FROM THE

EDITOR

The Federalist Society publishes *Class Action Watch* to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

Piecing Together the Puzzle of Mexican Class Actions

by William J. Crampton & Silvia Kim

After several years of debate, a long-awaited class action bill in Mexico became law. On August 31, 2011, the bill, which had passed the Federal Congress in April, was published in the Official Gazette. The law will become effective on March 1, 2012. As in other civil law jurisdictions, the procedures for class actions under this law do not necessarily resemble the procedures used in the U.S. or common law countries. For example, the majority of cases will not likely be filed by private class representatives. Such a claim is allowed, but standing is also granted to the Federal Consumer Protection Agency, Federal Environmental Protection Agency, National Commission for the Protection and Defense of Users of Financial Services, Federal Antitrust Authority, civil not-for-profit associations whose purpose is to protect the collective rights and interests at stake, and the federal attorney general. In addition, the law provides for either opt-in or opt-out claims, depending on the nature of the claim. If the claim seeks to protect the interests of society as a whole, the class will be opt-out. If the claim seeks recovery for an identifiable group of individuals, the class will be opt-in. The period for opting, however, will extend eighteen months *after* the judgment on common claims.

This law was the product of extensive debate, dating back to at least 2008, among many different sectors—academia, practitioners, consumer associations, NGOs, and the business community, among others. Each wanted to promote what they perceived to be the class action procedure. These initiatives were fueled by numerous articles, seminars, conferences, and press reports describing what many perceived to be a clear case of Mexico lagging behind other Latin American and European nations that already have some form of class or collective action.

One factor complicating the class action debate in Mexico was the question of whether a constitutional amendment would be necessary to allow for class actions. The Mexican Congress, scholars, practitioners, and many other stakeholders debated that question intensely between 2008 and 2010. One side of the debate, relying on circuit court precedent, argued that a constitutional amendment was unnecessary because the constitutional right to access to justice encompasses not only individual justice, but to collective justice as well. The other side, also relying on circuit court precedent, countered that the list of rights enumerated in the Constitution, which does not include collective justice, is exhaustive, and may not be the subject of expansive interpretations.

Those opposed to a constitutional amendment had a point. After all, even without express constitutional recognition, Mexico had already seen class actions. In 1994, the Consumer Protection Law was enacted giving standing to the Federal Consumer Protection Agency (Profeco) to file class actions on behalf of groups of consumers,[1] although actual claims were few and far between. On the other hand, a constitutional amendment would shut the doors to any future controversy on the issue. In the end, the Mexican Congress passed an amendment to article 17 of the Constitution establishing the availability of class actions in Mexico. It became effective with its publication in the Official Gazette on July 29, 2010.[2] The relevant language of the amendment reads:

> *The Federal Congress shall issue laws regulating class actions. Such laws will determine the fields of application, the judicial procedures, and the damage redress mechanisms. Federal judges will have exclusive jurisdiction on these procedures and mechanisms.*[3]

Significantly, the constitutional amendment required that a federal procedure class action law be enacted within one year of the amendment's effective date.[4] Thus, while it may not have been necessary to enact a federal class action law, the constitutional amendment probably did provide the final push necessary to get a bill through Congress.

At the start of congressional sessions on February 1,

2011, two proposals appeared to be leading the debate, one originating in the House of Representatives and the other in the Senate. The House bill was introduced in July 2010 by Representative Javier Corral Jurado, of the PAN party, the currently governing party.[5] It would have given standing to file class actions to a number of public officials and entities, including the President of the Nation, the Attorney General's Office, municipalities, and public prosecutors, civil and consumer associations, as well as any single individual in Mexico (art. 7). It had no class certification or admissibility rules. Under this bill, a defendant would have been given ten days to answer a complaint, which would have been followed by a short evidentiary phase. The judge would then decide the case on the merits within ninety days (arts. 25 and 26). In addition, the proposal expressly rejected the *loser pays rule*—traditionally applicable in Mexico as well as in most civil law jurisdictions—proposing instead that the defendants be bound to pay the plaintiffs' attorney's fees and expenses if they lose the case, while the plaintiffs would do so only if it is proven that they brought the action in bad faith (arts. 47-49).[6]

The Senate bill was introduced by Senator Murillo Karam of the PRI, the largest party in the House of Representatives.[7] Senator Murillo had been involved in a previous attempt to draft a class action law in 2008, when he headed a Senate Task Force charged with drafting a bill. The Task Force did not complete the task, however, because it failed to reach a consensus. But Senator Murillo came out of the task force as the "champion" of class actions in the Senate, which gave his 2010 proposal significant credibility.

This is the bill that eventually became law. But the ultimate law bears little resemblance to the original Murillo bill introduced in September 2010. In its original form, Senator Murillo's 2010 bill provided that class actions would only be available for matters related to consumer and environmental protection, antitrust activities, and financial services (art. 578). In addition, all class actions would be structured as opt-out models, allowing class members to opt-out at any time prior to the issuance of the final decision in the case (art. 594). Standing to bring the action was given to the Federal Consumer and Environment Protection Agencies, the National Commission for the Protection of Users of Financial

continued page 9

Supreme Court Narrowly Interprets the Relitigation Exception of the Anti-Injunction Act

by J.B. Tarter

In *Smith v. Bayer Corp.*,[1] the Supreme Court unanimously held that a federal district court could not enjoin a state court from considering whether to certify a class action.[2] The Court applied two of its precedents in the non-class action setting to invalidate an injunction issued pursuant to the "relitigation exception" of the Anti-Injunction Act.[3]

Smith concerned litigation arising out of Bayer's cholesterol-lowering drug Baycol. After Baycol was pulled from the market in 2001, numerous suits were filed around the country in both state and federal courts. The federal cases were consolidated for pretrial purposes in the District of Minnesota pursuant to 28 U.S.C. § 1407.

In 2001, George McCollins filed suit in West Virginia state court against Bayer. One month after McCollins filed suit, Keith Smith, along with another plaintiff, filed suit against Bayer in a different West Virginia state court.[4] Both suits alleged that Bayer's sales of Baycol violated West Virginia consumer protection laws and sought to represent a class of all West Virginians who had purchased Baycol.

In 2002, Bayer removed McCollins's suit to federal court, and then the Judicial Panel on Multidistrict Litigation transferred the case to the District of Minnesota for coordinated pretrial proceedings. Bayer was unable to remove Smith's suit because Smith had sued non-diverse defendants along with Bayer.[5]

For the next six years, the two cases—the MDL in Minnesota and Smith's action in West Virginia state court—proceeded along separate tracks. The MDL Court reached the class certification question first. It denied McCollins's motion for certification of a class under Federal Rule of Civil Procedure 23 because the West Virginia claims would require proof of actual injury for each plaintiff: thus, individual issues of fact would predominate over common issues.[6] After denying class certification, the MDL Court dismissed McCollins's individual suit for failure to demonstrate actual injury.

After that dismissal, Bayer moved the MDL Court to issue an injunction prohibiting the West Virginia court from entertaining Smith's motion for class certification. Bayer argued that the injunction was necessary to prevent "relitigation" of the issue that the MDL Court had just decided—namely, that individual issues predominated under West Virginia law. Bayer

17 Palacios v. Boehringer Ingelheim Pharm., Inc., No. 10-22398-CIV-TORRES (11th Cir. Sept. 14, 2011). The case is now scheduled for trial in early 2012, so barring settlement, it may be in the Eleventh Circuit within the next year.

18 *See, e.g.*, Schaefer-LaRose v. Eli Lilly, Case No. 07-CV-1133 (S.D. Ind. 2006) (4.59% opt-in rate); Engel v. EMD Sereno, Case. No. 07-CV-0117 (N.D. Cal. 2007) (4.3% opt-in rate).

19 *See, e.g.*, *Schaefer-LaRose*, Case No. 07-CV-1133 (S.D. Ind. 2006) (29 of 356 opt-ins are current employees).

Piecing Together the Puzzle of Mexican Class Actions

Continued from page 3

Services, the Federal Antitrust Commission, the Federal Attorney General, civil associations with at least one year of establishment prior to the lawsuit, and a group of at least ten individual members of the class (art. 584).[8]

During the last quarter of 2010, and after intense debate and participation from different sectors, Senator Murillo's bill was significantly amended to introduce a number of safeguards intended to protect defendants' rights. Class actions were divided into three categories, following categories of rights found in the legal doctrine of civil law countries: the so-called *diffuse actions* to protect comprehensive rights that belong to society in general and not to any individual in particular, such as the right to a clean environment; *collective actions* to protect rights that belong to a group of persons linked by a legal relationship; and *homogeneous individual rights class actions* to protect a group linked by a contractual relationship (art. 581). The opt-out procedure was replaced with a mixed system under which class actions will be opt-out if they involve diffuse rights, and opt-in if they involve collective rights or individual homogeneous rights (art. 594). While some class action advocates oppose the opt-in procedure because it narrows the reach of class judgments, the fact that the time for opting extends well beyond the decision on the merits of the claim means class members will be able to wait for the outcome before deciding whether to join.

A clear certification phase with familiar criteria such as commonality, adequate representation, class definition, and superiority, was introduced, together with rules that provide for the parties' right to appeal the trial court's certification ruling (art. 588-589). In addition, the *loser pays rule* was adopted and attorney's fees would be subject to caps that aim at avoiding abuse (arts. 616-618).[9]

In late December 2010, the revised Murillo bill was approved unanimously in committee and, shortly thereafter, by the Senate's Plenary. The publication of the law in the Official Gazette was the final piece of the puzzle. With the law now enacted, consumer advocates can prepare to file claims when the law becomes effective in March 2012, and potential defendants can brace for the impact.

But, while we can expect to see federal class actions in Mexico next year, that may not be the end of the debate in Mexico. There remains a question as to whether a federal class action law will preempt state legislatures from passing their own local class action procedures. Mexico is a federation comprising thirty-one states and a Federal District, Mexico City. Under the Constitution, states have specific powers that are not delegated to the federal government.[10] While the constitutional amendment states that federal courts will have exclusive jurisdiction over class actions, some commentators have voiced the opinion that a federal class action law would not preempt state legislation that governs matters for which states have sole or concurrent jurisdiction under the Federal Constitution (i.e., right to health).[11] As a result, local initiatives have also been frequent in state legislatures, and new proposals are being introduced often.

The most recent proposal is a bill in the Federal District (Mexico City) introduced this year by Representative Julio Cesar Moreno Rivera, with broad support from legislators in different political parties.[12] The bill would amend the Civil Procedure Code of Mexico City to introduce a chapter on class actions. The bill expressly refers in its preamble to the federal preemption issue stating that the state legislature is not invading the jurisdiction of the Federal Congress because it is only proposing modifications to local legislation. Under this bill, class actions would be heard by state civil courts (art. 674). Standing would be given to public and private entities whose organizational purpose is related to the protection of collective rights, the Attorney General of the Federal District, and groups of at least fifteen individual class members (art. 675). For a class action to be admissible, there must be common issues of fact and law and adequate representation of the class (art. 676 A). The defendant would have fifteen days to file its answer (art. 676 B). Thereafter, the judge would rule on admissibility under article 676 A. It does not appear that the parties would have the right to oppose admissibility, and the ruling of the court is not subject to review (art. 676 C). Class actions would be opt-out, allowing class members to do so at any time before the court issues its

final decision (art. 676 E). The proposal also provides that the parties must produce their evidence within a term of thirty days, and that the court must decide the case within ten days after the filing of closing arguments (art. 676 G). The final ruling would be binding on all the parties unless inadequate representation is proven or new evidence is discovered. In that case, a new class action based on the same facts may be filed within three years (art. 680).

A notable innovation of this proposal would be the introduction of punitive damages, which are currently foreign to Mexican law, as in most civil law countries (art. 677 B). This proposal will join a similar bill that has been pending in the Mexico City legislature since April 2009.[13] The question now is whether the Mexico City legislature will challenge the exclusivity of the federal law under the constitutional amendment by moving its own bill forward.

The Federal Congress in Mexico has now pieced together a class action model assembled with provisions intended to protect the interests of numerous stakeholders in the debate. It remains to be seen how class action cases will unfold in Mexico, and whether competing local class action models will challenge the exclusivity of the federal law.

** William J. Crampton is a partner in Shook, Hardy & Bacon's Global Product Liability Group in Kansas City. Bill represents and consults with clients on product liability matters throughout Europe and Latin America, and he is co-author of a chapter on "Class Action Developments Overseas" in* Product Liability Litigation: Current Law, Strategies and Best Practices *(2009 and 2010).*

*** Silvia Kim is an associate in Shook, Hardy & Bacon's Global Product Liability Group in Kansas City. Silvia is a licensed lawyer in the United States and Costa Rica. Her litigation practice, which centers on Latin America and Asia, focuses primarily on product liability, class action and consumer protection litigation.*

Endnotes

1 Gregory L. Fowler et al., *Class Actions in Latin America: A Report on Current Laws, Legislative Proposals and Initiatives*, 1:1 Latin Am. F. Newsl. (International Bar Association), Oct. 2008, at 72 ("It is important to mention that in the 15 years since the Consumer Protection Law was enacted, there have only been two group actions filed by the Consumer Protection Agency before the federal jurisdiction: The Air Madrid and the Lineas Aereas Azteca cases, both in 2007, with the exception of some isolated judicial precedents in consumer matters.").

2 *Id.*

3 *Id.*

4 Federal Constitution Amendment to article 17, published in the Mexican Official Gazette, July 29, 2010.

5 Decree which issues the regulatory law to article 17 of the Mexican Federal Constitution on collective actions. Representative Javier Corral Jurado of the PAN, July 2010.

6 *Id.*

7 The bill proposed a bundle of amendments to several pieces of legislation: the Federal Code of Civil Procedure, the Federal Civil Code, the Antitrust Law, the Consumer Protection Law, the Environmental Law, and the Law for the Protection of Users of Financial Services Law.

8 Bill which modifies and adds several articles to the Federal Code of Civil Procedures, Federal Civil Code, Federal Antitrust Law, Federal Consumer Protection Law, Federal Law of the Judicial Power, General Law on Ecological Equilibrium and Protection of the Environment, and Law for the Protection and Defense of Users of Financial Services, filed by Senator Jesus Murillo Karam, introduced in September 2010.

9 Bill filed by Senator Jesus Murillo Karam, approved by the Government and Legislative Studies Senate Committees, LXI Legislature, introduced December 2, 2010.

10 Federal Constitution of Mexico, article 124.

11 Alejandro Madrazo Lajous, Acciones colectivas: reforma engañabobos, El Universal, Apr. 27, 2010, *available at* http://www.eluniversal.com.mx/editoriales/48125.html.

12 Bill filed by Legislators of the V Legislature, which seeks to reform several articles of the Federal Civil Procedure Code, Federal Civil Code, and several federal laws, filed by Dep. Julio Cesar Moreno Rivera, introduced in January 2011.

13 Bill filed by Dep. Xiuh Guillermo Tenorio Antiga of the New Alliance Party before the IV Legislature of the Mexico City Congress, introduced in April 2009.