



U.S. CHAMBER

Institute for Legal Reform

Following Each Other's Lead

Law Reform in Latin America

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U.S. CHAMBER
Institute for Legal Reform

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Introduction

Legal systems are dynamic, continually evolving, and adapting to the changing norms of society. These adaptations can be found in all areas of law, all over the world. Revisions to the law often follow regional trends. This is certainly true in Latin America. In the past, countries in the region may have looked outside the region for ideas or guidance when developing their own laws, just as the U.S. once looked to Britain. But today, Latin America appears to be evolving independently as a region. Latin American countries look to each other; they follow each other's lead. When the law evolves in one country, similar changes will likely surface elsewhere. As a result, when change comes to Latin American law, it comes regionally.

In Latin America, as in other parts of the world, the case for change is often positioned as a need for "access to justice." Much of the doctrine of legal scholars in Latin America is focused on providing consumers with better access to the legal system. Consumers are seen

as disadvantaged compared to businesses or the government when it comes to legal matters. Legal doctrine often refers to the weaker party or the stronger party, and the need to take perceived advantages from the stronger party and give them to the weaker party.

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In some jurisdictions, the need for greater access to justice is probably a fact. There is a strong argument in some countries that class actions, for example, would improve access to justice. In those places, it is simply not credible to oppose the creation of a class action mechanism. But it is fair and appropriate to oppose class action systems that change the meaning of justice under the guise of creating access to it. If a claim is not viable individually, it should not become viable simply because it is joined with many other similar claims. New procedural rules should not tilt the playing field so far that defendants have no opportunity to defend themselves with facts and law. That is where debate over legal reforms becomes important.

This paper reviews some of the significant trends in Latin America that could significantly affect potential defendants.¹ These trends should not be overlooked. When the opportunity arises, the business sector should participate in the discussion, not to be seen as obstructing developments in law, but to ensure that a level playing field is maintained for both plaintiffs and defendants. Only by making its views known can unintended consequences be avoided. After all, access to justice should mean justice for all parties and fair resolution of legal disputes, without taking sides for plaintiffs or defendants.

Issues and Trends in Latin American Law

Several trends in Latin American law and procedure merit attention. As in the rest of the world, class action rules are being introduced or revised throughout the region. There are also additional procedures intended to improve access to, or the efficiency of, the legal system that have no clear counterpart in U.S. law, but that are important in Latin America. Beyond that, broad revisions to existing procedural rules—entirely new codes of civil procedure—are being enacted. And finally, the substantive law is also advancing in ways that could affect manufacturers in the region for years to come.

Class Actions Are a Reality in the Region

During the 20th century, only a few countries allowed class actions as a means to resolve claims for damages. Those that did were generally common law countries, such as the U.S., Canada, and Australia. But in recent years, class actions have become the main topic of procedural law reform. Many civil law countries are adapting common law class action procedures to fit their own systems; Latin America is no exception.² To understand the concept of a class action in Latin America, it is essential to understand the structure of the civil law model for collective redress.

THE CONCEPT OF CLASS ACTIONS IN LATIN AMERICA

Scholars in Latin America, and elsewhere, have divided the concept of a class action into distinct categories based on the rights or interests involved and on the appropriate remedies. Usually, they are divided into three categories, but more recently some Latin American scholars have reduced that to two—a welcome simplification that will suffice for this discussion.³ The first category includes “diffuse” and “collective” rights, which are indivisible in nature, meaning that the remedy for one person would also be the remedy for all. Environmental claims, for example, would be diffuse or collective claims. If the solution is to abate the pollution, that solution would be the same whether it is

for an individual or for all members of the affected group. Claims seeking to prevent deceptive advertising would likewise be diffuse or collective. In these cases, there is little need to provide a precise definition of the class or specifically identify its members. The rights belong to society as a whole, or to an affected subgroup. The remedy for these cases is generally injunctive. They do not (or at least should not) seek individual damages for class members.

The second category is known as “homogeneous individual rights” cases. Those are divisible, meaning that each class member has an individual claim that could be addressed separately. They are also homogeneous, meaning they are similar enough that they could also be addressed collectively. These are the more traditional class actions—numerous claims all based on the same basic set of allegations and laws against the same defendant(s). Multiple claims arising from a single event, such as a plane crash, would likely be homogeneous individual claims. They can be addressed together, but each plaintiff could also file a separate individual claim for damages.

THE BRAZILIAN MODEL

The development of a civil law class action system in Latin America began with the creation of Public Civil Action Law in Brazil in 1985.⁴ This law provides a mechanism to resolve indivisible “diffuse” or “collective” claims, and provides for injunctive awards intended to change or correct the behavior of the defendant. Public Civil Actions are not intended for monetary damages to individual members of any defined class.

The procedure is unlike a class action in the U.S., but it did not develop in complete isolation from the U.S. experience. The Brazilians were inspired by Italian scholars, including Mauro Capelletti⁵ and others, who had been studying the U.S. legal system and the way it had been used as a mechanism to change the behavior of government or private citizens, instead of for monetary damages.⁶ An American scholar, Abram Chayes,⁷ had written about the “new model of civil litigation” in the U.S. and called it Public Civil Litigation. This new model included cases in the 1960s and ‘70s involving such matters as school desegregation, prisoners’ rights, and environmental claims.

The Italians liked the concept and wanted to create something similar in Europe. But there were elements of the U.S. system they didn’t like. In the U.S., successful public interest cases usually involved an “activist judge” who would take hold of the case, suggest solutions, monitor progress, and generally drive the case forward. While that was accepted in the U.S., the Italians believed that the “activist” role should be played by a strong publicly-oriented group, not the court itself. They wanted to give standing to some organized body, so that the plaintiff and not the court would be the driving force. For a time, the Italians focused on the “Public Ministry” (roughly akin to the Attorney General’s office) as an appropriate body to empower with a new legal tool for public interest in Europe.⁸

At the same time, Brazil was coming out of 20 years of military dictatorship and was focused on creating an improved legal system to regain public trust. There were many scholars in Brazil eager to find a new system to protect public interests. Brazil also had a Public Ministry made up of intelligent, hard-working, ambitious lawyers who were interested in public civil litigation.

Following the writings of the Italian scholars, Brazil enacted a Public Civil Action Law, which gave the Public Ministry authority to bring claims to protect diffuse and collective rights. A few years later, provisions were added to a new Brazilian constitution that provided further autonomy and independence to the Public Ministry. The Public Ministry became Brazil's keepers of the public trust. The Public Civil Action Law also gives standing to consumer associations and other entities to bring public civil actions. Notably, the Brazilian model does not allow affected individuals (class members) to file collective claims.

The Public Civil Action Law also gives the Public Ministry broad authority to investigate claims and enter into binding settlements, in some ways like the powers of attorneys general in the U.S. to issue Civil Investigative Demands under state consumer protection laws. The Public Ministry is very active in the Brazilian legal system. Over 90% of public civil actions are filed by the Public Ministry.⁹

Later, Brazil developed a system to handle homogeneous individual rights cases. It was not a simple task. They could not simply add Rule 23 of the U.S. Federal Rules of Civil Procedure—the court rule which defines class action practice and establishes the criteria for

class treatment (including, for example, numerosity, commonality, predominance, and superiority)¹⁰—to their procedural rules. Issues of standing, constitutionality of opt-out classes, and the whole question of certification had to be adapted to fit the Brazilian legal system. The resolution came in 1990 with the enactment of the Consumer Protection Law, which contained a chapter on class actions.¹¹ The law provides for class actions for damages. Unlike the U.S. system, there is no upfront certification, or even a class definition. There is no requirement that the court decide whether the claim is appropriate for class treatment (i.e., whether the individual claims are truly homogeneous).

Standing is given to the Public Ministry and consumer associations, and other government entities. Class members do not have standing and generally are not involved in the initial case. In the first phase, the court decides “liability” in the abstract, without specifying a total damage award. The court also provides a class definition in the phase-one decision. The second phase comes if liability is established. At that point, individual class members bring separate individual “liquidation claims” to determine their individual damages and obtain individual recovery.

The system has some good aspects for defendants. For example, in the first phase, there is no aggregate damage award—no requirement for a single, massive judgment that might cripple the defendant financially. However, there is a bill currently pending in the Senate that could allow a court to determine the minimum amount of damages for each class member during the liability phase.¹²

“ The key to successful adjudication of a class action is the determination that the case can and should be decided collectively. Without that question being answered, the entire exercise could be a waste of time. ”

Nevertheless, there are potential issues with the process. First is the phase-one finding of “liability.” This concept of liability includes more than just a finding of fault (e.g., negligence, intentional conduct, etc.) or product defect in strict product liability cases. To establish liability the court must also find causation and damages. In the Brazilian system, causation and damages are not part of the first phase of a class action. At best, then, all that can really be resolved in phase-one is the question of fault/defect. The remaining elements of liability are not addressed until the second phase.

Second, the process calls into question whether the system is truly efficient. If there is a finding of liability, then all class members need to proceed with individual claims for damages. Courts still must proceed with individual trials for each class member to resolve the dispute. The desire is to have the liquidation claims be simple matters of establishing the individual damages, but if the case involves significant questions of causation, or even questions of whether the plaintiff is, in fact, a class member, the liquidation cases could be full-on trials with lots of evidence and many issues to be resolved. Beyond that, class members can file their liquidation claims in courts that had no part in the phase-one trial, and therefore have no record evidence upon which to base a decision in the phase-

two trial. All they have is the decision from another court finding “liability” which may or may not provide guidance on the particular issues presented by the individual class member. This is of particular concern when threshold issues such as predominance, commonality, and superiority were never addressed in phase-one.

This discussion highlights the value of certification. The key to successful adjudication of a class action is the determination that the case can and should be decided collectively. Without that question answered, the entire exercise could be a waste of time. Brazil would not need to use a U.S.-style certification procedure, but it could be an element of the initial admissibility decision civil courts make at the outset of any case. Courts could, when determining the admissibility of a class action, be required to determine if the claims were indeed homogeneous. And, if a party challenges the homogeneity of the class, courts could decide that issue at the beginning of the case to avoid the risk of proceeding with an improper class action.

Homogeneity includes concepts such as predominance, commonality, and typicality. One of the most respected Brazilian experts on procedural law, Ada Pellegrini Grinover, has written that the term homogeneity should be read to include the

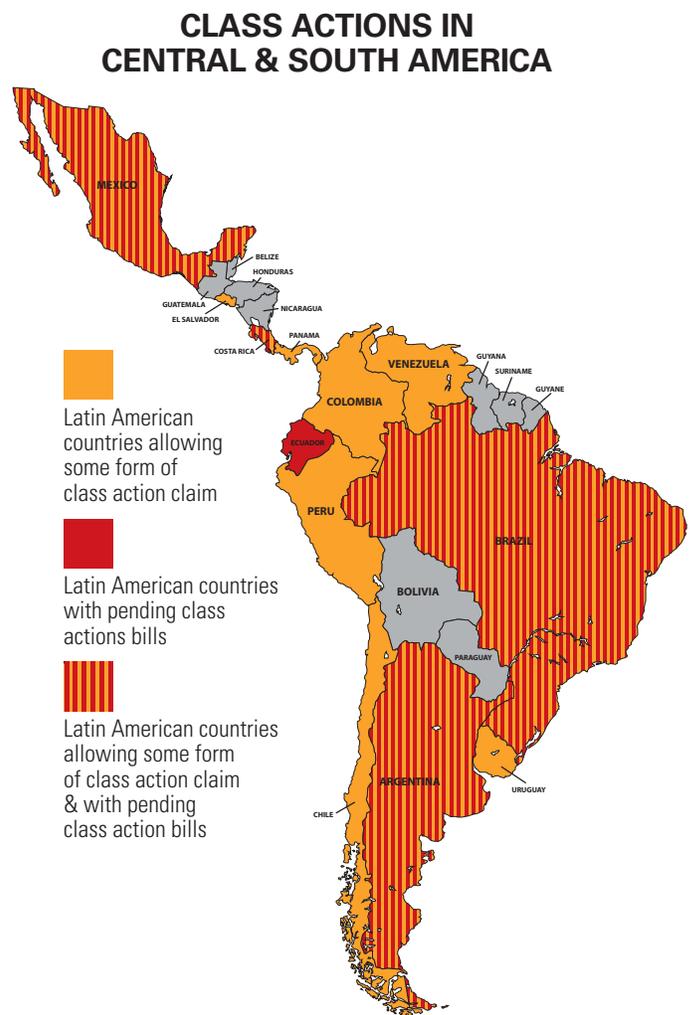
concept of predominance, and when the issues of fact or law do not predominate over individual issues, the case should not proceed collectively.¹³ But as it stands, the Brazilian system has no procedural device under which courts are required make that threshold determination.

Finally, one of the positive elements of the class action system in the U.S. is its service as a tool for settling mass claims. The parties can see the size and scope of the class and estimate the total damages. In the Brazilian system, with no class definition and no class members present in the case, there is very little opportunity to settle the case collectively. Defendants must try the whole case, phase-one and the myriad phase-two cases, to resolve the dispute. And, unlike in the U.S., settlements of homogeneous individual rights class actions are rare in Brazil.

In any event, with the Public Civil Action Law and the class action mechanism in the Consumer Protection Code, Brazil created a model for class actions in civil jurisdictions that serves as the starting point for the rest of the region. Two model class action codes, based on adaptations of the Brazilian experience, have been created to serve as guides for future class action mechanisms in the region.¹⁴ These model codes tend to be the starting point for legislation introduced elsewhere in the region.

The Expansion of Class Actions in Latin America

Over time, class actions became popular in Latin America. Legislation allowing class actions for damages has been enacted in Chile, Colombia, and Mexico. *De facto* class actions exist in other countries, such as Argentina and Costa Rica. Presently, there is legislation pending in Argentina, Brazil, Costa Rica, Ecuador, and Mexico to create a new class action system or modify the existing legislation. While they have not always followed the Brazilian procedure exactly, the starting point for this legislation often includes some discussion of the Brazilian models.



HOW THE SWINE FLU INFLUENCED THE MEXICAN CLASS ACTION

Serious proposals for the creation of class actions in Mexico began to appear in 2007, after the Supreme Court announced an interest in the procedure. Early proposals were based on Brazilian models with standing given to consumer associations and the Consumer Protection Agency, and no form of certification.

Some of the bills proposed in Mexico, and in other countries, provided for additional compensation beyond the resolution of the claims of class members

—punitive damages, financial incentives for associations who file successful class claims, and substantial contingency fees for lawyers. These provisions merit special attention because they are precisely the elements that many believe led to the expansive litigation climate in the U.S. This is especially true when class actions are excluded from the traditional civil law “loser pays” rule, meaning there is no risk for bringing an unsuccessful class action. They create the potential for speculative litigation and abuse of the system.

In 2009, one of these bills seemed poised to pass in the Federal District (Mexico City).¹⁵ A few members of private industry tried to revise some of the provisions in the bill that concerned them, but there was little organized support for the effort, and the politics of Mexico City’s legislature made progress difficult. Ultimately, on the last day of the legislative term, the Mexico City bill was to be voted into law. In a strange turn of events, the Swine Flu broke out in Mexico City, and the session was cancelled due to public health concerns. The legislature broke for the season, and the bill never passed.

Following that, members of the federal legislature pressed forward with a federal class action model for Mexico. Private interests took exception to the prior Mexico City proposal, as did the Federal Government. The debate over the form and substance of an appropriate class action law continued for another year. Ultimately, a bill introduced by Senator Jesus Murillo Karam, who had previously led a Senate task force on class actions, became the leading bill.¹⁶ While it was pending, the bill underwent multiple revisions as a result of negotiations among Senator Murillo, consumer advocates, and representatives of the business community.¹⁷ After a compromise was reached, a revised Murillo bill became law, effective on March 1, 2012.¹⁸

The new Mexican class action procedure has a certification phase, but otherwise contains many elements of the Brazilian system. Homogeneous individual rights class actions are said to be opt-in, but the period for opting-in extends for 18 months after the first phase decision on liability—meaning that class members can wait to see whether the case is successful before deciding whether to join.

As soon as the bill became law, legislation was introduced to eliminate some of its safeguards.¹⁹ So far, none of those bills have passed.

ARGENTINA'S CLASS ACTIONS WITHOUT PROCEDURAL RULES

Class actions are also a topic of interest in Argentina, where numerous class action models have been introduced before the national legislature in recent years, and five remain pending today. In Argentina, the right to class actions is specifically set forth in the 1994 constitution and in the consumer protection law, but there is no procedure in place for handling class actions. The Supreme Court issued decisions in 2009²⁰ and 2013²¹ setting out some basic principles for the admissibility of a class claim and calling upon the legislature to enact a complete set of

procedural rules. But to date, no specific rules exist. Courts are forced to improvise when handling class claims.

The Argentine Supreme Court:

“Nonetheless, in our legal system there is no regulation governing the effective exercise of actions referred to as class actions in the specific area that is the object of this case. This is of great importance because there should be a law setting forth when a plurality of individuals exists to carry out such actions, how a homogeneous class is defined, whether standing corresponds exclusively to a class member or to public agencies and associations, what procedures apply, and the effects of the final judgment and how to execute that judgment. Faced with this lack of regulation, which, by the way, constitutes a delay by the legislature that must be resolved as soon as possible to facilitate the access to justice guaranteed by our Supreme Law, we must point out that the constitutional provision is clearly operative and judges must implement it.”

“ [I]n the new Mexican class action...class members can wait to see whether the case is successful before deciding whether to join. ”

As it happens, the consumer law, which allows class actions, also instructs courts to use the most expedited procedure available when adjudicating any consumer rights claim. There is in Argentina a “*sumarísimo*” (super fast-track) process available to most courts.²² There have been instances where courts, faced with a class action under the consumer law, have applied the super fast-track process.²³ In these cases, the defendant has five days from service of the complaint to file a complete defense, including all evidence and witnesses that will be called to testify. There are other limitations on a defendant’s ability to present evidence. Clearly, this presents a problem for defendants. Plaintiffs have all the time they need to prepare the case and their evidence, while defendants have just five days to respond. There is a bill before the legislature that would change the consumer law to exclude class actions from *sumarísimo* proceedings, but the potential progress of that bill is unknown.²⁴ Regardless, as the Argentine Supreme Court has stated, Argentina still needs procedural rules for class actions.²⁵

CHILE’S RELAXATION OF CLASS ACTION PROCEDURES

Chile enacted a class action procedure in 2004.²⁶ Although the original law may have been initially inspired by the Brazilian experience, Chile’s law includes several procedural elements that resemble the U.S. system. It has a certification procedure with a right to an interlocutory appeal of a certification decision. The original certification process allowed for the production of evidence and had four criteria—predominance, commonality, numerosity, and superiority.

By 2008, approximately 40 class actions had been filed, most of which were dismissed at the certification stage. Only one has reached a decision by the trial court, and that case remains on appeal.²⁷ The case involves allegations of fraud by retail outlets in connection with credit card rates, and it has drawn attention to the class action procedure as a means of consumer redress. But the overall slowness of class actions drew criticism. As a result, the legislature revised the class action law in 2011 to shorten the certification phase by eliminating the production of evidence and two certification criteria—numerosity and superiority.²⁸ Accordingly, a class action can have as few as a handful of claimants, and they need not demonstrate that a class action device is superior to individual lawsuits as a means to adjudicate the claims in the case. The new law also eliminates the stay of proceedings pending an appeal of a certification order.

The Chilean experience may show that the certification process defined in the U.S. rule is not perfectly suited to civil law jurisdictions. But courts in Chile did identify cases that were not suited for collective adjudication. Thus, while the U.S. procedure may not fit exactly into other legal systems, some upfront consideration of the propriety of proceeding with a class claim should be maintained to prevent a waste of judicial resources.

THE COSTA RICAN CLASS ACTION DILEMMA

A new Civil Procedure Code bill was introduced in the Costa Rican Congress in November 2011.²⁹ It included a chapter on class actions with several features that could lead to abuse of the system. For example, the bill granted standing without a certification phase to any individual or entity to file diffuse rights class actions, to organizations to file collective actions, and to any class member to file homogeneous individual rights class actions; it allowed for monetary and injunctive relief in all types of claims; and it allowed courts to grant financial incentives in favor of nonprofit plaintiff organizations that prevail in any type of collective action in addition to awarding them costs.

Following coordinated efforts by business leaders and legal associations, several amendments were introduced. In its present form, the bill requires plaintiffs to provide an objective class definition in their initial pleading; allows parties to request a hearing on class certification (in addition to allowing the judge to do so in the absence of such a request); limits damages in diffuse rights collective actions to injunctive relief; and no longer includes potential financial rewards for associations that bring collective actions.

The bill passed a first reading by the plenary in July 2013 but has not yet been put to a second and final reading. The class action chapter was opposed by the Executive Branch and some business interests. In February 2014, the Congress approved a motion to send the bill back to the legislature's Legal Affairs Commission for a second look at the class actions chapter, i.e., to delete it from the bill. As of the date of this writing, the Commission has not yet released a revised text of the bill.

The dilemma lies in this: If the Civil Procedure Code bill passes with the class action chapter, then Costa Rica will have a reasonably balanced procedure. If the bill passes without the class action chapter, the process will start over. A new government has been elected, which presumably will not oppose class actions, and there are other proposals on the table now, including one in a Consumer Protection Code bill, that present issues similar to those in the original class action chapter in the Civil Procedure Code bill. At this point, it is up to the Legal Affairs Commission to either press ahead with the current class action chapter or leave the matter for future legislation.

CLASS ACTIONS BILLS IN OTHER JURISDICTIONS

Class action bills are also proceeding elsewhere. In Ecuador, they have been introduced by way of amendments to the consumer protection laws. In Mexico, two bills were introduced in 2013 to amend the current class actions procedures by, among other provisions, reducing the number of individuals necessary to form a collective or eliminating the numerosity requirement altogether; shortening the evidentiary phase; broadening standing; and removing subject matter requirements. As noted above, Brazil is not standing still. There are several bills in the national legislature seeking to modify the current class action procedure by, for example, broadening the territorial scope of class actions rulings to essentially allow for nationwide class actions; granting standing to political parties; allowing the judge to shift the burden of proof at any time before the decision; and allowing plaintiffs to modify the cause of action at any time before the final decision.

Special Constitutional Actions in Latin America

Constitutions in Latin American countries usually provide a long list of specifically enumerated rights for the people. For example, they often include rights to education, health, a clean environment, and full information on consumer goods and services.³⁰ Unlike the U.S., where the government cannot infringe upon constitutional rights, governments in Latin America have a constitutional duty to provide them. They are enforceable, affirmative rights.³¹ Furthermore, in most countries, rights provided in ratified treaties hold a status equal to, or even above, the constitution. Thus, rights contained in treaties, such as the American Convention on Human Rights, are also considered to be at least on the same level as those contained in the constitutions.³² A failure to warn claim, for example, could be characterized as a violation of a constitutional right to consumer information. More and more, constitutional rights make their way into private litigation.

There are procedures throughout the region intended to provide a quick and easy resolution for constitutional challenges. While these processes serve an important role in Latin American societies, they have tended to expand into tools for civil litigants to use against private parties. And because they are simple and quick, they are often the process of choice when available.

THE AMPARO: MEXICO'S CREATION

The oldest procedure for protection of constitutional rights in Latin America is known as the *Amparo* (which translates, roughly, as “protection” in English). The modern *Amparo* was developed in Mexico in the 1840s as a means to provide judicial oversight of the constitutionality of legislation, executive actions, and judicial application of law. It was inspired by the U.S. Supreme Court decision in *Marbury v. Madison*³³ which gave federal courts the authority to void acts of Congress that conflict with the Constitution.³⁴ While the inspiration may have come from U.S. law, the practice in Mexico is totally different. The Mexican *Amparo* is a unique and complex institution that has become an important tool for both plaintiffs and defendants in civil matters, far beyond its original purpose.

Plaintiffs use the *Amparo* as an adjunct to civil litigation, a means of obtaining a legal decision supporting their claim without litigating against the real target of their claim. If a family wants to stop a construction project near their home, they can file an *Amparo* challenging the issuance of the construction permit in the first place. This is a claim solely against the government, using an abbreviated process, seeking a decision that the construction violated a constitutional right—for example, to a clean environment. If the *Amparo*

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“ Both plaintiffs and defendants can also use the judicial Amparo as a sort of writ of mandamus, challenging unfavorable rulings of courts in civil cases. They file a separate claim against the civil court, alleging the decision in private litigation violated their constitutional rights—say, for example, equal protection or due process. This opens a second front in the civil litigation.”

succeeds, the permit will be revoked and the family will have a court ruling finding that the construction project caused them damage—which may be useful in a separate civil action for damages against the builder. The builder can participate in the *Amparo* action as an interested party but is not technically a party to the claim.

Both plaintiffs and defendants can also use the judicial *Amparo* as a sort of writ of mandamus, challenging unfavorable rulings of courts in civil cases. They file a separate claim against the civil court, alleging the decision in private litigation violated their constitutional rights—say, for example, equal protection or due process. This opens a second front in the civil litigation. The *Amparo* practice is now integrated into the legal strategies of Mexican lawyers.

The first decision by the Supreme Court of Mexico interpreting the new class action law came by way of the *Amparo*. Direct *Amparo* no. 28/2013 was a constitutional challenge to the dismissal of a class action filed before the district court in Sinaloa. The Supreme Court of Mexico accepted the *Amparo* case in order to determine the legality of dismissing a homogeneous individual rights class action before the certification phase. The Court’s decision, issued on December

4, 2013, concluded that the trial court had prematurely and improperly dismissed the claim in violation of the fundamental right of access to justice. In reaching that conclusion, however, the Court engaged in a discussion about the value and purpose of the certification phase in the class action law. Curiously, this discussion about the new class action law and how it operates arose by way of the *Amparo* and not a direct appeal. This demonstrates how the *Amparo* has become a vehicle for airing issues about law under the guise of an argument for access to justice far broader than initially contemplated.

REGIONAL EXPANSION OF THE AMPARO

With the success of the *Amparo* in Mexico, other countries in the region began adopting their own versions—some using the original label, *Amparo*, others referring to it as a “*Tutela*” (“Guardianship”). All countries in the region have some form of *Amparo*, but the procedures and jurisdictional rules for an *Amparo* or *Tutela* vary widely.³⁵ In some countries, as in Mexico, an *Amparo* can be filed in a trial court, with procedural rules provided for by statute, and appeals to higher courts from *Amparo* decisions. In others, only the Constitutional Chamber of the Supreme Court may decide an *Amparo*.

In those countries, it is a single instance case without appeal. In some jurisdictions, there are no clear procedural rules. For example, an *Amparo* in Venezuela is filed directly with the Constitutional Chamber of the Supreme Court. It is a single instance case with no appeals, following no pre-determined procedure. The Constitutional Chamber determines the procedure to be used on a case-by-case basis. But in every instance, the *Amparo* is intended to be an extraordinary, and rapid, procedure to protect constitutional rights. Timeframes to respond are short, and evidentiary procedures are truncated.

WHY DOES THE AMPARO MATTER?

Two trends in the developing *Amparo* laws make the process significant to businesses operating in the region. The first is the *Amparo* against a private party. The original Mexican *Amparo* could only be filed against the government or government entities. Over the years, it has expanded in several countries to allow claims against private parties. Claims against manufacturers for failing to provide complete product information or warnings could be the subject of an *Amparo*, as could claims that environmental damage occurred at the hands of a company. Some form of *Amparo* claims against private parties are allowed today in Argentina, Bolivia, Chile, Costa Rica, Uruguay, and Venezuela, among others.³⁶ In Mexico, an *Amparo* may now be brought against a private company if it is performing a public function under government license, for example a utility or telecommunications company.³⁷

In Argentina, the *Amparo* became the tool of choice for plaintiffs during the financial crisis of 2002. At the time, the Argentine peso was experiencing rapid deflation against the dollar. From 1991 through 2001, the two currencies traded one-for-one in the market. But the value of the peso dropped rapidly in January 2002. In response, the government decided to curtail the damage by maintaining an official exchange rate of one-to-one, and issuing a decree that all transactions (including withdrawal of dollars from bank accounts) needed to be in pesos at the official exchange rate. Argentines with accounts in dollars stood to lose substantial amounts under the decree, and they took to the *Amparo* to salvage their accounts. Thousands of *Amparo* claims were filed against the government seeking decisions that the decree was unconstitutional and against the banks seeking orders to release the accounts in dollars. The courts were flooded with *Amparo* actions, and the banks scrambled to defend themselves within the mandated law from the government.³⁸

Another trend is the developing concept of a collective *Amparo*, a form of class action to protect diffuse rights under the *Amparo* procedure. Mexico has now expanded its *Amparo* law to allow for representative, collective *Amparos* seeking reparations for society as a whole.³⁹ Collective *Amparos* have been recognized by court decisions in Argentina,⁴⁰ and collective *Amparo* legislation is currently pending there.⁴¹ With the expanded scope of the *Amparo* and the procedural ease of filing them, *Amparo* actions are likely to continue to be an action of choice for any claims that can be presented in terms of constitutional rights.

THE POPULARITY OF POPULAR ACTIONS

A similar form of claim common throughout the region is the Popular Action, which is much like a private attorney general action in the U.S. The plaintiff, a so-called popular actor, can file a claim to protect diffuse rights. These actions are said to protect public patrimony, health, consumers' rights, natural resources, public spaces, and the culture of the country. Unlike class actions, these claims can be filed by individual citizens, and there is no need for any kind of certification. Standing is also provided to non-governmental organizations and certain public authorities. Individuals and corporations can be defendants. The relief sought is generally said to be injunctive, but it can also include orders to provide reparation—to pay for cleanup of the environment or for corrective advertising. These awards, while not technically compensatory damages, can involve substantial amounts.

As with the *Amparo*, procedures are intended to be truncated to provide for a quick resolution, leaving the defendant with little time to prepare a defense and limited opportunity to present evidence. Because the Popular Action is available to

private citizens, it is the obvious choice for individual consumers seeking redress for matters that include diffuse rights.

Colombia provides a good example of the experience with Popular Actions. Under the Colombian Popular Action Law of 1998,⁴² a popular actor was also awarded a financial incentive if his claim was successful. This incentive could be several thousand dollars, or in some cases a percentage of the value of the claim, which could be big money. The Popular Action became prevalent in Colombia, leading to the development of a cottage industry of “professional popular actors” making a living by filing and settling Popular Actions. In 2010, over 20,000⁴³ Popular Actions were filed in Colombia, many of which were settled by the defendants for the value of the financial incentive. Once the settlements started, the claims multiplied. The primary targets were telecommunications providers, product manufacturers, and government services. In December 2010, the legislature responded by passing a bill that eliminated the financial incentive in Popular Actions.⁴⁴ Since then, the number of Popular Actions filed in Colombia has dropped remarkably.⁴⁵

“ *The Popular Action became prevalent in Colombia, leading to the development of a cottage industry of ‘professional popular actors’ making a living by filing and settling Popular Actions. In 2010, over 20,000 Popular Actions were filed in Colombia, many of which were settled by the defendants for the value of the financial incentive. Once the settlements started, the claims multiplied.* ”

New Civil Procedure Codes

The rules of civil procedure in civil law countries are contained in codes enacted by the legislature. There are separate procedural codes for criminal matters, labor matters, administrative courts, and general civil litigation. Traditional civil procedure in many civil law countries focuses on written evidence and argument. Hearings usually are not open to the public, and witness testimony is not very important. In some countries, parties often don't testify at all, and fact witnesses testify before a court clerk. The clerk then summarizes the testimony in a document to be read by the judge when considering the evidence. There is no true transcript and no means by which the court can view the witness to assess credibility.

Until recently, Latin American courts generally operated under traditional civil procedures. Although they had been amended over the years, many of the codes were very old, dating to a time before the electronic age and when the litigation process did not include many complex or scientific issues.⁴⁶ Today, that is changing. Several new codes have been adopted, and more are on the way. The current trend makes procedures in Latin America look quite a bit more North American than in the past. In addition, the use of modern technology is becoming common in Latin American courtrooms.

New civil procedure codes have recently been adopted in several countries, for example, in Bolivia, Honduras, El Salvador, and Colombia.⁴⁷ Bills to establish new codes are under consideration in Brazil, Chile, Costa Rica, and Ecuador.⁴⁸ As mentioned previously, Costa Rica is on the verge of passing a new code. Brazil is working on a new procedural code, a process that began more than three years ago.⁴⁹ While there is no legislation on the table yet, the subject is also under discussion in Argentina. There is a trend among these codes. Countries are watching what others do and then taking up similar initiatives at home. Some parts of the trend increase objectivity and transparency, while others could create issues.

CIVIL PROCEDURE CODES IN CENTRAL & SOUTH AMERICA



Among the most dramatic changes is the shift in some jurisdictions from a purely written proceeding to a system that includes both written and oral processes. Complaints and answers remain written for most cases, but evidence and arguments are oral. The testimony of witnesses, which once was subject to a summary by a clerk who was not a decision-maker in the case, is now more valuable to the parties. The new systems incorporate a concept called "*inmediación*," or immediation. Witnesses testify live, in open court, before the same judge who is to rule on the case. The court can see the witness, ask questions of its own, and assess the credibility of the witness. The testimony is preserved on videotape from several angles for review by appellate courts as necessary.

Previously, the last step in a case, before being submitted to the court for ruling, was the closing submission. These were written briefs addressing the evidence and law applicable to the case. Sometimes they were read aloud by counsel in private hearings, but there was no argument or counterargument among counsel. Under the new rules, courts hold open, public hearings for the parties to argue the merits of the case, in a manner similar to closing arguments in a trial, or a summary judgment argument, in the U.S. And again, the videotape is rolling.

Elements of Colombia's New Civil Procedure Code

1. Oral Procedures – proceedings to be conducted on the basis of public hearings
2. "Immediation" – Judge that decides the case must view the witnesses and evidence
3. Concentration – evidence considered in a concentrated trial hearing
4. Time limits for courts
 - a. Trial court must rule within one year of original service of process
 - b. Appellate Court must rule within six months of receipt of docket
5. Use of technology
 - a. Electronic docket
 - b. Service of process by email
 - c. Videotaping of all proceedings
 - d. Court may hold hearings by videoconference

These changes no doubt require lawyers to adapt their style of practice and develop new skills for questioning witnesses and presenting arguments. Implementation of the new procedures has been slowed somewhat as courts build in the technology to comply with the new rules, but the new procedures are coming and should improve the judge's ability to know and understand the case and make informed decisions.

Other changes (or in some cases the retention of old rules) merit careful consideration. For example, some new codes allow shifting the burden of proof.

Traditionally in civil law, as in common law, the burden of proof lies with the party asserting the fact. A plaintiff would need to prove that the defendant acted in an illicit manner (negligence, intentional misconduct, etc.), that damages were incurred, and that a causal connection existed between the two. The new codes include mechanisms for courts to shift the burden of proof—creating a “dynamic” burden of proof. This allows the court to shift the burden to the party whom the judge believes is in a better position to prove the fact at issue. In a product liability case, the judge may put the burden on the defendant to prove that the product is not defective, that its advertising was not misleading, or that a defect did not cause the injury.

One of the dangers of a dynamic burden of proof is the possibility for the court to shift the burden in the final decision, after all the evidence has been produced, when it is too late to come forward with new evidence to meet the burden. In other words, when the court reviews the record at the end of the case and finds that a given fact has neither been proven nor disproven, the judge can use this burden-shifting power to determine which side will win the case. These provisions merit special attention.

Colombia’s Dynamic Burden of Proof:

As a general rule, the party interested in proving facts has the burden to do so.

However, taking into account the particularities of the case, the judge may distribute the burden of proof between the parties, according to which party is in a better position to provide the evidence. The order of distribution of the burden of proof must be issued by the judge in the evidentiary writ or during the evidentiary stage.

A party will be deemed in best position to prove, based on: (i) its proximity to the evidentiary material; (ii) its possession of the evidence; (iii) any particular technical circumstances; (iv) its direct intervention in the events which led to the litigation; or (v) the defenselessness, character, or disability circumstance of the counterparty, among other similar circumstances

“ [I]n Brazil, liability is absolute. If the court finds that the risky activity provision applies, causation and damages are the only issues to address.”

In addition, time frames and deadlines tend to remain very short, as they were in the prior codes written in a different era. In Latin America, deadlines to respond to allegations can be as little as ten days. Beyond that, in many systems, answers must come complete with all evidence to be produced and all witnesses to be called. These deadlines can put a serious burden on defendants, and they cannot be extended.

Furthermore, in most countries, there is a further expedited procedure for certain matters—small claims, domestic matters, etc. These are the *sumarísimo* proceedings. Answers could be due in five days, or even in three. There have been proposals in some countries to try all claims involving consumers, regardless of their complexity, in *sumarísimo* proceedings. That is essentially the law in Argentina today.⁵⁰ While many claims filed by consumers may be simple enough that *sumarísimo* procedures will work, many are not. A consumer class action, for example, should not be tried under such onerous procedures. The procedure alone can be fatal to the defense of a case. As mentioned previously, there is a bill in Argentina to take class actions out of the *sumarísimo* proceedings.

Substantive Law—Civil Codes and Consumer Protection

The substantive law in Latin American countries is similar to that of other regions. The terminology varies, but legal concepts, such as negligent conduct, intentional torts, compensatory damages, product defects, and assumption of the risk, all exist in the region and appear to be based on the same fundamental logic. But there are perhaps a few substantive rules that exist, or have been proposed, that could be game changers for defendants in future litigation.

ABSOLUTE LIABILITY

The Brazilian Civil Code contains two provisions that suggest absolute liability for certain product manufacturers.⁵¹ The first is article 927 which refers to liability for “risky activity.” This is somewhat similar to the common law concept of liability for ultra-hazardous activities, such as dynamite blasting, transporting radioactive materials, etc. In common law countries, the threshold for liability for such activities is lowered and the required duty of care is greater. But in Brazil, liability is absolute. If the court finds that the risky activity provision applies, causation and damages are the only issues to address.

That may work as a legal construct if the provision is limited to truly risky activities. But in case law and legal doctrine, the

risky activity provision has been applied to the manufacture of products. Thus, the manufacture of a product that presents inherent risks, even if not defective, could be subject to absolute liability.

The Brazilian Civil Code's article 931 provides for absolute liability for dangerous products, as distinct from defective products. Again, this provision could be applied to any number of products that present some danger simply because of the nature of the product, such as guns or knives. Article 931 stands in contrast to another provision, article 12, applies the more familiar concept of liability for damages caused by defective products; that is, products that present risks that are not recognized by the ordinary consumer without an adequate warning.

In 2012, the Center of Legal Studies of the Federal Justice Council of Brazil issued an "*enunciado*" (a sort of advisory opinion) regarding article 931,⁵² which in essence reminded courts of the existence of the provision and stated that it "widens the concept of product liability" set out in article 12. The *enunciado* could signal a troubling expansion of liability in Brazil from strict liability for a defective product, to a system of absolute liability for any harms caused by a product.

There is a similar potential widening of liability contained in a new draft Civil and Commercial Code in Argentina.⁵³ Currently, doctrine holds that the owner or guardian of a risky thing is strictly liable for the damage it causes. This arose in response to claims for injury resulting from motor

vehicle accidents, where the responsible party (the driver) was held civilly liable.⁵⁴ The new proposal seeks to incorporate this doctrine into the civil code, but it goes a step further by calling for liability for anyone who benefits from the commercial activity surrounding the product. This could be the manufacturer, wholesaler, dealer, or transporter. Although this concept has been suggested previously in Argentina, it has not taken hold in the courts. The addition of this broad concept of liability in the written code would expand the concept of liability far beyond where it stands today.

PUNITIVE DAMAGES IN CIVIL LAW

Punitive damages—those designed to punish the tortfeasor, rather than to compensate the plaintiff—have traditionally been foreign to civil law in Latin America. The civil law system is designed to return the parties to the positions they would have held if there had been no tort or breach committed. It is not intended and should not be used to obtain an advantage, financial or otherwise. As such, there is no place for punishment in damage awards. Punishments for malfeasance are left to criminal law or administrative sanction. This traditional view, however, may be changing.

Argentina amended its consumer law in 2008 to allow punitive damages for any tort or breach of contractual obligations.⁵⁵ There is no heightened standard for the application of punitive damages—no requirement for reckless disregard or intentional conduct—as is required in the U.S. Furthermore, none of the safeguards that the U.S. Supreme Court has introduced to rein in punitive damages exist in the Argentine law. There

is no concept of ratios of punitive damages to compensatory damages, or limitations on multiple punitive awards for the same conduct. There is a maximum limit for punitive awards set at AR\$ 5 million, roughly US \$625,000.⁵⁶ A pending bill seeks to allow the court to impose punitive damages *ex officio* (i.e., on its own determination in the absence of a specific request from plaintiff).⁵⁷

Once punitive damages were allowed, plaintiffs began routinely seeking them in consumer cases. Punitive damages awards in some cases show that there is a risk of runaway punitive damages awards under the current law. In one case, *Teijeiro v. Quilmes*, the plaintiff alleged that he found a condom wrapper in a soda bottle and sued the manufacturer.⁵⁸ He did not drink

the soda or otherwise suffer damages as a result of the alleged manufacturing defect. The court awarded compensatory damages (a new bottle of soda) and punitive damages in the amount of \$2 million pesos (approximately \$450,000 at the time of the award). That punitive damages award was later overturned on appeal, in a decision that explained the purposes of punitive damages and referred specifically to recent U.S. Supreme Court case law.⁵⁹

Punitive damages are also a topic of discussion in Brazil. In that country, as in most, there are no punitive damages, but there are moral damages, which are roughly the equivalent of damages for pain and suffering. Several bills have been introduced in the national legislature to establish punitive damages outright, or to bring a punitive element to moral damage awards.⁶⁰

Article 52bis of the Argentine Consumer Protection Law (Ley 24.240) provides:

“Punitive Damages. At the request of the victim, the judge may award a civil fine against the supplier who does not comply with its legal or contractual obligations, which will be graduated according to the gravity of the facts and other circumstances of the case, independently from other compensations that are available.”

Conclusion: Litigation and Law Reform in Latin America

Legal systems are changing rapidly in Latin America through a process of reflection and imitation at the regional level. This process will impact the legal landscape and the litigation risk in the region for years to come.

As for this ever-changing law and procedure, an ounce of prevention is worth a pound of cure. Monitoring developments and catching them early will open up opportunities to engage in the process and shape the outcome. Legal blogs and private law firms often inform clients of changes in law only after they are enacted, when it is too late to do anything to change the outcome.

Businesses should take it upon themselves to monitor these developments as they arise, when the discussions and debates are still being formed. They should also ask their outside counsel to monitor and report on developments as they arise and participate in the debates themselves. And when a potentially unbalanced law is under discussion, private industry should express its concerns, not to hinder development of the law, but to ensure a level playing field for all members of society.

Endnotes

- 1 This is a survey paper containing the observations of a U.S. lawyer based on a study of the legal institutions in Latin America. None of these observations can substitute for professional legal opinions on particular matters of substantive or procedural law obtained from licensed counsel in the given jurisdictions.
- 2 Harvey L. Kaplan, William J. Crampton, Marc E. Shelley, "Class Actions Developments Overseas," *Product Liability Litigation: Current Law, Strategies and Best Practices* (2013).
- 3 Instituto Ibero-Americano de Derecho Procesal, *Código Modelo de Procesos Colectivos Para Iberoamérica*, 28 October 2004.
- 4 Lei de ação Civil Pública, Lei no. 7.347 (24 July 1985).
- 5 Antonio Gidi, "Class Actions in Brazil – A Model for Civil Law Countries," *American Journal of Comparative Law*: Vol. 51, p. 311 (2013).
- 6 *Id.*
- 7 McAllister, Lesley K. "Revisiting a 'Promising Institution': Public Law Litigation in the Civil Law World," *Georgia State University Law Review*: Vol. 24: Iss. 3, Article 2 (2007).
- 8 *Id.*
- 9 It has been reported that in 2001, the São Paulo Ministério Público had a total of 36,753 open investigations and public civil actions in the area of diffuse and collective interests covering environmental pollution, constitutional rights, children's rights, worker health and safety, housing and urban problems, consumer protection and disability rights. *Id.*
- 10 Fed. R. Civ. P. 23(a) provides the following prerequisites for class certification—all of which must be satisfied: "(1) the class is so numerous that joinder of all members is impracticable ["numerosity"]; (2) there are questions of law or fact common to the class ["commonality"]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Rule 23(b) provides that "[a] class action may be maintained if Rule 23(a) is satisfied and if... (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members ["predominance"], and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy ["superiority"]..."
- 11 Lei No. 8.078 (11 September 1990). For a translation of some of the class actions provisions see Gidi, *supra* note 5.
- 12 For more information about this Brazilian proposal, see ILR's publication *Class Action Evolution: Improving the Litigation Climate in Brazil*, May 2014, available at www.instituteforlegalreform.com [hereinafter Brazil].
- 13 Ada Pellegrini Grinover, "The Defense of the Transindividual Interests - Brazil and Iberoamerica" from *The Globalization of Class Actions*, An International Conference Co-Sponsored by Stanford Law School and Centre for Socio-Legal Studies, Oxford University (Dec. 2007) available at <http://globalclassactions.stanford.edu/content/defense-transindividual-interests-brazil-and-ibero-america>.
- 14 Instituto Ibero-Americano de Derecho Procesal, *supra* note 3. Antonio Gidi, *Las Acciones Colectivas y la Tutela de los Derechos Difusos, Colectivos Individuales en Brasil: Un modelo para países de derecho civil*, Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, Doctrina Jurídica Núm. 151 (2004).
- 15 See Jorge Perez, *Impulsan los juicios colectivos* (29 April 2009), available at: <http://arvm.mx/wp-content/uploads/2009/04/seduvi.pdf>, discussing the bill, which was titled, *Iniciativa en materia de acceso colectivo a la justicia con proyecto de Decreto que reforma y adiciona diversos artículos del Código de Procedimientos Civiles para el Distrito Federal, de la Ley Ambiental del Distrito Federal, del Código Civil para el Distrito Federal, de la Ley de Procedimiento Administrativo del Distrito Federal y de la Ley de Responsabilidad Patrimonial del Distrito Federal* (2009).

- 16 See Jesus Ruiz Munilla, *Las acciones colectivas en el Derecho Mexicano* (July 1, 2011), available at: <http://elmundodelabogado.com/2011/las-acciones-colectivas-en-el-derecho-mexicano/>.
- 17 For a complete analysis of the legislative process in Mexico and the ultimate legislation, see William Crampton & Silvia Kim, Piecing Together the Puzzle of Mexican Class Actions, *Class Action Watch* (Federalist Society for Law & Public Policy Studies), Sept. 30, 2011, at 1.
- 18 The law was published in the Federal Official Gazette on August 30, 2011. It is not a stand-alone statute; rather, it is a set of amendments to other statutes. For example: Articles 578-626 added to the Federal Code of Civil Procedure; Article 1934, added to the Federal Civil Code; Amendments to Article 38 of the Federal Law on Economic Competition; Amendments to Article 26 of the Federal Law of Consumer Protection; Amendments to Article 53 and Article 81 of the Organic Law of Judicial Power; Amendments to Article 202 of the General Law of Ecological Balance and Environmental Protection; and Amendments to Articles 11, 91, and 92 of the Law for the Protection of Financial Services Users.
- 19 Bill to Reform the Federal Code of Civil Procedure, submitted by Senator Isaías González Cuevas and published in the Parliamentary Gazette on November 27, 2012. Bill to Reform the Federal Consumer Protection Law and the Federal Code of Civil Procedure submitted by Senator Martha Palafox Gutiérrez and published in the Parliamentary Gazette on April 23, 2013.
- 20 Federal Supreme Court, “Halabi, Ernesto vs. P.E.N. -ley 25.873 dto. 1563/04- s/Amparo-ley 16.986”, February 24, 2009, Fallos 332:111.
- 21 Federal Supreme Court, “PADEC v. Swiss Medical S.A. s/ nulidad de cláusulas contractuales”, August 21, 2013, LA LEY 2013-E, 290.
- 22 Article 498, Federal Civil and Commercial Code of Procedure; Article 498, Civil and Commercial Code of Procedure of the Province of Buenos Aires. Similar provisions exist in the Civil and Commercial Procedural Code of the Province of Santa Fe, and the Civil and Commercial Procedural Code of the Province of Mendoza, among others.
- 23 The Consumer Protection Law, Law 24.240, provides in Article 53 that the most abbreviated procedures of the competent tribunal will govern claims brought under the law. As a consequence, courts have applied the fast-track procedures to class actions if available in that particular jurisdiction. VIEL TEMPERLEY, Facundo “Acciones colectivas: Dificultades prácticas”, LA LEY 2008-C, 996. See also Commercial Trial Court No. 12, Secretariat No. 5, in re “ADECUA vs. Banco BNP Paribas y Otro S/ Ordinario”, February 8, 2011.
- 24 Bill 7200-D-13, which was submitted to the Federal House of Representatives by Representative Fernando Yarade in October 2013.
- 25 Halabi, *supra* note 20, paragraph 12.
- 26 Ley 19.955 (July 14, 2004), amending Ley 19.496 (July 2, 1997).
- 27 See Tom Azzopardi, *Supermarket Ordered to Pay Compensation In Chile’s First-Ever Successful Class Action* (May 1, 2013).
- 28 Ley 20.543 (October 21, 2011), amending Ley 19.496 (July 2, 1997).
- 29 Expediente No. 15.979, *Código Procesal Civil* (2011).
- 30 Allan R. Brewer-Carías, “The Latin American Amparo Proceeding and the Writ of Amparo in the Philippines,” *City University of Hong Kong Law Review*: Vol. 1.1, p. 73 (2009).
- 31 Hector Mairal, “Problemas Actuales del Control Judicial”, in “Cuestiones de control de la administración pública. Administrativo, legislativo y judicial (jornadas)”, p. 751, RAP, Buenos Aires, 2010.
- 32 Brewer-Carías, *supra* note 30.
- 33 5 U.S. 137 (1803).
- 34 *Id.*
- 35 Brewer-Carías, *supra*, note 30.
- 36 Brewer-Carías, *supra*, note 30.
- 37 Ley de Amparo (April 2, 2013).
- 38 Horacio M. Lynch, “La justicia ante la emergencia” LL 2002-C-1287; see also SAGÜES NESTOR, “El Amparo constitucional a diez años de la reforma de 1994” JA 2004-III-981.

- 39 Nueva Ley de *Amparo* (published in the Official Gazette on April 2, 2013).
- 40 See, Federal Supreme Court, in re “Asociación Benghalensis”; Fallos 323:1339.
- 41 Bill 0172-D-2013 submitted to the Federal House of Representatives by Representative Paula María Bertol on March 4, 2013 and Bill 0541-D-2013 submitted to the Federal House of Representatives by Representative Gil Lavedra on March 11, 2013.
- 42 Ley 472 (August 5, 1998).
- 43 National statistics on the number of popular actions filed, by district, can be found at: http://fundacolectivos.wordpress.com/2013/09/08/estadisticas-colombianas-de-acciones-populares-anos-2010-2013/?relatedposts_hit=1&relatedposts_origin=776&relatedposts_position=0.
- 44 Ley 1.425 (December 29, 2010).
- 45 According to the Defensoría del Pueblo in Bogotá, in Bogotá alone, 1,024 Popular Actions were filed in 2010 whereas only 359 were filed between January 2011 and March 2012. The most drastic drop is seen in Santander, where 1,397 popular actions were filed in 2010 whereas only 193 were filed between January 2011 and March 2012. See http://www.ambitojuridico.com/BancoConocimiento/N/noti-121014-10la_eliminacion_del_incentivo_afecto_la_accion_popular/noti-121014-10la_eliminacion_del_incentivo_afecto_la_accion_popular.asp?CanV=192.
- 46 For example, Argentina (1871), Brazil (1973), Chile (1903), Guatemala (1964), and Mexico (federal) 1943.
- 47 Bolivia: Ley 439 (November 19, 2013); Colombia: Ley 1.564 (July 12, 2012); Honduras: Decreto No. 211-2006 (published in the Official Gazette on May 26, 2007); El Salvador: Código Procesal Civil y Mercantil (published in the Official Gazette on December 27, 2008).
- 48 Brazil: Bill 8046/10 (2010); Chile: Proyecto de Ley de Nuevo Código Procesal Civil (2012); Costa Rica: Expediente No. 15.979, *Código Procesal Civil* (2011); Ecuador: Proyecto de Código Orgánico General de Procesos (2014).
- 49 Brazil, *supra* note 12.
- 50 Article 53, Law 24.240 (Consumer Protection Law).
- 51 Articles 927 and 931, Civil Code of Brazil, *Lei No. 10.406* (January 10, 2002).
- 52 Conselho da Justiça Federal, “Jornadas de Direito Civil I, III, IV e V *Enunciados Aprobados*” (March 2012) available at <http://www.stj.jus.br/publicacaoaseriada/index.php/jornada/article/viewFile/2644/2836>.
- 53 Article 1758 of the *Proyecto de Código Civil y Comercial de la Nación*, issued by the executive branch on June 7, 2012 available at <http://www.infoleg.gov.ar/wp-content/uploads/2013/11/8842012.pdf>.
- 54 Civil Court of Appeals, Panel J, “*Mozzi, Ángel N. v. Ford Motor Argentina S.A.*,” February 19, 1992. See also Rubén H. Compagnucci de Caso, “Tipificación de la figura del guardián en la responsabilidad por el hecho de las cosas inanimadas,” ED, T. 67, p. 777.
- 55 Article 52bis, Law 24.240, as amended by Law 23,361.
- 56 Article 47, Law 24.240, setting a ceiling for monetary sanctions in the amount of \$5 million pesos.
- 57 Bill 1135-D-13, which was submitted to the Federal House of Representatives by Representative Daniel Brue on March 20, 2013.
- 58 Civil and Commercial Trial Court No. 5, city of Córdoba, “*Teijeiro ó Teigeiro Luis Mariano v. Cervecería y Maltería Quilmes S.A.I.C.A. y G.-abreviados- otros - 1639507/36*,” March 23, 2011, LA LEY 2012-C , 64.
- 59 *Teijeiro v. Quilmes*, Cámara de Apelaciones en lo Civil y Comercial de Córdoba (April 17, 2012).
- 60 Bill 699/2011 introduced in the House of Representatives by Representative Arnaldo Faria de Sá; Bill 523/2011 introduced in the House of Representatives by Representative Walter Tosta; Bill 3880/2012 introduced in the House of Representatives by Representative Domingos Nieto; and Bill 413/07 introduced in the Senate by Senator Renato Casagrande.



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