



EUROPEAN
Justice Forum

EJF MESSAGE MAP - Brussels, 23 April 2007

Message 1:

EJF supports a balanced legal system for both consumers and businesses alike

I. Civil justice systems must differentiate between meritorious and frivolous claims. Meritorious actions must be facilitated and frivolous claims must be prevented.

- a) Effective legal redress mechanisms must be available when needed.
- b) Redress mechanisms must be designed to ensure that those that have a legitimate cause for complaint are compensated. (It must not be the trial lawyers that are the primary beneficiaries as in USA).¹
- c) Unfounded actions hurt consumers and businesses alike:
 - They adversely impact jobs,² innovation and share prices
 - They increase tax rates and liability insurance
 - They undermine sound, competitive businesses

¹ On the class action phenomenon, see D R Hensler, 'Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation' 11 Duke J. Comp & Int'l L. 179 (2001). For contingency fees in individual cases compare H M Kritzer, 'The Wages of Risk: The Returns of Contingent Fee Legal Practice' 47 DePaul L. Rev. 267- 320 (1997-1998) and the attack in L Brickman, 'Effective Hourly rates of Contingency-Fee Lawyers: Competing data and Non-Competitive Fees' 81 Wash. U. L. Q. 653 (2003), and response in H M Kritzer, 'Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate over Contingency Fees: A Reply to Professor Brickman' 82 Washington U. L. Q. 477-507 (2004). For a recent study of contingency fees in class actions see T Eisenberg and G P Miller, 'Attorney Fees in Class Action Settlements: An Empirical Study' Journal of Empirical Legal Studies, Vol 1, Issue 1, 27-78, March 2004.

² Litigation can decimate a whole community if it is dependant on one major local business.

- They destroy consistency and predictability
- Ultimately this impacts on consumers

II. Dispute resolution should be established on the following principles:

- Disputes should be resolved within a reasonable time and at proportionate cost
- People should not be able to bring claims without having to fund them (or without being insulated from normal economic consequences)
- Claimants who bring claims that fail, should not be exempted from payment of opponents' costs
- It should not be permissible to award higher than compensatory damages
- The burden and standard of proof should not be changed in favour of claimants
- The normal rules on causation should apply
- Normal limitation periods should apply and not be suspended
- Discovery rights should not be extended to company records and to information held by authorities

Message 2:

Europe's efforts to improve its economic competitiveness are dependent upon a system that guarantees legal certainty, transparency, predictability and swift dispute resolution:

I. Investment in Europe is underpinned by its robust and predictable legal framework. Europe must respect and enhance its existing diverse and sophisticated legal structures.

- a) Europe must prioritise improving its existing legal mechanisms. It should work to simplify the judicial process and to reduce administrative burdens.
- b) National and EU authorities should conduct a cost-benefit analysis before intervening in the operation of national civil justice systems:
 - Civil justice systems have only recently been under consideration by Member States. The EU should await the outcome of reforms by Member States before considering action.
 - The EU should act only in so far as it is necessary to align developing national legal systems.

- c) Proven practices and rules in the Member States, which are important expressions of national identity, should be respected.

II. The costs of legal proceedings must be predictable, transparent and proportionate

- a) Any method of funding litigation must be strictly regulated
 - Without tight controls, contingency fees can lead to greatly disproportionate costs and unbalanced outcomes.
- b) The “loser pays” rule promotes cost-proportionality, discourages bad claims and encourages settlement.

Proof points:

- o The total annual accounting cost of the US tort system has recently been calculated as \$865.37 billion.³ This is equivalent to an 8 percent tax on consumption, or a 13 percent tax on wages.
- o US Federal Government has estimated that the direct costs of tort litigation in 2000 cost the US economy \$180 billion.⁴
- o Direct tort costs in US in 2004 were estimated to be \$260 billion. This equates to a “litigation tax” of \$ 886 per person. It was equal to over 2% of GDP.⁵
- o Tort cost in Europe are currently heading for 1% of GDP.⁶

³ *Jackpot Justice: The True Cost of America's Tort System* (Pacific Research Institute, 2007). The authors calculated that the excess (i.e. unnecessary) annual social cost in 2006 was \$588.63 billion, and the excess annual accounting cost is \$664.15 billion. They also identified that the annual wealth loss to US stockholders is \$684 billion; 60,000 workers have been displaced through asbestos bankruptcies, at an economic cost of \$226million in 2006 \$s; each worker losing up to \$50,000 over his career. Human capital losses total up to \$3.16 billion in lost wages, and \$559 million capital lost to pensions.

⁴ *Who Pays for Tort Liability Claims? An Economic Analysis of the U. S. Tort Liability System*, Council of Economic Advisors, 2002; *Senate Commerce Committee Report on Product Liability Reform Act of 1997*.

⁵ *U. S. Tort Costs and Cross-Border Perspectives: 2005 Update*, Towers Perrin-Tillinghast, 2006.

⁶ *Ibid.*

Message 3:

We need a balance between public and private mechanisms in order to bolster an overburdened legal system :

I. Investment is needed in the judicial systems to correct current failings that are hurting consumers and businesses alike:

- a) Member States need systems to handle multiple claims, but these need to be well thought through and should not further overburden the legal system.
 - Courts are overloaded and the back office systems of many are not fit for purpose
 - Cases take too long
 - Class actions by definition increase litigation.
- b) Simply to add class actions to courts' current workload would further overburden the system to the detriment of consumers.

II. Public enforcement and private litigation mechanisms must be efficiently balanced.

- a) The public regulatory enforcement system can provide effective mechanisms for streamlining handling of associated compensation claims. Such an approach could be more efficient, and accord more with the competitiveness agenda, than proliferation of private collective mechanisms.
- b) To the extent that any private law remedies may be necessary on a residual basis, in order to maintain competitiveness and achieve predictability and consistency, they should be based on the following principles:
 - cases should be decided by judges, not juries;

- claimants must start and control their claims on the basis of informed decisions (opt-in);
- costs must be proportionate, and lawyers fees must be regulated to ensure this;
- penalties must be set within enforcement procedures: compensation awards should not be punitive;
- consumer organisations should play a role in monitoring markets but enforcement action should be reserved to public authorities.

III. The EU should continue to promote mediation, alternative dispute resolution mechanisms, small claims and similar mechanisms.

- a) They typically offer:
 - good consumer protection
 - easy accessibility
 - cost effectiveness
 - swift resolutions , and
 - rational hearings and outcomes.

- b) The use of ombudsmen, and business redress or complaint schemes is also highly recommended.