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Global class actions

National report: Group Litigation in Sweden, update paper sections 2.5 and 3.

2.5 Practice under the New Act

The Act has now **(**November 2008) been in force for almost six years. As far as I know, group actions have been initiated in the general courts (including the environmental courts) in twelve cases. There have also been media reports concerning about a dozen cases that have not gone to trial, sometimes because the parties have settled. I will return to that *infra*. The Consumer Ombudsman's option to litigate "group actions" at the Public Complaints Board should also be mentioned in this context (see 3.6.3). But first I will review the twelve cases that have been dealt with or are pending in the courts.

- 1. *Bo Åberg* v *Elefterios Kefalas ("Air Olympic").*[1] The case involved claims for damages due to crime (gross dishonesty to creditors). The defendant was the owner of an airline that later went bankrupt. Under Swedish law, victims' claims for damages may be brought during the criminal proceedings. During the trial, the prosecutor moved for damages for several hundred passengers who had been left stranded in airports all over Europe and forced to make their own way home. But due to the large number of claims, the petitions for damages were separated from the criminal case for customary management as civil cases. This meant the prosecutor could no longer argue the victims' case. One passenger, *Åberg*, initiated a private group action with a claim for a total of about three million Swedish kronor (more than €300,000) in compensation for himself and about 700 other passengers. As all of their names and addresses were easily available from the criminal case, the court was able to notify them individually. The majority (about 500 people) opted in. The defendant moved to dismiss, arguing that the action failed to meet the conditions in Section 8 of the Act, but the District Court denied the motion in a separate ruling. The defendant appealed, but the Court of Appeal affirmed the District Court ruling. The case was about to go to trial when the parties reached a settlement of 810,000 kronor (about €70,000) to the

[1] Stockholm District Court, case number T 3515, 2003; the case was later transferred to the Nacka District Court, case number T 1281, 2004.

passengers.[2] The Court confirmed the settlement by judgment in July 2007. There was a risk agreement (see Sections 38–41 of the Act) between the plaintiff and his counsel under which the attorney would be paid twice his hourly rate if he won, but only half the usual rate if he lost. The victims would probably not have had their claims tried in court if they could not be litigated as a group action. An individual case would have been managed under the special rules for small claims, which do not permit awards for attorney's fees. It is unlikely any of the passengers would have been willing to appear as the sole plaintiff and without legal representation.

- 2. *Mattias Larsson et al.* v *Falck Security* (*Database 1*).[3] The plaintiff sued a security company and sought damages because the company had set up an illegal database covering "suspected graffiti vandals." The intention was to get the proceedings expanded to a group action. The defendant refused to divulge the names in the database. The plaintiff had to abandon the attempt to start group action due to inadequate Swedish rules of discovery and the case was litigated as an ordinary civil dispute

- 3. *Guy Falk and Lisbeth Frost* v *NCC AB ("NCC").*[4] The matter at issue was performance of a contractual obligation to build a marina. Fifty-three people opted in to the action. Again, the defendant in this case, one of the biggest construction companies in Sweden, moved for dismissal on the grounds that the conditions (see Section 8 of the Act) for a group action had not been met. A great many briefs were exchanged on this matter. The District Court denied the motion. The defendant appealed, but the Court of Appeal agreed the group action was permitted. The defendant applied for leave to appeal to the Supreme Court, but leave was denied. The proceedings are stayed until September 2008 for settlement negotiations between the parties.

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[2] If Kefalas defaults on the payment plan, he will become liable to pay about three million Swedish kronor. Under the settlement agreement, each party will pay its own litigation costs. The plaintiff's lawyer's fees will be paid primarily through the plaintiff's litigation insurance. The remainder will be paid according to the risk agreement.

[3] Stockholm District Court, case number T 6341, 2003.

[4] Göteborg District Court, case number T 7211, 2003.

- 4. *Grupptalan mot Skandia* v *Försäkringsaktiebolaget Skandia (“Skandia”).*[5] A non-profit organization – Grupptalan mot Skandia (*“Group Action against Skandia”)* – was formed in October 2003. In an action for declaratory judgment, the organization claimed a right to compensation (about €200 million) for 1.2 million policyholders of *Skandia Liv*, a subsidiary of the insurance company *Försäkringsaktiebolaget Skandia*. The plaintiffs averred that the subsidiary, and thus its policyholders, had suffered injury when proceeds of the sale of the subsidiary’s asset management business were transferred to the parent company. In short order, more than 15,000 people joined the *“Grupptalan mot Skandia”* organization. Each paid membership dues of ab) ee0 -1.72(eec)10.4(5.7( )]

SEK 1.4 billion (about €145 million) to the subsidiary, thus indirectly compensating policyholders. The award cannot be appealed.

- 5. *Linus Broberg* v *Aftonbladet Nya Medier AB ("Aftonbladet").*[7] Broberg claimed compensatory damages for himself and others, including for the entry fee they paid to participate in an online game arranged by one of the biggest newspapers in Sweden. Data transmission problems on the Internet prevented them from playing the game. The District Court rejected the application for summons and dismissed the action because the application did not meet the requirements imposed by chapter 42 of the Code of Judicial Procedure and the conditions imposed by Section 8 of the Act.
- 6. *The Consumer Ombudsman* v *Kraftkommission i Sverige AB ("Kraftkommission").*[8] The first *public* action under the Act was taken to court in December 2004 by the Consumer Ombudsman (CO). CO claimed damages for about 7,000 people in compensation for the defendant's failure to supply electricity as agreed under a fixed price contract. The defendant moved for dismissal on the grounds that the conditions provided in Section 8 of the Act had not been met. The District Court, followed by the Court of Appeal, denied the motion. In January 2006, the defendant applied for leave to appeal the matter to the Supreme Court, which in September 2007 decided not to hear the appeal. About 2, 000 people have opted in. The case is still pending.
- 7. *Lars and Vuokko Elner* v *Göteborgs Egnahem AB* (*District Heating*). [9] In the application for summons (lawsuit) submitted to the Göteborg District Court in July 2005, plaintiffs argued that the court should rule that the two group representatives and an additional thirty group members had ownership rights to the district heating systems on their respective properties in a neighborhood of single-family homes. It would cost SEK 3,300 per year to rent each system, or a total of about SEK 100,000 a (about €11,000) year for the group as a whole. The case never got to the point of examining whether the preconditions for a group action had been met under section 8 of the Group Proceedings Act because the homeowners had already achieved their aims within a few months of submitting the application for summons. Settlement negotiations had been initiated and the defendant had requested an extension for

[7] Stockholm District Court, case number T 10992, 2004.

[8] Umeå District Court, case number T 5416, 2004.

[9] Göteborg District Court, case number T 7247-05.

answering the suit. After the parties quickly reached a settlement, the plaintiffs withdrew their group action in September 2005 and the case was removed from the cause list in October of the same year.

- 8. *Devitor* v *TeliaSonera AB ("Telia").*[10] *Devitor* (a limited liability company) asked the court to enjoin Telia Sonera (the largest telecom operator in Sweden) to refund the difference between the amount billed during a particular period and the agreed rate for night-time cellular phone minutes. The District Court instructed the plaintiff to define the members of the group but the plaintiff did not answer this request. The suit was dismissed under Section 8 paragraph 4 of the Act because the group was not appropriately defined in view of its size, ambit, and otherwise. The decision was appealed to the Court of Appeal but the appeal was withdrawn by the plaintiff. I have been told by the plaintiffs counsel that the reason for this was that Telia admitted that the amount billed was not proper as far as Devitor was concerned and billed another (smaller) amount than the original one.
- 9. *Peter Lindberg* v *Municipality of Järfälla et al ("Stolen Childhood").*[11] Lindberg claimed compensatory damages for himself and a large number of others due to poor care in municipal orphanages when they were children. The District Court dismissed the action due to both general problems with the application for summons and failure to meet the preconditions for prosecuting a group action. Lindberg appealed to the Court of Appeal which upheld the dismissal. Lindberg applied for leave to appeal the matter to the Supreme Court, which in February 2007 decided not to hear the appeal. The courts did not react on the fact that the plaintiff´s counsel was not a member of the bar as requested in section 11 of the Act.
- 10. *Pär Wihlborg* v *The Swedish State through the Chancellor of Justice ("Wine-import").*[12] In a private group action, Wihlborg is claiming damages for himself and a group of other Swedes who privately imported alcoholic beverages, including wine, from other EU Member States. *"Föreningen för privatimport inom EU" ["Association for Private Imports in the EU"],* an organization created to litigate the claim, is financing the action but not acting as plaintiff. The group consists of roughly 400 members of this organization. A large number of goods have been confiscated by

[10] Stockholm District Court, case number T 5254, 2006.

[11] Stockholm District Court, case number T 9893, 2006.

[12] Nacka District Court, case number T 1286, 2007

Swedish Customs, part of which has probably been destroyed due to age. The case was stayed by the District Court while waiting for a ruling from the European Court of Justice concerning the right to privately import alcoholic beverages within the EU. The ECJ recently ruled that prohibiting such imports violates EC law (but tax on the goods must probably be paid). The case has not yet been taken up for further hearing.

- 11. *Carl de Geer et al* v *The Swedish Airports and Air Navigation Service ("Arlanda").*[13] Residents of Upplands Väsby, a community near Arlanda Airport, started a non-profit organization called "Föreningen Väsbybor mot flygbuller" ("Residents of Väsby against aviation noise"). Some of the members brought a private group action against the Swedish Airports and Air Navigation Service (LFV) and claimed damages for aviation noise on behalf of about 20,000 people, mainly residents of one particular area adjacent to Arlanda Airport. The District Court issued the summons and about 7,000 people so far have opted in. LFV has moved to dismiss, arguing that the conditions in Section 8 of the Act have not been met. The court has not yet (September 2008) ruled on the motion.
- 12. *Olivia Ozum* v *Sweden* ("*Discrimination"*).[14] A quota rule is applied to admissions to the veterinary medicine program at the Swedish University of Agricultural Sciences in Uppsala that gives the underrepresented gender among applicants (currently male students) a better chance of being admitted to the program. In a private group action in July 2008, the plaintiff claimed damages in total of 4.6 million Swedish kronor (about €500,00) for herself and 46 other female students who were not admitted. The plaintiff was represented by the Centre for Justice Foundation (*Centrum för rättvisa*), which has undertaken to pay the plaintiff's litigation costs. Through the Office of the Chancellor of Justice, the State declared that it had no objections to trying the case as a group action. The Uppsala District Court decided in September 2008 to hear the case as a group action.

The sum total is that private group actions have been initiated in eleven cases and a public group action in one (*Kraftkommission*). No cases of ("true") organization group actions have reached the courts, but private group actions are being litigated or backed up by organizations formed specifically for the purpose in at least three cases (*Skandia, Wine-import,* and

[13] Nacka District Court, Environmental Court, case number M 1931, 2007.

[14] Uppsala District Court, case number T 3897, 2008.

Arlanda). As discussed above, in *Skandia,* one member of the board of the organization transferred his claim to the organization, which accordingly could bring the suit as a plaintiff in a private group action (a "false" organization action).

The defendant line-up: a private citizen convicted of a crime in one case (*Air Olympic*), Sweden and Swedish government agencies in three cases (*Arlanda, Wine-import* and *Discrimination*), a number of Swedish municipalities in one case (*Stolen Childhood*), a medium-sized privately held company in one case (*Kraftkommission*), and in the others (the majority) some of the largest and most famous companies in Sweden (*NCC, Skandia, Aftonbladet,* and *Telia*). So far, only two cases (*Aer Olympic* and *District Heating)* have been resolved (in settlements favoring the plaintiff, in *Aer Olympic* approved by the court). Many cases involve very large aggregate claims, billions of Swedish kronor (more than €200 millions) in one *(Skandia)*. Some of the cases involve individually non-recoverable claims (*Aer Olympic, Skandia, Aftonbladet et.al.).*

The District Court has dismissed the suits in three cases. In every other case (except for *Discrimination*), the defendants also moved for dismissal on the grounds that the conditions for a group action had not been met, but the District Court (in some cases also the Court of Appeal) has so far denied the motions. Leave to appeal the matter to the Supreme Court has been applied for in three cases (one decision to dismiss and two decisions not to dismiss the action). The Supreme Court has decided not to hear any of these cases.

As mentioned above, new laws on group proceedings did not take effect in *Denmark* and *Norway* until 1 January 2008. One action has been brought in Denmark in a case involving forced sale of shares. There, as in Norway where no group actions have yet been initiated, information is being circulated in the media that actions are being prepared in several cases. No actions have yet been brought in *Finland*, where the law took effect in November 2007 and only the Consumer Ombudsman can initiate group proceedings.

Outside Court

As mentioned *supra*, group actions in general courts were unfamiliar concepts in Sweden only a few decades ago. These days, nearly all Swedes know about group actions, in large part due

to extensive media coverage when the law was passed and in connection with a few spectacular cases (especially *Skandia)*. Awareness that group actions can nowadays be prosecuted in the general courts is high among the general public and universal among lawyers in Sweden.

The media have reported plans for a fairly significant number of group actions (at least a dozen) beyond those mentioned *supra*. Naturally, the group action option has been actualized, among lawyers for instance, in a goodly number of additional cases. The new procedural avenue has certainly facilitated pretrial settlements in several cases. I will mention one example here. About a year ago, two of the biggest energy companies in Sweden (*Fortum* and *Sydkraft*) settled with an enormous group of people who were left without electricity, in many cases for several weeks, after a severe snowstorm in January 2005. The companies refused to compensate their customers for the damages caused by the power outage, which the plaintiffs claimed was caused to the companies' negligent failure to maintain the power transmission grid. Settlement negotiations did not begin in earnest until group members formed an organization and told the media they were preparing to bring a group action in court. It is unlikely an individual consumer would have even considered bringing an ordinary lawsuit against the companies. According to the best available information, a very large number of customers have now been compensated for their injuries.

I can also mention a few other cases that have yet to be tried. According to media reports, a group of more than 350 doctors have for some time been preparing a group action against an insurance company, *Salus-Ansvar,* regarding fund management and diminution of pension assets. The case resembles *Skandia* in some respects and the doctors are being represented by the same law firm (Bratt & Feinsilber in Stockholm) that handles that case (and *Air Olympic*) . Information about actions against other insurance companies (*Folksam Liv* and *SEB Trygg-Liv)* has also made the rounds in the context. There have also been earlier press reports about group actions against fund managers (such as *Banco Fonder*) and a few major Swedish banks that have charged unreasonable fees for ATM withdrawals in other EU countries. Group actions have also been actualized in one more case (cf. *Falck Security supra)* in connection with the 1998 Swedish Personal Data Act, which made the creation of databases containing personal information a criminal and tortious offense under certain circumstances. The case involved a database containing personal information about more than 1,000 people, including

their race, ethnicity, political and religious convictions, sexual orientation, etc. In both cases, the plaintiffs claimed damages of 25,000 Swedish kronor per person in the group (a common amount in the context). Internet file-sharing is the bone of contention in two other disputes that have garnered media attention; the parties have settled in one case. Environmental cases related to road construction (the E18 motorway in Danderyd and the "Northern Link" to the E4 motorway north of Stockholm) are two further examples where a court trial prosecuted as a group action may be actualized. *Hall Prison*, the construction company *Skanska,* and a branch bank (*Sparbanken in Karlshamn*), *Swedish State Railways*, a travel agency named *Swede Travels,* and the *Danish Police* (!) have also been mentioned as potential defendants in future group actions.

"Group Actions" at the Public Complaints Board

The Consumer Ombudsman (and consumer or wage-earner organizations) has been able to bring "group actions" via the Public Complaints Board (PCB) for more than ten years This is a significant factor when assessing the need for legal protection of group claims and the kinds of companies, etc., that may appear as defendants. This route is open to what have been loosely called public group actions and organization actions, but not private group actions. The law that governs the option uses the term "group action," but I must emphasize that these proceedings are *not* group actions in the sense used in this report, i.e., litigation in court. The PCB is not a court; it is a state agency where a board made up of representatives of business and consumer interests assess consumer complaints. The board is chaired by a jurist employed by the state. The board's decisions are recommendations only, and are not legally binding (no res judicata effect) or executable. But most companies comply with the decisions because the defendants otherwise risk ending up on the "black list" or suffering other negative publicity.

So far, only "group actions" initiated by the Consumer Ombudsman has been carried out at the PCB. The CO takes the initiative in some such group actions. In other cases when the PCB has received several private individual complaints against the same business operator the board may ask the CO if she wants to bring a "group action" in the matter so that a group of consumers can be covered by a single decision. As of 2002, four group action cases had been dismissed (two at the CO's request) and ten cases had gone all the way to a decision. In all ten, the decision was in the CO's favor. The defendants voluntarily complied with the PCB's

decision in seven of the ten cases. The defendants in two other cases had gone bankrupt. One defendant chose to litigate in general court and won the case. Two additional cases have been brought since then, of which the CO won one, but lost the other (see below).

The CO has initiated "group actions" against the following companies (the information is not complete in all instances): *Fordonia Förvaltning (a car leasing firm; twice), Skandinaviska Dataskolan (a computer training school), Pool Resor (a travel agency), Västindienspecialisten et. al (a travel agency; the name has since been changed to Östermalms Resebyrå AB), Hyllinge Buss & Resetjänst AB (a charter bus travel agency), Sydsvenska Dagbladet (a daily newspaper), Måleri & Byggentreprenad i Liljeholmen AB (a painting and construction firm)* as well as *Naso-National Air & Space Outlet Sweden (not a national agency, but a mail-order company), Telia Nära AB (a phone company), Storstockholms Lokaltrafik (the public transportation agency of the City of Stockholm)* and *PFK Fondkommission AB (a stockbrokerage).* Since 2002, the CO has lost a case against *Tele2 (a phone company)* concerning calling minutes and won a case against *Kraftkommission AB* regarding failure to supply electricity as agreed under fixed price contracts. In the latter case, the CO considered initiating a public group action under the Group Proceedings Act in a general court, but chose the PCB option, most likely to avoid the notice and opt-in requirements imposed by the Act. The CO also believed it would be easier to gain acceptance of standardized calculations of damages at the PCB than in a general court. When Kraftkommission refused to comply with the PCB's decision, the CO brought a public group action in the Umeå District Court; see *Kraftkommission supra*.

3 The Scandinavian Experience – Summary and Conclusions

Group litigation in the form of public and organization actions – but not private group actions – has existed for a long time in Sweden, but only in the Labor Court and the Market Court, and claims for damages for individual group members were not permitted.[15] A radical new order emerged when rules on group actions took effect in 2003 (Sweden), 2007 (Finland) and 2008 (Denmark and Norway).

[15] See also the preceding section on "group actions" at the Public Complaints Board regarding consumer issues. Note that the Public Complaints Board is not a court.

The Swedish Act on Group Proceedings covers group actions in general courts and its use is not restricted to any particular areas of law. All three forms of group action – private, public, and organization – are permitted. Plaintiffs can petition for injunctive relief (such as prohibitions and changes) and for declaratory judgments. But group actions are also allowed in connection with claims for damages and other forms of individual compensation to group members. Group members are not parties to the action and customarily do not appear at trial. They bear no liability for trial costs, but the judgment applies both for and against them as if they had been parties. However, they may intervene in the proceedings and appeal the judgment, in which case they are treated as parties.

The Swedish Group Proceedings Act may be seen as the initial breakthrough of a full-scale law on group actions in a civil law system.[16] Similar but not identical rules took effect in Denmark and Norway on January 1, 2008. The Consumer Ombudsman in Finland recently (October 2007) was granted the possibility to litigate claims in a limited form of public group action. While the Scandinavian countries are in the forefront, reforms are in progress in many other countries.[17]

The Swedish rules are similar in several ways to equivalent statutes in e.g. American, Canadian, and Australian law, with regard to things like the special conditions for permitting group actions and that both winning and losing judgments have legal force on everyone in the group.[18] But there are also key differences compared to customary rules in the other legal systems.

The Swedish law is based on a mandatory opt in procedure. The Danish and Norwegian rules allow the possibility of using the system with automatic group affiliation coupled with the right to opt out in certain cases. In Sweden, the court sends out notices to group members that an action has been commenced. The court then compiles a list of group members who opt in. The costs for all of this, and for subsequent notices concerning e.g. settlement agreements, are (in Sweden) paid for by the public (the court), not the parties. Notifications to members of the

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16 I refer here to the fact that actions can be litigated in all types of cases in the general courts, that all three types of group action are permitted, that claims for damages for group members may be brought, and that group members are bound by the judgment, win or lose.

17 Re group actions in consumer law on the European level, see *Final Report*, chapter 5.

18 For an excellent comparative study of class actions in common law legal systems, but also a few opinions on e.g. the Swedish system, see R. Mulheron, *The Class Action in Common Law Legal Systems*, 2004. See also Basedow et al. (see References below). See also reports from about 30 countries on http://w.w.w.globalclassactions.stanford.edu, 2008.

group in accordance with the Act shall be made in the manner considered appropriate by the court. The court may (see section 50) order a party – the plaintiff as well as the defendant – to attend to a notification, provided this has significant advantages for the processing. The party is in such a case entitled to compensation (in advance) from public funds for expenses.

Pretrial discovery *strictu sensu* does not exist in Swedish courts. Hence, it is often hard for the plaintiff to define the members of the group.

The rules on standing are very liberal, particularly for organization actions.

Another difference compared to US class actions is that under Scandinavian law, the losing party (but never the members of the group) is customarily liable to pay the opponent's litigation costs, including attorney's fees.[19] This also applies to group actions. In Sweden "risk agreements" regarding attorney's fees are allowed; agreements on conditional fees may be approved by the court, but classic contingent fee agreements are not permitted. Safety for the defendants costs is required from the plaintiff (and to a limited degree from the group members) in some cases in Denmark and Norway but not in Sweden.

In Sweden there is normally no special ruling on "certification" required to prosecute a group action. In Denmark and Norway a special ruling is required. Under Swedish law, motions to dismiss the group action on the grounds that the conditions for a group action have not been met are handled the same way as other motions to dismiss an action without trying it on the merits in ordinary individual trials according to the Swedish Code of Judicial Procedure. The conditions must be observed by the court ex officio. If the court finds that the conditions for initiating a group action have not been met, the group action is dismissed and the plaintiff may appeal to a higher court. But if the court believes the defendant's motion is groundless, the judge determines in each case whether a special written decision should be handed down regarding the motion. If a special decision is handed down denying the motion to dismiss, the court decides whether the decision may be appealed separately or only in conjunction with appeal of the final judgment.

[19] But see section 1.3 re small claims.

The Swedish Group Proceedings Act was the fruit of a comprehensive legislative process. Most referral bodies were in favor of the law, but the bill was the subject of heated debate, intense criticism, and hard lobbying, particularly by representatives of corporate Sweden, before an amended version was passed by the Riksdag. The Social Democratic Party was then in power. The same situation occurred in Norway and, to some extent, in Denmark. All parties represented in the Swedish Riksdag except the biggest conservative party ("Moderaterna", which is currently in power along with three other center-right parties), voted for the final bill.

The criticism of the Act before it was passed in Sweden can, perhaps somewhat trenchantly, be summarized in the following partially contradictory arguments:

1. There is no need for a law on group actions; the result will be either needless litigation or none at all. Difficulty funding litigation will prevent private group actions ("no need, no funding, no impact").
2. A law on group actions will drown the court in needless litigation to the detriment of the judicial system's other business and with tremendous costs to the public purse ("the floodgate argument").
3. There is potential harm to group members: they could, unawares, be deprived of the option to take independent legal action; it is also constitutionally unacceptable that judgments in group actions will be binding on group members ("constitutionality").
4. The business and investment climate in Sweden will suffer as a consequence of "legal blackmail," frivolous lawsuits, and a tarnished reputation among foreign investors ("legal blackmail, less domestic and foreign business investment").
5. Traditional, individualist Swedish tort law may be undermined by demands for simplification of rules on causation and greater use of standardized calculations and radical damages awards to group members ("distorted tort law");
6. Sweden should not lead the way and be the first country in Europe to enact comprehensive legislation on group actions. The matter should be studied and resolved jointly within the framework of the EU ("the Union card").

My comments on these bogeys follow – in reverse order – from the perspective of procedural common sense and lessons learnt since the new law took effect.

Playing the Union Card!

The technique of “playing the (European) Union card” is aimed at making sure no country in the EU – and certainly not Sweden – should be the first to institute a reform. Countries should preferably refrain altogether or at least wait until all (currently) 27 States of the Union can agree on common rules. This is a stratagem of exploiting European cooperation as an alibi for

Constitutionality?

Arguments that group actions are unconstitutional have been made in debates about class actions all over the world, but have lacked even the force to stop most countries from permitting *automatic* group affiliation, supplemented with the right to opt out. In Sweden, we should be able to put the argument to rest now that the Riksdag decided to require group members, without exception, to opt in explicitly and in writing, to be covered by the action. Group members are also protected by their capacity to intervene in actions and appeal judgments and decisions. The Group Proceedings Act also imposes special requirements on the plaintiff and plaintiff's counsel, notice to group members is required in several cases, the court must actively manage the proceedings, and risk agreements and settlements are subject to court approval.

A floodgate?

Twelve group actions in five years is not a flood. Group actions improve the cost-effectiveness of litigation in certain cases, e.g., if repeated litigation can be avoided or settlements can be reached. As well, the rules on group actions certainly have considerable preventive effects**,** including the reduction of case inflow. Thus, it is unlikely that the workload or resource consumption has increased in Swedish courts (even though the court manages and pays for notices to group members according to the main rule in Section 50).

No need, no impact, no funding?

Twelve group actions to date. The flow of cases has been smaller than many people expected and others feared. The figure should be viewed in light of the fact that public and organization group actions have yet to "take off." On the other hand, eleven *private* group actions is a surprisingly high number (see 3.5.2). The number is even greater than certain foreign experts forecast on the basis of the weak financial incentives and substantial cost risks involved in group actions in systems like the Swedish one.[20]

In some respects, it is too soon to draw any far-reaching conclusions from case law only five years after the new law took effect. This is particularly true with regard to a voluntary procedural complement to ordinary litigation, and not to general rules that parties and courts must always follow. It takes time before procedural reforms gain their full impact. Lessons

[20] See e.g. Weinstein p. 837.

learnt in other countries also show that group actions are usually few in number in the initial years, but become more common with time.

Other reasons the total number of actions so far has been lower than expected are the retreats designed to keep a lid on litigation that occurred towards the end of the legislative process and the strong antipathy that still exists in some quarters. There are deterrents both inside and outside the regulatory system. Of particular significance here is the plaintiff's cost liability – which also applies to public and organization actions – the absence of state funds that support litigation, the absolute opt-in requirement, the lack of pretrial discovery, the lack of a post-trial calculation mechanism and standardized computation of damages (which would be useful in *Kraftkommission*, for instance), the negative attitude among insurance companies, and the negative stance of certain members of the Swedish Bar Association (most likely dominated by defense lawyers in this legislative matter), as well as the general problems – primarily slowness, costs, and lack of expertise – which make it hard for even ordinary litigation to compete against arbitration and other forms of alternative dispute resolution in a free market.

But even if we are dealing with "only" twelve commenced (and probably many more planned) group actions, a great many Swedish citizens have been directly affected, considerably more than the number who typically appear as plaintiffs in ordinary civil litigation in a Swedish court during an equivalent period. A single successful group action can have considerable *reparative* impact and the mechanism inarguably improves access to justice in Swedish society. I have been told many times that the alternative to group action in several relevant cases would have been no action at all.[21] In addition, we can be sure potential defendants will often make amends voluntarily and compensate potential group members as soon as it appears the group claiming damages is standing on solid ground in substantive law and intends to take advantage of the new procedural avenue, if necessary.

Furthermore, perhaps the most important function of group actions – especially concerning individually non-recoverable claims – is *preventive*, i.e. behavior modification. Hopefully, the very existence of the law will curb potential defendants' impulses to commit unlawful acts and promote voluntary settlements when they have. As with an effective military defense, the

[21] See Hensler, p. 467 f., Watson, p. 269 et.seq. and Bratt & Harling p. 30 et.seq.

functional paradox of civil litigation is that the mechanism most perfectly serves its purpose when it does not have to be used. Citizens must be persuaded, either voluntarily or by the financial fear factor (deterrence/cost-internalization) to comply with laws and contracts through compliance or settlement, without the opponent having to litigate. But this is conditional upon realistic opportunities to take legal action in; we must have "real and equal" access to justice to the courts for group claims as well.

To a noteworthy extent, the Group Proceedings Act is already serving its two main purposes: access to justice and behavior modification. Avid media coverage of ongoing and planned trials is furthering that end. The same applies to the other aims of all civil litigation, including group actions. Judicial lawmaking and precedent-building, as well as political control,[22] will perhaps mainly appear in connection with public and organization actions brought by strong and established agencies and non-profit organizations. But *Vin-import* shows that private group actions may also be relevant in these contexts.

Surprisingly, private group actions, sometimes litigated or backed up by ad hoc organizations, have so far dominated the case statistics. This may in part be due to that group actions may also be a means to fulfill the "new" functions of civil procedure: to provide a forum for legal policy debate, and an arena for ethical/moral discourse. Incentives to sue in court are not always solely financial. Some group members (for instance in *Skandia*) have said in the media (and told me) that the sense of being wronged and disregarded by big business and public institutions or perceived immorality among the "high and mighty" were what made them want to go to court once there were realistic options for taking legal action in group contexts.

Naturally, many potential defendants would prefer it if disputes were never litigated. But if action is nevertheless taken, the knee-jerk response is to try and head off a group action, perhaps mainly due to the media coverage and equalization of strength between the parties to which this procedural mechanism often leads. But group actions also make defendants more secure, since the judgment is binding on every member of the group. Group actions reduce the risk of repeated litigation and strengthens protection against frivolous and unethical lawsuits.

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22 This refers to judicial review and judicial control of whether a national law is consistent with EC law.

For plaintiff attorneys, group actions with risk agreements provide avenues to new and interesting tasks, image enhancement, and particularly good income. Experiences abroad show that defense attorneys may also have a great deal to gain financially by this form of litigation. Accordingly, it is hard to explain on any rational grounds why some Swedish lawyers and insurance companies still seem undecided – or even directly opposed – to group actions. Several examples indicate that the choice between a group action and e.g. joinder of claims or test cases is for this reason being guided towards costlier, clumsier, and less efficient litigation than group actions, weakening the impact of reforms that are democratically decided and manifested in law. This applies not only to the Group Proceedings Act, but the rules of substantive law it is supposed to underpin as well.

So, is the Group Proceedings Act a hit or a flop? The answer is neither, and reviews probably vary according to the preference of the reviewer. But we should at least be able to agree that the feared adverse effects simply did not happen (see below). Instead, we are dealing with a significant theoretical and – despite or due to the cautious start – practical success in the area of legal protection for group claims. While we are certainly not witnesses to a procedural revolution – revolutions do not happen in the promised land of compromise – we have seen in Scandinavia typically Swedish cautiously reform-oriented developments that is worthy of a sequel under to the philosophy of gradual reform.

For there is absolutely reason to continue the discussion and start considering further reforms. The funding issue is in urgent need of a better solution; if the insurance companies shirk their responsibilities, the state should step in and take the legislative route to assuring the quality of legal insurance or else amend the law on public legal aid[23] and/or set up special funds to support a limited number of group actions. The introduction of a limited form of pretrial discovery should be discussed. We need to find out why organization and public group actions are so seldom used. Opportunities for simplified calculation and post-trial distribution of collective and individual damages should be considered. There may be reason to make group actions for damages to crime victims possible within the framework of the initial criminal trial. The actual wording of the law deserves review and a few amendments should be considered. Additional protective rules for defendants do not seem necessary. But rules on

[23] In Sweden, public legal aid cannot be granted when the plaintiff, as almost all Swedes, has got a private litigation insurance.

the opt-in system for group members should be supplemented with an opt-out alternative in actions involving minor claims, at least in public group actions. The special preconditions for group actions set in Section 8 of the Act should be better coordinated and perhaps augmented with a general clause on the appropriateness of group litigation in special cases or a separate rule on "manageability." We should also determine whether anything can be done to speed up decisions and appeals on motions to dismiss group actions, which currently can take several years. This is not acceptable and the problem cannot be only that it always takes time for case law to "settle in."

Certain preparations for possible reforms have already begun. As predicted when the law was passed, *the Swedish government decided in 2007 to appoint an official investigator to evaluate the Group Proceedings Act and report the lessons learnt from the first five years of its application*. The investigator was asked to determine whether the aims that were the basis for introducing the Group Proceedings Act – primarily improved behavior modification (prevention) and access to justice – have been met. In parallel, she should also assess whether the provisions included especially to protect the interests of defendants could be deemed useful and appropriate. The investigator was also asked to study the impact on small business and other business of introducing group litigation into the Swedish legal system, e.g., with regard to the risk of abuse feared by certain referral bodies before the law was passed.

From these perspectives, the investigator has been reviewing all group actions handled by the courts so far, even when the proceedings did not lead to judgment. She has also followed up settlements reached in such cases, tried to determine the extent to which threats of initiating a group action have been used to bring pressure to bear outside the courtroom, and formed an opinion of whether the business and investment climate in Sweden has been affected by the Group Proceedings Act. The investigator was asked to propose statutory amendments if she felt there was a need.

The investigator's report was made public in the middle of October 2008. Her main conclusions are that it is in many respects too early to express any reliable conclusions about the effectiveness of the Act. But according to the investigator, no information has emerged to suggest that the fears expressed on behalf of business were justified. Thus, the Act seems not to have been abused to force illegitimate out-of-court settlements (legal blackmail). Nor

according to the investigator has any evidence emerged that the Act has had adverse impact on the investment climate in Sweden. The Group Proceedings Act must, according to that presented in the report, be regarded as having improved the individual's access to the justice system. A number of group actions are in progress to pursue claims that, the investigator believes, the individual would otherwise most likely not have asserted. On that basis, the investigator believes the possibility of initiating group proceedings should be regarded as a positive addition to Swedish procedural law.

However, the investigator finds that the Act cannot be said to have fulfilled hopes with regard to efficiency. This applies especially to managing the special preconditions for instituting proceedings, whose assessment has proved relatively difficult and very time-consuming. On that basis, the investigator proposes certain changes to the wording of the Act and introduction of a certification procedure leading to an explicit decision ("certification") on whether or not the group action should be permitted. Unfortunately, the investigator does not propose any exceptions to the notification requirement – opt-in – for group members, but, unfortunately, does recommend that the plaintiff should normally issue notifications to group members that an action has been initiated, albeit with a right to reimbursement of costs from public funds. In the investigator's opinion, potential group members should also be required to provide more concrete information about their claims when they formally opt in than is currently required. The investigator also says that contingent fees for the plaintiff's attorney should be accepted to a somewhat greater extent than currently and that opportunities for state legal aid should be expanded in a couple of respects.

As a whole, I believe there is significant risk that the investigator's proposals are more likely to impair than to improve the capacity of the group action to serve its social purposes. Plaintiffs may be deterred from initiating actions, thus diminishing the scope for equal access to justice. The same applies to behaviour modification, normative control and legal development, as well as opportunities to use the courts as an arena for legal policy reform and a forum for moral discourse. And the efficiency gains the investigator expects with regard to time and costs may very well metamorphose into their opposites. With inordinate concern for generally affluent defendants and the overburdened courts, the proposals are far too apt to work to the detriment of plaintiffs and group members – consumers, victims of environmental destruction, targets of discrimination, etc.

The investigator's recommendations are currently in circulation for comment by relevant bodies.

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