



JONES DAY  
**COMMENTARY**

## **NEW CLASS ACTION RULES IN MEXICO CREATE SIGNIFICANT RISKS FOR COMPANIES DOING BUSINESS IN MEXICO**

Beginning March 1, 2012, companies doing business in Mexico will face the risk of class action lawsuits in Mexican federal courts. Under a series of new laws, private plaintiffs, government entities, and certain nonprofits may bring consumer, financial, antitrust, and environmental claims as class, or “collective,” lawsuits. Through these suits, federal courts in Mexico will be authorized to award class-wide damages and injunctive relief, including product recalls and orders to remediate environmental damage. The new laws will establish procedural rules that disadvantage defendants in several respects, including by giving defendants only five business days to oppose class treatment and by allowing potential claimants to await the outcome of the action and then opt in to the class after the plaintiffs have won and judgment has been entered.

This *Commentary* highlights the most significant aspects of the new laws and the risks that the new laws pose to companies doing business in Mexico. For practitioners familiar with class actions in the United States or collective actions in Brazil, this *Commentary* also summarizes the key similarities and differences between Mexico’s new laws and the more established rules in these jurisdictions.

### **COLLECTIVE ACTIONS UNDER THE NEW LAWS**

On July 29, 2010, the Mexican Constitution was amended to create the “collective” action, a procedure analogous to class actions in the U.S. and collective actions in Brazil. On August 30, 2011, the

Mexican Congress published amendments to various federal laws to authorize collective actions and identify the types of claims for which they are available.<sup>1</sup> These amendments include a major addition to Mexico's Federal Code of Civil Procedure (the "Code") that authorizes collective actions in cases involving harm to consumers of public and private goods or services or harm to the environment.<sup>2</sup> Mexico does not differentiate collective actions by the type of harm, but rather by the type of rights the action seeks to protect. The amendments create three types of collective actions and describe who may bring such actions, the procedures to be followed, and the available remedies.<sup>3</sup> The three types are: "diffuse" collective actions, collective actions "in the strict sense," and "individual homogenous actions." All three types of collective actions borrow legal terminology and concepts from the collective action laws in other civil law countries such as Brazil and Italy<sup>4</sup> and incorporate certain aspects of U.S. class action law.<sup>5</sup>

## **"DIFFUSE" COLLECTIVE ACTIONS: INDIVIDUAL DAMAGES NOT AVAILABLE**

Borrowing a concept from Brazilian law, the new laws authorize what they term a "diffuse" collective action to protect rights that are indivisible in nature, such as lawsuits to enjoin environmental damage or false advertising.<sup>6</sup> The relief sought must be general, such that it necessarily benefits all other class members. For example, the plaintiff class in an environmental case might seek an injunction against further harm and damages to be used to clean up the region. Individual damages are not contemplated in this type of collective action. There is no requirement for an individual to affirmatively opt out of this type of collective action to preserve a right to pursue claims on an individual basis.

## **Two Types of Opt-In Actions: Individual Damages Available**

The new laws authorize collective actions to recover both general relief (*i.e.*, relief that benefits all other class members) and individual damages in two situations. Again borrowing terms from other civil law countries, the new laws permit collective actions to protect "collective rights" (through collective actions "in the strict sense") and "homogenous individual rights" (through "individual homogenous actions.") Both types of actions proceed in two stages: a first stage to establish a defendant's liability and a second stage in which individuals may opt in within 18 months *after* entry of the judgment to prove their entitlement to an individual damage award. As a result, a defendant will not know its total liability until 18 months after judgment has been entered.

## **Collective Actions "In the Strict Sense."**

Collective actions "in the strict sense" (referred to as such to distinguish these from "diffuse" and "individual homogenous" collective actions) protect rights belonging to a plaintiff class consisting of 30 or more individuals whose members can be determined based on common circumstances arising from some sort of legally recognized relationship.<sup>7</sup> As noted above, the relief granted may include both injunctive relief and individual damages. For example, a collective action in the strict sense on a product liability claim could result in a court-ordered recall of the defective product and an award of individual damages to class members who purchased the product or otherwise suffered damages. If and when the defendant's liability has been proven in the case, class members who previously had not participated in the action would have 18 months after entry of the judgment to opt in to be eligible to seek an award of individual damages arising from their purchase and use of the product.

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1 The laws amended include: Article 1934, added to the Federal Civil Code; Amendments to Article 38 of the Federal Law on Economic Competition; Amendments to Article 26 of the Federal Law of Consumer Protection; Amendments to Article 53 and Article 81 of the Organic Law of Judicial Power; Amendments to Article 202 of the General Law of Ecological Balance and Environmental Protection; and Amendments to Articles 11, 91, and 92 of the Law for the Protection of Financial Services Users.

2 Article 578 of the Mexican Federal Code of Civil Procedure. Unless otherwise indicated, references to the "Code" are to the Mexican Federal Code of Civil Procedure.

3 Articles 580 and 581 of the Code.

4 Collective actions in Brazil are governed by the 1990 Consumer Defence Code and the 1985 Public Civil Action Act; in 2009, Italy enacted Law no. 99, amending Article 140 of the Consumer Code to allow for class actions.

5 See *e.g.*, Rule 23.

6 Article 581, section I of the Code defines "diffuse actions."

7 Article 581, section II of the Code defines "collective actions in the strict sense."

**“Individual Homogenous” Actions.** “Individual homogenous actions” under the new rules protect contractual rights where 30 or more individuals assert claims arising out of the same contractual relationship with a defendant.<sup>8</sup> The rights are “individual” in the sense that each individual possesses the same contractual right, and are “homogenous” in that each individual has entered into the same contractual terms and conditions. The court can order injunctive relief, such as ordering the defendant to comply with the contract in question or modifying the contract. In the event the representative plaintiffs prevail in the action, other individuals have 18 months to opt in and establish their entitlement to an individual damage award.

## FILING AND EXPEDITED CERTIFICATION

Under the new laws, collective actions may be initiated by filing a formal complaint with a federal district judge. The complaint must meet certain formal requirements, including establishing the standing of the representative, the type of action claimed, the factual basis for the claim, and the common circumstances that make collective action appropriate.<sup>9</sup> For collective actions in the strict sense and individual homogeneous actions, the complaint also must identify the representative plaintiffs and set forth the facts and basis for proceeding as a collective action rather than an individual claim.<sup>10</sup> Claims are subject to a three-and-a-half-year statute of limitations unless the damage is continuous, in which case the statute does not commence until the last day of claimed damage.<sup>11</sup>

After the complaint is filed, the judge will serve it on the defendant. The defendant then has only five business days to challenge the plaintiff’s standing to bring a collective action and to oppose the request for the case to proceed as a collective action. This very short time frame means that the defendant will need to respond immediately, with only a

few days to conduct factual investigation and to prepare an opposition.

After the defendant’s challenge, the district judge will have 10 days to make the certification decision.<sup>12</sup> In deciding whether to allow a collective action, the district judge will take into account the following factors:<sup>13</sup>

- Whether there are common factual/legal circumstances;
- Whether there is adequate representation of the class;
- Whether the class definition is appropriate to the circumstances;
- Whether there is a clear relationship between the defendant’s conduct and damages;
- Whether the plaintiffs have established the appropriateness of collective action over individual action (*i.e.*, superiority of a class action);
- Whether there are a minimum of 30 class members identified (applicable to collective actions in the strict sense and individual homogenous actions).
- Whether the action is barred by *res judicata*; and
- Any other requirements based on specific legislation.

The district judge may decertify or modify the collective action at any stage of the proceeding.<sup>14</sup>

## STANDING

A plaintiff who brings a collective action must have “active legitimacy,” a concept similar to “standing” under U.S. law. Under the new laws, the following entities have standing:

- A class with at least 30 identified members, acting through a common representative;
- Federal consumer protection and environmental protection agencies, the financial services consumer protection agency, and the Federal Competition Commission;

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8 Article 581, section III of the Code defines “individual homogenous actions.” Standing in an individual homogenous action is limited to groups of 30 or more individuals, as these actions cannot be filed by government agencies or nonprofit corporations.

9 Article 587 of the Code outlines the requirements of a collective action complaint.

10 *Id.*

11 Article 584 of the Code.

12 Article 590 of the Code. The judge may extend this period to 20 days if necessary.

13 Articles 587, 588, and 589 of the Fifth Title to the Code.

14 Article 590 of the Fifth Title to the Code.

- Nonprofit organizations whose stated purpose includes promotion or defense of the interests involved in the action; and
- The General Prosecutor of the Republic.<sup>15</sup>

## CONCILIATION/SETTLEMENT

Settlement is encouraged under the new laws, and the parties generally are free to reach full or partial agreements at any stage of the proceedings. After certification, the judge will hold a preliminary hearing where the judge may propose solutions to the underlying dispute and urge the parties to settle.<sup>16</sup> The judge also may preside over conciliation or settlement hearings, as well as work directly with the parties to facilitate a resolution. If the parties come to an agreement, the judge will approve the agreement, provided that the settlement terms are legal and the interests of the class are protected.<sup>17</sup> Despite the procedures authorizing the district court to actively facilitate settlement talks, we expect that most settlements will continue to be reached through direct negotiations between the parties.

## RELIEF AVAILABLE TO PLAINTIFFS AFTER JUDGMENT AND THE EXTENDED OPT-IN PERIOD

The final judgment in a collective action may include injunctive relief (such as product recalls), restitution, establishment of a fund for relief (discussed below), and individual damages. When a judgment is entered in a collective action in the strict sense or an individual homogenous action, each member of the class will then participate in an “incident proceeding,” where the class member must prove his or her individual damages. It is unclear whether the defendant will be able to challenge each individual member’s claims. Individuals who opt in to the class during the 18 months after judgment is entered must prove that they satisfy the requirements for class membership and then must similarly

participate in an incident proceeding. Obviously, the lengthy opt-in period will often make it difficult or impossible for a defendant to assess its potential exposure from a collective action until long after the entry of judgment.

The *res judicata* effect of a judgment in a collective action is somewhat unclear. It is not known whether an individual who fails to opt in to a collective action in the strict sense or an individual homogenous action will be precluded from bringing future lawsuits. However, a diffuse action appears to have limited *res judicata* effect, precluding only later collective actions without having any effect whatever on the ability of individuals to bring non-class claims.

Finally, one innovation of the legislation borrowed from other civil law countries such as Brazil is the establishment of a general fund, administered by Mexico’s Federal Judiciary Council, to hold monetary awards not paid out as individual damage awards. The fund may be used to pay for environmental remediation, costs of collective actions, honorary fees to class representatives, and to promote collective actions in general.<sup>18</sup>

## FEES

Each party is responsible for paying the fees of its attorneys and class representative(s).<sup>19</sup> A successful plaintiff may pay the fees of its own attorneys out of the judgment, but an unsuccessful plaintiff will not be required to pay any portion of the defendant’s legal fees. Similarly, a successful defendant cannot recover the fees of its own attorneys from the unsuccessful plaintiff.

The new laws cap plaintiffs’ attorney fees based on a calculation linked to the minimum wage in Mexico City.<sup>20</sup> These caps are designed to reduce the percentage of a judgment that goes to the plaintiffs’ attorneys and, of course, they also reduce the incentive for plaintiffs’ attorneys to bring such

<sup>15</sup> Article 585 of the Code lists the entities with “active legitimacy.”

<sup>16</sup> Article 595 of the Code.

<sup>17</sup> *Id.*, providing two guidelines for approval of agreements: legality and protection of the class’ interests.

<sup>18</sup> Articles 624, 625, and 626 of the Code.

<sup>19</sup> Article 616 of the Code.

<sup>20</sup> Article 617 of the Code.

lawsuits.<sup>21</sup> The caps are calculated using the following sliding scale:

- When damages total up to 200,000 times the minimum daily wage in Mexico City (in 2012, up to 12 million pesos, or roughly \$938,000), fees are capped at 20 percent of the award (in 2012, up to 2.4 million pesos, or roughly \$187,000).
- When damages total between 200,000 and two million times the minimum daily wage in Mexico City (in 2012, between 12 million and 120 million pesos, or between roughly \$938,000 and \$9.38 million), fees are capped at 10 percent of the award (in 2012, up to roughly \$938,000).
- When damages exceed two million times the minimum daily wage in Mexico City (in 2012, more than 120 million pesos, or roughly \$9.38 million), fees are capped at 11 percent of the damages up to that amount (in 2012, roughly 13.2 million pesos, or \$1.03 million), and 3 percent of the excess.

## APPEAL

Before final judgment, a party can appeal an unfavorable decision (such as the certification decision or the issuance of an interim injunction against the party) through a constitutional proceeding.<sup>22</sup> This type of appeal is common in Mexico; therefore, such appeals may be expected as the new laws are implemented, which will result in case law for use in future collective actions. Following entry of a final judgment in a collective action, a defendant may appeal to an intermediate appellate court for review of the judgment. After that appeal, a constitutional proceeding before a Circuit Court may be initiated to review the judgment.<sup>23</sup> Review of a judgment by the Supreme Court of Justice is limited to constitutional issues.<sup>24</sup>

## COMPARISONS WITH U.S. RULE 23

There are many significant similarities and differences between the new Mexican laws and U.S. class actions under Fed.R.Civ.P. 23.

**Certification.** Perhaps the most dramatic difference between Mexico's new laws and class action law in the U.S. is that the Mexican laws contain a highly expedited (and potentially perfunctory) approach to class certification. This contrasts sharply with class certification in the U.S., where class certification usually is hotly contested and may take many months or years in complex cases. Indeed, the United States Supreme Court has held that prior to certifying a class, the court must rigorously scrutinize each element of class certification under Fed.R.Civ.P. 23.<sup>25</sup>

While it is difficult to see how the courts in Mexico could have enough of a record to *rigorously* analyze any element of class certification given the expedited certification period, courts in Mexico will consider similar elements of certification as those required under Fed.R.Civ.P. 23(a), including numerosity, commonality, and adequacy. Predominance, which is crucial to certification under Fed.R.Civ.P. 23(b)(3), does not appear to be required for certification under the new Mexican law, although presumably it could be considered as part of the general inquiry into whether a collective action is appropriate.

In the U.S., defendants opposing class certification often rely heavily on information obtained through discovery. This will not occur under Mexican law, which does not provide for discovery, and thus defendants will need to rely on readily available evidence that can be gathered within the five-day response window.

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21 At this time, it is unclear at what point in a proceeding the total damages will be ascertained; because class members can opt in up to 18 months after the judgment, the calculation of fees may not occur until after the opt-in period.

22 Article 107, Section VII of the Mexican Constitution; Article 114, Section IV of the Constitutional Proceeding Law.

23 Article 107, Section III of the Mexican Constitution; Article 158 of the Constitutional Proceeding Law.

24 Article 107, Section IX of the Mexican Constitution; Article 83, Section IV of the Constitutional Proceeding Law.

25 See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) ("certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'")

**Notice.** Mexico's new laws authorize the district judge to order the parties to give notice to the class while taking into consideration "the size, location, and other characteristics of the community."<sup>26</sup> This is roughly analogous to the notice provisions in Fed.R.Civ.P. 23(c)(2)(A)&(B).

**Settlement.** Similar to U.S. class action law, the new Mexican laws encourage settlement. A district judge in Mexico has the authority to hold conciliation hearings in which the judge can provide suggestions to the parties for settlement. Judges can approve a settlement agreement between parties at any stage before the final judgment. The process is somewhat similar to the process in the U.S. See Fed.R.Civ.P. 16, 23(e).

**Extended Opt-In Period.** The post-judgment opt-in component of collective actions in the strict sense and individual homogenous actions will be unfamiliar to U.S. attorneys. This component creates tremendous uncertainty on the defense side of a case because it can make it difficult or impossible for a defendant to assess its potential exposure. Although the defendant has the right to challenge each new claimant's membership in the class and the claimed individual damages as they opt in, it is not yet clear how such challenges will be made. On balance, this uncertainty creates a significant incentive for early settlement.

## COMPARISONS WITH BRAZILIAN COLLECTIVE ACTIONS

**Types of Actions.** Practitioners familiar with Brazil's Article 81 will note that Mexico's use of the terms "collective action in the strict sense" and "individual homogenous action" is entirely the opposite of Brazil's. Where Mexico uses "individual homogenous actions" to protect contractual rights, these rights are protected by "collective actions in the strict sense" in Brazil. Group rights based on common noncontractual allegations generally are protected by "collective actions in

the strict sense" in Mexico, but these rights are protected by "homogenous individual actions" in Brazil.

**Standing.** Individuals do not have standing to bring collective actions under Brazilian collective action legislation.<sup>27</sup> Instead, standing to bring a collective action is conferred on an enumerated list of public and private entities. In this regard, Mexico's new laws go further by allowing individuals to bring claims when the represented class consists of 30 or more identified members.

**Certification.** Certification under Mexico's new laws is a departure from the influence of Brazil's collective action proceedings, which do not include a separate certification stage. In this regard, Mexico's collective action laws have been influenced by U.S. proceedings, where as described above certification is a critical step.

**Notice.** Brazilian collective actions require notice only in homogeneous individual actions, and even then publication notice suffices.<sup>28</sup> Mexico's notice requirement is much broader than Brazil's.

**Conciliation.** Brazilian collective actions do not emphasize settlement.<sup>29</sup> In fact, because class representatives have little power to waive rights held by class members, Brazilian judges do not have much power under the regulations to approve settlements.<sup>30</sup> This leaves the parties with little incentive to negotiate for a settlement. Mexico's new laws encourage settlement agreements and allow for judicial review and approval of agreements.<sup>31</sup>

**Global Fund.** Brazil also uses a global fund to administer monetary judgments that are either global in scope (relief granted in diffuse actions, for example), or where not enough members have come forward to bring individual damages claims.<sup>32</sup> Practitioners interested in learning more about Mexico's adoption of the global fund concept, and

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26 Article 591 of the Code.

27 Antonio Gidi, "Class Actions in Brazil—A Model for Civil Law Countries," 51 Am. J. Comp. L. 311, 366 (2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=903188](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=903188).

28 *Id.*, at 341 (noting the low readership levels of newspapers).

29 *Id.*, at 342-343.

30 *Id.*, at 343.

31 Article 595 of the Code.

32 Gidi, *supra* note 27, at 339-340.

predicting how it might be used, may wish to study examples of how the fund has been used in Brazil.

**Res Judicata.** In Brazil, if the outcome of a collective action is unfavorable to the plaintiffs, plaintiff class members retain their individual rights to damages.<sup>33</sup> At this early stage, it is difficult to predict the *res judicata* effect, if any, of an unfavorable judgment in a collective action in Mexico. However, it appears unlikely that class members who failed to opt in will be barred from bringing individual actions.

## CONCLUSION

The class action procedure presents significant new risks for businesses operating in Mexico. The very short class certification period raises a concern that classes may be routinely certified, and the threat of post-judgment opt in may put significant pressure on defendants to settle. Obviously, there are a whole host of questions about the new laws that remain unanswered, including questions about how the courts will interpret the certification requirements and other requirements under the new laws and whether, as a practical matter, district judges in Mexico will err on the side of certifying cases. We will continue to monitor these issues closely.

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