

# Korean Government Seeks to Expand Class Action Law & Punitive Damages in Commercial Lawsuits

## Introduction

South Korea is on the verge of passing legislations that would expand the scope of the country's existing class action law and award of punitive damages. The proposed changes, which purportedly aim to provide a legal remedy for collective harm to the Korean public, are likely to have a significant impact on the business community.

Currently, class action suits are only available for securities-related cases, but the proposed legislation ("**Class Action Act**" or the "**Act**") would allow litigants to contest their cases as a class action in all areas of the law (i.e., expanded to all incidents with more than 50 claimants). Moreover, the potential ramifications of the proposed *Class Action Act* require careful consideration by businesses, as the Act would allow claimants to bring action against businesses for events that occurred *prior* to the effective date of the law.

In addition, the proposed changes to the Korean *Commercial Act* (“**Amendment to the Commercial Act**”) will include award of punitive damages for intentional or grossly negligent acts, regardless of the industry or areas of law involved. Currently, punitive damages are only available under certain statutes, such as the *Product Liability Act* (the “**PLA**”), the *Personal Information Protection Act* (the “**PIPA**”), and most recently, under the *Patent Act* for willful infringement.

While these two bills are still proposals, the Korean National Assembly, the nation’s highest legislative body, is supportive of these efforts. Since President Moon’s Democratic Party (“**DP**”) won a decisive victory in the April 15 general elections, the DP has a supermajority in the Korean legislature. And Chong-in Kim, the interim leader of the opposition, the conservative “People Power Party,” publicly expressed his support for the passage of the bills on September 28. Therefore, these legislations are expected to pass shortly after the end of the 40-day public comment period.

## The Class Action Act & Key Implications

As noted above, the *Class Action Act* intends to expand the application of class actions to all areas of the law. Consequentially, **all companies could now find themselves facing class action lawsuits for any alleged wrongdoing in Korea.**

Other noteworthy changes in the *Class Action Act* are: (i) the introduction of pre-litigation discovery; (ii) the implementation of evidence preservation and production orders; and (iii) trial by jury.

### 1. Pre-Litigation Discovery

The new *Class Action Act* proposes to introduce a pre-litigation discovery system that appears to be based on the American system. However, unlike the U.S. discovery system, which starts *after* a lawsuit has been filed (i.e., after a complaint is filed), the pre-litigation discovery system proposed in the *Class Action Act* allows the applicant to request access to certain evidence *before* the class action is filed (i.e., before a complaint is filed).

## 2. Evidence Preservation and Production Orders

Also, the *Class Action Act* proposes a system that will require preservation and production of evidence. The obligation to preserve evidence under the proposed *Class Action Act* begins when an applicant requests pre-litigation discovery or by court order, which is more certain than the U.S. legal hold/document preservation mechanism, where the obligation to preserve evidence begins when litigation is initiated or *anticipated*.

Further, the *Class Action Act* proposes sanctions for violating the preservation or production order. For example, failing to preserve evidence without justification may result in an adverse inference that the violating party was in possession of the subject evidence. Failing to preserve or produce evidence without justification may also result in an adverse inference that the fact to be proven based on the subject evidence sought is deemed to be true.

These measures are comparable to the U.S. FRCP Rule 37<sup>1</sup>. In the United States, (federal) courts are allowed to impose sanctions when they find that parties improperly failed to preserve evidence. However, the proposed *Class Action Act* does not go so far as to allow the court to dismiss or enter a default judgment as the U.S. does (instead, it includes a monetary fine of up to KRW 30,000,000).

## 3. Trial by Jury

The proposed *Class Action Act* will allow the class representative to request a trial by jury at the court of first instance (i.e., trial level). However, unlike the American jury system, where the jury is also known as the “fact finder” and courts are bound by the jury’s factual determinations, the jury system proposed in the *Class Action Act* will not bind the court to the jury’s findings. Yet, if the court wishes to depart from the jury’s determinations, it will be required to explain its reasoning in the decision.

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1. FRCP 37(e)(2): (A) presumption that the lost information was unfavorable to the party, (B) instruct the jury that it may or must presume the information was unfavorable to the party, or (C) dismiss the action or enter a default judgment.

One final, but important change to note in the proposed *Class Action Act* is that class actions may be applied **retroactively**. Thus, causes of action that occurred prior to the passing of the legislation may still be subject to class action lawsuits if the statute of limitations has not expired.

## Amendment to the Korean Commercial Act & Key Implications

To complement the proposed *Class Action Act*, the proposed *Amendment to the Commercial Act* introduces punitive damages in all commercial causes of action that will be applicable to “Merchants” defined as “**companies or owners operating as a business.**”

The scope of the law’s applicability of punitive damages is consistent with the Korean government’s policy reasoning to punish and deter incidents that harm society in the pursuit of economic gain. Recent examples of these incidents include the controversial humidifier sterilizer case, the automobile emissions scandal, the scandal involving certain private equity funds, proliferation of fake news, and massive human disasters that have resulted from violations of safety standards. Accordingly, **businesses, including manufacturing, financial, construction, and even the media, among others, would be subject to the proposed law.**

The *Amendment to the Commercial Act* will allow claimants to collect punitive damages up to **five times** the damages sustained from the company’s or business owner’s **intentional or grossly negligent** conduct. In awarding such punitive damages, the court will consider the following six factors:

1. The degree of intentional or grossly negligent conduct;
2. The extent of damages that occurred as a result;
3. The economic benefits the defendant obtained;
4. The defendant’s assets;
5. The circumstances of punishment; and
6. The defendant’s efforts to provide relief.

Additionally, unlike the *Class Action Act*, the *Amendment to the Commercial Act* is ***not retroactive***, but will be applied prospectively after the bill passes.

## Next Steps:

Shin & Kim's Mass Torts/Class Action Team will continue to coordinate with the relevant practices to closely monitor the legislative progress of these bills, including any major changes or the final passage of the bills. Should these proposed changes become law, we will provide more specific analysis on the changes and the impact on specific industries. In the meantime, should you have any questions or comments on the contents of this newsletter or how these changes may affect your specific situation, please do not hesitate to contact us.



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