

# Class Actions in Poland: two years of tries, successes and failures of the Class Actions Act

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# Enthusiasm and reality – do class actions work in Poland?

- Appetite for access to justice in post-socialist countries,
- Drafting of the Act: Codification Commission, consultations (Prof. Hodges and EJP's role), last-minute changes,
- No research into real gaps in access to justice or restitution,
- Final product – relatively balanced mechanism, with some surprising elements,
- The build-up: anticipation and enthusiasm - websites, law firms, consumer organizations, politicians,
- Somewhat disappointing (for some) two years - the 'myth' of class actions?
- THIS PAPER: WHAT WORKS and WHAT DOES NOT?

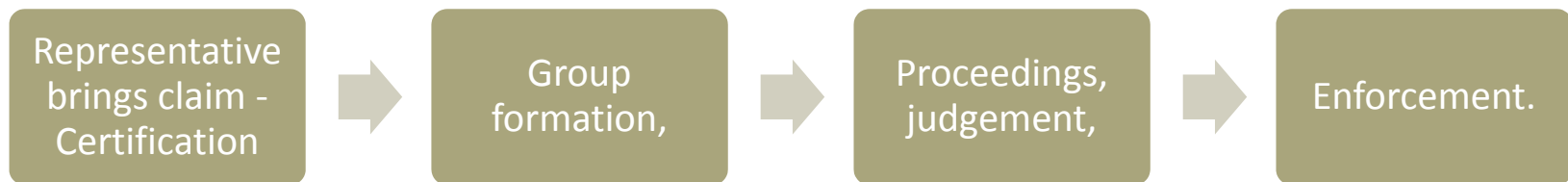
# Certification criteria

Minimum 10 persons with claims of the same kind based on same or similar facts,

Class representatives: members or consumer ombudsmen only,

Very unique commonality requirement in monetary claims – all claims must be standardised (sub-classes possible).

# Stages of proceedings



# So far ...

- Around 60 class actions,
- Defendants: state (leader), banks, insurers,
- More being considered – websites (groupaction.com, sue-him.pl, suethegovernment.pl,...), law firms (sometimes bringing an individual case first to ‘test the ground’),
- Most rejected: formal weaknesses, requirements for certification not met,
- Those which were certified: now in the group formation stage,
- None yet concluded by substantive judgement,
- One Supreme Court decision (consumer ombudsman as class representative also must be represented by a lawyer).

## Successes and challenges of Class Actions Act

# Aims of the Act

Are they realistic?

# Limited Scope of Application





# Exclusion of claims for the protection of personal rights

- Does this mean no personal injury claims allowed?
- Article 23 of the Civil Code lists (non-exhaustively) personal rights: health, freedom, dignity, good name, conscience, reputation, home, correspondence, creative output,
- April and September 2011 – Warsaw District Court and Warsaw Court of Appeal decide to refuse certification in a class action concerning collapse of Katowice Trade Hall - most class members had claims for the protection of personal rights (personal injury claims), only 5 with other claims,
- ,Death' of class actions in Poland?
- What happens to ordinary product liability claims or to ordinary tort claims (why include them at all)?

# Requirement of standardization of monetary claims

- Can be done in sub-groups of minimum 2,
- Constitutional concerns, access to justice concerns,
- Consequences: limiting the claim to declaratory relief only,
- Declaratory relief – encouraging settlements?
- Further consequences: no contingency fee – no „amount obtained for the class”,
- Claims can be standardized in straightforward cases (Amber Gold – 100 sub-classes).

# Limited scope of class representatives

- Only class members and regional consumer ombudsmen,
- Class representative – „named party” who leads the case in his own name but on behalf of the entire class,
- Duties of class representative:
  - no duty of adequate representation (class can replace the representative and some judicial oversight),
  - fee agreement with lawyers,
  - mainly financial responsibilities (coordinating payments of court fees and lawyers' fees by all class members).
- Unnecessary limitation? Should other entities be allowed to represent classes?
- Consumer ombudsmen are not necessarily comfortable with the new power.

# Contingency fees? No

## Cash up-front? Yes!

- General rules of ethics of Polish legal professions (solicitors and barristers): charging exclusively a percentage of winnings is not allowed,
- Class Actions Act allows contingency fee arrangements with the upper limit of 20%,
- While contingency fees are more and more common in individual litigation (Supreme Court upheld an agreement in 2011), they are not used in class actions,
- Lawyers demand money up-front
  - Amber Gold case – Chałas & Wspólnicy demanded between 3% and 9% of value of claim,
  - KKG cases – flood victims: 1500 PLN per class member in one case, amount depending on claim in another,
- Pro bono?
- Declaratory relief – no basis for contingency fee.

# Other costs of class actions

- Court fee – 2% of value of case,
- Experts,
- Witnesses,
- Translators,
- Other expenses.

# **Lack of legal aid and the loser pays principle - are class actions too risky?**

- Class representative cannot claim legal aid
- Loser pays – Article 98 of Code of Civil Procedure – ,reasonably incurred costs’ will be awarded to the winner,
- Modifications possible – if claimant’s situation calls for it, or if one of the parties behaved unreasonably,
- Statutory tariff for lawyers’ fees (Ministerial Regulations of 2002) – fee for cost-shifting purposes depends on type of case and value of claim; court may award lower fee or higher fee in very limited cases.

# Security for costs

- Defendant can ask (during first procedural activity) for security for costs (up to 20% of value of the case),
- Judicial discretion, decision can be appealed,
- To be paid within 30 days, in cash,
- Requests are made often, but courts do not always grant security for costs,
- How much can the defendants ask for realistically? (tariff for lawyers' fees).

# Inherent procedural problems

- Polish civil procedure and legal culture: delays, lack of judicial management, deficit of social trust in judiciary, expert shortage and delays in getting opinions,
- Class Actions Act relies on general rules of civil procedure – not enough judicial levers to efficiently manage litigation,
- Need for special provisions assisting judges in their new managerial role, the Code of Civil Procedure does not go far enough (even after May 2012 reforms).



# Encouraging settlements?

- No discovery – not much pressure on parties to settle,
- Should discovery be introduced into Polish civil procedure, or only class actions?
- Declaratory relief may encourage settlements.

# Need for systemic approach

- Are we missing the bigger picture in Poland?
- No research into gaps in civil justice,
- Too much emphasis on court-based justice,
- No comprehensive research into forms of redress existing to respond to specific legal problems (regulation, ADR, courts, other mechanisms),
- New forms of ADR appearing (for instance: the new Regional Boards for Liability arising out of Medical Accidents),
- Increasingly powerful, and increasingly active, regulators,
- Legal culture within society – courts are considered the embodiment of justice, ADR not appreciated, Regulators are seen and see themselves as having a different role.

**The End**

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