Evolution of class actions in France and the impact on the health sector

What are the implications of the new 18 November 2016 law for class actions in France, and what does it mean for class actions lawsuits in health-related matters?

A new Law dated 18 November 2016 was passed by the French Parliament after years of debates. What are its implications for class actions in France, which new areas for class actions does it create and, more specifically, what are its implications for class actions lawsuits in health-related matters?

The possibility of class actions in the area of consumer products, services and competition had already been created by Law No. 2014-344 of 17 March 2014 (better known as the “Hamon Act”).

Furthermore, the Law No 2016-41 dated 26 January 2016 for the modernisation of the French healthcare system, implemented by Decree No. 2016-1249 of 26 September 2016, had established the principle of class action lawsuits in health related matters.

The Law dated 18 November 2016 introduces new areas for class actions for discrimination, discrimination at work, environmental damage and the protection of personal data.

New areas for class actions

Law n°2016-1547 dated 18 November 2016 on the modernization of justice, finally passed by the National Assembly on 12 October 2016, constitutes a third extension (after that implemented by the “Hamon Act” and by the Act for modernization of our healthcare system) of the scope for class actions in the French legal landscape.

The French Parliament has now opened class actions to four other areas: discrimination, discrimination at work, environmental damage and the protection of personal data.

For all these types of actions, the Act establishes that the class action is based on "individual cases presented by the applicant". Regarding the action introduced before the judicial court, it can be engaged when several people placed in a similar situation have suffered damage caused by the same entity.
Each of the five categories of actions that may now be subject to a class action are governed by the common rules established by the Act dated 18 November 2016 for both civil and administrative proceedings.

The Act dated 18 November provides for a general procedural framework for all class actions except for consumer class actions. Indeed the “Hamon Act” and the Commercial Code remain unchanged by the new Act dated 18 November 2016.

1. With regard to class actions in the area of discrimination, the legislator has provided general rules but also specific rules concerning discrimination in labor relations attributable to an employer.

Under the general rules, a class action can be initiated for any damage that may lead to any kind of discrimination, but which is outside the professional framework: eg discrimination in access to housing, education or health. The class action is then only open to associations of at least five years standing involved in combating discrimination or working in the field of disability.

2. As regards discrimination at work, the law provides that a representative trade union may take action before a civil court in order to establish that candidates for employment, training or work experience, or employees are discriminated against, directly or indirectly, on the basis of a recognised reason and by the same employer. This action may also be initiated by an association of at least five years standing involved in combating discrimination or working in the field of disability. The action must be the subject of a prior request for the cessation of the discrimination and may therefore be initiated only after the expiry of a period of six months from the date of the request or from the date of the notification of the rejection of the application by the employer.

3. The law also provides that class actions may be brought against those who cause environmental damage on the basis of the new Article L. 142-3-1 of the Environment Code. This action is open to approved environmental protection associations whose statutory purpose is to protect victims. The purpose of a class action is to obtain the cessation of a breach and / or compensation for any environmental damage. However, this notion of “environmental damage” is not defined by the legislator, potentially broadening its scope considerably.

4. Finally, class actions which are specific to the protection of personal data allow any approved consumer association, any representative trade union or any association of five years’ standing (having as its object the protection of privacy and personal data) to initiate collective actions. Thus, these designated bodies can act when several “natural persons” in a similar situation suffer damage resulting from a breach of the law on information technology and individual freedom, dated 60 January 1978, by a person liable for processing personal data or by a subcontractor. However, this class action is limited to requiring the cessation of a breach, which means that no compensation for victims is provided for by the law.

Class actions for discrimination and environmental damage can be introduced only if the operative event or breach took place after entry into effect of the law.

For all these areas (as opposed to class actions in the field of health), a prior notice is necessary before any action is taken.

**Changes for health-related class actions?**

The Act dated 26 January 2016 applied the same principles that were defined in relation to class actions for consumers, but adapted those principles to the field of health to allow compensation for personal injuries.
As stated in Article 184 of the above-mentioned Act, such an action can be commenced by an approved healthcare users' association, with the purpose of compensating for any physical damage caused by the breach of a legal or contractual obligation by a producer or a supplier of health products, or a provider using one of these health products.

The procedure laid down in the Act dated 26 January 2016 provides for two different phases:

- **Step 1** - admissibility and collective liability: the civil or administrative judge, depending on the case, determines whether the conditions required for the application to be admissible are met or not and, if necessary, renders a judgment on the liability of the defendant (producer, supplier or user of the product) in light of the individual cases represented by the approved association;

- **Step 2** - individual compensation procedure: as a result of a breach recognized by the judgment, people fulfilling the criteria for joining the group (the "opt-in" system) obtain individual compensation for the damage suffered.

However, an amicable procedure is possible. Indeed, mediation can be initiated with the parties' consent, in order to find an amicable agreement on the claims of the applicants.

Nevertheless, some elements of the procedure remain untouched regarding health-related class actions: a class action may be introduced by the applicant association without giving prior notice to the defendant. In addition, compensation for damages can only be awarded through an individual compensation procedure, because personal injuries must be reviewed by medical experts on an individual basis.

The Law n°2016-1547 dated 18 November 2016 on the modernization of justice also specifies that individuals who claim that their damages are not properly compensated by step 2 can assert their claims before the same judge who issued the judgment on liability. The Law also specifies that French Regional Courts (Tribunaux de Grande Instance) will have jurisdiction.

One uncertainty remains over health-related class actions: the Act dated 26 January 2016 provides for the possibility of actions being introduced even for damages that predate the entry into force of the law. This principle was validated by the French Constitutional Council in its Decision No. 2015-727 of 21 January 2016 Cons 98. But it may be that the decree implementing the Act dated 18 November 2016 revisits this point.