*N° spécial « Group Actions » - Février 2010*

INTUITY est heureux de vous présenter un numéro spécial sur les « group actions » (actions de groupe) en Angleterre et aux Pays de Galles, rédigé par notre partenaire, Michael GOLDBERG, associé du Cabinet DAVIES ARNOLD COOPER, à Londres. Michael GOLDBERG et son équipe sont spécialisés en responsabilité produits, notamment dans le secteur pharmaceutique.

Michael GOLDBERG viendra présenter le système anglais d'actions de groupes lors de la conférence de l'AJIP consacrée aux actions collectives que nous aurons le plaisir de recevoir le 18 février prochain, dans les locaux de ChateauForme, 2, avenue Velasquez, Paris 17°.

## Reform of Group Actions in England and Wales

### Introduction

Over the last two years there has been renewed interest in the reform of group actions in England and Wales. The focus of the pressure for reform was a major report on collective redress procedures prepared by the UK's Civil Justice Council ('CJC'). In a series of research papers and reports published in 2008, the CJC set out to demonstrate (1) the evidence to support and justify a major overhaul of group action processes; and (2) the organisational and legal principles under which such actions should be run to ensure efficiency and fairness.

### Civil Justice Council's key proposals

The CJC tasked itself with finding *"evidence of need"* for reform of group action procedures in England and Wales. The paper found what it described as *"overwhelming evidence of the need for a further collective redress mechanism, in order to supplement presently existing procedural devices available to Claimants"*. The main solution offered by the paper's author (Professor Rachael Mulheron of Queen Mary University of London) was the introduction of US-style 'opt-out' procedures for group actions. The 'opt out' principle means that Claimants are required to take a positive step to remove themselves from a group action.

Courts in England and Wales manage group actions via Group Litigation Orders. These orders require all group actions to be certified and case-managed by the court. The CJC criticised Group Litigation Orders as failing to represent the interests of UK citizens, especially in comparison with the group action procedures in place in other Commonwealth countries such as Australia and Canada.

A further factor highlighted by the CJC was the withdrawal of tax payers' money to fund group actions. This followed a series of hugely expensive yet evidentially-flawed group actions which, despite costing many millions of pounds, never reached the courtroom. One of the most high-profile of these was the MMR vaccine litigation in which thousands of children alleged that the vaccines had caused them to develop autism and bowel problems. Public funding to support the action was withdrawn in 2003.

## The UK Government's Response

In its formal response to the CJC's final report, published in July 2009, the Government pointed out that it did not consider that a new generic collective action procedure was required or appropriate for the UK. Instead, and in line with previous government findings, it proposed that reform would be better advanced by taking it forward on a sector-by-sector basis, where the relevant government department is satisfied that there is a genuine need for reform. One way of doing this would be to increase the involvement of regulatory bodies, as distinct from the courts. A recent example of such reform is the planned financial services legislation. This will enable an authorised representative to bring collective proceedings on behalf of a group of consumers whose claims raise "similar or related" issues of fact or law. If it reaches the statute book, such legislation could be brought on either the current 'opt-in' system for claims or the proposed 'opt-out' basis, although this reform will only cover claims brought within the financial services sector.

## Pharmaceutical and Life Sciences-based Group Actions

Typically, group action claims brought within the pharmaceutical and life sciences industries will involve complex issues of liability and causation which do not easily lend themselves to the group action format. As has been seen in the United States, claims involving complex evidential issues are less likely to proceed by way of US class action processes. This is often because the challenge of proving individual causation in each and every case - or at the very least in lead or illustrative claims - is too heavy a burden for Claimant lawyers to take on, particularly if they are operating under the usual contingency fee funding arrangements. Both in the US and the UK, the Courts have been less than sympathetic to claims brought on the basis of vague assertions or imprecise statistical or epidemiological arguments.

In the UK, pharmaceutical-based group actions always proceed on the basis that specific individual causation must be established in a defined selection of, if not all, lead cases. Such cases do not lend themselves so well to the principles of 'opt-out' which, due to their very nature, favour claims pleaded in as broad terms as possible.

## Comments

As a result of the UK Government largely ignoring the CJC's recommendations for a global reform of group actions, there seems to be little immediate prospect of a deluge of fresh group litigation directed towards the pharmaceutical industry. The recommendations of the Jackson report were published in January 2010 and are still being considered. The most significant of these from the perspective of group actions would be the introduction of US-style contingency fee arrangements. However, the report sets out the proviso that this introduction should only be on the basis that the unsuccessful party be required to pay a reasonable amount of costs and that all contingency arrangements for group actions must be properly regulated.

An alternative funding process would be the introduction of 'one way' cost shifting whereby a successful Claimant will recover costs from the Defendant but, if unsuccessful, will not be required to reimburse the Defendant. This type of funding is regarded as being particularly suitable for personal injury claims and, it follows, group actions which target the pharmaceutical and life sciences industries.

Whether all or only a few of the proposals will eventually find their way onto the statute book remains to be seen. In what will be an election year in the UK, the political will to reform group actions may be lacking. However, pressure for change is likely to remain a continuing feature of the legal landscape. Against such a background, the question of reform seems not so much one of 'if' but rather 'when'.

**Michael Goldberg, Partner,**
**Davies Arnold Cooper LLP**
**Tel: +44 (0)20 7293 4584**
**Email: mgoldberg@dac.co.uk**