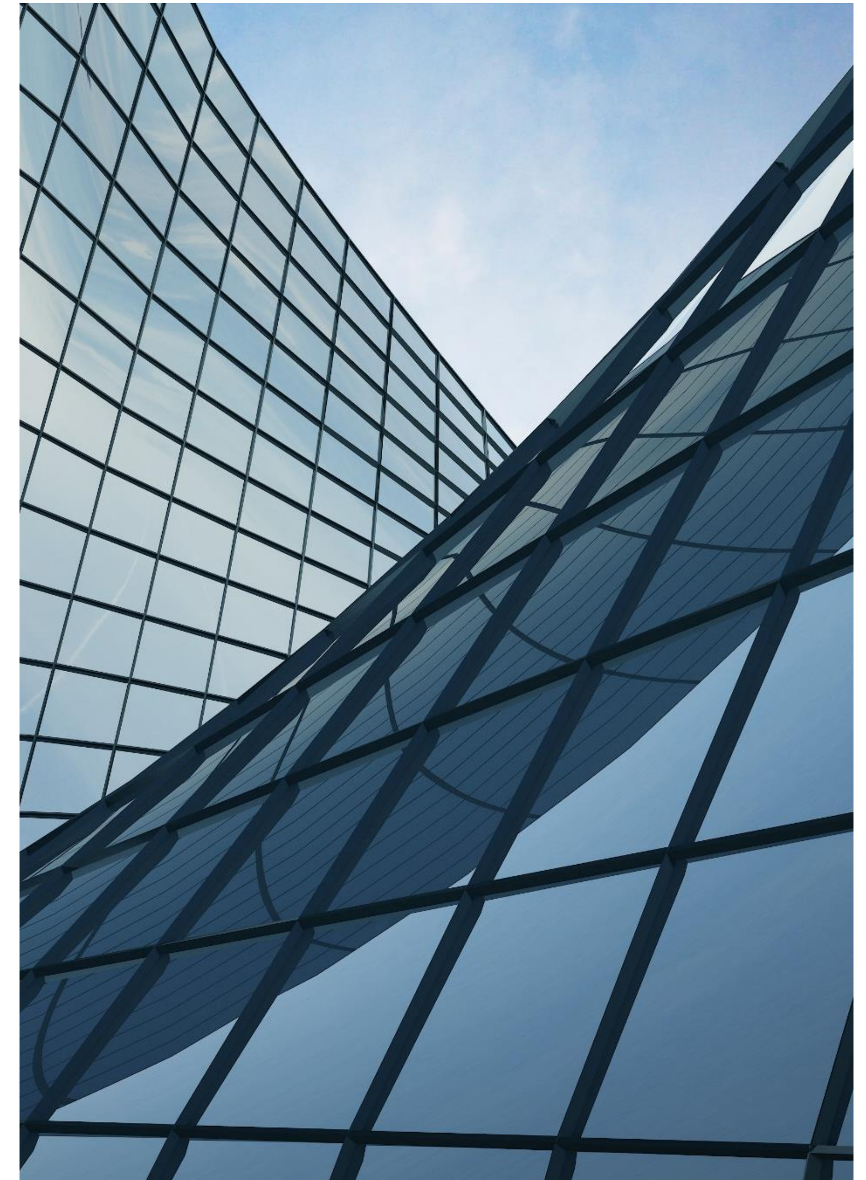
Litigation relating to exposure to PFAS is likely to increase as a raft of regulations limiting its use come into force. The ongoing MDL on 'Aqueous Film-Forming Foams (AFFF) Products Liability litigation' is switching its focus from the water contamination claims advanced by municipalities (following the settlement of those claims) to the individual claims from firefighters exposed during their use of AFFF (which contain PFAS or derivative/related compounds), who allege that they have suffered cancers and numerous other medical conditions. State attorneys general and local governments have filed several other actions against manufacturers, alleging contamination of water supplies.

Finally, the issue of climate change is likely to generate increased risk and claims costs for insurers in the United States. Noteworthy claims by activists in the US to date have focused on enacting legislative change at the state (Held v Montana) or federal (Juliana v United States) level. However, a series of claims have been issued by states against fossil fuel companies alleging responsibility for actual and proximate contribution to climate change, associated damages being sought for a fund to cover climate-related damage. In one instance, a fossil fuel subsidiary is pursuing its insurers in relation to a dispute over the application of the pollution exclusion in the policy relating to defence costs. These claims if successful will result in significant damages awards being made against fossil fuel companies, and may result in further actions being encouraged, and additional costs to insurers.

Public sentiment

Public sentiment carries a disproportionately large impact on civil claims in the United States. Public willingness to pursue litigation increases claims. The availability of civil jury trials in the United States means that outcomes can be influenced by personal bias in a unique manner, triggered by a variety of factors:

- The wider economic climate and inequality of wealth create a desire to punish companies and award plaintiffs based on fairness rather than legal grounds.
- Increasing mistrust of large businesses and corporations in the United States.
- Younger generations are increasingly involved in activism, including in relation to climate change and other social trends, and may look to challenge certain behaviours or actions such as corporate mismanagement. Millennials and Generation Z have also been disproportionately affected by cost-of-living concerns and may hold negative perceptions towards organisations viewed as having deep pockets.
- Media reporting of 'nuclear verdicts' awards, without fully explaining the likelihood of significant reductions on appeal, can lead the public to assume that these figures represent the status quo. Plaintiffs expect more and juries are likely to award more.



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Nuclear verdicts

This term, or the alternative 'shock verdicts', is often used to describe civil jury verdicts awarding damages of $10 million or more, usually in relation to a single verdict as opposed to the total sum agreed or awarded to a class or group of claimants which often far exceeds $10 million. The specific association of nuclear verdicts with jury involvement again highlights the importance of public sentiment on social inflation.

Nuclear verdicts often involve the awarding of compensatory damages by a jury, accompanied by a punitive damages award, significantly exceeding the compensatory sum, usually aimed at punishing the wrongdoer. The application of punitive damages is not uniform across the United States.

Those states where the risk of nuclear verdicts is heightened are often called 'judicial hellholes' by defendant activists. A 2023-24 report on this issue highlights the following locations as allowing innovative lawsuits and welcoming litigation tourism: Georgia, the Supreme Court of Pennsylvania, Illinois (specifically Cook County), California, New York City, South Carolina (asbestos litigation), Michigan, Louisiana and St. Louis.

Analysis by Marathon Strategies indicates that the median value nuclear verdicts increased from $41 million to $44 million in 2023. Figures from 2022 included outliers such as the award of $7.3 billion against the cable company, Spectrum, following the murder of a customer by a technician employee (reduced to $1.15 billion on appeal).

Significant post-pandemic increases in nuclear verdicts have been driven by awards against various sub-industries. Product liability claims result in a significant proportion of nuclear verdicts. As an example, Bayer was ordered to pay $2.25 billion in January 2024 to a plaintiff alleging that the company's glyphosate weedkiller was responsible for his non-Hodgkins lymphoma. However, as noted in the section on public sentiment, these decisions are often reduced on appeal. In this instance, a judge in Pennsylvania reduced the billion-dollar award to $400 million on appeal.

Johnson & Johnson continue to agree payments as part of the ongoing MDL relating to talcum powder marketing and liability. In June 2024, J&J agreed to pay $700 million to settle an investigation by a large number of US states into the marketing of its baby powder and other talc-based products blamed for allegedly causing cancer.

Further increases in nuclear verdicts in 2024 are expected as backlogs of claims generated by the COVID-19 pandemic begin to clear. The trucking industry has also seen numerous nuclear verdicts following wrongful deaths involving collisions with trucks. Recent jury decisions involving wrongful deaths following truck collisions have resulted in awards such as $37.5 million in Texas and $47 million in Georgia.

Considering these figures, there have been considerable efforts by activist groups, such as the American Tort Reform Association and US Chamber of Commerce Institute for Legal Reform, to enact tort reforms in various US states to provide caps on non-economic and punitive damages. An example of such a reform was enacted in Iowa last year, meaning Iowans making a claim after being struck by a truck or commercial vehicle are now limited to receiving $5 million per plaintiff for noneconomic damages, subject to some exceptions relating to the actions of the driver.

Claimant strategy

The plaintiff bar in the US is aggressive and adept at developing strategies to maximise settlements and judgments in jury trials. These strategies, when combined with availability of funding and savvy advertising, have led to greater numbers of claims with ever greater damages awards.

The nature of jury trials in the United States mean that conflicting expert evidence can be presented. For example, allegations that cancer is caused by the weedkiller Roundup have not been conclusively proven, without which causative link similar claims would be unlikely to succeed in European nations. However in the US, substantial damages (both general and punitive) have still been awarded to successful plaintiffs.

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England and Wales

Collective redress

England and Wales have a number of established routes through which multi-party actions may be pursued, each with their own process and costs consequences.

Depending on the circumstances, both opt-in and opt-out actions are capable of being pursued in England and Wales. Opt-in actions are more common and require potential claimants to take proactive action, whether joining or issuing proceedings themselves, or authorising a representative to act on their behalf. Opt-out actions allow a single party to pursue on behalf of a defined class, with any decision binding on any other party affected by the action, unless they choose to opt-out to preserve their own rights to pursue the claim.

There are various types of collective redress mechanisms in place:

- Group litigation orders: These manage multiple claims with "common or related issues of fact or law". Claimants have to opt-in to join the Group Register before a cut-off date decided by the Judge. Details of all group litigation orders can be found on the UK Government website. However, a review of GLO data clearly indicates that these claims are limited and are focused on specific types of actions. For example, in January 2024 GLOs were granted in respect of three separate actions against Jaguar Land Rover, Nissan and Renault respectively regarding emission 'defeat devices' (NOx group litigation). Their limited use suggests that more flexible approaches to collective redress are being sought in England and Wales.

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- Representative claims: One or more claimants represent other claimants with the 'same interest'. CPR 19.8 enables claims on an opt-out basis. The authoritative decision in Lloyd v Google highlighted the issues with bringing a representative action for breaches of data protection legislation, and there was a similar failure in the High Court in Prismall v Google & Deepmind (currently awaiting appeal) in relation to claims for misuse of private information.
- Competition Appeal Tribunal collective proceedings: These are proceedings dealing with alleged breaches of competition law by a representative, who does not have to be a member of the defined class. This type of action may be brought either on an opt-in or opt-out basis. The ongoing Merrick v Mastercard CAT action is the most well-known, but there likely remains a significant period before this action proceeds to a trial. In January 2024, an action against BT became the first CAT collective proceeding to be heard before the courts.
- Multiple joint claims: These claims involve multiple claimants using a single claim form, as their action can be "conveniently disposed of in the same proceedings." The largest single group claim in UK legal history, the Fundão Dam action, is currently proceeding through the High Court and involves more than 700,000 claimants. As these actions are brought by multiple claimants, they can be said to be opt-in.

Litigation funding

Third party litigation funding is permitted in England and Wales, where it is used in an increasing number and type of claims and is no longer perceived as limited to certain type of claims.

Favourable market conditions have meant the risk of US-style class actions against corporations and their directors has never been greater in England and Wales. Alongside the more traditional funding models, funders are choosing to collaborate with legal firms allowing the funding of claims portfolios directly. An example of this trend is the £450 million investment agreement between Gramercy and Pogust Goodhead, a UK-based firm using US-based experience in class actions lawsuits.

Litigation funders offer a range of services including funding for individual claims or group actions, allowing claimants to bring valid claims where they may otherwise be unable due to lack of funds, or where it would be uncommercial to bring individual claims.

Litigation funders in England and Wales are self-regulated by the Association of Litigation Funders (ALF) charged "by the Ministry of Justice with delivering self-regulation of litigation funding in England and Wales." Membership of the ALF is voluntary and includes major litigation funders such as Harbour, Therium, Burford Capital and Augusta Ventures.

Signatories are subject to a code of conduct which includes provisions in respect of capital adequacy of funders, termination, approval of settlement and control provisions. Funders are prevented from taking control of settlement discussions or actions which may cause a claimant's legal representatives to act in breach of professional duties. There is no compulsory requirement that compels a claimant to disclose a litigation funding agreement to an opposing party or the court, although such a disclosure may be ordered.

In April 2024, the Civil Justice Council launched a review of the third party litigation funding market in England and Wales. An interim report is expected by summer 2024 with a final report following in summer of 2025. The review may consider further regulation of the sector.

Litigation funding agreements (LFAs) have, primarily, been written on a share of proceeds model which calculates the funder's fee as a share of the proceeds recovered by successful claimants. Prior to the Supreme Court decision in PACCAR in July 2023, it was widely understood LFAs were not damages-based agreements (DBAs) and fell outside the scope of the DBA Regulations. The Supreme Court in PACCAR , however, held LFAs calculated by reference to a share of damages recovered are DBAs. Since LFAs have not generally complied with the DBA Regulations, PACCAR effectively upended the enforceability of many LFAs. A further complication is opt-out proceedings in the Competition Appeal Tribunal (CAT) prohibit the use of DBAs and, without adequate funding in place to meet an adverse costs order, such claims cannot proceed. The decision has had significant consequences for collective redress mechanisms in England and Wales, where claimants are heavily reliant on funding arrangements.

The UK Government advanced legislation to reverse PACCAR in early 2024, which would have amended the law to clarify that LFAs are not DBAs. However, following the announcement of the 2024 General Election, the legislative process was not completed, and the Bill was abandoned due to the dissolution of Parliament.

Pending any future legislation on this issue, many funders have adjusted their LFAs to a multiple-based repayment model. In this model, a funder can recover its capital outlay along with a multiple of that amount on the successful conclusion of a claim.

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Emerging risks

Those risks generating multidistrict litigation and mass tort actions in the United States, such as glyphosate, opioids, talcum powder and PFAS, have not yet translated to England and Wales in a meaningful sense. Glyphosate is currently authorised for use in England and Wales until December 2025 and, in the absence of unequivocal evidence linking glyphosate use with health issues, bringing successful actions is likely to be challenging.

As concern grows over the use and impacts of PFAS, further regulations on their use (and exposure) may be introduced. However, given the lack of clear evidence directly associating PFAS with various health-related issues in England and Wales, it is not clear whether any additional regulations on PFAS will generate an increase in claims costs, whether via individual claims or class actions. Nonetheless, insurers may wish to consider any additional risk to their portfolio from insuring such products or companies.

A significant proportion of US-based class actions involve product liability, and there have been examples in England and Wales of large product liability claims, including metal-on-metal hip defects and PIP breast implants. The Dieselgate litigation also involves a defective product, and as products increase in complexity, the greater the risk of inherent defects generating litigation. Discussions around product safety and liability reforms in England and Wales have emphasised that any proposals should make it "easier for consumers to seek redress if they have been harmed by an unsafe product."

Although increases in D&O claims usually accompany company insolvencies, claims using the provisions under S90 and S90A of the Financial Services and Markets Act 2000 (FSMA) are gathering pace. At a time when company financial disclosures are under increasing scrutiny, allegations of false statements or dishonest omissions in financial reporting adversely affecting investors can result in claimed losses running into hundreds of millions of pounds. Currently, due to a lack of judicial authority, these actions are expensive and complicated to defend. If these claims were to be driven by litigation funders, this would add an additional risk element.

New regulations dealing with companies' climate-related and sustainability-related disclosures will increase company accountability in England and Wales. Those companies which make disclosures that are materially relied upon by investors and are found to be in breach of regulations may find themselves subject to the FSMA actions referred to above. An increase in these types of actions is again likely to attract the interest of litigation funders.

The impact of climate change is also increasingly being felt in litigation in England and Wales against private companies. Although the 2023 derivative action brought by the activist group, ClientEarth, against the board of directors of Shell was unsuccessful, this is arguably at odds with a more general willingness on the part of the courts to entertain climate change and ESG-related actions, as shown in the Supreme Court decisions in Vedanta and Okpabi. Publicity is often second only to victory in this area of law. Challenges of this nature continue to gain momentum, as activists continue to search for creative ways to circumnavigate obstacles to continue their fight.

The issue of forum shopping is also a concern, with Vedanta, Okpabi and the Fundão Dam action demonstrating that claimants are willing to pursue actions in England and Wales which would ordinarily be pursued in the country where the damage or injury took place. These actions are only likely to proceed in specific circumstances but should remain a concern for insurers.

Public sentiment

In England and Wales, public attitudes towards business have shifted negatively. The most recent edition of the BEIS Tracker on Public Attitudes towards corporate governance in summer 2022 indicated that "levels of trust were lower in relation to transparency about social matters (36% trust and 52% distrust) and being honest about their impact on the environment (33% trust, 56% distrust)".

Unlike the United States, public sentiment cannot be said to directly impact the outcome of claims, or any compensation awarded. The impact of public sentiment may, however, be reflected in an increased willingness by claimants to commence litigation. There may also be cases of the courts being willing to expand the boundaries of tortious liability following societal trends and public policy. For example, in Begum v Maran (UK) Ltd, the Court of Appeal refused to strike out the Claimant's duty of care arguments and was prepared to extend the duty of care so that the Defendant might be liable for damage caused by third parties on the ground that it created the source of the danger. As Coulson LJ observed, there is "a growing trend of claims in negligence where there has been an intervention of some kind by a third party, such as claims against public bodies and local authorities based on the acts of others."

The large number of COVID-19 business interruption claims finding in favour of businesses could be considered outcomes affected by considerations of public policy and 'fairness'. Similarly, in allowing the Fundão Dam claim to proceed in the UK (and following the Vedanta and Okpabi decisions) the Court of Appeal was motivated by genuine concerns over the adequacy of remediation in the foreign courts and was not willing to allow the challenges of managing complex, cross-border group litigation to stand in the way.

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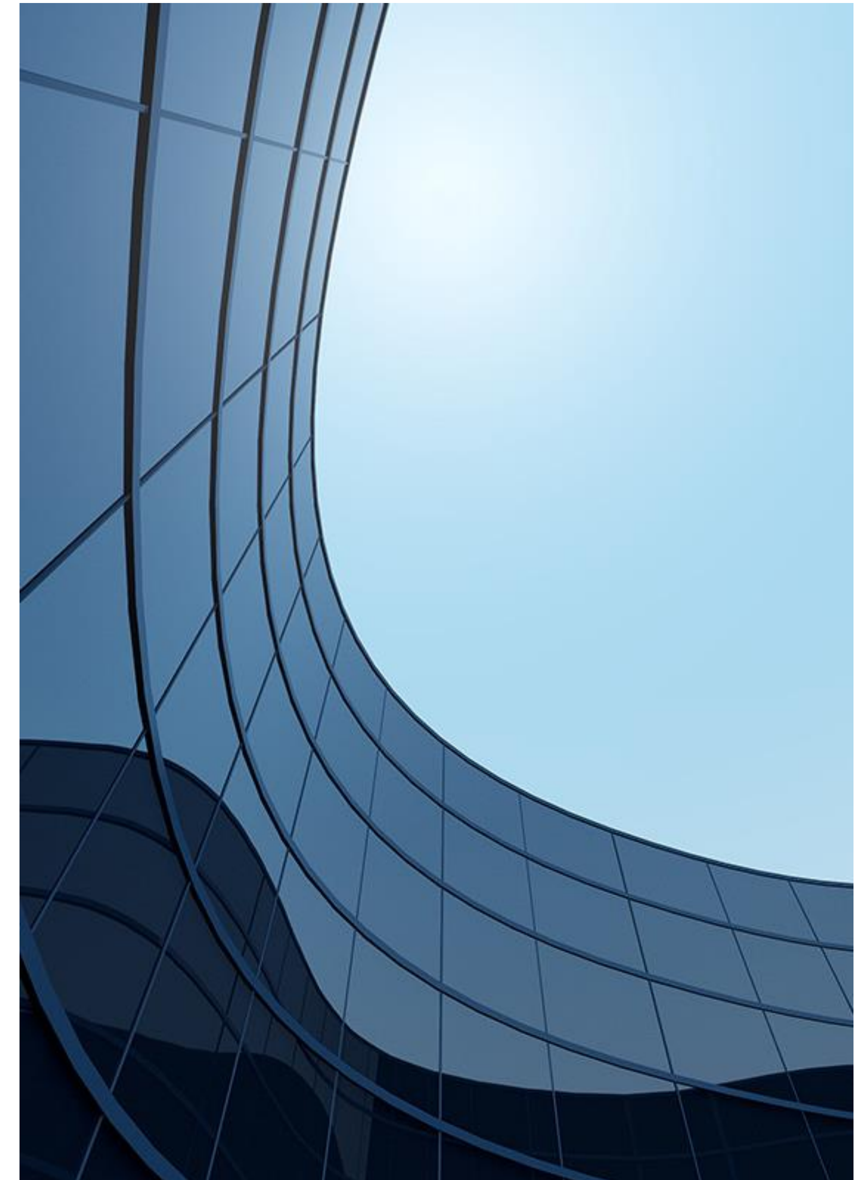
Nuclear verdicts

A fundamental difference compared to the US is the absence of civil jury trials. In England and Wales, punitive (or exemplary) damages in tort may be awarded but are available in limited circumstances. The reduced nature of their application means that they cannot be said significantly to impact claims costs or generate concern for insurers when reserving.

Claimant strategy

There are now a number of established UK-based claimant law firms specialising in litigating mass torts, class actions and group litigation. Firms include Pogust Goodhead, which is currently managing a significant number of group consumer claims including the Fundão Dam action and the recent NOx group litigation orders.

However, these firms have limited influence on the outcome of actions and judgments save for their representation, with actions in England and Wales subject to structured rules on what is recoverable both in damages and costs.



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France

Collective redress

French law currently provides for an opt-in group action procedure, which was introduced into French law (Law 2014-344) in March 2014 to cover consumer affairs. The procedure has gradually been extended to health products, environmental matters, personal data protection and discrimination suffered at work or in obtaining an internship or a job. The most recent group action was introduced in 2018 for compensation for collective damages suffered by consumers during the rental of a property. Group actions may only be brought before the civil courts currently (Art. L. 623-1 of the Consumer Code).

The French group action procedure grants standing to approved associations that are representatives at a national level. The associations must also have been in existence for five years. French law currently allows for compensation for individual damages suffered by consumers, with no reference to injunctive measures. In 2020, a report was submitted to the French Parliament which indicated that results from the introduction of the group action legislation in 2014 were disappointing and thus required reform.

To standardise the domestic legal framework, and to implement the Representative Action Directive (RAD) in French law, a draft Bill was introduced in December 2022. The bill will standardise the rules governing all the group actions available under French law, going beyond the consumer protection obligations set out in Annex I of the RAD. The Bill is currently progressing through the French legislative system but has not yet been adopted. On 6 February 2024, the French Senate adopted it on first reading, with amendments. The Assemblée Nationale (lower house of the French Parliament) and the Senate must now meet to agree on a final Bill.

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The Bill will make required changes to French law to ensure compliance with the RAD and to expand the jurisdiction of the French courts, including:

- The introduction of cross-border representative actions.
- The continued opt-in procedure for group actions.
- The opening up of remedies applicable to consumer group actions to include injunctive measures.
- Codifying the requirements in the RAD for representative entities and lowering the existing requirements for consumer associations to have been registered from five years to two years.

Litigation funding

Litigation funding is not forbidden in France and there are no current limitations on application to specific types of claims or disclosure requirements. There are no specific regulations on it. It is currently used to a limited extent, and only in large international arbitration matters rather than smaller civil disputes.

As part of the draft Bill to standardise group actions in France, litigation funding will be permitted for representative actions in France. However, such funding will be subject to supervision by the representative party bringing the claim and the court and the use of any litigation funding must be independent, and not influenced by persons other than consumers, in particular those with an economic interest in bringing the group action. Furthermore, the representative must not place themselves in a conflict of interest, preserving the group action from the influence of a third party to the proceedings.

Emerging risks

There have been a number of shareholder and activist-related actions commenced in France directed at corporate interests (not limited to fossil fuel exploration) and their response to climate change with reference to the duty of vigilance and other legal obligations.

Those actions include:

- Notre Affaire a Tous v Total – an action by non-governmental organisations alleging that Total has failed to provide detailed information in its Vigilance Plan on the reduction of emissions.
- Envol Vert et al v Casino – an action against the French supermarket chain Casino by a group of non-governmental organisations. It is argued that Casino's involvement in the cattle industry in Brazil and Colombia violates both the French duty of vigilance, by causing harm to the environment in those nations, and human rights.
- Notre Affaire a Tous v BNP Paribas – an action by non-governmental organisations alleging the detail contained in BNP Paribas' due diligence plan on the climate risks of its activities is inadequate and in violation of the duty of vigilance.

In addition, France is the location of the first greenwashing case in Europe challenging the net-zero claims of a fossil fuel company, in Greenpeace France v Total, and seeking an injunction and moral damages.

France has also been indirectly involved in a recent landmark climate change decision by the European Court of Human Rights in Verein KlimaSeniorinnen, which found that Article 8 of the European Convention on Human Rights encompasses a right for individuals to effective protection by state authorities from serious adverse effects of climate change on their life, health, well-being and quality of life. The decision involved the review of three separate applications, one of which was Carême v France, which was deemed inadmissible. However, the Verein KlimaSeniorinnen decision will generate more rights-based arguments by climate activists and environmental groups looking to challenge domestic policy making. The impact of the Verein KlimaSeniorinnen decision on business, and by extension insurers, is likely to be indirect, affected by any subsequent governmental policy changes, which may give rise to additional risk and claims.

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Looking to those liability risks present in the United States which are identified as a signifier of social inflation, the issue of glyphosate has been subject to domestic discussion in France. Although the European Commission recently extended the licence for glyphosate use for 10 years, the French government abstained in the vote in line with partial domestic restriction on the use of glyphosate where alternatives exist. Despite this, and the French Government compensating farmers with Parkinson's-linked glyphosate exposure, there are no expectations of large numbers of claims alleging injury from glyphosate exposure as seen in the US.

The French Government has also recently agreed a draft bill banning the manufacture, sale and import of certain products containing PFAS in France, to take effect from 1 January 2026. The ban will apply initially to cosmetics and clothing textiles (excluding certain protective materials). However, it should be noted that certain products (such as pieces of kitchenware) were removed from the draft bill.

The proposed ban may result in additional claims against non-compliant companies in the future, but to date, there are no significant numbers of claims in France alleging damage caused by exposure to PFAS whether on an individual level or for environmental remediation as seen in Belgium following the contamination of Zwijndrecht.

The Cour de cassation (Supreme Court) has also handed down some noteworthy rulings on defective products in recent years. In November 2023, it ruled that the victim of a defective product can seek compensation from the producer for its loss by choosing to invoke either the defect in the product or a fault committed by the producer, which gives the victim more time to take action (the limitation period being longer in cases of fault).

On the technology front, the French Insurance Code provides for compensation for damage caused by a breach of an automated data processing system, which may generate increased risk as the use of automated systems grow.

Public sentiment

Shareholder activism and pressure from consumer groups is the primary form of influence of public sentiment on French claims.

As with many nations, there is increased pressure on French companies to consider the implications of their business model with reference to climate change and ESG-related concerns. Notable in this jurisdiction is the French duty of vigilance, which places requirements on specified companies and groups in France. Those organisations must create, implement and monitor their own 'Vigilance Plan' to prevent breaches of human rights and fundamental freedoms, health and safety of individuals and to the environment. This is the vehicle that has been used to bring the actions referred to above.

Nuclear verdicts

France does not have a system of civil jury trials or the imposition of punitive damages that we see in the US. Therefore, the type of verdict which can be considered a 'nuclear verdict' is only handed down in the event of a major disaster. As an example, the Erika judgment involved an incident in which a grounded vessel created an oil slick and Total was ordered to pay €192 million. However, these types of incidents are rare, and therefore the prospect of nuclear verdicts in France is unlikely to generate increased risk and claims costs.

Claimant strategy

Civil and commercial claims in France are heard by judges and are not subject to a jury trial. French law follows the principle of 'integral reparation', meaning the victim must be compensated for loss or damage without being impoverished or enriched as a result. The aim is to put the victim back in the situation they would have been in had the damage not occurred, or in an equivalent situation. Therefore, anchoring strategies used by legal representatives in the United States to increase damages awards are not applicable in France. Bodily injuries in France are assessed with reference to The Nomenclature Dintilhac. This lists all recoverable damages / heads of loss in a personal injury claim and provides a method of valuation.

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Germany

Collective redress

Prior to the introduction of an Act transposing the Representative Actions Directive (RAD) into German law, other collective redress procedures were already available in Germany. Since 2018, the 'model declaratory action' has allowed consumer protection associations to file lawsuits on behalf of multiple individuals who have suffered similar harm from the same defendant. This opt-in model can be brought by a qualified entity and allows courts to make injunctive or declaratory findings regarding the potential liability of a defendant. Individual claimants must pursue their claim individually thereafter and cannot be pursued by the qualified entity. Prior to 2018, there were other collective redress procedures available in Germany limited to specific sectors, but these cannot be said to impact on social inflation.

In October 2023, the German Federal Council approved the law implementing the RAD. Article I of the implementing act was the Consumer Rights Enforcement Act (the "Act") which introduced the representative action for performance (redress or compensation) and amended the requirements for the 'model declaratory action'.

The Act provides that opt-in representative claims may be brought by representative entities. The Act is not only applicable to actions pursuing infringements of European Union law as defined within Annex I of the RAD but expands the new procedure to a wider range of infringements including general tortious actions.

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The Act sets out that:

- Small businesses employing fewer than 10 people and turnover not exceeding EUR 2 million will be considered 'consumers' and allowed to join representative actions.
- Those representative entities entitled to bring domestic representative actions must be 'qualified consumer associations' registered in accordance with the Injunctions Act, who do not receive more than 5% of their financial resources from private companies.
- The Injunctions Act sets out that a domestic representative entity must demonstrate:
  - It has been registered for at least one year.
  - It will continue to fulfil any statutory duties effectively in the future.
  - It will not bring claims primarily to generate income.
  - It does now allow those who work for the association to benefit from unreasonably high renumeration.
- Representative actions and model declaratory actions in Germany require a 'reasonable demonstration' that at least 50 consumers are affected (an alteration from the original model declaratory action which required 50 consumers to opt in to the action).
- Once a representative action is ongoing, other representative actions against the same defendant relating to the same subject matter may not be pursued until the conclusion of the initial action.
- If the parties agree a settlement, it must be approved by the court. In the event of settlement, any consumers who do not wish to be bound by its terms can withdraw within a one month period following the settlement announcement.

A register of representative actions in Germany (both model declaratory and remedial actions) can be found on the German Federal Office of Justice website.

Litigation funding

Third party litigation funding is permitted under German law. In recent years, there has been a growing use of such funding in litigation and arbitration matters. Funding is not limited to certain types of claims and can be used across various types of civil litigation, including commercial disputes, personal injury cases, intellectual property disputes, and more.

Although there is no specific restriction on the types of claims eligible for third party funding, certain funders have their own criteria for selecting cases to finance. Specific sectors and claim types are more attractive to funders due to factors such as the likelihood of success, the potential recovery amount and the complexity of the legal issues involved.

There are certain regulations and ethical considerations that apply to the use of third party funding. Funders may need to comply with licensing requirements and regulations governing their activities if they act in a specific manner. The German Federal Financial Supervisory Authority (BaFin) is responsible for supervising and regulating entities engaged in financial services activities. While third party litigation funding may not fall within the traditional scope of financial services activities, certain aspects of funding arrangements may be subject to the regulatory oversight by BaFin (e.g., if they are seen as an investment firm).

Additionally, legal practitioners in Germany are subject to ethical rules, such as those outlined in the German Federal Lawyers' Act, which may impose restrictions or guidelines on the use of third party funding.

The Consumer Rights Enforcement Act contains provisions on the use of litigation funding in these actions. As set out within the Directive itself, a representative action may be deemed inadmissible if the funder is a competitor of or dependent on the defendant being pursued. In addition, the representative entity is expected to be responsible for the conduct of proceedings and should not be influenced by the funder. Evidence to the contrary will result in the action being deemed inadmissible.

In Germany, there is an additional factor that the action will also be deemed inadmissible where the funder’s success fee exceeds 10% of the sum to be paid by the defendant.

On disclosure, when the action is filed the representative entity must advise how the action is funded. If a funder is involved in the continuing pursuit of the action, then any funding agreement must be disclosed.

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Emerging risks

There have been several landmark court decisions creating significant liability precedents, but the new representative action scheme is likely to create additional risk of claims and have financial implications as well. The Federation of Consumer Organisations (FCO) announced it intended to use the new action for redress against energy suppliers, telecommunication companies and financial services providers. As intended, the FCO has already issued representative actions for compensatory redress under the new regime against Hansewerk Nature, ExtraEnergie and E.ON by the Federation of Consumer Organisations over energy prices.

The Act on Corporate Due Diligence Obligations in Supply Chains (LkSG) requires companies to conduct appropriate human rights and certain environmental due diligence across their supply chains. The Act applied from 1 January 2023 to companies in Germany with at least 3,000 employees. Since 1 January 2024, this extended to companies with at least 1,000 employees. The catalogue of due diligence obligations includes the establishment of risk management systems, regular risk analyses and preventive measures. Environmental regulations or enforcement policies may impact liability risks for businesses involved in activities with potential environmental impacts. For example, there is an increased focus on ESG compliance in M&A transactions in Germany. The LkSG provides that violations of new ESG due diligence obligations constitute an administrative offence, giving rise to a fine of up to 2% of global annual turnover. This applies to companies with an annual turnover of more than EUR 400 million. For companies with a turnover below this threshold, fines of up to EUR 800,000 are still possible.

The climate change action in Lliuya v RWE, when concluded, will potentially offer a significant judgment on the liability of a German fossil fuel emitter for damage and harm resulting from the effects of climate change which have occurred in a different jurisdiction (in this instance Peru). The prospect that a German court may recognise a private company as liable for damage in another country would mark a very significant development and liability risk.

The draft EU Product Liability Directive proposes a new approach on cyber-resilience, where companies will be liable for potential deficiencies in their cyber security systems. The draft directive also defines “products” as including software and lowers the threshold for a defect in a product. Furthermore, the list of potentially liable subjects gets extended, including authorised representatives of the manufacturer, fulfilment service providers and (under strict conditions) retailers and operators of online marketplaces as potential defendants.

The EU Supply Chain Act will also go far beyond existing legislation at national level. It will encompass more companies, including those between 250 and 500 employees, and require them to consider the entire supply chain as users and disposers of products. As a result, managing directors of companies may have personal liability for any breaches.

Public sentiment

There are no civil jury trials in Germany. The German legal system is known for its formalistic approach to law and legal proceedings. Courts rely heavily on statutory law, legal principles and precedents when making decisions about damages awards, rather than considering broader social or cultural factors.

Nevertheless, public perception of justice and fairness can indirectly influence damages awards. Courts can be sensitive to public opinion and may seek to ensure that their decisions are perceived as fair and equitable by society at large.

Nuclear verdicts

Germany does not have a reputation for nuclear verdicts. It is, however, still possible for significant financial damages to be awarded in liability cases. German courts award substantial damages in certain cases, particularly in matters involving complex commercial disputes, product liability, medical malpractice, environmental harm and other serious issues.

The approach to awarding damages in Germany tends to be more conservative compared to jurisdictions with common law systems. The calculation of damages under German law is based on compensating the actual losses suffered by the injured party rather than being punitive. While German law does not completely preclude the possibility of punitive damages, such awards are rare and only available in exceptional circumstances, such as cases involving intentional wrongdoing or gross negligence where the defendant's behaviour warrants additional punishment beyond compensatory damages.

Claimant strategy

Germany has a history of collective redress mechanisms, and the new regime will make litigation of this nature even more attractive. The Register of representative actions and model declaratory actions maintained by the Federal Ministry of Justice shows that there have been new representative actions seeking compensatory redress issued in Germany since the passing of the Consumer Rights Enforcement Act, suggesting that further actions will follow, and in greater numbers.

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Spain

Collective redress

In Spain, there are existing mechanisms to defend the collective interests of consumers. Currently, this takes the form of collective actions where consumers or consumers' associations are entitled to claim compensatory damages where consumers have been affected by the same damaging conduct. However, this system is used infrequently, and is subject to various rules which are not dealt with under a unified system of regulation.

Collective actions pursued under the existing mechanisms have focused on litigation regarding financial products sold by banks to consumers and the private enforcement of competition law (e.g., claims for damages against the so-called "truck cartel").

This existing system will be significantly altered by the transposition of the Representative Actions Directive (RAD) into Spanish law. The RAD has not yet been implemented in Spain, but the draft bill is progressing through the Spanish legislative system. The draft bill would implement a specific, unified system for bringing class actions via a new Title IV to Book IV of the Code of Civil Procedure, replacing the current articles in respect of existing mechanisms.

The draft bill, if passed in its current form, will include introduction of the following changes in Spain:

- A new procedural regime for the protection of collective interests. This will not be limited to covering infringements of European Union law as set out in Annex I of the RAD but will cover any type of infringement in which the collective rights and interests of consumers have been harmed.
- Representative actions will be able to seek injunctive redress (including declarations) and compensatory redress.
- In the interests of effectively managing these representative actions, 'individual intervention' in actions will not be permitted, leaving the management of the claims with the representative entity.

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- The creation of a Registry of Representative Actions, for which the Ministry of Justice will be responsible, which will set out any updates on certified actions and details of any settlements.
- The introduction of litigation funding disclosure requirements.
- There will be bifurcation of proceedings where necessary, allowing for a liability trial first, followed by a separate quantum hearing.

The key element of the draft bill is that representative actions will proceed on an opt-out basis as a general rule. As an exception, an opt-in system will apply to foreign consumers and, depending on the circumstances of the case, where the court considers it preferable (provided each represented claim amounts to at least EUR 3,000).

The draft bill also extends the requirements for cross-border representative bodies to those associations permitted to bring domestic actions, ensuring consistency.

Litigation funding

Litigation funding is permitted in Spain, with no current limitations on the types of claims or disclosure requirements.

The draft bill will introduce new requirements to avoid undue influence from funders, including:

- Within the statement of claim it must be clearly identified whether there is any source of litigation funding (and identify the funder).
- When making an order to certify the representative action, the judge may be able to order the modification or rejection of the litigation funding if the judge finds that the funding may create a conflict of interests.
- The judge may also order modification or rejection of the funding if they believe that the management of the claim (including settlements) is influenced by the funder, causing detriment to the collective interests of the consumers concerned.

Emerging risks

Claims are not currently being brought before the Spanish courts in relation to PFAS, although this situation should be monitored as PFAS-related claims are already being brought in other European countries.

The limited number of significant climate change actions in Spain have been directed at governmental bodies, as opposed to private organisations. There are therefore no indications that Spain is a jurisdiction where company and director liability related to climate change issues is likely to generate increased claims number and costs in the near future.

Public sentiment

Spanish courts are recognised as a friendly forum for those looking to pursue claims against banks, particularly in relation to financial products purchased by consumers.

However, as we have noted, collective actions in Spain are currently used infrequently. We wait to see whether the introduction of the new representative action regime will encourage more widespread use of this new mechanism.

Nuclear verdicts

Spanish tort law is based on the indemnity principle, with damages limited to placing the injured party back in the same position as if the damage had not occurred. Claims for personal injury are assessed using a tariff system (the Baremo). Out-of-court settlements involving insurance companies are incentivised by penalties for late payment of claims by insurers of up to 20%.

Punitive damages are not available under Spanish law. Therefore, there is no risk of nuclear verdicts in Spain in terms of figures comparable to those seen in the United States.

Claimant strategy

Civil claims in Spain are not subject to a jury trial, which, combined with the absence of punitive damages in the Spanish system, would suggest that claimants will not be incentivised to pursue actions in Spain.

However, the introduction of an opt-out system as a rule for Spanish claimants covering any type of infringement of collective interests will inevitably prompt interest in Spain as a favourable jurisdiction from parties such as funders and legal representatives.

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Italy

Collective redress

Italy operates what is referred to as a 'double track' of actions to protect consumers. The first track involves class actions, and the second track involves representative actions as envisaged by the Representative Actions Directive. Both mechanisms operate on an opt-in basis.

Class actions / collective proceedings

Class actions (referred to as 'collective proceedings') were first introduced into Italian law in 2007 within Article 140 bis of the Italian Consumer Code and were subsequently amended by Law no.31/2019 which applies to events occurring after 19 May 2021. This sets out the process for bringing class actions and was unaffected by the transposition of the Representative Actions Directive into Italian law.

Class actions can be brought independently by each member belonging to the class or by non-profit organisations or associations against companies or entities managing public services or public utilities. The non-profit organisation or associations must have statutory objectives which include the protection of the individual rights in question. The remedy sought in these actions could be compensatory or injunctive, and an action is not limited by the subject matter.

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Representative actions

Italy transposed the Representative Actions Directive (RAD) into domestic law in June 2023 via Legislation Decree 28/2023 which inserted new articles into the Italian Consumer Code from Article 140-ter to 140-quaterdecies. The implementation of this legislation allows for both domestic and cross-border representative actions to be brought in Italy.

Domestic representative actions can be pursued by approved representative bodies registered in the list referred to in Article 137 of the Consumer Code.

Approved bodies currently include the following: the Association for the Defence of Users of Banking, Financial, Postal and Insurance Services, Altroconsumo Association, the Consumer User Protection Center Association and the Consumer Movement Association and National independent public bodies (e.g., the Antitrust Authority and the Data Protection Authority). Domestic representative entities can also seek to be registered as a cross-border representative, provided they also comply with the requirements set out in Article 140-quinquies of the Consumer Code.

Representative actions can pursue compensatory or injunctive measures but are limited to the collective interests of consumers in respect of interests set out in Annex II-septies of the Consumer Code, which are those provisions of EU law set out in Annex I of the RAD.

Litigation funding

Litigation funding is not prohibited, nor specifically regulated, in Italy.

For representative actions, following the transposition of the RAD, there are certain requirements to be complied with if litigation funding is used, but this stops short of a formal regulatory regime. Article 140-septies of the Consumer Code aims to avoid conflicts of interest by establishing some disclosure obligations. The amount of funding to be received from third parties must also be disclosed during the proceedings.

A representative action will be inadmissible where the lender is a competitor of the defendant or depends on the defendant.

Emerging risks

Italy has seen some climate-related activism. The energy company ENI has been the subject of at least three actions. The most significant, brought by Greenpeace Italy and others, remains ongoing and aims to prompt major government and banking shareholders to apply appropriate influence on the company to halt alleged climate-related breaches of human rights.

More generally on new liability risks and pending legal reforms:

- The new Italian insolvency code provides for new duties on directors and statutory auditors.
- A recent judgment of the Supreme Court established that penalty interest now at about 12% (compared to legal interest at about 2.5%) applies to compensation for damages both in the case of contractual and extracontractual liability.
- By 31 December 2024, companies will be required to take out insurance contracts to cover damage that could result to land and buildings, plant and machinery as well as industrial and commercial equipment when natural catastrophes occur.
- The implementing decree of Gelli law entered into force on 16 March 2024 and regulating medical professional liability provides that a patient who suffers injury from medical malpractice has a right to take direct action against the insurance company.

Looking to other liability risks usually associated with social inflation, claims alleging personal injury caused by glyphosate are not widespread in Italy, despite the introduction of a partial ban on use of the product in 2016.

However, the risk of claims in relation to PFAS exposure or contamination is higher in Italy than in other jurisdictions. In Veneto, the drinking water of over 350,000 people was contaminated with PFOA, one of the members of the PFAS family. A criminal proceeding is currently pending before the Corte d'Assise of Vicenza against 15 managers of the Miteni, Icig e Mitsubishi Corporation charged with water poisoning, unnamed environmental disaster, unauthorized waste management, environmental pollution and bankruptcy offences.

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As data breaches increasingly occur, there may also be an increase in data breach actions in Italy, particularly due to the class action regime which is available. Italian case law to date (Supreme Court judgment 29982/20) has set out that compensation of non-material damages arising from the unlawful processing of data is not triggered by the mere violation of privacy law. However, the ECJ decision in the 2023 Austrian Post claim agreed that not every GDPR infringement gives rise to a right to compensation on its own but found that there is no threshold of seriousness for non-material damage claims.

Public sentiment

The Ministry for Business maintains a list of class actions in Italy. A review of this list indicates since 2016 there have been fewer than 20 claims pursued, suggesting that public interest in large-scale actions is currently low. Whether the introduction of the RAD into Italian law may prompt an increase in actions remains unclear.

The emerging risk of PFAS at both an environmental and individual level is however the subject of negative public sentiment particularly following the contamination in the Veneto.

We await to see whether an increase in these types of actions will prompt increased risk and claims in relation to companies, and their directors and officers.

Nuclear verdicts

The courts in Italy normally do not award punitive damages. Damages in liability disputes are typically compensatory. Although punitive damages are not usually awarded, a recent judgment of the Court of Cassation in its joint division established that punitive damages awards would not conflict with the Italian legal system. However, in practice, punitive damages can only be pursued in cases where the Italian courts are asked to enforce a foreign judgment.

Certain provisions of Italian law have gradually recognised the right to obtain payment of amounts which exceed the mere compensation for the loss or damage suffered. These provisions relate to specific subject matters, such as industrial property rights, labour law and financial intermediaries, and would not be applied more generally in claims for damages.

As expected in a legal system with no civil jury trials and no expectation of punitive damages, there is no track record in Italy for liability verdicts resulting in large financial damages awards which might be considered 'nuclear verdicts'.

Claimant strategy

Civil claims in Italy are not subject to a jury trial. Combined with the absence of punitive damages in the Italian legal system, claimants pursuing Italian liability claims are not incentivised to be influenced by legal representatives seeking greater amounts of compensation.

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Republic of Ireland

Collective redress

Until recently there was no formal procedure for bringing class actions in Ireland. Multi-party litigation was dealt with by 'test cases', where numerous claims arise from the same set of circumstances but only one single 'test case' is run. This then acts as a precedent for the remaining cases. In addition, a basic form of 'representative action' was permitted under the Rules of the Superior Court, but did not apply to tort claims, and could not result in the award of damages.

The Republic of Ireland has passed the Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 which introduced the EU Representative Actions Directive (RAD) into Irish law in April 2024.

The Act provides that representative actions in Ireland will be opt-in, and designates consumer associations and certain public entities as domestic representative entities in line with the certification requirements set out in the RAD.

To be a 'Qualified Entity' which can bring an action, an organisation must apply to the Minister for Enterprise, Trade and Employment Remedies for such designation. Amongst other things a 'Qualified Entity' must be able to demonstrate 12 months of public activity in the protection of consumer interests and have a non-profit making character.

Settlements in representative actions taken under the 2023 Act (once commenced) will be subject to court approval and, once approved, will be binding on the qualified entity, the defendant entities and consumers. Qualified Entities, and not consumers, bear the costs of a representative action (save for the payment of any entry fee charged to consumers to join the representative action). The court has the power to make orders in relation the costs of the proceedings on the basis that the losing party pays.

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Litigation funding

Irish law prohibits litigation funding by a third party subject to certain exceptions. Legislation allowing third party funding in cases linked to international commercial arbitration was passed in 2023.

The Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 (section 27) also permits the third party funding of representative actions "insofar as permitted under Irish law".

Where an action is so funded by a third party, the court must ensure that any conflicts of interest are prevented, and the funding does not divert the action away from the protection of the collective interests of consumers.

In 2023, the Irish Law Commission published a Consultation Paper on the law governing litigation funding in Ireland more generally and, following submissions from interested parties, a final report setting out conclusions and recommendations can be expected soon.

Emerging risks

There has been climate change litigation commenced in the Republic of Ireland, however those actions have been directed at governmental bodies. Ireland does not have a formal mechanism permitting shareholder class actions, and it remains to be seen whether there will be a significant uptick in the number of climate-related claims being made in Ireland. However, directors of Irish companies may also be exposed to climate or ESG-related claims due to the various directors' duties set out in the Companies Act, for example as at S228(1)(g) which requires the exercise of reasonable care, skill and diligence by the Director. Reported decisions in the Irish courts are limited but this could change in the future.

From an individual perspective, per GDPR and the Irish Data Protection Act, parties who have suffered a data breach are entitled to compensation for material or non-material damage suffered as a result of a data breach. The recent decision of Nolan & Ors v Dildar & Ors also offers a reminder to company directors, and their insurers, that they may be held personally liable for data breaches that take place while conducting the company's business.

Liability risks which have emerged in other countries, such as the United States, have not been identified in the Republic of Ireland. The issue of PFAS contamination is acknowledged by the Irish Environmental Protection Agency including the current time-limited exemptions for various products including fire-fighting foam, semiconductor manufacturing and others. Studies have been undertaken into dietary (the ELEVATE study) and groundwater (the FUEL study) exposure with further monitoring proposed. However, to date, there have not been any significant legal actions in Ireland reported.

The Republic of Ireland was one of the EU nations which recently voted in favour of the renewal the EU licence for glyphosate. There are examples of Irish legal firms suggesting the pursuit of personal injury damages relating to long-term glyphosate exposure, but to date there are no reported claims which have been successful. Similarly, although trends in strong opioid prescribing in Ireland suggest an upward trend, there have been no reported claims similar to those seen in the US.

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Public sentiment

The use of collective redress measures in the Republic of Ireland for large-scale liability actions is uncommon. In the absence of the implementation of the law allowing for the use of collective redress measures, it is difficult to quantify public appetite for pursuing new types of claims arising from new liability risks.

Interestingly, the Republic of Ireland could be said to have seen a recent example of 'social deflation' aimed at reducing insurance claims costs as a result of public sentiment.

The Irish Government set out in 2020 various aims within the Action Plan for Insurance Reform. These changes could be described as an attempt at social deflation by prompting reductions in liability costs and damages through legislation and regulation perceived as beneficial in public sentiment. These changes are like those undertaken by the UK Government in applying to a tariff to short-term whiplash injuries (with the aim of lowering motor premiums) and the introduction of widespread fixed costs reforms.

Stated goals in the Action Plan included reducing insurance premiums. These objectives were as much prompted by societal considerations as issues such as climate change. Being seen to be dealing with the cost-of-living crisis and challenging perceptions of unmeritorious or unjustified personal injury claims can provide valuable political capital. Similarly, as a major international global hub for worldwide companies (such as Meta), observations around the prohibitive costs of insurance could impact Ireland's attractiveness for businesses.

The measures undertaken by the Irish Government include:

- A scale of lower ranges of damages across all categories of injury (up to 50% + reductions on applicable damages for soft tissue injuries).
- The Personal Injuries Resolution Board Act, aimed at reducing personal injury claim values and associated costs. The staged introduction of that legislation continues.
- Radical changes to occupiers' liability legislation in favour of occupiers. From 31 July 2023, the amendments to the Occupiers Liability Act 1995 under the Courts and Civil Law (Miscellaneous Provisions) Act 2023 took effect. The provisions included limits on the circumstances in which a court can impose liability on the occupier of a premises where a person has entered onto premises for the purpose of committing an offence; and allowing for broader circumstances where it can be shown that a visitor or recreational user has voluntarily assumed a risk.
- Potential significant procedural reforms to avoid and reduce legal costs. The Irish Government commissioned An Economic Evaluation of Options to Control Litigation Costs last year. Pressure groups have sought the publication of the report to support or refute views that legal costs are increasing premiums in Ireland.

Nuclear verdicts

The concept of nuclear verdicts is not applicable to the Republic of Ireland.

Although the jurisdiction does have jury trials for certain civil matters, it is limited to specific actions such as those of defamation. Punitive damages (referred to as 'exemplary damages' in Ireland) may also be awarded when it is considered necessary to punish the defendant and deter other individuals from similar behaviour. However, the targeted application of exemplary damages by the judiciary is not comparable to the widespread use in the United States, meaning that nuclear verdicts cannot be said to occur in Ireland.

Claimant strategy

For personal injury claims, the Republic of Ireland relies upon guidelines for the assessment of general damages in injury claims ranging from severe to minor. Therefore, techniques which may be used by claimant representatives in jurisdictions such as the United States are not appropriate, particularly due to the limited application of exemplary damages and the absence of widespread civil jury trials. In addition, there is no significant use of collective redress to pursue large numbers of liability claims for personal injury or other damages to date.

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The Netherlands

Collective redress

Unlike other European jurisdictions, the Netherlands had a well-established class action regime prior to the introduction of the Representative Actions Directive (RAD).

In 2005, the Dutch Act on the Collective Settlement of Mass Claims (WCAM) introduced the concept of collective settlements into Dutch law. A representative entity, such as a foundation or association, could agree a settlement with a defendant, and they would seek a declaration from the Amsterdam Court of Appeal that the settlement was binding on all persons affected by the incident.

WAMCA

The Dutch Act on the Redress of Mass Damage in Class Actions (WAMCA) entered into force on 1 January 2020 and applies to events taking place on or after 15 November 2016. WAMCA facilitates collective actions for 'mass' damages. An interest group can only start a class action when the matter at hand has sufficient ties or connection with the Netherlands. A sufficient connection can be said to exist if:

- The defendant is domiciled in the Netherlands and additional information suggests a sufficient relationship or
- The event(s) triggering the action took place in the Netherlands or
- The majority of claimants in the class action are domiciled in the Netherlands.

The most significant change that WAMCA has made to the landscape of class actions is that a representative entity filing an action on behalf of a group of injured persons can now seek damages in the collective action, thus establishing both the liability of the party causing the damage and the compensation in a single lawsuit.

Under WAMCA, the representative entity must be a non-profit organisation, be sufficiently representative and represent a suitably large group of aggrieved parties.

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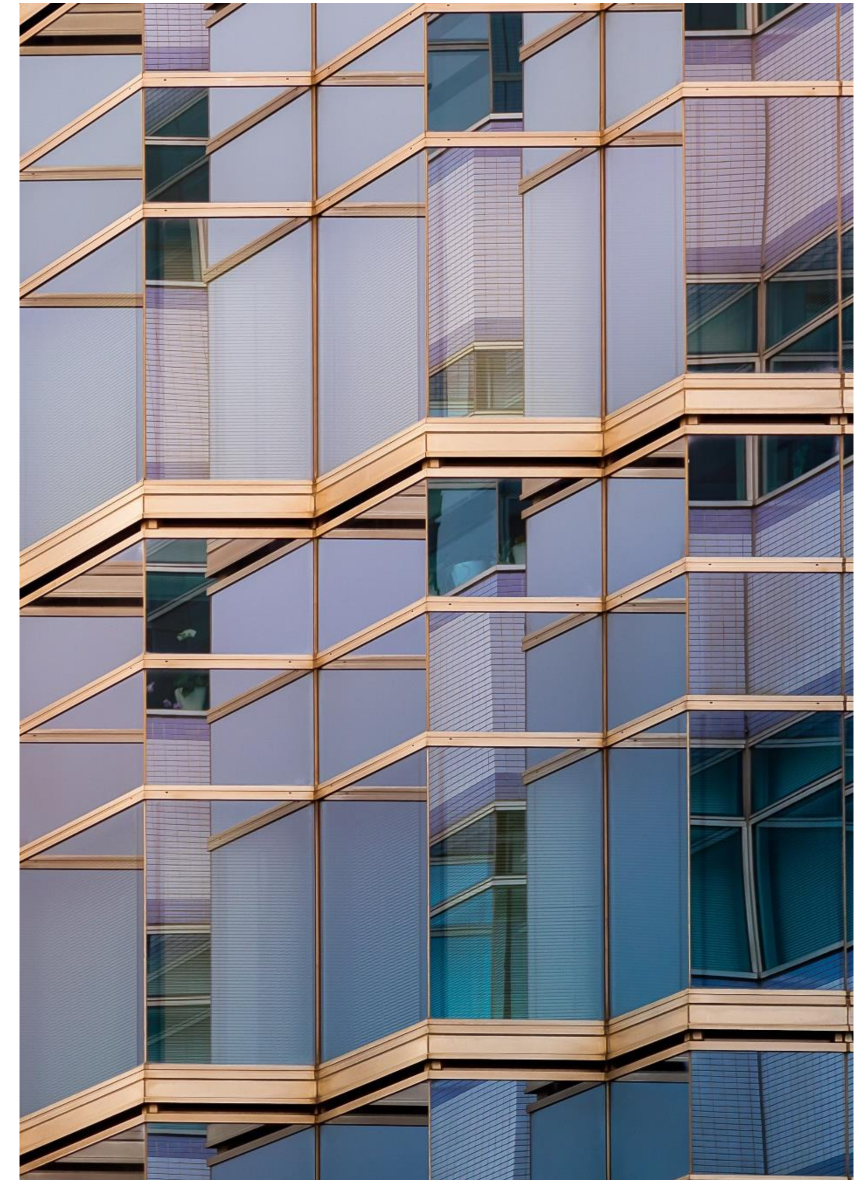
The interest group must also fulfil several other conditions, including having:

- a supervisory body,
- a suitable and effective mechanism for the participation or representation of the persons involved in the claim in the decision-making process of the interest group,
- adequate financial resources to bear the costs of the collective action,
- adequate experience and expertise to be able to conduct a collective action, and
- a publicly accessible web page presenting specific information relating to the structure and working method of the interest group.

The court will decide on the scope of the collective action and for whom the representative entity will act. Injured parties residing in the Netherlands have the option to opt-out. Their interests will, in theory, be represented (by default) by the representative entity unless they indicate that they do not wish to be part of the group of represented persons. The court determines the opt-out period, which is at least one month. For non-Dutch parties to a WAMCA action, a party to the proceedings may request that they be added to the opt-out action.

The court will usually set a term for the parties to try to reach a settlement. If the court approves the settlement agreement, the collective settlement will be declared binding.

The injured parties then have a second opt-out term, once again of at least a month, to decide if they wish to accept the settlement. If no collective settlement is reached or the court rejects the settlement, the proceedings will continue. The court may dismiss the collective claim, establish liability, or award damages if requested to do so. In this last case the court may use a compensation scheme with different amounts of compensation per category of injured persons. The court's ultimate ruling is binding on all Dutch injured parties who have not made use of the opt-out option(s), and on all foreign injured parties who have previously opted in.



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Representative Actions Directive

The legislation adopting the RAD into Dutch law made slight amendments to the existing procedure under WAMCA. Funding of actions cannot be made by competitors of defendants or by a funder that is dependent on a defendant. Cross-border representative entities are not subject to the organisational requirements under WAMCA as they are granted mutual recognition across the European Union if they fulfil the requirements to bring a cross-border representative action.

The ability for non-Dutch parties to be bound in an opt-out action is also not permitted for representative actions. In those claims brought on or after 25 June 2023 within the scope of the RAD, claimants who are not domiciled or resident in the Netherlands may be bound by an opt-in procedure.

Litigation funding

Third party litigation funding is permitted in the Netherlands, both in civil proceedings as well as in arbitration. Dutch law does not specifically regulate third party litigation funding.

In practice, litigation funding is most often used in class actions and WAMCA established some obligations regarding the use of third party litigation funding. Those claimants who are represented by an interest group, association or foundation (a representative entity) must have appropriate and effective mechanisms to participate in the decision-making of the entity (article 3:305a, paragraph 2, subsection b of the Dutch Code of Civil Procedure). The representative entity should have sufficient funds to progress the claims, but also retain sufficient control over the class action. Simply put, third party litigation funders should not be the ultimate decision-making power in a class action.

Courts may also order representative entities to provide details of their funding arrangements, including funding structures and documents. Defendants can be provided with information on third party funding, but certain information may be withheld or redacted. This is to prevent the defendant identifying the funding available for the class action, which could lead to behaviours such as dragging out proceedings in the hope of exhausting those sums, resulting in a more favourable settlement for the defendant side.

As an example of how these obligations may apply, in 2023, the Hague District Court found that a representative entity had outsourced essential activities to a Bahamas-based law firm (who was also the entity's founder). In addition, a member of the Supervisory Board of the representative entity was found to be closely associated to the litigation funder. Therefore, there was a risk of the representative entity being influenced by the funder and it was therefore inadmissible as the representative entity.

Following the passing of the Implementation Act relating to the (RAD), an additional requirement was added to article 3:305a confirming that the financing of an action pursuing an infringement of European Union law per the RAD cannot come from a competitor of the defendant or a party reliant on the defendant.

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Emerging risks

The Netherlands has been at the forefront of climate and ESG-related litigation against both government and businesses, and we expect this risk to grow, which may increase corporate and D&O related insurance claims. The climate activist group Milieudefensie successfully pursued an action against Shell in 2021 which resulted in the company being ordered to reduce its carbon emissions. An appeal was recently heard, and if the original decision is upheld, it offers a blueprint for ongoing and prospective actions against other companies seen as contributing to carbon emissions in the Netherlands, building on the landmark *Urgenda* decision against the Dutch government.

Furthermore, a Dutch court recently offered the first judgment on aviation greenwashing in Fossielvrij v KLM, underlining the serious reputational costs for those operating in the ESG space, and by extension, the risks of additional damages or penalties to be borne by their insurer. Although the airline was not penalised financially, this successful judgment may encourage further greenwashing actions, especially in the Netherlands which has a mature class action system.

Companies facing data breach claims under the GDPR will have been reassured by the Austrian Post decision in 2023 which confirmed that a breach of the GDPR does not automatically give rise to a right to claim damages. However, this has not prevented the progression of several class action claims (under WAMCA) against various technology companies alleging breaches of GDPR. As none of these claims have reached a conclusion yet, it remains unclear whether the court will hold that an opt-out claim under WAMCA for breaches of GDPR is viable. Examples of ongoing privacy class actions being pursued include:

- The Data Privacy Foundation pursuing Meta for continued illegal processing of users' personal data in line with a 2023 finding that Meta had used the illegal processing for targeted advertising.
- Stichting Data Bescherming Nederland pursuing Amazon for the unlawful processing of personal data.
- The Consumers' Association and the Foundation for the Protection of Privacy Interests pursuing Google for alleged GDPR violations including tracking and profiling users.
- The Privacy Collective pursuing software companies Oracle and Salesforce for illegally collecting and processing the data of internet users in the Netherlands.

If one of these actions is successful, then those pursuing existing actions will be encouraged, and new actions might be triggered.

More generally on emerging risks, the Supreme Court provided additional clarification in 2022 on how secondary victim shock damage will be assessed going forward. Key factors include:

- The circumstances and consequences of the unlawful act, including consideration of the intention of the perpetrator.
- The nature and severity of the suffering caused to the victim.
- How the secondary victim was confronted with the unlawful act and the suffering caused to the victim.
- The relationship between the primary and second victims.

Looking to those liability risks which are often associated with social inflation risk in the United States, glyphosate is banned for domestic use in the Netherlands, but there have been no reported examples of litigation alleging physical injury sustained through exposure, on an individual basis or class actions, being successfully pursued.

The litigation environment in respect of PFAS is advancing. In 2023, a Dutch court held the US chemical company, Chemours, liable for PFAS-related environmental damage in the municipality of Dordrecht. It is possible that this finding will open the door for compensatory proceedings for remediation work and potential personal injury claims. It was also announced in April 2024 that a group of eleven consumer groups are pursuing a claim against the state of the Netherlands for failing to take sufficient measures to limit and prevent the damage caused by PFAS. The action will pursue several declaratory findings in respect of PFAS exposures and seek a complete ban on all PFAS emissions in the Netherlands.

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Public sentiment

The growing register of ongoing and settled WAMCA actions maintained by the Dutch government is a clear indication that the use of the WAMCA procedure continues to be popular. By extension, the Netherlands is a jurisdiction where class actions will be expected to increase in the coming years. The introduction of the representative action created by the transposition of the Representative Actions Directive is likely only to increase the public desire to pursue collective redress.

The register also demonstrates the diversity of actions that are being pursued. According to research released in 2023, technology, data and consumer claims together represented 95% of the total quantum in respect of class actions issued in the Netherlands. In addition, the recently concluded greenwashing action against KLM and other climate-related actions illustrate the public emphasis on ESG and focus of actions being pursued in the Netherlands.

This diversity suggests an increasing familiarity (and positive association) with the WAMCA mechanism amongst the general Dutch population, activist groups and legal representatives. This may generate increased litigation.

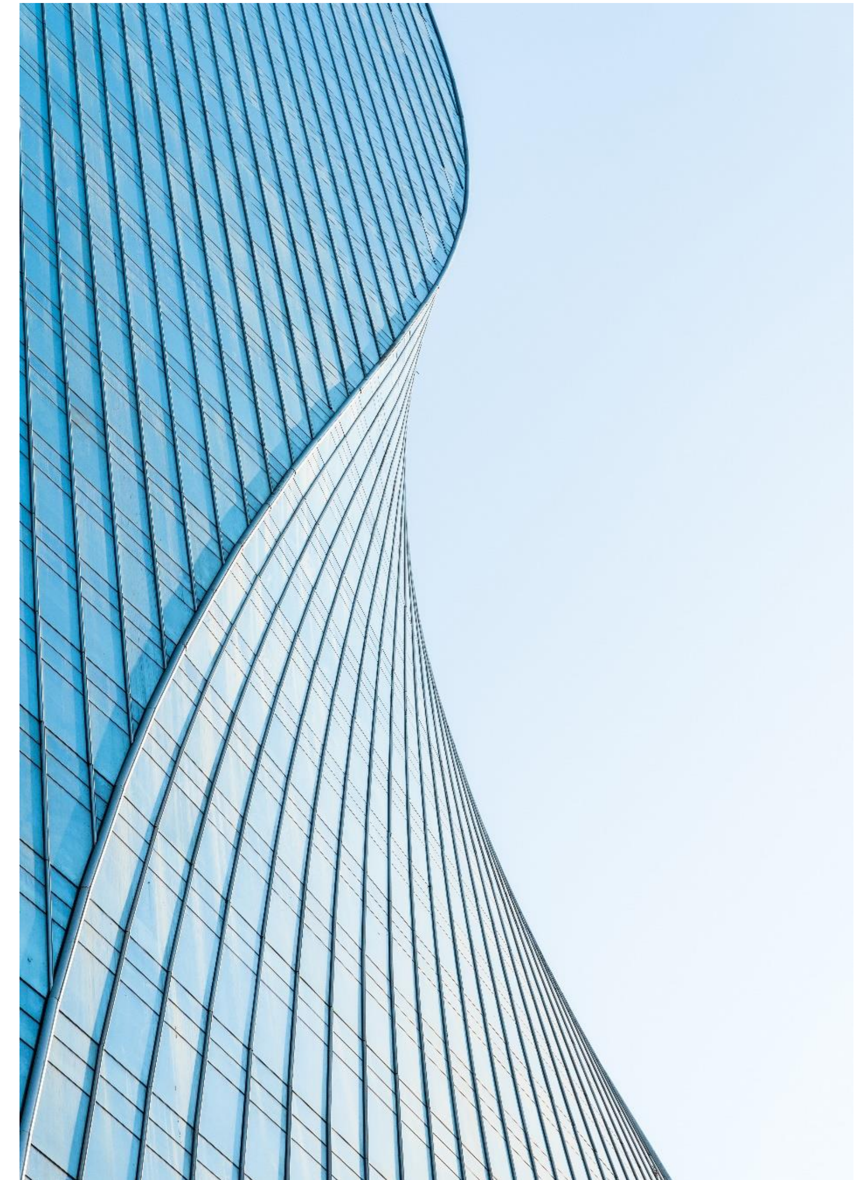
Nuclear verdicts

Punitive damages are not available in the Netherlands. The starting point for any damages awards in the Netherlands is always the victim's distress, pain and suffering.

Claimant strategy

Civil claims in the Netherlands are not subject to a jury trial. Combined with the absence of punitive damages in the Dutch system, it could be argued that claimants are not incentivised to pursue actions in the Netherlands.

However, this jurisdiction arguably offers the most mature collective redress system, with clear rules, and experience in dealing with such claims. This makes the Netherlands an attractive destination for litigants, provided that an action can be pursued in the jurisdiction. The opt-out system in place (subject to the restrictions on non-Dutch injured parties) is also attractive to legal representatives and litigation funders looking to maximise financial gains in pursuing actions.



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Australia

Collective redress

Collective redress is permitted in Australia through class action regimes existing at both state and federal levels. Australia is considered a plaintiff-friendly jurisdiction and one of the most active class action markets in the world.

Class actions in Australia are conducted as 'representative proceedings' where any person or entity can bring a claim on behalf of a class of group members. The threshold requirements to commence a class action are:

- seven or more persons with the same claim;
- the claims arise out of the same or related circumstances; and
- the claims contain at least one substantial common issue of law or fact.

Any person or entity can bring a claim on behalf of a class of group members. Some regulators are empowered under statute to bring representative proceedings. For example, the Australian Competition and Consumer Commission (ACCC) is permitted to act as a representative party on behalf of consumers, and the financial services regulator - the Australian Securities and Investments Commission (ASIC) - is able to commence representative proceedings in the name of a company or a natural person.

In Australia, an opt-out system applies to each of the class action regimes. There is no formal class certification process required for class actions in Australia. The absence of a formal certification process means that defendants may face multiple class actions that arise from the same or similar allegations. To date, Australian courts have generally required matters to be transferred to and managed within the same court by the same judge. However, the management of competing or overlapping class actions is a matter of discretion and case management, which means that the process of managing multiple class actions can be both time consuming and uncertain.

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Courts have permitted classes to be defined in such a way that only group members who had entered into a litigation funding agreement with the funder could be a class member. This is, in effect, an opt-in arrangement operating within an opt-out system.

For settlement purposes, if a claimant is within the defined class but does not opt out before a time that is fixed by the court, then they will generally be bound by any settlement that is approved by the court or any judgment of the court if the matter does not settle.

Litigation funding

Third party litigation funding is permitted in Australia and is commonly used in insolvency-related and class action litigation. There is no limitation to the types of civil claims that may be funded.

In August 2020, regulations were introduced requiring third party litigation funders to hold an Australian Financial Services Licence (AFSL) or be an authorised representative of an AFSL holder. This regulation was short-lived, and in December 2022 the Australian Government introduced regulations that provided litigation funding schemes with exemptions from the requirement to hold an AFSL.

Litigation funders are required to manage conflicts of interest consistent with ASIC Regulatory Guide 248.

Federal and state court practice notes also require litigation funding agreements to include provisions for managing conflicts of interest. Those same practice notes require disclosure of litigation funding agreements to the court and other parties in certain circumstances. The Federal Court of Australia's Class Actions Practice Note (GPN-CA) requires, subject to objection:

- confidential disclosure of any litigation funding agreement to the presiding judge before the first case management hearing; and
- disclosure of a copy of the standard litigation funding agreement to other parties, which may be redacted to conceal any information which might reasonably be expected to confer a tactical advantage on another party to the proceeding.

Similar procedures are covered in state court practice notes.

Further, developments in two jurisdictions have opened pathways for law firms to act for lead plaintiffs and applicants in class actions on a contingency basis, and to apply for orders for their payment by way of a percentage amount of any settlement or judgment sum (i.e. a solicitors' common fund order). This effectively introduces the prospect of law firm funded class actions in Australia.

Legislation in the State of Victoria now expressly permits lawyers representing a lead plaintiff in a class action to recover a contingency fee charged as a percentage of the amount recovered apply for a solicitors' common funder order (referred to as a Group Costs Order). The Full Court of the Federal Court of Australia also recently handed down a judgment which found that the Federal Court has the power to make solicitors' common fund orders. That power has been found to exist under the Court's general powers relating to the approval of settlements in class action matters and in awarding judgments. This is likely to remain the position for class actions listed in the Federal Court of Australia unless and until there is any contrary determinations made by the High Court of Australia.

The availability of solicitors' common fund orders in the State of Victoria and the Federal Court of Australia in any particular class action remain subject to the Court being satisfied that the relevant orders are in the interests of justice in the circumstances of the case.

Emerging risks

Areas that have seen significant class action activity in Australia in recent years include: mass consumer claims, securities class actions, employment-related class actions (particularly for alleged wage theft and systemic underpayment), government-related class actions, and class actions relating to financial products. These are likely to continue, particularly as the recent loosening of regulation relating to litigation funding in Australia will generate further interest in class actions.

New areas of exposure are likely to include actions in relation to data breaches, cyber security, sports concussion claims, and ESG-related claims such as greenwashing.

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Australia is an active jurisdiction in respect of litigation relating to PFAS exposure, with class action firms active in this space. To date, claims involving PFAS exposure have typically settled before judgment, meaning there is currently an absence of authoritative judgments clarifying:

- When persons involved in activities with PFAS-containing products should have been aware of potential health and environmental risks;
- What reasonable actions these persons should have taken to mitigate these risks; and
- The types of injuries, damage and loss that can be attributed to PFAS contamination.

Clarification of these issues may generate more litigation in the longer term.

There has also been a surge in climate change and activist litigation brought against corporations and government bodies in Australia, particularly targeting the energy and resource sectors. Broadly speaking, there have been three main categories of cases seen in Australian courts:

- Investor or activist led claims: These aim to influence corporate and governmental practices through declaratory and injunctive relief rather than seeking compensation.
- Regulatory prosecutions: These focus on the accuracy of environmental reporting and compliance with emissions targets.
- Challenges to Government authorisations: These cases question approvals for energy and resources projects, citing concerns over climate change impacts, Aboriginal cultural heritage, and human rights. Cases such as *Cooper v National Offshore Petroleum Safety and Environmental Management Authority, Munkara v Santos NA Barossa Pty Ltd and O'Donnell v Commonwealth of Australia* underscore legal developments in this area.

Public sentiment

There has been a degree of erosion in public trust and confidence in corporations and institutions in recent years. There have been a number of Royal Commission reports into institutional and industrial wrongdoing. This has contributed to an environment in which the Australian public are comfortable being part of class actions as set out in the emerging risks section, and becoming involved in activist litigation on issues such as climate change.

More generally, Australia has a strong culture of promoting access to justice. This is reflected in the low level of regulation of litigation funding and the requirement of internal dispute resolution processes for businesses operating in certain regulated industries (such as banking and insurance).

Nuclear verdicts

Nuclear verdicts are not a feature of the Australian litigation landscape. The use of juries in Australia for civil trials is limited. Victoria is the sole Australian state jurisdiction where jury trials are generally available as of right on application by the plaintiff or defendant in civil claims. Ultimately, the court retains the discretion to direct a trial without a jury.

The awarding of punitive (or exemplary) damages is very rare and statutory intervention has abolished the availability of exemplary damages in many species of claims, including in claims for negligence resulting in death and personal injury.

It should be noted that there have been settlements of actions in Australia for significant financial sums, however, these have involved class actions as opposed to individual outcomes. For example, the Australian Government recently settled a class action over PFAS contamination on terms that required it to pay AUD132.7 million. Since 2020, Australia's Defence Department has paid out more than AUD366 million to settle class action lawsuits over its use of firefighting foam alleged to contain PFAS.

Claimant strategy

There is a healthy plaintiff Bar in Australia, yet similar to other jurisdictions, they have limited influence on the outcome of actions and judgments save for their representation. Strategies such as anchoring as seen in the United States are not applicable.

Australia has also established various consumer-friendly external dispute resolution forums that aim to promote fair resolution of complaints without the cost of legal representation. Indeed, many of these forums discourage or do not ordinarily permit the parties to be legally represented.

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Singapore

Collective redress

Singapore has a form of representative action which allows one or more persons to represent a group of persons with a common interest in proceedings. If there is a class of persons and all or any member of the class cannot be ascertained or cannot be found, the court may appoint one or more persons to represent the class.

Representative bodies can only bring actions on behalf of a class of persons such as consumers if the representative body or the representing person(s) have a common interest with the members of the class.

Any court-approved settlement is made in the form of an order, and an order given in a representative proceeding in which the court has appointed persons to represent a class would be binding on the class.

Litigation funding

Litigation funding is permitted in Singapore, but only in relation to international and domestic arbitration, mediation proceedings in relation to arbitrated disputes, court proceedings relating to arbitration, court proceedings in the Singapore International Commercial Court, and a range of claw-back court actions by liquidators in the insolvency context.

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Those funders operating in this jurisdiction are required to satisfy certain requirements under Section 5B(3) of the Civil Law (Third-Party Funding) Regulations 2017. To be a qualifying 'Third Party Funder', the funder must:

- Continue the principal business of funding dispute resolution proceedings; and
- Have a paid-up share capital of not less than: (i) $5 million; or (ii) the equivalent amount in foreign currency; or
- Have managed assets of not less than: (i) $5 million; or (ii) the equivalent amount in foreign currency.

The Singapore Institute of Arbitrators (SIArb) established guidelines in 2017 for funders with the aim of promoting best practice, expectations of transparency and accountability. The SIArb website has a list of those funders who support the funding guidelines including major funders Woodsford, Burford Capital and Augusta Ventures Limited.

If a party to litigation is receiving third party funding, the Professional Conduct Rules 2015 for legal representations require disclosure of the funder's identity and address to the appropriate court/tribunal and other parties.

Emerging risks

Compared to other jurisdictions highlighted within this guide, there are no examples of liability litigation trends giving rise to social inflation in Singapore. This includes US-comparable risks such as opioids and glyphosate. Significant risk of PFAS features across many jurisdictions and Singapore is no different. The National Environmental Agency of Singapore recently confirmed the use of fire-fighting foams containing PFAS will be phased out from January 2026. However, there are no examples of claims being pursued which would give rise to increased litigation generally or claims costs.

In relation to data breach claims, which have been seen in the UK and Europe, the Singaporean courts, via contravention of the Personal Data Protection Act, do allow individuals who have suffered emotional distress as a result of a data breach to pursue an organisation for relief . However, due to the limited nature of collective redress available in Singapore, there have not been any significant examples of large-scale data breach actions to date.

From a climate change perspective, Singapore recently introduced local reporting standards for climate-related disclosures aligned with the International Sustainability Standards Board. These standards will apply to Singapore Exchange-listed and large non-listed companies. In addition, directors and officers of companies will increasingly be expected to consider their companies' exposure to liability, physical and transitional risks associated with climate change. To date though, there have been no such actions reported in Singapore.

Public sentiment

The use of collective redress measures in Singapore is uncommon. In the absence of widespread use, it is difficult to quantify public appetite for pursuing new types of claims arising from new liability risks. There is currently one high-profile representative action brought against a Singapore-incorporated blockchain company, Terraform Labs, by 376 claimants who claim to have been fraudulently induced into investing into the tokens sold by the blockchain company. If successful, this may pave the way for more such lawsuits in the future.

Nuclear verdicts

In the absence of jury trials, nuclear verdicts do not occur in Singapore.

Punitive damages are available in Singapore but are reserved only for 'outrageous breaches or conduct'. The issue of punitive damages in tort was considered in the case of ACB v Thomson Medical PTE Limited, which confirmed that in the event of an award, "the sum awarded would be additional to, not in lieu of any compensatory award."

Claimant strategy

Singapore does not have jury trials for any court proceedings. For personal injury claims, similar to the UK, Singapore relies upon case precedent as well as published guidelines and actuarial tables for the assessment of general damages in injury claims ranging from severe to minor, and therefore, techniques which may be used by claimant representatives in jurisdictions such as the United States are not applicable. In addition, there is no significant use of collective redress to pursue large numbers of liability claims for personal injury or other damages.

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Argentina

Collective redress

The Consumer Protection Law No. 24,240 allow associations of consumers and users to bring consumer claims before courts on behalf of a class of consumers and users.

The procedural aspects of these class/representative actions have never been regulated by statute. The landmark Halabi ruling issued by the Argentine Supreme Court of Justice in 2009 established the following requirements for a collective action:

- Definition of the class.
- Same factual cause of loss. If the damage has been caused by the same cause of loss it may be reasonable for that breach to be considered in a single action/proceedings.
- Impairment of the class members' right of access to justice. The claim must be focused on the damage sustained by the group, rather than what each party could claim individually.
- A suitable representative.

The Argentine Supreme Court of Justice applied an opt-out mechanism in the Halabi decision. The Supreme Court has also created the Public Registry of Class Actions.

These class/representative actions are organised in a manner consistent with ordinary commercial proceedings. However, additional specific rules apply, including that:

- Evidence must be provided that the representative party is qualified to act on behalf of class members.
- The Public Registry must be contacted in order to establish whether there is a substantially similar claim proceeding/concluded. If there is, the court in question may refer the action to the court dealing with/having dealt with the substantially similar claim.

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Litigation funding

Litigation funding is permitted in Argentina. The use of funding is not regulated, and it is not limited to certain types of claims. Contingency fee arrangements are valid, although they are regulated in accordance with the Attorneys' Fee Law No. 27,423 meaning that a fee cannot ordinarily exceed 30% of the result of the lawsuit.

Emerging risks

There are emerging liability risks in Argentina, such as a series of regulatory initiatives including:

- The establishment of a new mandatory car insurance regime.
- A draft bill to update the Argentine Data Protection regulation. The draft bill establishes the obligation to notify security breaches to the data protection authority within 72 hours of becoming aware of it.

A new government took office in December 2023, and a set of new measures has been either issued or proposed in Congress to deregulate different regimes, including for the insurance activity:

- elimination of prior authorisations for insurers (opening of branches in the country and operating in lines of business/ insurance plans);
- elimination of the power of the SSN (insurance regulator) to establish minimum and maximum intermediary commissions (i.e., reinsurers brokers).

A series of rulings were issued by the Argentine Supreme Court of Justice late in 2023, which confirmed the Flores case, meaning that in the case of compulsory motor insurance policies, judgment is not enforceable against the insurer for a sum outside the limit of cover in the contract. In addition, there has been a judicial ruling establishing that an insurance broker is jointly liable for breach of an insurance contract, based on the Consumer Protection Law.

Looking to those litigation risks present in jurisdictions such as in the United States, concerns around the use of glyphosate have been present in Argentina for some time, particularly due to the high usage of the weedkiller for Argentina's soy fields. Although the Argentinian region of Misiones has banned the use of glyphosate as of 2025, and concerns have been raised about the prevalence of certain illnesses close to locations where glyphosate is used, litigation has not followed.

In respect of data breach and possible claims, the Argentinian Data Protection Authority has a variety of powers available to it including administrative fines. However, there have not been sizeable numbers of data breach actions in Argentina to date.

From a climate change perspective, several actions have been pursued against governmental agencies and corporations in order to block construction of energy projects including fossil fuel exploration. However, shareholder activism in Argentina is limited due to the nature and size of the market. Therefore, actions against companies, and their directors and officers, which may give rise to additional D&O risk and costs have not been identified to date.

Public sentiment

Argentina does not have jury trials for civil matters, meaning that concerns around the influence of juries on damages awards are not applicable.

There are examples of Argentinian activists pursuing actions against corporations and governmental organisations. However, these have not translated to large numbers of claims likely to result in increased risk and claims costs.

Nuclear verdicts

Argentina allows for punitive damages under Consumer Protection Law No. 24,240, (i.e., for claims involving defective products). Any punitive award in this context is capped at AR$1,708,204,953 (US$1,915,027.97 at current exchange rates) and depends on the seriousness of the defendant's conduct and circumstances of the claim. Punitive damages are not otherwise available in general civil law litigation in Argentina.

Claimant strategy

Argentina does not have jury trials for civil matters, meaning that concerns around the use of specific strategies to increase damages award are not applicable.

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Mexico

Collective redress

Collective redress mechanisms are available in Mexico. Class actions are regulated by the Federal Code of Civil Procedure (the Civil Code). The Civil Code recognises three types of class action as follows:

- Diffuse Actions (Acciones Difusas): These actions relate to rights where individual parties are not identified, and the remedy is indivisible in nature (e.g. environmental claims). The main purpose of these actions is to restore things to how they were before the damage was caused. Individual damages are not available for this type of action, as the relief sought is general, such as carrying out an environmental cleanup.
- Strict Group Actions (Accion Colectiva en Sentido Estricto): These actions relate to rights where individual parties can be identified but the remedy is indivisible in nature (e.g., maintaining collective property). The main purpose of these actions is for the defendant to repair the damage caused or to prevent further damage. In addition, defendants will be expected to indemnify each claimant for damage caused.
- Uniform Individual Actions (Acción Individual Homogenea): These actions relate to rights where individual parties are grouped together based on common circumstances and the remedies are divisible in nature, allowing for payment of damages to each claimant within the class.

The Strict Group and Uniform Individual Actions operate on an opt-in basis, but Diffuse Actions operate on an opt-out basis.

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Across all three types of action, classes of claimants must be made up of least 30 members who are linked by common legal or factual circumstances.

Representative bodies or entities are entitled to bring the group actions defined above. In respect of consumer matters, the representative body is the Consumer Protection Federal Bureau and in respect of financial services, the representative body is the National Commission for the Protection and Defence of Financial Service Users.

Any total or partial settlement agreement approved by the court is binding for all parties (the claimants, their representative body and the defendants) that entered into the settlement agreement.

Litigation funding

Third party litigation funding is neither expressly permitted nor prohibited in Mexico. There is no framework for regulating the use of litigation funding, which is consistent with its limited use in civil actions.

However, the development of a comprehensive framework of collective redress mechanisms, along with the development and incorporation of the concept of punitive damages, are likely to make Mexico a more attractive proposition for litigation funders.

Emerging risks

There have been a number of developments in relation to claims and insurance more generally in Mexico which will give to rise to additional claims and costs payable by insurers. Mexican insurance law is distinctly pro-insured in many aspects, driven by a regulatory framework designed to protect the rights of insureds including guaranteeing adequate compensation while ensuring that insurers operate openly and fairly.

The courts are keen to protect minorities and vulnerable persons (e.g., indigenous groups, children etc) and may sometimes overlook the statutory caps on damages for state liability available in the administrative court. Claims against private organisations are not subject to any damages caps and are at the discretion of the courts, with a clear trend for increasing compensations awards over the past 50 years, which has seen awards increasing ten-fold in some cases.

At the same time, claims by claimants directly against liability insurers are becoming increasingly normal.

Extension of limitation

The limitation period for filing claims under insurance policies in Mexico is two years (five for life insurance claims), starting when the insured or beneficiary becomes aware of their right to claim.

For a property or liability policy, the two-year limitation period runs from the date of the occurrence of the loss for insureds or from the date when the beneficiary acknowledges their right under the policy.

Under Mexican law, claimants are entitled to claim directly against liability insurers without the need to claim first against the insured; however, any claim made directly against the insurers is still subject to the same rules, including any applicable limitation periods. Recent case law has shown a tendency of the courts to extend the limitation period for the benefit of insureds, especially in direct claims where those claiming might not be immediately aware of their rights. For example, in a recent decision, the Supreme Court extended the limitation period for civil liability insurance claims from two to five years in cases involving deceased victims. In another Supreme Court decision, the Supreme Court clarified that the limitation period should commence when the claimant acknowledges the existence of the policy, shifting the burden of proof to the insurer to demonstrate earlier awareness by the claimant and any time bar defences. Such flexibility introduces legal uncertainty for insurers.

There is also a study being undertaken by the Chamber of Deputies, considering whether the statute of limitations applicable to actions arising from a civil liability contract should be increased to five years.

Incorporation of 'full compensation' and punitive damages

Since constitutional reform in 2011 on the issue of human rights, Mexican courts have been progressively awarding more significant compensation for damages, including moral and punitive damages, driven by international human rights principles advocating for "full compensation".

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In the context of insurance claims, the courts have and continue to expand the criteria for the assessment of damages to include moral damages. Factors such as the impact a person suffers on their feelings, affections, beliefs, dignity, honour, reputation, private life, physical appearance, and how others perceive them, as well as their physical or psychological integrity, will all be considered.

In addition, when presented with a claim for moral damages, the judiciary must consider whether an award for punitive damages may be necessary.

Liability risks

In 2022, the Mexican Ministry of the Environment proposed a limit on the import and export of the PFAS group of chemicals, but the current status of that proposal is unclear. There are no reported liability claims in respect of PFAS in Mexico to date.

There have also been proposals to ban glyphosate, which was intended to take effect in April 2024. However, this has been postponed indefinitely. Again, there are no reported examples of glyphosate litigation in Mexico.

Climate litigation

There have been claims issued in relation to climate change in Mexico, but those reported have been directed at public bodies, and therefore there is no immediate risk presented to insurers by climate litigation in the jurisdiction.

Public sentiment

There are no civil jury trials in Mexico, and therefore, public sentiment cannot be said to have a direct impact on the outcome of claims.

Nuclear verdicts

The approach to damages in Mexico has evolved following constitutional reforms in 2011 and subsequent guidance from the Inter-American Court of Human Rights. These reforms integrated a new catalogue of human rights into Article 1 of the Political Constitution of the United Mexican States, including the right to fair compensation.

This trend has led to the recognition and incorporation of the concept of punitive damages into Mexican law. To that end, the Supreme Court has held that compensation for moral damage has a punitive element through the provisions of article 1916 of the Civil Code for Mexico City. Although judgments of this value are rare, they are increasing.

Moral damage in Mexico relates to non-financial (or spiritual) harm. Types of moral damage include damage to honour, aesthetic damage and damage to feelings, both now and in the future. The Supreme Court issued a recent ruling stating when seeking a claim is presented for moral damages, the judiciary must consider whether it is appropriate to take punitive damages into account to increase the amount of compensation when the conduct that caused the damage is of such seriousness that it warrants a punitive damages award. This guidance opens the door for Mexican judges to analyse the applicability of punitive damages whenever moral damages are claimed. Additionally, the burden of proof will fall on the defendant to demonstrate that their actions did not cause damage or that the damage caused is not sufficiently serious to justify an award of punitive damages.

The Mayan Palace litigation provides an example of how punitive damages can be applied. In that case, a minor died from electrocution while kayaking at the hotel. It was held that the parents were entitled to compensation for moral damage, including damages to discourage similar behaviour in the future. The Supreme Court referred to these as 'punitive damages'. In light of the defendant's high level of responsibility, negligence, economic capacity and the severity of the moral harm, the court increased the moral damage compensation to MX$30,259,200. In 2023, a government entity was ordered to pay total compensation to a minor and their family in the sum of MX$100 million as a result of the minor suffering significant burns to their body.

Claimant strategy

In the absence of jury trials in Mexico, legal representatives are not able to employ specific tactics to encourage the award of punitive damages. However, the availability of punitive damages in Mexico means that more claimants may seek to plead and make arguments that the threshold for them has been reached in serious incidents.

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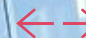

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