

Model Declaratory Action - Sense or Nonsense?

Two examples from Germany

RIAD Congress | 7 November 2019

The 1st Case: Product Liability

Pharma company produces drug X

- Against hypertension
- In 2011: drug registration
- In 2012: market launch
- In 2016: first publication that X presumably leads to liver damage
- Most cases: complete healing
 - after disease progression with varying severity
- In some cases: severe health impairments
- In two cases: lethal

The 1st Case: Product Liability

- Package insert is only modified in 2018
- Frequent co-medication with drug Y
- Thousands of persons affected
 - All in all more than 100,000 claims
 - Approx. 30% cases of co-medication with drug Y
 - Approx. 70% date from the time before the modification of the package insert
 - Approx. 10% of these: between the first public warnings and the modification of the package insert
 - 30% date from the time after the modification

The 2nd Case: Premium Reimbursement

- Life insurance company sells life insurance with inadequate revocation instructions
- This leads to an "eternal" right of revocation acc. to s. 5a Insurance Contract Act (VVG) old version (ECJ, NJW 2014, 452 et seq.; FCJ, NJW 2014, 2646 et seq.)
- 8,233 policyholders exercise their right of revocation and reclaim the premiums paid
- 823 of these policyholders already gave notice and were paid the surrender value
- 4,123 policyholders had cash value policies
 - Approx. 50% of these had pension plans
- 4,110 policyholders had unit-linked life assurance

Do Class Actions help?

- Compensation in cases of **mass damages**
 - A large number of **damaged parties**
 - The **same (insured) defendant**
 - The **same cause**
 - Also **large quantity but low-value damages**: small individual amounts of damage (pasta producer sells packages of 480 grams instead of 500 grams; bank charges EUR 0.50 for each cash transfer)
 - The German answer:

MUSTERFESTSTELLUNGSKLAGE

The Declaratory Motion

- S. 606 para. 1 sent. 1 Code of Civil Procedure (ZPO):

"Declaration of the existence or non-existence of actual and legal preconditions for the existence or non-existence of claims or legal relationships (objectives of the declaration) between consumers and entrepreneurs."

- Any **legal relationship** that may be subject to a declaration
- But **only factfinding**, no **decision on claims** (OLG Braunschweig, 3 July 2019 (VW))
- Only **consumer vs. entrepreneur**
- The decision aims at a **declaration**
- Value of dispute at most **EUR 250,000** acc. to s. 48 para. 1 sent. 2 Law on Court Costs (GKG)

Course of the Proceedings

- Establishing prima facie evidence that at least **10 consumers** are concerned (s. 606 para. 3 no. 2 ZPO)
- Within two months at least **50 consumers** must be registered with the litigation register (s. 606 para. 3 no. 3 ZPO)
- "Qualified entity" (s. 606 para. 1 sent. 2 ZPO) sues for certain declaratory objectives
- **Two-tier legal action**

Declaratory judgement

Enforcement of claims in ensuing individual proceedings

Compensation judgement

- **"Qualified entities"** (s. 606 para. 3 no. 1 in conjunction with para. 1 sent. 2 ZPO)
 - Consist of 10 associations or 350 natural persons as members
 - Fours years of continuous registration in the registry of associations that have a right of action (no matter in which Member State)
 - Purpose of the constitution is the protection of consumer interests; no intent to realise profit by filing Model Declaratory Actions
 - At most 5% (of what?) are financed by third party contributions

Publication and Register

- Filed Model Declaratory Actions must be publicly announced in a **litigation register** (with the Federal Office of Justice) (s. 607, s. 609 ZPO)
- Until one day before the oral hearing, consumers may register with this litigation register, so-called "**opt in**" model (s. 608 para. 1 ZPO)
 - The registration suspends limitation for the individual consumer (s. 204 para 1 no.1a Civil Code (BGB))
- Further preconditions of the registration acc. to s. 608 para. 2 ZPO
 - Designation of the claim
 - Amount of the claim (directory provision)
 - An examination of the content is not performed

Admissibility of the Declaratory Motion

- Appropriate objectives of the declaration acc. to s. 606 para. 1 sent. 1 ZPO?
 - Existence or non-existence of
 - factual and legal preconditions
 - for the existence or non-existence of
 - claims or legal relationships

→ This must be about **general declarations** that can be made regardless of the specific individual

First assessment of a German court

- Only facts and
- principles of law
- No decision of claims
- Not even with a basic judgement only
- German law or local law of foreign claimants (Art. 4 Rome II–Directive)?
- No repetition of legal principles (e.g. s. 31 BGB = responsibility for officers)
- OLG Braunschweig 3 July 2019 (VW)
www.bundesjustizamt.de/claim_201802

On top: (Too) many variables

- Common interests, different groups
- **Pharma**
 - Co-medication
 - Old package insert
 - New package insert
 - Before/after first publication
- **Financial Reimbursement**
 - Pension plans
 - Cash value policies
 - Unit-linked life assurance
 - Already paid out policies

And then: What to do?

- Essentially the same factual circumstances
- But completely different individual situations
- **One** declaratory motion **may** be sufficient
 - "Drug X causes liver damage"
 - "Premium reimbursement in principle after revocation of the contracts with insurance company Y"

- Motion **too wide**: shift to individual proceedings
- Motion **too narrow**: no binding effect for all groups

How to proceed?

- **Several motions** are possible
 - The groups need to match the motions
 - Otherwise it remains unclear, which court declaration applies to what group
 - But: consequences regarding costs

- **Several actions** are also conceivable
 - But: in case of overdetailed group formations individual proceedings may be predominant

Where it all ends...

- **Declaratory judgement** (s. 613 ZPO)
 - Competence of **Courts of Appeal** (s. 119 para. 3 GVG)
 - Appeal on questions of law before the FCJ as remedy

- **Settlement** authorised by the court (s. 611 ZPO)
 - When could the court refuse the authorisation?
 - Association vs. large entities, both are represented by counsel

It's not the end but just the beginning

- **Declaratory judgement does not benefit** anyone
 - Pharma: at best declaration of general eligibility of damage
 - Premium Reimbursement: merely declaration of the right of revocation that exists anyway

- Despite the **general binding effect** (also in case of **dismissal!**)
 - **Follow-up proceedings**
 - At a different court, the "competent" one (in accordance with the general rules)
 - New lawyer = new costs, this time at the risk of the consumer
 - As long as it takes: the benefits of using VW cars consume any possible compensation

The Pharma Case

- Only in follow-up trial the **individual claim** can possibly be clarified
- The defence of producer of the drug X
 - **Misuse**
 - no sufficient indication
 - overmedication
 - overprescription
 - simultaneous use together with drug Y despite the warning in the package insert
 - **No particular causality**
 - Declaratory Action clarified causality only in general (harmfulness of the drug)
 - other cause probable (alcohol; hepatitis)
- **Limitation**

The Pharma Case

- Only in follow-up proceedings it is possible to clarify
 - specification of the impairment
 - damage to the individual plaintiff
 - pleas/objections e.g. misuse despite knowledge of the defect
 - contributing causative factors
 - contributory negligence
 - statute of limitations
 - amount of damage
 - follow-up damage
 - material damage
 - loss of earnings
 - increased needs
 - immaterial damage (damages for pain and suffering)

Premium Reimbursement

- The insurer defends basically
 - Fulfilment by payment of the surrender value
 - Limitation as of the first revocation
 - Forfeiture
 - Assignments to third party for security purposes

Premium Reimbursement

- Regarding the **amount** defence arguments are
- Diverging courses
 - Capital policies or
 - Unit-linked life assurance
- Deduction of risk costs
 - Calculated risk costs?
 - At least actual risk costs?
- Compensation of advantages by utilisation of capital?
 - Net interest? Gross interest? Return on equity?
- Tax advantages (Capital gains tax? Deductions for income tax expenses?)
- Consideration of fiscal grants (e.g. "Riester")

Does anyone go for a settlement?

- Acc. to s. 611 para. 2 ZPO the **settlement** shall contain regulations on
 - the benefits for registered consumers
 - the proof of entitlement by the registered consumers
 - the due date of the benefits
 - the allocation of costs between the parties
- **However:** the registration contains no proof whatsoever whether the consumer is qualified as class member
 - Name, adress and a short description of the claim only
 - No proof
 - No details
 - No documents are required
 - Anyone can register!

Is that possible?

- **Specific claims by designated consumers?**
- Individual claims cannot be decided in class actions either in the Pharma Case or in the Premium Reimbursement Case
- Each case needs to be decided individually
- **Lump sum for distribution, the criteria for distribution regulated in the abstract only, so that they need to be specified in the individual case**
- No abstract specification conceivable that covers all individual cases
- **...the proof of entitlement to be submitted by the registered consumers**
- This, too, belongs in individual proceedings and not in any distribution schemes
- Only with rough estimates based on specific group classifications

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