A spotlight on the growing claims industry in The Netherlands: the pros and cons

Article by Prof. E. Bauw, University of Utrecht

4 March 2016

The article "The claim industry' by De Volkskrant [Dutch national daily] on February 27th this year, pointed to the increasing number of collective (class action) claims in our country. The figures presented newspaper presents speak for themselves: associations allegedly representing half a million people, have together submitted claims for 1.6 billion euros in damages from businesses and institutions. Still, this message will not surprise the average newspaper reader. The media regularly report about new collective claims and many people will have wondered whether they should also sign up. Who hasn't got an insurance contract with unfair terms, isn't driving a car with tricky software, doesn't play the state lottery or doesn't take the train during the rush hour? Only a few people would take the trouble to litigate to recover damages. The claim amount would be too low and litigation would be too costly and risky. This is referred to as "scattered damage". However, if the claims are bundled in a collective claim for compensation, it suddenly involves considerable amounts and it becomes a totally different matter.

The Volkskrant article explains that increasingly the collective claims are initiated by 'claims companies " that operate on a commercial basis and that are hiding the same people. It very much looks as if a lucrative industry has developed from which we will hear more in the future. For those companies media attention is vital, the fuel their machine is running on. The business model focuses – just as the Pied Piper - on enrolling as many claimants as possible and for that they need advertising. Each additional claim increases the total amount of compensation sought, and also the profit when successful. They usually work on a no-win-no-fee basis and receive 15 to 25 percent of the claim value as revenue; after deducting costs these are still attractive returns in times of almost negative interest rates and falling stock prices. Furthermore these claim companies increasingly are increasingly attractive as a vehicle for investors looking for a better return on investment. " A phenomenon that has blown over from the Anglo-Saxon legal systems and is known there as "third party (litigation) funding (TPF); These lenders invest up front in the start-up costs of the claim to be able to reap a percentage of the proceeds at the end. Of course there is a risk that the claim is not recoverable but investors know: no risk, no return. And so you have it, the "claims industry" is a phenomenon that developed rapidly and is worth studying.

Utrecht University is currently doing research on how and by whom claim organizations (foundations, associations, "companies") are being controlled, whether and how they financially report and share information with those who have joined them. In 2011, a 'Commission Claim Code' in consultation with claim organizations drafted claim rules (the Claim Code) which organizations in this field should comply with. The research focuses

primarily on compliance with these rules. The results are expected early May. Earlier research showed that compliance was not as good as it should be (see a report on the results of that investigation Bauw E. & T. Tan, "Slow start of veeg teken? Inadequate compliance with the Claim Code requires intervention" NJB 2013 140, Vol. 3, p. 165). Because this study took place shortly after the introduction of the Code, this was probably still due to the starting problems but the next measurement is serious.

More research is however needed to gain insight into the combination of factors (determinants) that can explain the emergence of collective claims in the Netherlands and to identify the social impact. That should be multi-disciplinary research. After all, we are dealing with a phenomenon that cannot be explained by legal factor only. For that research experiences should be used from specific countries like Australia and the United States as well. Research can contribute to a balanced picture of the phenomenon. Unlike the news seems to suggest there are not simply advantages. What could be wrong with honouring a claim? We can be confident that the court will only honour a claim when there is a good reason for it and, in that case , just the actual damages will be compensated. Without collective claims, injured parties would just not bother and companies or institutions that have acted unlawfully or culpably would benefit from not fulfilling their obligations. The incentive to be more diligent would then be missed and the deterrent effect of liability law undermined. It is precisely because of this deterrent effect that recent European legislation is promoting the collective claim when acting against rules in the field of personal data protection and competition law. It was considered inadequate that companies that are guilty of unlawful processing of personal data or forbidden price-fixing (can) get a (hefty) fine as is already the case. The damage that individual consumers have suffered must also be compensated and that can be seen as a welcome addition to enforcement by regulators and an extra incentive to adhere to the rules. Collective action, given the generally small sums per injured person, is an important means to let the system work. Bundling claims arising from this is also much more efficient and less harmful to the judicial system than the settlement of large numbers of individual cases. As for Third Party Litigation Funding? This helps to overcome the financial obstacles to access to justice and therefore a cut of the profits is okay. In short, collective actions to increase the deterrent effect of liability law, promote access to justice and ensure efficient settlement of claims, so that the courts are not unduly burdened.

From such a standpoint, one wonders why there is so much concern about the development of collective claims. Because it is clear that there is concern. The Netherlands has made the necessary efforts to regulate the phenomenon. The aforementioned Claim Code is one example, but it is not binding. The legislature subsequently attempted to give this code a status by instructing the judge by law (Art. 3: 305a paragraph 2 of the Civil Code) to declare a claim organization inadmissible "if (..) the interests of the persons for whose benefit the action is brought are not sufficiently guaranteed "and inter alia referring to the rules in the code. So far, this addition to the few judicial rulings has not been successful. Currently a

proposal is being drafted for a law that enables class actions on the one hand but is also attempting to control the proliferation of claim organizations.

But the European Commission is concerned about "abuse" of collective redress and in a Commission recommendation it advises Member States not to allow performance-related remuneration (such as no cure no pay), not to allow commercial claims organizations, and to enable the judge to guard against abuse. The Commission does not exclude Third Party Funding but attached conditions pertaining to transparency, so as to avoid conflicts of interest between the claim organization and claimants.

With the latter we touch upon the core of the objections to the claim industry as it is developing. Claim Organizations can be useful but should be transparent to the points required by the claim code: governance, oversight, accountability and financial compensation and representation of interests. Only then can claimants assess whether their interest is in good hands and not in conflict with the financial interests of directors of the claim organization or potential lenders in the background. Such conflict of interests could quickly arise when choices have to be made or a an agreement has to be made on settlement or further litigation and the costs involved. From the mentioned investigation it should be apparent if claim organizations are complying with the rather basic requirements of the Claim Code. If they do not, that might be ‘a sign on the wall’. Whether the feared negative effects are actually materializing, is not wholly clear. This requires another study. Research that also needs to be directed to find solutions allowing to maintain the above-mentioned advantages of collective claims and at the same time prevent the undesired side phenomena.