White Paper

Culture Shift – Is the UK Trending Towards US-type Class Action Litigation?

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introduction

While class actions have had a long, storied history in the United States, they are relatively new to our neighbor across the pond.

In 2015, legislation passed in the United Kingdom to allow for antitrust class action claims to be brought, but it has taken years to finally gain some footing. While there were quite a few opt-out collective action filings the past six years, no substantial case advanced past the very early procedural stages until August 2021 when the first competition class action was granted certification.

Besides the competition collective action statute, there is no formal way to bring a consumer class action complaint applying to other areas of law. Recently, the Supreme Court issued a long-awaited ruling on a significant U.K. data protection consumer class action against Google. This decision effectively closed the door on data breach claims stemming from loss of consumer control over data, but also provided some helpful guidance for future attempts of advancing U.K. representative actions.

U.S. Class Actions

Class actions were first introduced in the U.S. legal system in 1853 in the landmark case of *Smith v. Swormstedt*[1]. It was there that Supreme Court held that the decree in a representative suit bound the absent class members. Then, in 1937 the Supreme Court adopted the Rules of Civil Procedure (FRCP) and created Rule 23. While they did not provide a mechanism for giving notice to class members at that point, or for allowing them to opt out of a class action, it cemented class action litigation as a legal mechanism. Then, in 1966 Rule 23 was amended to explicitly state that all absent parties are indeed bound. The amendment established a procedure for notifying all parties and giving them the opportunity to opt out of the class. In 1974, the Supreme Court, in *Eisen v. Carlisle & Jacquelin2*, held that, in opt-out class actions, notice must be given to each member of the class who can be identified, even those whose claims are so small that it is unlikely they would opt out to pursue individual actions. Finally, the latest legislative change to class action law came in 2005, with the Class Action Fairness Act (CAFA). This law moved jurisdiction of any case involving more than $5 million in damages from state courts to federal district courts. With class action laws well established in the U.S., there have been thousands upon thousands of class action claims brought in the past 50 years. Americans are accustomed to seeing notifications asking them to opt in or out of class action groups and enjoy receiving checks when settlement funds have been distributed.

Amid the digital age and global legislative focus on consumer privacy, more U.S. class actions in the data protection space are trending. This includes harms resulting from violation of health data laws, biometric privacy laws, data breaches, and more. Notification methods are also evolving with the times, as illustrated in a recent case where a class action settlement against TikTok was halted until notification mechanisms were altered to improve claim rates.[3] More courts will likely continue to cast a critical eye on the notification process, especially with consumer privacy cases. Pushing for mechanisms reflecting communication habits of a class will help reach more individuals and drive a greater response to participate in settlements, which should act as a deterrence for similar behaviors by organizations handling personal data. The increase in digital privacy class actions and higher notification scrutiny illustrates that the U.S. continues to prioritize class actions as an important part of the legal system and that the tools to redress consumer harm will adapt as the world changes.

[1] *Smith v. Swormstedt*, 57 U.S. 16 How. 288 288 (1853)
[2] *Eisen v Carlisle & Jacquelin,* 417 U.S. 156, 94 S.Ct 2140, 40 L.Ed 2d 732 (1974)
[3] *In Re: TikTok, Inc., Consumer Privacy Litigation*, 20-cv-4699 (N.D. Ill. 2021)

U.K. Class Actions

Collective or class action litigation in the U.K. is quite new. With a few exceptions, there has not really been a proper mechanism in place for cases to be brought as a group action. It wasn't until Oct. 1, 2015, when the Consumer Rights Act (CRA) was enacted, that the potential for opt-out class actions for private enforcement of competition claims was established.

The CRA broadens the jurisdiction of the Competition Appeal Tribunal ("CAT") to hear both 'follow-on' claims and standalone actions, both of which may continue to be brought in the High Court. In addition, it introduced a number of new procedures for damages claims, in particular collective proceedings (on either an 'opt-in' or 'opt-out' basis) and made provisions for collective settlements and collective redress schemes. These changes prompted a revision of the CAT's procedural rules, which are now contained in The Competition Appeal Tribunal Rules 2015 ("CAT Rules"). These were entered into force in October 2015.

Unlike American class action law, under Rule 78(3)(c) of the CAT Rules in the U.K., when considering whether it is just and reasonable for a person to act as a class representative the Tribunal will consider whether the proposed class representative has prepared a plan for the collective proceedings. The plan must include a method "for notifying represented persons of the progress of the proceedings" (Rule 78(3)(c)(i) and (ii)).

In the U.K., under the CAT, at the same time the claim is filed the lead representative needs to file an application for a Collective Proceedings Order (CPO). Within the CPO a plan for notice and administration of any settlement fund must be included. Unlike its American counterpart, where the subject of notification is not broached until after the class action claim has been fully litigated and/or settled, in the U.K. the following must be sufficiently addressed in the CPO or the CAT will deny the class action as a whole from going forward:

- How will parties find people who should be members of the class?
- How will class members be informed of their rights?
- How will litigation updates be communicated to the class?
- How will claims be submitted?
- What proof will be necessary to determine eligibility of the claim?
- What method will be used to distribute the claim award?

For nearly six years, there were no claims filed where the CAT was satisfied with the notice and administrative plan. Finally, in August 2021 a claim that had been pending and debated for five years moved forward when the CAT granted certification.[4] This landmark decision has set the stage for more competition claims to move out of limbo and will guide future certification decisions. This could signal the start of a culture shift in the U.K. when it comes to accepting U.S.-style class action litigation, at least with the application of the CRA to competition claims. Whether U.K. collective actions will gain speed in other areas is unknown. A data protection claim against Google recently failed but also provided some insights regarding future actions that could potentially open the door wider.

4 *Walter Hugh Merricks CBE v MasterCard Incorporated and Others* [2017] CAT 16

The MasterCard Case

In 2016, a £14 billion damages claim was filed against MasterCard for imposing illegal card charges that were ultimately paid for by U.K. consumers. This was the first claim to be filed under the CRA of 2015 on behalf of all U.K. consumers and was the biggest claim to be filed in U.K. legal history.

In 2014, MasterCard was found to have infringed EU law by imposing interchange fees on the over 500,000 business that accepted MasterCard debit and credit cards. The new section 47A of the Competition Act of 1998, inserted by the CRA, allows a person to make a claim in the CAT for monetary loss in respect of an infringement on EU law. Under section 47B, there is a right to "collective proceedings" so long as the CAT authorizes the person bringing the proceedings to act as the class representative and it must certify the claims as eligible for inclusion.

Though MasterCard was guilty of breaching U.K. and EU competition laws, in 2017 the CAT refused to grant the CPO because it found the way in which damages were to be paid was too imprecise and would not restore claimants to the position they would have been in but for MasterCard's breach.

The CAT stated that there must be "sustainable methodology which can be applied in practice to calculate a sum which reflects an aggregate of individual claims for damages", and a "reasonable and practicable means for estimating the individual loss which can be used as the basis for distribution." Should the claims succeed, the CAT concluded that there was insufficient data for the different proposed methodologies to be applied on a sound basis. The methods presented have been long accepted by the courts in the U.S., but by initially denying this CPO, the CAT inferred that it intended to apply more stringent standards than those seen abroad. Following the Tribunal's refusal to grant an Application for Permission to Appeal, the case was appealed directly to the Court of Appeal.

The appeal was heard in the Court of Appeal in April 2019. The court reversed the CAT's decision with a unanimous ruling, finding that the certification standard applied was too high. The Court of Appeal sent the case back to the CAT to decide certification on re-hearing, noting that it is proper to advance a claim when the party illustrates a chance for success. The Court of Appeal also clarified that determination of damages allocation is not needed at this early stage and should be decided at trial.

Mastercard challenged this order from the Court of Appeal, which was heard by the Supreme Court. In December 2020, the Supreme Court dismissed Mastercard's appeal and upheld the order sending the claim back to the CAT for certification. The Supreme Court stressed that certification should be allowed when such claims are better suited as a collective proceeding as opposed to individual filings, that the CAT should not review claim merits so early on in a matter, and that damages being difficult to determine is not a valid reason to deny certification where a proposed class will be able to establish harm. This landmark decision by the U.K.'s highest court put the case back in circulation and established a more concrete test for certifying competition collective actions moving forward.

On Aug. 18, 2021, the CAT issued judgement in favor of certification at a remittal hearing. The Tribunal accepted the proposed lead plaintiff and ruled that the collective action could proceed. What happens with this case is extremely significant in the development of U.K. collective action law. Following the Supreme Court's 2020 ruling, five other collective proceedings order applications were already heard and awaiting decisions. Now that there is a more established test for certification, the CAT is expected to commence hearings on these and other applications that have been collecting dust.

The Google Case

On Nov. 30, 2017, a representative action was filed in the U.K. alleging that Google was tracking the activity of Apple Safari users without their knowledge or consent. They were then aggregating this data and selling the information to advertisers for a very substantial profit. The question was whether this violates the Data Protection Act of 1998. The claimants sought damages for the infringement of their data protection rights and for the commission of the wrong and loss of control over personal data.

Claimants brought this action under section 13(1) of the Data Protection Action, which allows for individuals to claim compensation for breaches of the Act:

> *An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.*

Unlike the other collective actions brought in the U.K. since 2015, this action was brought pursuant to the Civil Procedure Rules ("CPR"), as opposed to the CRA. CPR 19.6 is a 150-year-old provision that has only been used a handful of times. This CPR section arguably authorizes opt-out representative actions for parties with same interest. This specific action could not be filed before the CAT because it was not a competition claim, however, claimants asked for CAT rules to be used to administer the claim. Claimants also asked for an opt-out vs opt-in since the statute of limitation ran out prior to filing and claimants could no longer bring their own claim.

An estimated 5.4 million people could have been affected by the Safari workaround in the relevant 9-month period. The Claimant Class consisted of all individuals who:

(i) were present in England and Wales from June 1, 2011 to Feb. 15, 2012;

(ii) had an Apple ID, owned or were in lawful possession of an iPhone;

(iii) used the Apple Safari browsers;

(iv) did not change the default security settings in Safari so as to accept Tracking and Collation and were a resident of England or Wales at the date of issue.

For damages calculation, claimants in this case requested that each claimant receive the same fixed damages award, to be set by the Court. Because Google is in another jurisdiction, court approval was necessary to effectuate service. If approved, this would have been the first representative claim in the U.K. to see its day in court outside of the Mastercard case. However, after four years of court proceedings the Supreme Court foreclosed opportunities for collective actions in this area.

In October 2018, the High Court initially halted this case finding lack of common interest amongst individuals that would comprise the class and that proof of damage resulting from the data sales was necessary. In September 2019, the Court of Appeal reversed this ruling noting that the lack of interest decision was without merit and that damages for loss of control over personal data was sufficient – regardless if there was individual pecuniary loss.[5]

[5] *Lloyd v Google LLC* [2019] EWCA Civ 1599
[6] *Lloyd v Google LLC* [2021] UKSC 50

Google appealed this decision to the Supreme Court, who heard argument on the appeal in April 2021. On Nov. 10. 2021, the Supreme Court sided with Google in a unanimous decision and dismissed this action.6 The court held that the fixed manner requested for awarding damages was improper and there would need to be evidence of financial loss or mental distress for each class member to measure harm and subsequently award damages. The court was not convinced by the argument that all class members suffered common harm through loss of control over their personal data. As such, it would not allow Lloyd to serve Google and the matter could not advance. This decision may set precedent that individuals are not entitled to damages every time a nontrivial breach occurs under the DPA unless measurable harm occurs with supporting evidence from every class member. With this type of action, it is hard to imagine a situation where all members would be willing and able to present individual damages evidence for court evaluation, but it is an option left on the table.

Although this business-friendly decision may put a damper on data protection representative claims for now, all hope is not lost for other types of collective actions as there are still other avenues that class representatives and their counsel can explore. The court made clear that the fact there is no legislation authorizing opt-out collective actions in other specific areas besides competition law does not mean there is no chance of succeeding. This opens to door for future cases to advance using the CPR, as the Google decision confirmed this provision offers flexibility and will be subject to the court's discretion. This may prove realistic in cases based on statutes that are clearer than the U.K.'s data protection laws or will not invoke individual damages analysis for all class members. Products liability actions based on loss of value would be a solid contender. However, future legislation or amendments authorizing representative claims in a specific area of law or providing a clear compensation path would streamline processes and provide the best chance of success.

[6] *Lloyd v Google LLC* [2021] UKSC 50

conclusion

While the U.S. has a long history of class action litigation, there are still many unknowns in the U.K. with using collective actions as a legal mechanism for relief.

However, the MasterCard decision has established guidance for certification of competition claims and this will expand as more claims proceed to hearing. Once some competition class actions settle or go to trial, there will be even more clarity about where the U.K. is heading in this legal space. Additionally, while the Google case abandoned the availability of DPA claims where consumers lost data control, the decision left flexibility for future representative actions outside the realm of competition law. This case unfortunately slowed progression in the larger scheme of U.K. collective action practice but could also have positive effects of sparking new legislative overhaul that could generate some momentum. Since consumer data privacy is a trending global concern, it will be interesting to see if this decisions sparks lobbying for DPA amendments to provide more checks on organizations that handle consumer data or provide a clearer path of relief for consumers subject to violations where they may have not suffered pecuniary losses.

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