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CLASS & GROUP ACTIONS

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in class and group actions.





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Peter Haas is a founding partner of Eversheds Sutherland in Switzerland and has been managing partner since September 2013. His practice areas are national and international litigation, as well as employment and contract law. He has a particular expertise in insurance and liability matters. He is the head of the insurance team, including social insurance. His prior experience includes several years as an in-house counsel in the claims department of one of the largest Swiss insurance companies, as well as an associate attorney in a business law firm.

Switzerland

■ **Q. How would you characterise class and group action activity in Switzerland over the past 12 months? What key trends would you highlight?**

HAAS: There is no specific procedure equal to the US ‘class action’ in Switzerland. The Federal Council Dispatch to the Swiss parliament regarding the Civil Procedure Code (CPC), which came into force on 1 January 2011, expressly refused to implement a ‘class action’ into the Swiss civil procedure. The CPC is currently under revision, however. In the aftermath of the ‘Dieselgate’ scandal and various issues with implants, including breast implants, artificial hip joints, and so on, political pressure on parliament to introduce group settlement proceedings into the CPC to ensure that a group of consumers will be able launch collective actions and seek compensation, has increased.

■ **Q. Are there any common factors generally driving claims?**

HAAS: Since the losing party has to bear the court costs and pay an indemnification to the winning party for the costs of its attorney, the financial risk can be considerable, as both court and party costs are linked to the value in dispute.

■ Q. Could you outline some of the key challenges a class or group action defendant will typically face when a claim is made? What are the biggest risks and threats to companies?

HAAS: Besides procedural risks, there is certainly a risk to a company's reputation. For the time being there is no group action available similar to the class action in the US or a collective redress mechanism. A way to mitigate the risk of legal cost is that individuals that have suffered a loss assign their claim to a consumer organisation, which will then introduce a lawsuit. With regard to the 'Dieselgate' scandal, this approach has been chosen, and about 6000 consumers are being represented by the *Stiftung für Konsumentenschutz*, which introduced a claim against Volkswagen and Amag in December 2017.

■ Q. Given the nature of class or group action litigation, what strategies can in-house and outside counsel employ to effectively manage a case in Switzerland?

HAAS: Besides the legal issues, effectively managing a case is often a logistical issue. A huge number of documents need to be handled. They must be gathered together as the claimants will ask for internal documents that demonstrate a product malfunction or a lack of internal organisation. This can lead to serious compliance issues if the documents are not available. Therefore, it is important that in-house counsel prepare the documentation properly and that management is aware that it will be involved in preparing the defence, but may also be called as a witness. Since in-house counsel do not benefit from attorney-client privilege, it is important to involve a law firm from a very early stage in the process, as once the claim has been filed there is often only a short window for the defence to bring together all of the relevant information.

■ Q. At what point should the decision to fight or to settle be taken? To what extent can consulting experts and statistical analysis assist?

HAAS: A settlement should always be a viable solution as lawsuits often affect management as well as the overall business. Parallel to a strict legal assessment, there should also always be



an ‘economic assessment’, and whenever the latter is more favourable, the opportunity for a settlement should not be passed over. Statistics can be useful when certain factual elements need to be proven. Experts appointed by one party often help parties to understand technical issues. However, parties must be aware that their own experts do not have the same status as those mandated by the court. The view of a party expert is not considered to be evidence, for example; instead, they carry the same weight as a party assertion.

■ **Q. How important is it to stay on top of discovery obligations? What options are available to more effectively and efficiently manage this process?**

HAAS: It is extremely important for parties to fulfil the discovery obligations set out in the procedural rules. Where a large number of documents need to be reviewed before filing, it may make sense to use artificial intelligence (AI).

■ **Q. Do you expect to see the amount of class or group action litigation increasing in Switzerland in the years ahead? If so, how do you foresee defensive strategies evolving?**

HAAS: Swiss civil procedure will likely be modified in the coming years and collective action, which allows consumers to seek compensation, will probably be introduced. ■



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