

Pharmaceutical Executive

Jumping the Pond

Class-action lawsuits are commonplace in the United States. Now, aggregate litigation is a looming threat in Europe.



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Class-action litigation threatens industries that deal with the public *en masse*. Automotive manufacturers, petrochemical companies—and certainly, pharmaceutical companies—are squarely in the cross hairs of product-liability and consumer-fraud class actions. Historically, class actions have been threats only in the United States. But today, these lawsuits pose a growing threat in Europe.

Generally, litigation in Europe has been less threatening than US litigation for several reasons. First, there are fewer compensable damages in most European countries: Victims' medical expenses are frequently covered by nationalized healthcare, and employers or the government reimburses lost wages. Second, there are procedural restrictions in Europe on litigation: Discovery—disclosing vast quantities of documents and taking pre-trial testimony of witnesses—is limited, and contingent-fee agreements are unheard of. Third, European laws don't authorize class actions.

If the last of those restrictions is removed, dangerous litigation could result. Many American pharma companies have been sued in the United States in consumer-fraud class actions. Plaintiffs in these cases claim that they overpaid for a drug that is allegedly ineffective or harmful. These cases do not seek reimbursement of medical expenses or lost wages; they seek only to aggregate a large number of small claims for plaintiffs who suffered no physical injuries. However, successful, consumer-fraud class actions could pose substantial risk to defendants.

Indeed, the Class Action Fairness Act of 2005, recently enacted in the United States, was passed in large part to transfer these cases to federal courts, which are less likely to permit them to proceed.

Class actions in the United Kingdom and the European Union could become problematic as well. Although these jurisdictions do not typically award certain categories of damages, if European

then analyzes one or two of the cases and uses those to resolve the common issues. That ruling binds all conjoined claims, but any award of damages is still adjudicated on a case-by-case basis. By permitting liability issues to be resolved on a common basis, these cases represent the embryonic form of mass torts.

Aggressive collective litigation is on the rise elsewhere. In Sweden, the Class Action Act, which went into effect on January 1, 2003, allows a private individual to institute proceedings on behalf of a group. Any individual in the group can opt into the action by notifying the court. The court's decision then binds everyone who has opted in. Although this mechanism has some limitations, it is still a far more potent threat than the individual lawsuits previously filed in Sweden.

Although Germany does not yet recognize class actions, plaintiffs' lawyers filed roughly 15,000 individual claims against Deutsche Telekom, Europe's biggest telephone company, when it suf-

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For example, so-called "group litigation" has existed in England for some time. In the late 1990s, the then-most senior English judge conducted a wide-ranging review of the litigation system and, in 1999, Parliament introduced the Civil Procedure Rules, which made group litigation quicker and easier to pursue.

Even in group litigation, individuals must institute their claims separately; one person cannot litigate on behalf of a class of claimants. Once related claims have been instituted, they can be conjoined either by the court's own motion or at the request of the parties. The court

fered an 86-percent drop in share price. An extraordinary 754 German law firms were involved in the litigation. This is the type of coordination formerly seen only in the United States.

Proposals to permit other forms of aggregate litigation have been suggested in the Netherlands, France, and Italy. Although those proposals are in early stages of debate, pharma companies should pay heed. If aggregate litigation is permitted in Europe, clever plaintiffs may file cases that pose dangers despite the limited categories of available damages.

It is not yet clear whether class actions will take root in Europe. But if they do, beware: When class actions jump the pond, they may land on pharma. ☐