The Next Wave of Global Litigation

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THE "dramatic increase in international commerce" has increasingly required companies and their lawyers to think "globally when considering their litigation objectives."[1] In this article, we discuss four emerging trends that are likely to have a significant impact on global litigation in the product liability space and beyond: (1) the expansion of class and collective actions, (2) the explosion in costly data-privacy litigation, (3) the budding product liability lawsuits in the cannabis and vaping

[1] Kurt B. Gerstner, *The New Normal: International Litigation and Its Implications for Trial Lawyers*, 83 DEF. COUNSEL J. 257, 257 (2016).

industries, and (4) the increase in third-party litigation funding.

I. Class and Collective Actions

The "United States class action regime is sophisticated and well established," but the United States is not the only jurisdiction with a form of collective action.[2] Procedures for "collective actions or aggregate litigation in some form have existed . . . for some time in both common law and civil law countries."[3]

Canada has "well-established class action regimes at [the] federal level and in most of its provinces."[4] Under Canada's class action procedure, individuals and corporations are both permitted to bring class actions for a wide variety of causes of actions where the purported representative plaintiff is able to establish the certification or authorization criteria. These criteria include a class of two more persons, issues that are common to the class, and that the class action is the preferable procedure. Most jurisdictions in Canada have relatively low certification thresholds.

Australia similarly has a well-established collective action procedure, "particularly at [the] federal level and in some states."[5] The Australian collective action procedure "is widely used for product liability and securities litigation," although there have also been some "competition damages class actions."[6]

Class and collective redress actions "are on the rise in Europe" as well,[7] where "collective action regimes for competition law damages claims are nascent at best, but there is a strong push from the European Commission . . . for such regimes to be developed and enhanced within the Member States."[8]

Many European countries, with a perceived "increasing number of mass wrongs" and "lack of any feasible alternative," have modeled their class or collective action procedures after the well-established American class action system, "to the point where the class action has now [become] one of the most successful judicial exports of [the] United States."[9]

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[2] David Scott, et al., *Global Trends in Private Damages: The Future of Collective Actions*, 13 COMPETITION L. INT'L 137, 138 (2017).

[3] Spencer Weber Waller and Olivia Popal, *Fall and Rise of the Antitrust Class Action*, 39 WORLD COMPETITION 1, 37 (March 2016).

[4] Scott, *supra* note 2, at 147.

[5] *Id.* at 148.

[6] *Id.*

[7] STEFAAN VOET, EUROPEAN COLLECTIVE REDRESS AND COMPENSATION 126 (2018).

[8] Scott, *supra* note 2, at 137–138.

[9] Ioan Ilies Neamt, *Historical and Geographical Evolution of Collective Action*, 2017 R.R.D.A. 115, 115 (2017); *accord* Scott, *supra* note 2, at 139 (observing that Canada

The United Kingdom has enacted the Consumer Rights Act, which "permits private-enforcement actions for violations of competition law, and authorizes the Competition Appeals Tribunal to bless opt-out suits"; in other words, "a consumer antitrust class action in the American style is possible in the United Kingdom."[10] This "U.K. innovation was one of many responses to the European Commission's recommendation for collective actions in Europe."[11]

The Netherlands has also adopted a class procedure—the "Wet Collectieve Afwikkeling Massaschade (WCAM)."[12] The WCAM permits global class settlements, irrespective of the country where the plaintiff-claimant is domiciled. For instance, "one of the earliest settlements to use the WCAM process involved approximately 11,000 insurance policy holders from across Europe, the United States, and Thailand."[13]

Germany has established procedures "for bringing collective or representative claims in certain fields of law," including a "mechanism for collective actions, certain trade associations and consumer protection organizations to seek injunctions on behalf of their members to prevent unfair competition."[14]

France has introduced a class action regime for specific types of claims, including competition, health, discrimination, environment, privacy and data protection law.[15] Under France's system, "[c]laims can only be brought by licensed consumer associations on behalf of consumers who opt-in to the claim" and the claims must also be able to "rely on a previous regulatory finding of infringement."[16]

In some of these jurisdictions, class or collective action "procedures modify ordinary disclosure rules."[17] For instance, "Canadian class proceedings require leave of the court before discovery is sought against any class members other than the representative litigant."[18] Companies increasingly need to consider efforts to use discovery from U.S. litigation (where discovery is more robust) in class or collective actions in other

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and Australia have class/collective "regimes that are considerably better established than any in Europe," although they are not as well-developed as the U.S. class action system).

[10] Zachary D. Clopton, *The Global Class Action and Its Alternatives*, 19 THEORETICAL INQ. L. 125, 132–133 (2018).

[11] *Id.*

[12] *Id.* at 133–134.

[13] *Id.*

[14] Scott, *supra* note 2, at 142.

[15] *Id.* at 144.

[16] *Id.*

[17] Rebecca Money-Kyrle and Christopher Hodges, *European Collective Action: Towards Coherence*, 19 MAASTRICHT J. EUR. & COMP. L. 477, 493–494 (2012).

[18] *Id.*

countries. Companies can seek protective orders in U.S. litigation, but these orders can still come under collateral attack in U.S. courts by third parties; if these collateral attacks are successful, the underlying discovery may end up being used in litigation in other parts of the globe.[19]

In sum, while the United States may be imposing more limits on class actions, other countries are expanding their procedures for aggregate litigation. Global companies are likely to see both the expansion of class or collective actions around the globe and increasing efforts by plaintiffs to use the broader discovery available in the United States to fuel collective actions in other countries. Mass litigation in several jurisdictions at once can "compromise efficiency, risk inconsistent decisions, and increase [the] expense and complexity of litigation."[20] The looming wave of global class and collective action litigation can therefore significantly cut into a company's bottom line.

II. Data-Privacy Litigation

Data privacy has become a "hot" issue in recent years, one that has an increasingly dangerous potential to expose companies to high levels of liability in numerous jurisdictions around the globe. Indeed, in a recent survey of over 250 corporate counsel at companies with a median revenue of $1 billion, more than 50% of them expressed concern about cybersecurity and data protection issues.[21]

A recently enacted law in the State of California, the home of Silicon Valley and leading technology companies, is a prime example of this potential exposure. The California Consumer Privacy Act ("CCPA"), which became operative at the beginning of 2020, secures "the right of Californians to": (1) "know what personal information is being collected about them"; (2) "know whether their personal information is sold or disclosed and to whom"; (3) "say no to the sale of personal information"; (4) "access their personal information"; (5) "equal service and price, even if they exercise their privacy rights."[22]

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[19] Ctr. for Auto Safety v. Goodyear Tire & Rubber Co., 454 P.3d 183, 183–184 (Ariz. Ct. App. 2019) (reversing "superior court vacat[ing] a protective order [that] directed the unsealing of filings that contain[ed] trade secrets"); *see also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 471–473 (1991).

[20] Money-Kyrle and Hodges, *supra* note 17, at 493–494.

[21] Norton Rose Fulbright, *2019 Litigation Trends Survey* 2 (Dec. 2019).

[22] Cal. Assem. Bill No. 375 (2017-2018 reg. sess.) (as chaptered June 28, 2018).

The CCPA provides a private right of action to a "consumer whose nonencrypted or nonredacted personal information . . . is subject to an unauthorized access and exfiltration, theft, or disclosure as a result of the business' violation of the duty to implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information."[23] The statute also provides for hefty civil penalties of $7,500 for each intentional violation of the CCPA, which a consumer (on an individual or classwide basis) may prosecute if the California Attorney General declines to do so.[24]

The CCPA bears a notable resemblance to the data-privacy protection laws of Europe.[25] "For instance, under the European Union's General Data Protection Regulation (GDPR), an entity is only able to collect personal information about a 'data subject' if it has a legal basis to do so, for example by obtaining the data subject's consent."[26] The GDPR has "provisions governing how data is processed, stored, and transferred and gives data subjects the right to request information about what data is collected and how it is used, to correct information, and even to request the deletion of the data."[27] And, like California's CCPA, the GDPR may be enforced through a private right of action too.[28]

Data protection in Canada falls within both the Federal and Provincial jurisdictions. The Federal Government enacted the *Personal Information Protection and Electronic Documents Act* to govern how private companies can collect, use, and disclose personal information.[29] Personal information about an identifiable individual, other than an employee's name, title, business address and telephone number, is not to be disclosed.[30] Provinces also have data protection legislation, such as Quebec's *An Act Respecting the production of Personal Information in the Private Sector* and British Columbia's *Personal Information Protection Act*. Privacy rights in Canada have been litigated in both individual and class actions.[31]

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[23] *Id.*

[24] CAL. CIV. CODE §§ 1798.150(b), 1798.155.

[25] *See* Erdem Buyuksagis, *Towards a Transatlantic Concept of Data Privacy*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 139, 176 (2019).

[26] Joseph V. DeMarco and Brian A. Fox, Forum, *Data Rights and Data Wrongs: Civil Litigation and the New Privacy Norms*, 128 YALE L.J. 1016, 1022–1023 (2018-2019).

[27] *Id.*

[28] *Id.*

[29] Tina Piper, *The Personal Information Protection and Electronic Documents Act - A Lost Opportunity to Democratize Canada's Technological Society*, 23 DALHOUSIE L.J. 253, 266–269 (2000).

[30] *Id.*

[31] *McLean v. Cathay Pacific Airways Limited, BCSC, Vancouver Registry,* VLC-S-S-199228

Given the expanding data-privacy protections for which there is now a private right of action on both sides of the Atlantic, and the burgeoning mass action procedures around the world, companies may well begin to see in the coming years an explosion of costly, aggregate litigation involving claims that allege violations of data privacy.

III. Cannabis and Vaping Industry Product Liability Litigation

The trend in the United States and Canada toward legalizing recreational cannabis use, and the significant profits generated from the sale of that product, has made the cannabis industry a tempting target for product liability plaintiffs' counsel in the United States and Canada.

In *Flores v. LivWell*, the plaintiffs brought an action in a Colorado state court, asserting that a dispensary had used myclobutanil[32] in the cultivation of its marijuana, which allegedly tainted the resulting product.[33] Before the case got to the class action certification stage, however, the court dismissed the case on standing grounds, concluding that the complaint had not alleged any compensable injury, such as personal injury, from the purchase and use of the product.[34]

In *Kirk v. Nutritional Elements, Inc., and Gaia's Garden*, the plaintiffs brought a wrongful death action against a medical marijuana bakery in a Colorado state court, alleging that the bakery had sold edibles to their father without adequately labeling the product or warning about its potential effects.[35] Plaintiffs further alleged that their father shot their mother to death as a result of possible psychotic behavior and hallucinations he experienced from ingesting an edible infused with a large dosage

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(This privacy case is indicative of the increasing globalization of commerce and the consequences of data breaches. A British Columbia, Canada court has been asked to take jurisdiction of a worldwide privacy breach class action where a recent worldwide data breach class action was commenced in circumstances where the data breach did not occur in Canada and the vast majority of the individuals who allegedly had their personal information accessed were not in Canada. Plaintiff's counsel chose the jurisdiction for the prosecution of the action, apparently viewing it as the most favorable for the purported class).

[32] Myclobutanil is a fungicide commonly used to treat food crops; it has been banned in the cultivation of marijuana because, when burnt, it converts to hydrogen cyanide.

[33] Flores v. LivWell, Inc., 2016 Colo. Dist. LEXIS 1658, *2 (Colo. Dist. Ct. Feb. 11, 2016).

[34] *Id.* at * 3–8.

[35] Alexis Lazzeri, *California Cannabis Regulations and the Federal Food, Drug & Cosmetic Act: A Product Liability Perspective of Edible Cannabis*, 16 HASTINGS BUSINESS L.J. 1, 86 (Winter 2020).

of marijuana.[36] This case appears to have been the first of its kind in that it was brought by parties who did not themselves purchase the marijuana products (i.e., a third-party product liability claim).

In addition to these two cases in the United States, the Canadian case of *Downton v. Organigram*,[37] involves a company that issued a voluntary recall after learning of the use of myclobutanil in its production of marijuana plants. The representative plaintiff (who alleged that she had suffered adverse health conditions as a result of the use of the recalled product) was able to successfully certify the class action. The court certified a number of common issues, including those concerning the negligent distribution, marketing, and sale of the product, breach of contract, and breach of the applicable consumer protection legislation.

These early cases suggest that the cannabis case law will develop along the lines of the existing jurisprudence in medical product class actions, potentially giving rise to claims concerning labeling, warnings, marketing misrepresentation, negligent manufacturing and design, and contamination. It is also possible that enterprising counsel will attempt to link the significant increase in the occurrence of serious mental illness to an increasing use of cannabis.[38]

The vaping industry, like the cannabis industry, is also likely to face increased product liability litigation. Amid intense public pressure to curb vaping by minors and alleged vaping-related illnesses, the Trump administration recently issued a ban on "all flavors of vaping cartridges except menthol and tobacco."[39] Likewise, executive orders in several states, including California, have been issued to address a string of recent illnesses that are alleged to be tied to vaping.[40] Numerous lawsuits in courts throughout the United States, which are still in their early stages, have been filed too.[41] These cases (which include individual and class actions) allege various types of

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[36] *Id.*; *see also* John Campbell and Sahib Singh, *Budding Torts: Forecasting Emerging Tort Liability in the Cannabis Industry*, 30 LOY. CONSUMER L. REV. 338, 364–365 (2018).

[37] 2019 NSSC 4.

[38] Alex Berenson, *What Advocates of Legalizing Pot Don't Want You to Know,* N.Y. TIMES (Jan. 4, 2019).

[39] Stephanie Ebbs, *Trump administration restricts most flavored vaping cartridges but not menthol*, ABC NEWS (Jan. 2, 2020); *see also* United States Food and Drug Administration, *FDA Finalizes Enforcement Policy on Unauthorized Flavored Cartridge-Based E-Cigarettes That Appeal to Children, Including Fruit and Mint* (Jan. 2, 2020).

[40] Anna Kaplan, *California Becomes Third State to Get Executive Order on Vaping Crisis*, THE DAILY BEAST (Sep. 16, 2019).

[41] Brendan Pierson, *Factbox: U.S. lawsuits take aim at vaping*, REUTERS (Sep. 25, 2019).

claims, including product liability and deceptive marketing.[42]

IV. Third-Party Litigation Funding

A fourth trend is the growth of third-party funding.[43] This type of litigation funding "has been rapidly developing in the common law world (Australia, United States, and United Kingdom)" due to the relaxation of the "common law doctrine of champerty"; in contrast, "in the civil law world" (including Germany, Austria, and Switzerland), its "existence is very limited" due to the lack of an industry for third-party funding.[44]

The increase in third-party funding has numerous implications for defendant-companies. Not only is the "number of suits filed . . . likely to grow," third-party funding also "changes the expected values of other variables in the litigation equation." Financing companies may now be able to provide plaintiffs "the additional expertise that comes from being repeat players in the litigation market," and plaintiffs may consequently demand higher settlements and damages awards due to their obligations to the litigation financing companies.[45]

V. Conclusion

Recent increases in class and collective action procedures around the world; data-privacy litigation; product liability litigation in the cannabis and vaping industries; and third-party funding are all likely to impact the future of global litigation. Each of these trends, considered on their own or together, underscore the need for companies to think globally when crafting litigation strategies.

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[42] *Id.*

[43] Third-party funding refers to a "business arrangement whereby an outside entity—called a third-party funder—finances the legal representation of a party involved in litigation or arbitration or finances a law firm portfolio of cases in return for a profit." Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 405 (2017).

[44] Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 CARDOZO J. INT'L & COMP. L. 343, 343 (2011).

[45] Cassandra Burke Robertson, *The Impact of Third-Party Financing on Transnational Litigation*, 44 CASE W. RES. J. INT'L L. 159, 170 (2011).