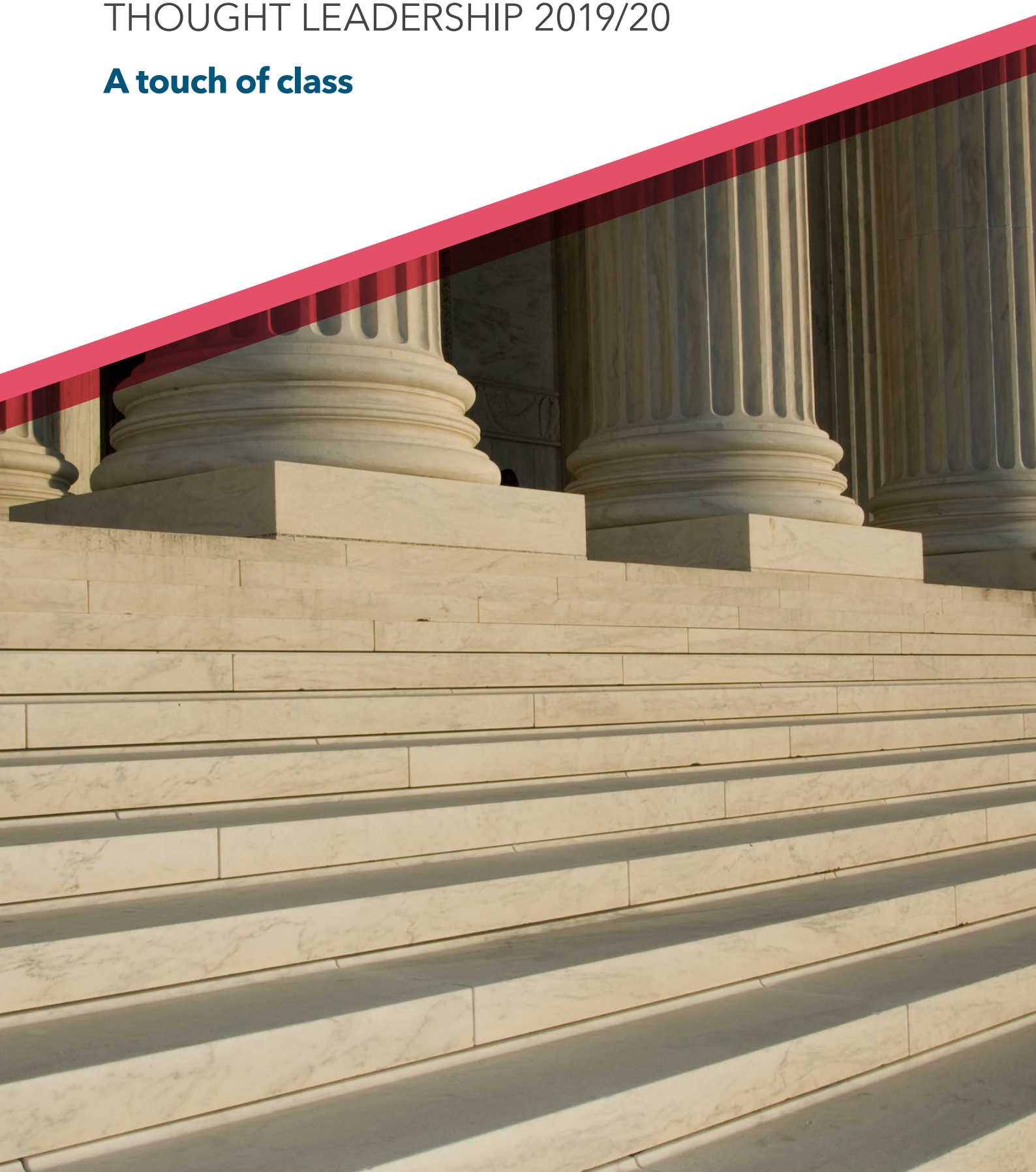
DAC BEACHCROFT

# INFORMED INSURANCE:
# THOUGHT LEADERSHIP 2019/20

## A touch of class



# A TOUCH OF CLASS

Class actions have been a feature of the US legal system for years, designed, at least in theory, to help groups of individuals seek redress against major (and minor) corporations and organisations. There are now signs across the globe that this approach is gaining more traction, particularly in Europe.

A class action, class suit, or representative action – where one of the parties is a group of people who are represented collectively by a member of that group – originated in the US before spreading to Australia. Now pressure is building in Europe in the wake of cross-border scandals from VW's Dieselgate through to Petrobras, a bribery and corruption securities class action, which was one of the largest of all time.

## THE US AND AUSTRALIA LEAD THE WAY

The US and Australian legal systems are structured for class actions to flourish as the use of contingency agreements shield plaintiffs from having to cover costs if a case should fail. In addition, plaintiff law firms and litigation funders can reap rich financial rewards of up to 35-45% of the damages awarded – particularly in shareholder related cases.

"We are seeing unprecedented activity in the Australian market in the class action environment," says Andrew Moore, Partner at Legalign firm Wotton + Kearney in Sydney. "This volatile environment is having a major impact on insurers' appetite when it comes to D&O insurance and premiums have been on the rise for some time."

There are, however, some signs in the US that the business community – boosted by the Trump administration's pro-business stance combined with changes to members of the Supreme Court – will increasingly look to avoid class actions. "The Supreme Court is showing a growing acceptance of agreements that waive class arbitration," says David Ross, Partner at Legalign firm Wilson Elser in Washington. "This is increasingly being utilised by the business community across all classes, including the consumer and employment area, to avoid class actions altogether. If someone sues you and tries to bring a potential class action, you can divert the case to arbitration and force the case to be administered on an individual basis instead of having to face a class action in either a court or arbitration."

In addition, the fees that law firms can earn are being trimmed, notes Paul S White, Partner at Wilson Elser in Los Angeles, as the courts – and the Department of Justice – are increasingly scrutinising settlements to find a way to ensure the class members themselves get a fair share of the damages.

These developments aside, the appetite for class actions shows no respite. New moves include attempts to obtain class certification around the #MeToo movement, although these have been hampered by the need for the injuries claimed to be unique to the individuals. There has also been increased activity over company websites for being inaccessible to the visually impaired and claims related to concussion in sport at the collegiate (and youth and professional) level.

In the securities areas, says Jim Thurston, Partner at Wilson Elser in Chicago, there has also been a major increase in the number of actions being filed. And filed, as opposed to being trialled, is the key word here as the cases underline the power of media pressure on large corporates. "Since 1995 there have been over 5,200 actions filed of which fewer than two dozen have actually gone all the way to trial," says Thurston. "In other words, you don't need a successful trial to get a settlement, and often, as soon as a claim is made, a company's insurer may be willing to open settlement discussions."

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Similarly in Australia, Patrick Boardman, Partner at Wotton + Kearney in Sydney, reports: "Securities class actions continue to be seen as 'good business' by plaintiff law firms and litigation funders alike. While the number of class actions is still small (compared to the US), those numbers are increasing, as is the number of competing class actions that require judicial determination on which is to proceed. Plaintiff-friendly laws (which have been the subject of the recent judicial commission's recommended amendment, but that are unlikely to be followed in the current political and business climate) are the 'bedrock' of the claims and have meant that to date all claims have been settled, with the average settlement increasing from $40m to $50m." With a D&O premium pool of approximately $300 million it does not take many class actions to cause market losses.

The market is changing, with brokers reporting a median increase in primary premiums of 89-122% and some insurers are either reducing capacity or pulling out of the market altogether. Boardman also notes: "The recent Banking Royal Commission has provided material for a variety of consumer class actions against financial institutions including responsible lending, add-on insurances and superannuation."

Fuelled by a desire to find new sources of income around the world, this experience is now driving powerful plaintiff law firms to make inroads in Europe.

## THE MOVE TO EUROPE

Bastian Finkel, Partner at Legalign law firm BLD in Cologne, comments that there has been a sea-change in political mood: "There is a political desire to embrace some form of class action in Germany, in large part in the wake of the Volkswagen emissions scandal. German consumers feel mistreated – they have seen class actions and enormous payments to consumers in the US following class actions taken against a German company – whereas they have had nothing."

Compensatory collective redress is available in 19 member states, but in over half of them it is limited to specific sectors, mainly consumer claims. At the same time, nine countries do not provide the option to collectively claim compensation in mass harm situations. Only six member states have a proper alternative dispute mechanism focused on mass harm situations: Belgium, France, Italy, the Netherlands, Spain and the UK.

Germany has now introduced a sort-of class action regime, says Finkel, though this is only available for use by specific consumer not-for-profit agencies. "This is well short of the US or Australian system," he adds.

There is, however, a European Commission (EC) proposal that goes a step further, says Finkel. The Representative Action Directive is a part of the New Deal for Consumers, launched in April 2018 by the EC, which aims to ensure stronger consumer protection in the EU and follows in the wake of cross-border scandals.

It would allow group action against trader violations with a broad public impact in domestic and cross-border cases in different consumer areas such as data protection, financial services, travel and tourism, energy, telecommunications, environment and health. Crucially, however, under the draft rules representative action could only be brought by eligible entities, such as consumer organisations and certain independent bodies designated by member states. These should be non-profit and have no financial agreements with law firms.

"If the draft is passed as it is now," says Finkel, "we will have opened the door to a class action related to consumer protection – including data breach lawsuits."

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> BLD

Julie-Anne Binchy, Senior Associate at DAC Beachcroft in Dublin, adds that the Directive would, however, still face some hurdles in Ireland, "particularly in relation to third-party litigation funding, which is expressly permitted by the Directive, but which remains broadly unlawful in Ireland."

Recent decisions of the Irish Supreme Court upheld Ireland's position, "however," says Binchy, "these cases also highlighted the need for consideration to be given to potential legislative reform where the prohibition on third-party litigation funding arrangements may impede access to justice by a party that cannot otherwise afford costly litigation to protect or secure its rights. Practitioners in Ireland will be following developments in this area with interest."

The English legal system, although it recognises group litigation in restricted factual situations, has not traditionally permitted US-style class actions. It is, however, seeing increasing pressure to embrace more collective redress in the consumer area. The Consumer Rights Act 2015 introduced an opt-out collective redress regime for competition claims. This permits a claimant representative to bring an action on behalf of a group of individuals where this follows-on from an 'infringement decision' or 'an alleged infringement' of anti-competitive behaviour prohibited by the Competition Act 1998 or EU law.

The opt-out nature means that claimants are included in the group unless they expressly opt-out. However, claims can only proceed if they are certified as suitable by the Competition Appeal Tribunal (CAT) and, crucially, the person representing the class is a suitable representative. If these stringent eligibility criteria are met, a Collective Proceedings Order is issued and the class action may continue.

This has been used in the Mastercard case pursued by former Chief Ombudsman Walter Merricks, who alleges that for 16 years, 46 million people paid higher prices in shops than they should have because of high card fees and that they should all be awarded a share of £14 billion. The CAT threw out a representative claim but now the Court of Appeal has ordered it to look again.

## A MATTER OF DATA

If there is one cross-border issue that illustrates the challenges facing society internationally, it is data privacy. Even the US, with its advanced class action regime, is struggling with this issue – as so-called injured parties are not actually injured in any way. Or are they? The US courts are split, especially in the data breach area. As the US Congress is not taking the lead on the issue, nothing will really change until the Supreme Court looks at it – and that, as Thurston comments, "could be some time away, as the court is usually at least five years behind any new trend."

This international move to recognise and enshrine an individual's data privacy rights – such as the European Union's General Data Protection Regulation (GDPR) – has been universally accompanied by a failure to establish any form of affordable process for redress. In the case of the EU, while the national regulatory bodies such as the Information Commissioner's Office in the UK can issue fines against firms, it has no say over individual compensation.

As Hans Allnutt, Partner at DAC Beachcroft in London, says: "In this context it is fair to say that class actions could serve a need – enabling individuals to have access to justice."

That said, the GDPR has opened the door for collective redress – but only if it is via a not-for-profit body such as human rights organisations and privacy watchdogs. No surprise then when campaigner Max Schrems launched the first challenge on day one of the GDPR last year, aimed at Google and Facebook's 'forced consent' via his hastily created not-for-profit NOYB.

Two other English cases also underline how data privacy could drive more class action style activity. Following supermarket chain WM Morrison being found liable for the actions of a former employee who stole staff pay data and published it on the internet, a group litigation order is being pursued, led by ten claimants – representing 5,500 of the total 100,000 staff affected – who were selected to articulate the different types of claims, damage and circumstance. However, Morrison has now been granted permission by the Supreme Court to appeal the judgment and, crucially, the critical issue of quantum of damages for distress has not yet been addressed.

According to Allnutt, the claim by Richard Lloyd against Google also failed when the High Court refused to allow a representative action – the court reinforcing the need to demonstrate damage resulting from data privacy breaches and not rely solely on a violation of a legal right in order to claim compensation.

However, perhaps more significantly, the case attracted noticeable litigation funding, says Allnutt, with the backers prepared to put up £15.5 million for costs and to buy insurance in case of loss of £12 million. The case did not progress, but it certainly shows the appetite.

This point is underlined by his colleague, Partner Graham Ludlam, who cites an increasing investment by US law firms and litigation funders in England and Wales – and Europe. They are not able to practice in England and Wales but are organising or providing funding themselves, along with their knowledge of how to force corporates to settle.

Sticking with Europe, the Netherlands is also proving to be a natural home for cross-border busting collective-redress claims, with the Petrobras case a major example. In 2018, it accepted jurisdiction over the international securities class action lawsuit against Petrobras Brasileiro – despite the offences taking place in a foreign jurisdiction.

In April 2019, its Government passed a new law declaring that representative entities, for example the Dutch claim foundation in Petrobras, will no longer be prohibited from claiming financial damages on behalf of their constituents. This will undoubtedly increase the attractiveness of the Dutch collective redress system in cross-border disputes. As Duncan Strachan, Partner at DAC Beachcroft in London, comments: "Only the Netherlands is anywhere close to the US system – although there is nowhere with a comprehensive opt-out system in Europe and no jurisdiction that recognises punitive damages in its own law to the extent available in the US."

In the final analysis, despite a noticeable shift in public and political opinion moving towards acceptance of the value of class actions – particularly in the wake of international corporate scandals and new data privacy rights – the legal, judicial and funding systems across Europe, and much of the world, continue to work against any major change. But with US plaintiff firms looking to grow outside their country, litigation funders eyeing potential returns, and international cross-border corporate scandals, attempts to force the issue will no doubt continue to increase.


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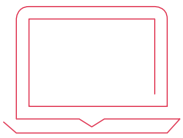

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**Brochure**

**Sept '19**

### Thought Leadership

Delivering fresh thinking and strategic insight on hot topics, our global thought leadership will stimulate discussion and debate.

**Jan '20**

### Predictions

Our international experts will look ahead at the opportunities and challenges the insurance market may face in the coming year.

**May '20**

### Developments

Our guide will keep you abreast of key legislative, judicial and other developments, essential reading for managing risk and business planning.

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