

Report for IBA website on Session Speakers

IBA Pro Bono & Access to Justice Committee
Class Action Session:
Class Actions: Are They an Effective Tool for Access to Justice?
IBA Buenos Aires Annual Meeting
October 16, 2008

The Pro Bono & Access to Justice Committee of the International Bar Association organized two Sessions for the IBA's Buenos Aires Annual Meeting.

The second session illustrated the wide variety of mechanisms for collective litigation available in the many jurisdictions studied and called the audience's attention to the strengths and weaknesses of the various approaches. The speakers, moderators and audience members debated how, in the multiple jurisdictions, collective litigation can facilitate access to justice by otherwise marginalized groups.

The Report that follows aims to provide short summaries of the excellent presentations made by the speakers, highlighting their most prominent messages.

Speakers:

Phoebe A. Wilkinson	Chadbourne & Park LLP, New York, US
David Paterson	Paterson Law Office- Vancouver, B. C., Canada
Alberto D.Q. Molinario	Marval, O'Farrell & Mairal – Buenos Aires, Argentina
Fernando González	Hammonds – Madrid, Spain
Kôves	Clifford, Chance; Council of Bars of Europe Hungary
Gonzalo Fernández	Carey y Cía Ltda, Abogados – Santiago, Chile
Fernando Dantas M. Neustein	Mattos, Muriel, Kestener, Advogados – São Paulo, Brazil

Phoebe A. Wilkinson: Ms. Wilkinson convincingly described both sides of class action litigation in New York. She has defeated class action certification motions 21 out of 22 times. And she successfully obtained certification for a class consisting of Single Room Occupancy hotel tenants. She explained that the class certification motion is the main battleground: once a class has been successfully certified, the parties always settle, she advised. She provided some history of the development of class actions, which originated with litigation over mass accidents where all plaintiffs shared a uniform causal event, and went on to describe how litigation involving varied causal events (such as actions involving certain pharmaceuticals) might well not survive the certification motion stage. She explained that in such cases, plaintiffs might nonetheless obtain access to justice by relying on consumer protection statutes, which rest less on issues of causation and reliance and look

more at the manufacturer's behavior. Discussing her litigation on behalf of hotel tenants, she explained how class actions can provide anonymity and thus enhance access to justice for individuals fearful of reprisals.

David Paterson: Mr. Paterson maintains what he calls an aboriginal law practice, representing indigenous peoples in connection with actions of government and industry and defending his clients' rights to fishing, territory and land access. He discussed litigation he spearheaded involving the residential school system maintained by churches in Canada for native peoples, beginning in the 19th century. The collective action in this case proceeded through a National Consortium of 19 law firms with a national litigation strategy, including individual claims, group claims, test cases, individual school cases, and a national class action involving the entire residential school system. He discussed issues of forum and applicable statutes of limitations. The litigation resulted in a \$4 – 5 billion recovery, a Truth and Reconciliation Commission, and an apology from the Prime Minister. He explained how the use of collective action produced leverage for relief beyond what the judicial system could provide.

Alberto D. Q. Molinario: Mr. Molinario reviewed Marval, O'Farrell & Mairal's extensive pro bono practice. He explained that Argentina's courts do not permit class actions but have, in the last ten years, developed new collective forms. Standing is given to individual ombudsmen and private associations to bring actions asserting collective rights, in which individuals have indivisible interests, such as the protection of wildlife. He also discussed collective actions permitted in matters such as power blackouts and credit card fees. He reviewed Argentina's "loser pays" rules for legal fees and described limitations in Argentina's insurance industry which have caused many mid-sized companies to self-insure against risks of litigation. He concluded by cautioning against allowance of reckless litigation; moderator Naldo Dasso pointed out that the absence of rules tends to favor plaintiffs.

Fernando González: Mr. González explained that Spain's procedural rules are similar to Argentina's as concerns collective action and that, as a result, much of collective litigation tends to focus on consumer concerns. A seminal development in Spain was an episode in 1981 in which 650 people died from contaminated canola oil. Consumer laws were enacted giving standing to associations of consumers. This and later 2000 reforms to the civil procedure law permitted associations (incorporated expressly for this purpose) to bring actions. Determination of damages proceeds on an individual basis. Mr. González described problems with identifying the class, problems with partial settlements, and difficulties arising from the facts that other claimants can join the class post-judgment.

Peter Kôves: Appearing in his capacity as President of the Council of Bars of Europe, Mr. Kôves urged that Council countries avoid the abuses he perceives in the U. S. system. He explained that the bars of continental Europe adhere to the historic notion of

autonomous litigants who cannot be included in litigation without express decision. In particular, he endorsed loser-pay principles for fees, which have been the rule in Europe for hundreds of years. With regard to collective redress for consumer rights, he explained that the European Commission and the European Union may have jurisdiction in this area, but that many countries dispute that claim. The matter is the subject of a Green Paper expected to issue during 2009.

Gonzalo Fernández: Chile enacted a class action statute in 2004, giving courts extensive power to control potential abuses. Its Congress closely studied American and Spanish class action rules and precedents and determined to avoid large-scale litigation. Thus, the Chilean rules are not intended to accommodate mass torts. Actions can only be brought by the National Consumer Service, a government agency, or groups of 50 consumers. Damages for pain and suffering are excluded, and, while fines may be levied, punitive damages are not awarded. The presiding judge makes a declaration of admissibility, determining whether the case has been brought by a party with standing, whether it affects a collective group, and what the costs and benefits of the litigation are. Forty-two cases have been brought under the law since 2005. Experience shows that class actions under the new law are not ideal vehicles for access to justice, as the proceedings are slow, the required declaration of admissibility is a major barrier (20% of the cases brought were declared inadmissible), and the plaintiffs have few resources. Nonetheless, Mr. Fernández credits the law with causing companies to open consumer service centres and in general to offer better client services. Mr. Fernández's paper is posted at <http://www.int-bar.org/login.cfm?url=/conferences/BA2008/papers.cfm>

Fernando Dantas M. Neustein: Mr. Neustein discussed Brazil's class action rules, which have been operative since 1985. The law was amended in 1991 to provide for more sophisticated class action techniques. Under Brazil's class action law, individuals do not have standing to bring class actions. A class action can only be brought by a governmental entity, foundations/companies, the public prosecutor/defense office, or a civil association incorporated one year previously. Another unique feature of Brazil's class action law is that there are no class certification procedures. Rather, the law presupposes that those with standing to sue adequately represent the interested parties. Mr. Neustein described in detail how the outcomes in class actions may or may not be res judicata as to individuals in pre-existing lawsuits. Considering whether class actions are indeed vehicles for access to justice, Mr. Neustein distinguished between diffuse rights, such as those affected by damage to the environment, and collective rights, such as those for salary loss due to inflation. He concluded that class actions are partially effective as tools for access to justice, in that the phase in which general liability is determined applies to all, but that they are less effective in the damages phase, in which each individual must hire counsel. Mr. Neustein's paper is posted at <http://www.int-bar.org/login.cfm?url=/conferences/BA2008/papers.cfm>