

CHAMBERS GLOBAL PRACTICE GUIDES

Collective Redress & Class Actions 2023

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Austria: Law & Practice and Trends & Developments

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KNOETZL



AUSTRIA

Law and Practice

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Contents

1. Policy Development of Collective Redress/Class Action Mechanisms p.4

- 1.1 History and Policy Drivers of the Legislative Regime p.4
- 1.2 Basis for the Legislative Regime, Including Analogous International Laws p.5
- 1.3 Implementation of the EU Collective Redress Regime p.5

2. Current Legal Framework and Mechanisms Applicable p.6

- 2.1 Collective Redress and Class Action Legislation p.6

3. Scope and Definitional Aspects of the Legal Framework p.7

- 3.1 Scope of Areas of Law to Which the Legislation Applies p.7
- 3.2 Definition of Collective Redress/Class Actions p.8

4. Procedure for Bringing Collective Redress/Class Actions p.8

- 4.1 Mechanisms for Bringing Collective Redress/Class Actions p.8
- 4.2 Overview of Procedure p.9
- 4.3 Standing p.10
- 4.4 Class Members, Size and Mechanism (Opt In/Out) p.10
- 4.5 Joinder p.10
- 4.6 Case Management Powers of Courts p.11
- 4.7 Length and Timetable for Proceedings p.12
- 4.8 Mechanisms for Changes to Length/Timetable/Disposal of Proceedings p.12
- 4.9 Funding and Costs p.12
- 4.10 Disclosure and Privilege p.13
- 4.11 Remedies p.13
- 4.12 Settlement and ADR Mechanisms p.15
- 4.13 Judgments and Enforcement of Judgments p.16

5. Legislative Reform p.16

- 5.1 Policy Development p.16
- 5.2 Legislative Reform p.16
- 5.3 Impact of Brexit p.17
- 5.4 Impact of Environmental, Social and Governance (ESG) Issues p.17

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1. Policy Development of Collective Redress/Class Action Mechanisms

1.1 History and Policy Drivers of the Legislative Regime

No Class Action

Austrian law has not historically provided for class actions. However, as a result of a directive of the EU – Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC – all that is about to change. Traditionally, class action in the Anglo-American style has even been seen as contrary to Austrian legal culture, based on individual action and individual parties who assert their own individual claims.

Limited Instruments of Collective Redress

There are only very limited opportunities for collective redress.

Currently, procedural law allows certain associations to bring collective interest litigation through representative actions and sample lawsuits (*Verbandsklagen* according to Sections 28 ff of the Consumer Protection Act and Section 14 of the Unfair Competition Act; *Musterklagen* according

to Section 502, paragraph 5, line 3 of the Code on Civil Procedure).

Nevertheless, Austrian legal practice is facing the phenomenon of mass claims – ie, many similar individual claims for damages based on the same damaging event against the same defendant. Consumer protection lawyers and associations have reacted to this phenomenon by developing a tool for “bundling” individual claims on the basis of existing procedural and substantive rules (the “Austrian-type mass claim”, *Sammelklage österreichischer Prägung*).

Finally, a court before which several similar actions against the same defendant are pending has the possibility to join these proceedings if joining them promotes procedural efficiency (Section 187 of the Code on Civil Procedure).

Current Developments

In the past, there have been initiatives to strengthen collective redress, but these have fizzled out, without concrete legislative proposals. In recent years, starting with the mass individual investor lawsuits in the wake of the financial crisis and the Volkswagen “Dieselgate” cases, the demands for collective legal protection have resounded. In recent years, international attention was attracted by the currently pend-

ing lawsuits filed by numerous tourists who were infected with COVID-19 in the Tyrolean ski resort of Ischgl in February/March 2020. They are suing the Republic of Austria for the allegedly faulty information and the allegedly delayed reaction of the authorities in the spread of COVID-19 at the beginning of the pandemic.

Nevertheless, only the pressure from the latest EU legislation is leading Austria to implement a regime of collective redress, the adoption of which is currently being worked on (see **5.1 Policy Development** and **5.2 Legislative Reform**).

1.2 Basis for the Legislative Regime, Including Analogous International Laws Representative Actions

Austrian representative actions are transpositions of an EU directive into Austrian national law (see **1.3 Implementation of the EU Collective Redress Regime**).

Sample Lawsuits

The sample lawsuit has been noted by some law professors to be comparable to the German “sample declaratory claim” (Section 606 of the German Code of Civil Procedure). While similarities in the developments of such a legal instrument have been noted in both the Austrian and German legal systems, there is no indication that Austrian legislators set out to explicitly model their instruments upon Germany’s or other country’s regimes.

Austrian-Type Mass Claim

The Austrian-type mass claim has been developed by Austrian legal practice using specific provisions of Austrian substantive and procedural law. It is therefore an autochthonous tool.

1.3 Implementation of the EU Collective Redress Regime

Representative actions under Sections 28 ff of the Consumer Protection Act and Section 14 of the Unfair Competition Act are transpositions into Austrian law of the EU Directive 98/27/EC on injunctions for the protection of consumers’ interests (repealed by Directive 2009/22/EC).

In 2013, when the European Commission published the non-binding recommendation on the introduction of collective redress measures, the discussion on the introduction of a “group action” (which was already included in a draft of a Civil Procedure Reform Bill in 2007) was relaunched. However, despite working groups being established in the Ministry of Justice, no practical implementation of this instrument took place. At the beginning of 2018, before the European Commission announced the draft directive for collective redress under the “New Deal for Consumers” in March 2018, two Austrian political parties respectively introduced draft legislation for “group proceedings” (*Gruppenverfahren*) and “representative sample declaratory actions” (*Verbandsmusterfeststellungsklage*). These initiatives remained proposals.

The implementation of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers is still in progress. While member states were required to adopt and publish, by 25 December 2022, the laws necessary to comply with the directive and apply them from 25 July 2023, Austria, like other member states, is late in implementing the Directive. However, a draft law with wide-reaching effects is expected soon (see **5.1 Policy Development** and **5.2 Legislative Reform**).

2. Current Legal Framework and Mechanisms Applicable

2.1 Collective Redress and Class Action Legislation

Representative Actions

Sections 28 ff of the Consumer Protection Act and Section 14 of the Unfair Competition Act provide for representative actions. Representative actions are available for certain legal entities (“associations”, *Verbände*) to bring legal action against unlawful business practices in dealings with consumers and against the use of unlawful general terms and conditions.

A representative action can only be used to seek injunctive relief and removal of the unlawful status (*Unterlassungs- und Beseitigungsanspruch*). It cannot be used to assert claims for damages. Thus, a representative action can control future conduct, but cannot grant damages for past harmful conduct.

Sample Lawsuits

Section 502, paragraph 5, line 3 of the Code on Civil Procedure provides for sample lawsuits, with which certain associations (the same entitled to representative actions) can file a case on behalf of an individual and – irrespective of the amount in dispute – bring it before the Supreme Court. The prerequisite is that the individual has assigned their claim to the association.

While the judgment only has legal effect regarding the specific case, the lower courts will generally observe the decision of the Supreme Court as a “precedent”.

Austrian-Type Mass Claims

In order to deal with mass claims, legal practice has established “Austrian-type mass claims”.

The aim was to create a functional equivalent to class actions.

The Austrian-type mass claim is based on the concept that claims may be assigned for collection (*Inkassoession*) and that a plaintiff may file a single lawsuit to deal with multiple claims it has against the defendant (Section 227 of the Code on Civil Procedure). Thus, the entity that has been assigned claims from different individuals can raise all these individual claims (as a bundle of claims) against a single defendant with one lawsuit in the same proceeding.

The bundling of many claims is more cost-efficient than individual lawsuits because the costs are proportionately lower if the amount in dispute is higher. Moreover, a higher amount in dispute facilitates third-party financing (see **4.9 Funding and Costs**).

Joinder of Individual Proceedings

Finally, a court before which several similar actions against the same defendant are pending has the possibility to join these proceedings if joining them promotes procedural efficiency (Section 187 of the Code on Civil Procedure). The effect of the joinder of several legal disputes consists solely of the several cases being heard together and, if the joinder is not rescinded, decided together.

However, the two proceedings retain their independence in substance – ie, the setting aside of the judgment with regard to one claim by the appeal court does not mean a setting aside with regard to the other (joined) claim.

3. Scope and Definitional Aspects of the Legal Framework

3.1 Scope of Areas of Law to Which the Legislation Applies

Representative Actions

The right to bring a representative action is available to certain associations, for example the Chamber of Commerce, the Chamber of Labour, the Federation of Trade Unions, the Chamber of Agriculture and the Association for Consumer Information (Section 29 of the Consumer Protection Act, and Section 14 of the Unfair Competition Act). In practice, mainly the Association for Consumer Information and the Chamber of Labour have made use of this tool.

By means of a representative action, the following claims can be asserted:

- claims for injunctive relief against the use of unlawful general terms and conditions;
- claims for injunctive relief against certain unlawful business practices in dealings with consumers; and
- claims for the removal of a situation that is contrary to fair competition – eg, the removal of unlawful general terms and conditions from business premises or the sending of letters to inform affected customers that certain clauses of the terms and conditions do not apply.

No claims for damages can be asserted by means of a representative action.

Sample Lawsuits

A sample lawsuit can be brought by the same associations as the representative actions (Section 502, paragraph 5, line 3 of the Code on Civil Procedure, and Section 29 of the Consumer Protection Act).

Since the sample lawsuit is based on assignment, only those claims can be asserted that can be assigned (Austrian Supreme Court 8 Ob 123/09k). Typical civil law actions, such as for damages or warranty, can usually be assigned. A contractually agreed prohibition on assignment that prevents an assignment of consumers to an association for the purpose of legal action under Section 29 of the Consumer Protection Act is considered severely disadvantageous and immoral and, therefore, void (recently Austrian Supreme Court 8 Ob 59/20i).

Furthermore, the assigned claims must fall within the area of responsibility of the association bringing the action, eg, the Association for Consumer Information may bring a sample lawsuit for an individual consumer claim which has been assigned to the Association (Austrian Supreme Court 4 Ob 208/08d, Section 502, paragraph 5, line 3 of the Code on Civil Procedure).

Austrian-Type Mass Claims

Austrian-type mass claims can be used for all kinds of claims that can be assigned. However, they must fulfil certain procedural requirements (see **4.1 Mechanisms for Bringing Collective Redress/Class Actions**). In practice, they are mainly used by consumer protection organisations. As mentioned above, typical civil law actions, such as for damages or warranty, are generally assignable. A contractual prohibition of assignment that does not concern an assignment under Section 29 of the Consumer Protection Act may be effective if it is not considered to be severely disadvantageous or immoral for other reasons (see recently Austrian Supreme Court 7 Ob 68/21g).

Judicial Joinder of Proceedings

Judicial joinder of proceedings for the purpose of procedural efficiency is, in principle, possible

for all types of cases pending at the same court under the same procedural rules (Section 187 of the Code on Civil Procedure).

3.2 Definition of Collective Redress/Class Actions

Since there is no collective redress/class action in Austrian law, there is no statutory definition.

4. Procedure for Bringing Collective Redress/Class Actions

4.1 Mechanisms for Bringing Collective Redress/Class Actions Representative Actions

The claim for injunctive relief is to be asserted in “normal” contradictory proceedings according to the general rules of the Code on Civil Procedure. The labour and social courts are responsible for representative actions in the field of labour law.

Entrepreneurs who are domiciled in an EU member state may be sued in Austria pursuant to Article 7(3) of the Brussels I Regulation (Austrian Supreme Court 6 Ob 264/02w).

Before bringing action, an association may, but is not obliged to, request the entrepreneur concerned to acknowledge its obligation to cease and desist and to promise a penalty in the event of a further infringement. If the company makes a corresponding declaration, there is no longer any legal interest in bringing an action (Section 28, paragraph 2 of the Consumer Protection Act).

Sample Lawsuits

In principle, the same rules apply to jurisdiction for a sample lawsuit as for the respective individual action. However, the assignment of

a consumer claim does not transfer the special jurisdiction for consumers under Article 18 of the Brussels I Regulation (ECJ, C-498/16, Schrems/Facebook). The same applies here as described below for Austrian-type mass claims.

Austrian-Type Mass Claims: Jurisdiction

The jurisdiction for Austrian-type mass claims derives from the jurisdiction for the individual claims bundled in the mass lawsuit. However, the mechanism of bundling individual claims may change jurisdiction with regard to: (i) the amount in dispute; and (ii) the special jurisdiction for consumer matters.

The amount in dispute

In general, a claim may be brought as part of a “bundle of assigned claims” before the same court only if that court has local jurisdiction over this claim (Article 227, paragraph 1 of the Austrian Court on Civil Procedure). The requirements for jurisdiction are, in this regard, no different than if the assigned claims were asserted by the originally entitled parties (Austrian Supreme Court 2 Ob 130/20m, 2 Ob 21/17b).

A more generous regulation applies with regard to the “value limit jurisdiction”. In general, the district courts have jurisdiction for actions with an amount in dispute of less than EUR15,000. If the amount in dispute exceeds EUR15,000, the regional courts have jurisdiction at first instance. Similar claims of different creditors that have been assigned to the plaintiff are not aggregated for the purpose of determining the value limit jurisdiction. However, if one of the assigned claims exceeds EUR15,000 and is therefore subject to the jurisdiction of the regional court, the assigned claims below EUR15,000 can also be included in the mass claim and are processed by the regional court (Section 227, paragraph 2 of the Austrian Code on Civil Procedure).

Special jurisdiction for consumer matters

If consumer claims are assigned, the special jurisdiction for consumer claims is not transferred with the assignment (ECJ, C-498/16, Schrems/Facebook). Therefore, the Association for Consumer Information bringing an Austrian-type mass claim for consumers cannot invoke this jurisdiction. In the case of the Volkswagen emissions lawsuits against the German manufacturer, for example, the Association for Consumer Information relied on special jurisdiction for delict in order to sue in Austria. The ECJ ruled in favour of the Association for Consumer Information that persons who purchased the vehicle in Austria can sue in Austria on the basis of delict (ECJ, C-343/19, VKI/Volkswagen).

Austrian-Type Mass Claims: Pre-litigation Mechanisms

In order to bring an Austrian-type mass claim, the plaintiff (eg, the Association for Consumer Information) usually publicly calls on the individuals concerned to assign their claims to the plaintiff. The assignments are handled via forms on which the individual claims must be specified in the same detail as would be necessary for an individual lawsuit.

4.2 Overview of Procedure **Representative Action**

Representative actions are to be asserted in “normal” contradictory proceedings according to the general rules of the Code on Civil Procedure.

Some special provisions of the Unfair Competition Act apply, namely:

- special provisions that facilitate the granting of an interim injunction (Section 24 of the Unfair Competition Act);

- special provisions regarding the publication of judgments (Section 25, paragraphs 3-7 of the Unfair Competition Act); and
- the possibility to exclude the public due to endangering business or trade secrets (Section 26 of the Unfair Competition Act).

Sample Lawsuit

The sample action is characterised by the fact that there is no value limit for the admissibility of an appeal to the Supreme Court (see **4.11 Remedies**).

Austrian-Type Mass Claims

The Austrian-type mass claim as a bundle of claims is based on the possibility of the “objective aggregation of claims” (*objektive Klagenhäufung*, Section 227 of the Code on Civil Procedure). Objective aggregation of claims means that the same defendant can assert several claims against the plaintiff in one action.

According to the wording of Section 227 of the Code on Civil Procedure, claims may be bundled regardless of whether there is a special connection between them. Contrary to this wording, an obiter dictum of the Supreme Court from 2005 indicates that a certain connection is nevertheless required (Austrian Supreme Court 4 Ob 116/05w obiter; obiter dictum is the court’s expression of opinion uttered in a judgement, but not essential to the decision). Accordingly, all claims must be based on an “essentially similar cause of action” and concern “essentially identical issues of fact or law”. However, the same decision indicates that the connection need not be too close and that only an arbitrary set of claims is to be rejected. Literally, the Supreme Court states that the necessary connection is not fulfilled “in the case of an arbitrary ‘collection’ of completely different claims in one proceeding” (Austrian Supreme Court 4 Ob 116/05w obiter).

After that decision, the Supreme Court has always considered the necessary connection to be given. Famous Austrian law professors therefore predominantly assume that the Supreme Court only wants to prohibit the completely arbitrary bundling of claims.

Nevertheless, defendants may claim lack of admissibility and lack of jurisdiction for individual claims with an amount in dispute lower than EUR15,000 by invoking the decision from 2005. This may lead to long interlocutory disputes on the admissibility of the Austrian-type mass claim.

4.3 Standing

Representative Actions and Sample Lawsuits

Representative actions and sample lawsuits can only be brought by certain associations, for example: the Chamber of Commerce, the Chamber of Labour, the Federation of Trade Unions, the Chamber of Agriculture or the Association for Consumer Information. In practice, the Association for Consumer Information and the Chamber of Labour have predominantly made use of the representative action and the sample lawsuit.

Austrian-Type Mass Claim

Contrary to representative actions and sample lawsuits, an Austrian-type mass claim can theoretically be brought by anyone to whom claims can be assigned under civil law rules. In practice, it is mainly used by the Association for Consumer Information and the Chamber of Labour.

4.4 Class Members, Size and Mechanism (Opt In/Out)

Since there is no class action, there is no class and no rule defining who belongs to the class. There are only individual plaintiffs. Individual plaintiffs are:

- the respective association bringing the representative action;
- the respective association bringing the sample lawsuit; and
- the assignee to whom the claims were assigned (not the original plaintiffs) in the case of the Austrian-type mass action.

4.5 Joinder

No Special Rules for Class Actions

Since Austrian law does not provide for collective redress/class actions, there are no rules for joining further parties to such actions.

“Joining” an Austrian-Type Mass Claim

“Joining” an Austrian-type mass claim is done prior to the filing of the action by the entitled individuals assigning their claims to the “mass plaintiff” for collection. With the assignment for collection, however, the assignor does not actually join the action; rather, they assign their claim to the plaintiff and are not themselves a party to the proceedings. Recent case law clarified that under certain conditions it is also possible that, after filing a lawsuit, further claim-holders assign their claims to the plaintiff and the plaintiff asserts these claims by extending its lawsuit. The prerequisite for this is that the extension of the lawsuit avoids further litigation without disproportionately complicating or delaying the ongoing litigation and that the new claims are not yet time-barred at the time of assertion (Austrian Supreme Court 3 Ob 149/21i). For the procedure of assignment see 4.1 Mechanisms for Bringing Collective Redress/Class Actions.

General Rules on Third-Party Joinders

In general, a third party may join the proceedings on the side of the plaintiff or defendant if it has a legal interest in the success of the respective party. Legal interest is a given if the decision will have a direct legal effect on the third party’s

position – eg, an insurer may join proceedings of an insured party against the damaging party.

However, the fact that a potential claim is based on the same facts subject to the pending proceeding does not justify a third-party joinder. For example, if defective products are sold and several persons have been injured as a result, one injured party cannot join the proceedings of another injured party, even though the same preliminary question arises for both as to whether the product was defective.

A “de-facto-joinder” in such a case is only possible through an assignment and an “Austrian-type mass claim”. Moreover, if such claims are pending at the same court, the court may join proceedings to be heard together (for both, see **4.1 Mechanisms for Bringing Collective Redress/Class Actions**).

4.6 Case Management Powers of Courts **Interruption of Proceedings due to Other Pending Proceedings**

If the decision of a legal dispute depends in whole or in part on a legal relationship that is the subject of other court proceedings, the deciding court may interrupt the proceedings until a final decision has been rendered in these other proceedings (Section 190 of the Code on Civil Procedure).

This provision primarily refers to the case where another proceeding is pending between the same parties. However, it can also be relevant if many individual claims of the same kind are pending. In these cases, too, the court may, if it appears necessary with regard to procedural efficiency, interrupt a proceeding until another proceeding has been decided.

For example, in the “Dieselgate” cases, many Austrian courts interrupted proceedings until the ECJ had ruled on the question of jurisdiction in one of these proceedings (see – eg, Austrian Supreme Court 4 Ob 119/19g) and subsequently followed the decision of ECJ (see **4.1 Mechanisms for Bringing Collective Redress/Class Actions**).

The interruption in these cases is at the discretion of the court. In its decision, the court has to consider that the interruption should lead to an improvement in procedural efficiency (Regional Court Vienna 44 R 24/10w). The desire to reach decisions that are consistent with each other does not alone justify an interruption (Higher Regional Court Vienna 1 R 73/09a).

An interruption can therefore be envisaged if the other proceedings are likely to be terminated in the near future and extensive and costly hearings of evidence can be avoided in the interrupted proceedings.

Joining of Proceedings by the Court

If several similar actions against the same defendant are pending before the same court, the court may join these proceedings for a joint hearing if this is likely to simplify or accelerate the decision (Section 187 of the Code on Civil Procedure, see **2.1 Collective Redress and Class Action Legislation**).

Even if the connection objectively serves procedural efficiency, it is usually still associated with additional work for the respective judge. At the Commercial Court of Vienna, the rules on the allocation of cases between the judges therefore provide that when two proceedings are joined, the joining judge may “sit out once” the allocation of future proceedings. This rule is limited to a maximum of five proceedings per joinder.

4.7 Length and Timetable for Proceedings

Average Duration

Proceedings before Austrian courts are generally efficient. In civil proceedings, most procedural steps are foreseen to be taken within two to four weeks of each other. The average duration of proceedings is one to one-and-a-half years in the first instance and from nine months to one year in the appellate stage.

Complex Duration

Complex disputes may take longer. Especially in more complex cases, the evidence procedure in the first instance can take longer, for example if experts or many witnesses are involved. Additionally, the appellate court proceedings may reveal errors of the lower court proceedings and the case can be remanded to the lower court for repetition and/or completion of the taking of evidence. The judgment rendered in such a remand is also subject to appeal according to the general procedural rules. In such cases, it can take several years before a final, binding judgment is rendered.

4.8 Mechanisms for Changes to Length/ Timetable/Disposal of Proceedings

Accelerated procedures are only provided for actions with a small amount in dispute (up to EUR75,000). For these actions, the court issues a decision in favour of the plaintiff based on the lawsuit alone. This decision becomes final and binding if the defendant does not object to it within four weeks. If they object, “normal proceedings” are initiated.

In order to avoid procedural delays by the parties, the law provides for different consequences of default. For example, a submission that is culpably made only at an advanced moment in the proceedings can be rejected if it would signifi-

cantly delay the proceedings (Section 179 of the Code on Civil Procedure). In addition, the judge may order the parties to make a specific submission, name witnesses or produce documents within a certain period. If a party fails to comply with such an order in due time without reasonable excuse, the submission may be rejected (Section 180, paragraph 2 of the Code on Civil Procedure).

4.9 Funding and Costs

The limited possibility of collective suit in Austria is partly compensated by third-party financing. At present, it is an accepted tool, recognised without any formal restrictions and used particularly for Austrian-type mass claims.

In practice, in most cases, the funders provide their financial support to the plaintiff, and theoretically it is also available to the defendant.

It is common practice that litigation funding companies fund cases with a significant financial impact, as they tend to be compensated for their services with a significant portion of the proceeds (approximately one third). This portion must cover both the risk undertaken by the funder and the costs of their own lawyers. Therefore, in practice, cases with low financial impact tend only to attract funders if multiple, similar, cases are likely to emerge and collective action (in the form of Austrian-type mass claims) can be brought.

Generally, litigation funding agreements cover all legal fees/costs that may arise in the proceedings – ie, court fees, lawyer’s fees, fees for expert witnesses and/or translators and travel expenses for witnesses. The opponent’s legal fees are usually also covered to provide for the scenario in which the funded party loses the case and thus becomes required to reimburse its opponent for

its legal fees/costs. The litigation funder will usually reserve the right to terminate the agreement at any time to prevent covering further costs while bearing the costs already incurred.

4.10 Disclosure and Privilege

For the Austrian forms of collective redress, the same principles apply with regard to disclosure and privilege as for individual actions.

Pre-trial Disclosure

Austrian procedural law does not provide for pre-trial proceedings as known – eg, in Anglo-American jurisdictions.

There are only a few specified applications available which may be decided before the trial takes place, such as request for injunctive relief (to secure future enforcement or to safeguard evidence) or application to dismiss the claim for lack of jurisdiction.

Trial Disclosure

In civil proceedings, a party may be ordered by the court to produce information/evidence at its disposal, if the court considers such information/evidence material and orders the party on its own initiative to produce the evidence (this rarely occurs) or upon request by the other party (Section 303 of the Code on Civil Procedure).

Under Section 305 of the Code on Civil Procedure, a party ordered to produce a piece of evidence is entitled to object to the order to protect:

- family affairs;
- the party's duty of preserving honour;
- itself or third parties from criminal prosecution;
- legal privilege; or
- business secrets.

However, under Section 304 of the Code on Civil Procedure, the requested party may not refuse to produce the requested evidence if:

- it previously referred to the piece of evidence (mostly documents) in the proceedings;
- substantive law requires the requested party to produce the evidence (this also applies to evidence in the possession of third parties); or
- the evidence is in the form of a document and may be considered to be of joint use with respect to both parties – eg, a contract (this also applies to evidence in the possession of third parties if the piece of evidence is of joint use with respect to the third party and either party to the litigation).

If a party does not comply with the court order, there is no enforcement available. The court will consider the refusal in its assessment of evidence and adverse inferences may be drawn by the court as finder-of-fact.

Legal Privilege

Austria recognises the concept of legal privilege. For example, members of legal professions – particularly attorneys-at-law – must refuse to testify with respect to any one of their mandates before any authority unless released by the client. Neither the party nor its counsel can be forced to produce the products of client-attorney work. No adverse inferences may be drawn by the court from such a refusal. Client-attorney correspondence and the products of attorney work are protected by legal privilege irrespective of where such documents are located.

4.11 Remedies

For the Austrian forms of collective redress, the same principles apply with regard to remedies as for individual actions, with one important

exception: the admissibility of an appeal to the Supreme Court for sample lawsuits.

Appeal Levels and Principles

In Austrian civil procedure, there are two appeal levels, one to the Court of Appeal and one to the Supreme Court. An appeal to the Supreme Court is limited to matters of significance for the judicial system and depending on the amount in dispute. Parties may appeal first instance decisions to regional courts which hear appeals from decisions of district courts, and to regional appellate courts in cases of appeals from regional court decisions.

The service of the judgment triggers a four-week period during which the partly or entirely unsuccessful party may file an appeal. The opponent may respond thereto within four weeks of service with the appeal. These time periods cannot be extended.

The appellant may claim errors of procedural and/or material law, errors of fact and/or nullity (which rarely occurs). The appeal proceedings serve to review the correctness of the judgment in first instance, but not to raise any new facts or bring new claims. The court of appeal must disregard new allegations and new evidence.

The Supreme Court only reviews questions of (material and/or procedural) law. Factual findings are never subject to revision of the Supreme Court. Factual findings and the assessment of the evidence can only be challenged before the courts of appeal.

Admissibility of an Appeal to the Supreme Court

For admissibility of an appeal to the Supreme Court, the following rules apply (Section 502 of the Code on Civil Procedure).

- If the amount in dispute is less than EUR5,000, no appeal to the Supreme Court is admissible.
- If the amount in dispute exceeds EUR5,000, the decision of the Court of Appeal includes a statement on whether its judgment is open to an appeal to the Supreme Court.
- If the amount in dispute is between EUR5,000 and EUR30,000, the Court of Appeal's decision on admission can be contested with a request for amendment. The Court of Appeal (not the Supreme Court) decides on this request and its decision is not appealable.
- If the amount in dispute exceeds EUR30,000, the party seeking further appeal may challenge the Court of Appeal's decision on admissibility and request permission to seek further appeal to the Supreme Court (so called "extraordinary appeal"). In such cases, the challenge must contain: (i) the challenge of the decision of the court of appeal denying further appeal to the Supreme Court; and must also (ii) set forth the actual appeal. The Supreme Court decides on both.

Austrian-Type Mass Claim

The individual claims assigned to the plaintiff are asserted in one action but, nevertheless, they are considered as individual claims for procedural purposes. For the calculation of the amount in dispute, the individual amounts are not to be added together (see also **4.1 Mechanisms for Bringing Collective Redress/Class Actions**). Therefore, the admissibility of the appeal must be assessed separately for each claim (Austrian Supreme Court 5 Ob 123/12t).

Sample Lawsuit

The sample lawsuit was introduced to allow for the creation of a precedent independent of the admission rules. The entitled associations may file a case on behalf of an individual (a consumer)

and bring it before the Supreme Court irrespective of the amount in dispute (Section 502, paragraph 5, line 3 of the Code on Civil Procedure). While the judgment only has legal effect regarding the specific case, the lower courts will generally observe the decision of the Supreme Court as a practical precedent.

4.12 Settlement and ADR Mechanisms

For the Austrian forms of collective action, the same principles apply with regard to settlement and ADR as for individual actions. Accordingly, a distinction must be made between extrajudicial and judicial settlements.

Extrajudicial Settlements

Extrajudicial settlements are concluded without a court being involved and – in order to stop the lawsuit – would require the parties to agree to withdraw the claim or to an indefinite stay of proceedings. This is a common practice.

Judicial Settlements

Judicial settlements are concluded before the court and are immediately enforceable.

They are possible in every moment of the procedure. Judges try to encourage parties to reach a settlement, especially in the first hearing, and often support settlement negotiations.

The parties are not limited by the pending dispute and may also agree on subject matters that have not yet been part of the dispute. This might trigger additional court fees, however. The court will only review if the subject matter in dispute is something capable of being settled (eg, something that is fundamentally within the autonomy of the parties). Some courts also check whether the terms of the settlement are specific enough to be enforced. In practice, courts are open to

record a settlement in the form as reached by the parties.

Costs

The conclusion of an extrajudicial settlement agreement triggers a specific settlement tax duty, a concept which is not known in many other jurisdictions. Parties should consult their local lawyer before concluding a settlement under Austrian law.

Judicial settlements are covered by the court fees and do not trigger extra taxes (if the subject of the settlement does not exceed the subject of the proceedings). If the legal dispute is settled in the first hearing, the court fees are halved.

ADR Mechanisms in Austria

ADR and, in particular, mediation are viewed positively in Austria. The Law on Mediation regarding Civil Claims (*Zivilrechts-Mediations-Gesetz*), enacted in 2004, aims to promote and facilitate access to mediation by setting out the basic standards to conduct mediation procedures, defines the qualifications of certified mediators, provides that mediation conducted by a certified mediator prevents the limitation period from expiring, and that certified mediators may not be asked to testify in court proceedings.

ADR as a Voluntary Mechanism

The prevailing opinion in Austria is that parties should engage in ADR proceedings voluntarily. There are only a few situations in which mediation is compulsory by law. These cases mainly relate to disputes between neighbours, tenancy disputes and disputes between members of certain professional groups subject to a code of conduct (eg, architects and lawyers).

Judges increasingly encourage parties to consider ADR, in particular mediation. If mediation

fails because of lack of co-operation of (one of) the parties, there are no adverse consequences.

ADR Institutions

Several organisations offer and promote ADR in Austria, including the Bar association. In international cases, the Vienna International Arbitral Centre of the Federal Economic Chamber (VIAC) is the leading institution.

In January 2021, VIAC revised its ADR rules to offer a flexible procedural framework that optimally caters to clients' needs. To promote understanding and use of ADR, VIAC also published a handbook in 2019 which provides guidance to ADR proceedings under its new mediation rules.

4.13 Judgments and Enforcement of Judgments

Representative Action

The judgment is binding only inter partes and does not interrupt the limitation period of other claims. Individual consumers cannot directly refer to it in individual subsequent proceedings. In fact, a Supreme Court judgment on a representative action has a guiding function in individual proceedings as well.

The injunction can only be enforced by the plaintiff (ie, the association). The general enforcement rules apply. Injunctions are enforced with penalties if the obligated party acts contrary to the judgment.

Sample Lawsuit

The sample lawsuit only has binding effect for the individual case and only interrupts the limitation period for the individual case. Formally, there is no doctrine of precedent in Austrian law; de facto, however, Supreme Court decisions naturally have a guiding effect for further rulings.

Sample lawsuits are subject to the general enforcement rules.

Austrian-Type Mass Claim

The decision on an Austrian-type mass claim is binding inter partes for the assigned claims and only interrupts the limitation period for these claims.

The plaintiff enforces the decision and transfers to the individuals (part of) the amount corresponding to their individual claim. The general enforcement rules apply.

5. Legislative Reform

5.1 Policy Development

Austria is in the process of implementing Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers.

5.2 Legislative Reform

It is the intention of the Austrian lawmakers to provide an expansive tool for consumers to seek redress as provided by Directive (EU) 2020/1828, leading to a remarkably changed landscape in the civil procedural law, as well as substantive tort law provisions, in particular, a revised interruption of the statute of limitations. Even though the details of the new regulations are not yet clear, it is fair to assume that the benefits to, and the leverage of, parties seeking redress for damages who are eligible to participate in such a collective redress action will be monumental. Affected parties seeking to bring an action now, may wish to consider waiting for the implementation of this new law – unless time bar forces earlier action. Conversely, defendants who wish to avoid being sued under the new plaintiff-friendly regime might consider ways to create

lis pendens in advance of the effectiveness of the new law.

5.3 Impact of Brexit

Brexit has not had any impact on the Austrian regime of collective redress.

5.4 Impact of Environmental, Social and Governance (ESG) Issues

It remains to be seen whether ESG-related litigation will gain momentum after the introduction of collective redress in Austria. At the moment, there are no signs of collective lawsuit initiatives or categories. However, this can change quickly. For example, the authors note that so-called climate activists gluing themselves to the streets and pouring soup on world-famous art treasures are out for attention. A wave of lawsuits with high claims for damages would be a next logical step. That said, however, court fees in Austria are currently far too high for large amounts in dispute, hindering affordable access to justice in cases without specific interest for litigation funders. The introduction of a law on collective redress in line with the Directive could easily make the same more economically viable – ie, when court fees are significantly lowered, there will be little standing in the way of a wave of lawsuits.

Trends and Developments

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KNOETZL is Austria's first large-scale disputes resolution powerhouse dedicated to high-profile, important and complex cases. The firm's diverse expertise encompasses civil, commercial, sovereign, corporate and fraud litigation, focusing significantly on liability claims; corporate – including M&A, financing and joint venture disputes – banking, insurance and financial derivatives cases; investor protection; digital transformation; data protection and social media; business and political crime; asset-tracing and provisional measures, such as freeze orders and attachments, in the domestic

and international contexts; and the enforcement of foreign judgments and arbitral awards. **KNOETZL**'s practice also covers international commercial arbitration, investment protection and arbitration-related court proceedings, mediation and ADR. The firm is well-recognised for its disputes work at the intersection of civil and criminal matters. Distinguished international law firms, corporate decision-makers and general counsel frequently turn to **KNOETZL** to act as counsel in their significant disputes with an Austrian nexus.

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New Representative Actions Ante Portas

At present, Austrian law does not provide an official platform for class actions. However, all that is about to change. For the time being, there are only limited possibilities for collective redress. Current Austrian law allows certain, specified organisations, such as consumer protection associations, to file actions for declaratory judgment and/or for injunctive relief in the interest of a group of individual claimants. Many changes to General Terms and Conditions, for example in financial or online service products, were forced into effect through this makeshift means of collective redress. However, the available instruments provided for strict limits: even if the organisation was successful, an individual still had to bring a follow-on damages claim on their own account and was forced to start legal proceedings, unless the defendant thought it would be advantageous, for some reason, to settle the claims out of court.

As this historical avenue of redress was restricted to injunctive relief and did not allow for the filing of damages in the past, legal practice has, over time, devised ways to collect similar damages claims and file those jointly under one single lawsuit. Typically, such actions would be financed by third-party funders, a practice approved by the Austrian Supreme Court. For

lawyers, however, working on a contingency fee basis is still held to be unethical under Austrian rules. KNOETZL does not anticipate a change in this respect. Therefore, third-party funding will continue to be a popular way to seek collective redress in Austria.

Current Ways to Pursue Mass Claims

The current ways to pursue mass claims under a single lawsuit are as follows.

Assignment of individual claims

One method is through the assignment of individual claims to one party, as the named claimant. In practice, it is often a consumer protection organisation that files the lawsuit and assumes the role of the claimant.

This system provides certain advantages for the individual holders of the claims in terms of expenditure. Under Austrian law, the loser of a dispute pays the final costs for both parties and the costs (court fees and lawyers' fees) decrease proportionally as the amount in dispute increases. Therefore, the bundling of many claims in one lawsuit means a lower cost risk for the individual holders of the claim than many individual lawsuits. Moreover, litigation funders are more likely to be found in large-amount disputes.

Nevertheless, costs of pursuing claims remain high. For example, in a joint action of 3,200 claimants against an Austrian bank, the amount in dispute was EUR127 million in the aggregate. The court fees alone for the proceedings in the first instance (there are three instances up to the Austrian Supreme Court available) were EUR1.5 million. These court fees must be paid upfront when filing the lawsuit. Such burdensome costs often incentivise forum shopping, with parties seeking ways to bring the action(s) in jurisdictions offering a significantly lower cost risk.

Furthermore, there are disadvantages involved in the assignment, including the loss of the possibility for consumers to bring the action at their own place of domicile.

Claims joined in one legal filing

A second way to pursue mass claims is to have all individual claims joined in one legal filing. For this purpose, certain procedural criteria must be satisfied. The Austrian Supreme Court tended to allow such joint actions through a rather generous interpretation of the legal prerequisites. The claimants need to convince the court that their claims are “basically similar” (*im Wesentlichen gleichartig*). This loose wording does not impose a significant hurdle. However, having to deal with a huge number of individual claims without aids provided by law to ease the joint litigation of these claims imposes a significant practical hurdle on the court that has to deal with the cumbersome lawsuit. Aside from these administrative burdens, filing such a joint action triggers significant court fees and imposes a huge cost risk on the parties, owing to the way Austria calculates court and lawyers’ fees and the “loser pays” system.

Implementation of the New EU Directive

With the introduction of Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers (the “EU Directive” or the “Directive”), Austria, like all EU member states, was obliged to implement a clear, collective redress instrument for consumers by the end of 2022, aiming at bringing significant benefits to claimants choosing to utilise this new system. Like other member states, however, Austria has been late in implementing the Directive, but a draft law is expected soon.

For the Austrian legislature, the implementation of the Directive presents a huge political challenge because, traditionally, collective redress, particularly class action in the “Anglo-American” style, is seen as contrary to Austrian legal culture, which is more based on individual action and individual parties asserting their own, individual claims. This hurdle is the reason all previous attempts to implement stronger collective redress mechanisms have failed to date. The fear of potential defendants becoming subject to frivolous claims and to unjustified pressure to settle continues to be significant.

Nevertheless, having been mandated by EU legislation, Austria is now in the process of formulating changes to its civil procedural laws to allow a functioning system of collective redress for consumers. The working group set up at the Ministry of Justice to implement the Directive has now completed its work. It is not yet clear how Austria will use the leeway the Directive gives the member states. However, from previous discussions, some inferences can be drawn already.

- It is fair to assume that Austria will choose the “opt-in” model.

- Only certain “qualified entities” will be allowed to bring such actions. Those institutions currently allowed to seek injunctive relief will likely be included among the entities so qualified.
- There will be significant benefits to individuals who join such a class action, including those further described below. Among other advantages, the currently high litigation costs are likely to be significantly reduced.
- The new class action will likely not be restricted to enable redress for specified claims contained in the catalogue of the EU Directive, but will, more likely, be available for claims based on any legal ground.

The Austrian legislature is treating the development of the law with a determined priority, to bring relief to the courts that are currently swamped with old-school class actions arising from the “Dieselgate” cases. A practical tool to cope with Austria’s massive number of lawsuits is being urged by the courts. The Austrian legislature has been accelerating the process of implementing the Directive and a first draft of the new law is expected soon.

It can be assumed that, due to the significant benefits to lawsuits brought under the coming new law, the current ways to seek collective redress will no longer be utilised, even if they continue to be available as an alternative. In any event, unless the statute of limitations dictates otherwise, any potential claimant would be well-advised to await the implementation of the new law on collective redress in Austria instead of starting new proceedings now. Therefore, when looking at trends and developments in Austria, it is important to focus on the provisions of the Directive as they will dictate the parameters of the forthcoming reforms in Austria.

Latest EU Legislation: Directive 2020/1828

General aspects

On 4 December 2020, the Directive was published in the Official Journal (OJ L 2020/409, 1). It should have been implemented into national law by 25 December 2022, and made effective as of 25 June 2023 (Articles 22 and 24, Directive 2020/1828).

The Directive is part of the European “New Deal for Consumers”, designed to strengthen consumer rights throughout Europe and make them more effective. It provides for a minimum level of protection (Article 1(2), Directive 2020/1828). Thus, the member states are free to grant higher levels of legal protection, and to provide representative actions not only to consumers but also to small businesses.

Until now, European law granted collective redress for consumers only in the form of injunctive measures (Directive 2009/22/EC on injunctions for the protection of consumers’ interests). According to the new Directive, so-called qualified entities (Article 4, Directive 2020/1828) can also bring actions for performance in the collective interest of consumers (so-called redress measures, see Article 7(4)(b), Article 9, Directive 2020/1828). These actions provide remedies including compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid.

In addition, declaratory and injunctive relief including interim relief (Article 7(4)(a), Article 8, Directive 2020/1828) remain possible.

Qualified entities

Member states are required to ensure that representative actions, as provided through the Directive, may be brought by “qualified entities”, designated as such by the member states

for this purpose. Member states may designate as a qualified entity a legal person with a non-profit-making character which can demonstrate 12 months of actual public activity in the protection of consumer interests (Article 4, Directive 2020/1828). The member states may, of course, also enable other persons to bring the actions as provided in the Directive.

It can be assumed that all Austrian organisations currently entitled to seek collective redress in the form of injunctive relief will be entitled to designation as a “qualified entity”.

Injunctive and redress measures

Qualified entities will be entitled to bring representative actions before courts or administrative authorities. Member states will ensure that qualified entities are entitled to seek at least the following (Article 7, Directive 2020/1828): (i) injunctive measures, and (ii) redress measures.

- Injunctive measures – must be available in the form of a provisional and a definitive measure to cease a practice or, where appropriate, to prohibit a practice, where that practice constitutes an infringement of European consumer law (Article 8(1), Directive 2020/1828).
- A redress measure – will require traders to provide affected consumers with remedies such as compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid (Article 9(1), Directive 2020/1828).

Significant changes to the existing Austrian law are not expected in this respect. The requirement for revision relates mainly to the mechanism to seek a money judgment.

Opt-in or opt-out mechanism

Member states may provide for either an opt-in or an opt-out mechanism for redress actions. Mixed forms are also possible (Article 9(2), Directive 2020/1828).

Actions for injunctions and declaratory relief are brought by qualified entities on the basis of their own entitlement; no opt-in/opt-out mechanism is necessary in this regard.

From previous discussions, Austria is expected to choose the opt-in mechanism. However, the point in time when an affected party can join the class action proceedings has been subject to hot debate. Defendants push for a rather early date in the proceedings in order to gain clarity of their financial exposure, such as three or six months after the lawsuit is filed, and not later than the standard limitation period for damage claims (three years). Conversely, some voices push for the latest imaginable point in time, such as the moment when the evidentiary phase of the proceedings in first instance is closed and the only step left is the rendering of the judgment.

Form of representation

It is up to the member states to regulate the form of representation and the relationship between individual claims and representative actions for redress measures. Different models are conceivable, including assignments, recovery authorisations and class suits.

It is assumed that Austria will no longer require a formal assignment of claims, however, otherwise there is no particular clarity on how this process will ultimately be structured.

Limitation periods

A representative action has the effect of suspending the limitation period for claims of the “consumers concerned”. To explain in more detail, this means the following (Article 16, Directive 2020/1828).

- A pending representative action for an injunctive measure has the effect of suspending or interrupting limitation periods in respect of the consumers concerned by that representative action, so that those consumers are not prevented from subsequently bringing an action for redress measures concerning the basis of the claim(s) because the applicable limitation periods expired during the representative action for those injunctive measures.
- A pending representative action for redress has the effect of suspending or interrupting applicable limitation periods in respect of the consumers concerned by that representative action.

This will be one of the major benefits of the new law for consumers. It is assumed that Austria will stick rather closely to the wording to the EU Directive.

Binding effect

Member states are required to ensure that a redress measure entitles consumers to benefit from the remedies provided by that redress measure without the need to bring a separate action (Article 9(6), Directive 2020/1828).

The EU Directive does not provide for any binding effect for declaratory and injunctive judgments. Member states must ensure only that they can be used as evidence in subsequent proceedings (Article 15, Directive 2020/1828).

Austria will comply with these requirements, the details of which are not yet clear.

Allocation of costs and third-party funding

With regard to costs and funding, the situation is similar and Austria will certainly comply with the Directive’s numerous provisions.

For redress measures, the Directive follows the Austrian model and adopts the “loser pays” rule (Article 12(1), Directive 2020/1828).

Third-party funding will be allowed in accordance with national law, but the member states shall ensure that, where a representative action for redress measures is funded by a third party, conflicts of interests are prevented and that economic interests of third-party funders do not divert the representative action away from the protection of the collective interests of consumers (Article 10(1), Directive 2020/1828).

For these purposes, member states shall, in particular, ensure that (Article 10(2), Directive 2020/1828):

- the decisions of qualified entities in the context of a representative action, including decisions on settlement, are not unduly influenced by a third party in a manner that would be detrimental to the collective interests of the consumers concerned; and
- the representative action is not brought against a defendant that is a competitor of the funding provider or against a defendant on which the funding provider is dependent.

Disclosure of evidence

Disclosure of evidence has heretofore not been a part of Austria’s litigation culture or procedure. The new provisions will therefore bring a huge

benefit to claimants who volunteer to be part of the new class action.

Member states will be required to ensure that, where a qualified entity has provided reasonably available evidence sufficient to support a representative action and has indicated that additional evidence lies in the control of the defendant or a third party, if requested by that qualified entity, the court is able to order that such evidence be disclosed by the defendant or the third party in accordance with national procedural law. Member states shall ensure that, if requested by the defendant, the court is also able to equally order the qualified entity or a third party to disclose relevant evidence, in accordance with national procedural law (Article 18, Directive 2020/1828).

Redress settlements

So far, Austria has not offered a joint redress mechanism, as for example, in the Netherlands. In practice, however, all “class actions” have ended with a settlement, be it in court or out of court. While courts undoubtedly put pressure on the parties to settle, the process itself has always been party driven, only. So far, the court’s involvement has been limited to “recording” the settlement to which the parties agreed. The new law will now ask for a court approval. It remains to be seen how Austria implements the Directive’s provision that expressly provides for the possibility of a settlement regarding redress. A redress settlement must be approved by the court. Approved settlements will be binding upon the qualified entity, the trader and the individual consumers concerned. Member states may lay down rules that give the individual consumers concerned by a representative action and by the subsequent settlement the possibility of accepting or refusing to be bound by settlements.

Cross-border representative actions

The Directive also provides for cross-border representative actions. “Cross-border representative action” means a representative action brought by a qualified entity in a member state other than that in which the qualified entity was designated (Article 3(7), Directive 2020/1828).

Member states will be required to ensure that qualified entities of another member state can bring such representative actions before their courts. Where the alleged infringement of EU law affects consumers in different member states, a representative action may be brought before the court of a member state by several qualified entities from other member states in order to protect the collective interests of consumers in different member states (Article 6, Directive 2020/1828).

The Directive contains no rules on international jurisdiction for cross-border representative actions. Consequently, the general rules of the Brussels Ia Regulation (Regulation 2012/1215) apply (Article 2(3), Directive 2020/1828). Most likely, the special jurisdiction for delicts (Article 7(3) Brussels Ia Regulation) will play an important role for cross-border representative actions. The special jurisdiction for delicts confers jurisdiction to the courts both at the place where the act causing damage was committed and at the place where the damage was realised.

Summarised Outlook

Austria is in the process of formulating and implementing the Directive.

It is the intention of the Austrian lawmakers to provide an expansive tool for consumers to seek redress as provided by the EU Directive, leading to what will become a remarkably changed landscape in Austrian civil procedural law, as well

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as substantive tort law provisions, particularly, a revised interruption of the statute of limitations.

Even though the details of the new regulations are not yet clear, it is fair to assume that the benefits to, and the leverage of, parties seeking redress for damages who are eligible to participate in such a collective redress action will be monumental. Affected parties seeking to bring an action now, may wish to consider waiting for the implementation of this new law – unless a time bar forces action sooner. Conversely, defendants who wish to avoid being sued under the claimant-friendly new regime might consider ways to create *lis pendens* in advance of the effectiveness of the new law.

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