

## Introduction of a Nordic Class Action Institute

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*In view of the intense debate in several European countries concerning the introduction of class actions, one would think that class actions are a fairly new concept in Europe and the result of recent influence from the United States. But nothing could be further from the truth: class actions in Europe date back to 12<sup>th</sup>-century England. Most of the early cases reported centre around religious issues or the crown's collection of taxes and show remarkable similarities to modern consumer class actions.<sup>1</sup>*

### Introduction

Mass tort claims like those in the United States are still unknown in Europe. The recent passage of laws permitting class actions in Sweden and Norway have triggered fears that it is only a matter of time before the region sees a dramatic rise in class actions. To understand the evolution of such laws and how far they may go, we will first examine class action laws and proposals in the Nordic region and then compare the Nordic class action systems with that of the United States. Finally, we will offer some conclusions on whether or not the Nordic countries will experience increasingly aggressive group litigation on a similar scale to the United States.

Class actions are used for court actions in which one plaintiff litigates on behalf of a passive group of class members who, although not parties to the proceedings, will be bound by the court's decision. However, class actions do not include situations known as consolidation (the combination of proceedings or individual issues in disputes) — these are present in a number of variations in existing laws in the four Nordic countries. Unlike a class action, in a consolidation each plaintiff is still actively involved in the proceedings.

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### **Class actions in Sweden**

The Swedish Group Proceedings Act, which took effect on 1 January 2003 and makes class actions possible, was created after intense debate over nearly ten years. More than 60 official and private entities were heard on the draft leading to the Act and, not surprisingly, reactions varied from strong support from consumer and environmental groups to opposition by the business community.

The Act introduced group actions for civil suits at both the common courts and special environmental courts. Group actions are not allowed in criminal cases, public administrative law disputes and labour law disputes (the last are handled in a collective action system in accordance with the Labour Law Dispute Act).

#### **Types of group actions**

Three different types of class actions are allowed under the Act:

- **Private or individual group actions**

This type of action is brought by individuals (natural persons and legal entities) in disputes that contain identical or similar facts.

- **Organisational class actions**

Organisations are allowed to bring class actions on behalf of others (without having a claim on their own).

Organisational class actions are restricted to two areas of law: consumer and environmental law. Within consumer law, organisational class actions are open to all non-profit organisations as long as the dispute is between consumers and providers of goods or services.

In environmental law, organisations which may bring lawsuits are restricted to certain non-profit associations dedicated to conservation and environmental protection or professional federations in the fishing, farming, reindeer and forestry industries.

- **Public or state group actions**

The law provides for public class actions in which an authority appointed by the government may act as plaintiff and litigate on behalf of a group of class members.

Group actions are only allowed as plaintiff actions, ie plaintiffs may define a group and sue one defendant, but it is not possible to sue a group of defendants in one action.

#### **Court approval**

A group action is not intended to serve as a substitute for traditional two-party litigation, and must be approved by the court as a class action.

For a class action to be permitted, the following conditions must be met:

- A group must be adequately defined with regards to the circumstances of the case. There are no minimum requirements as to the number of group members.
- One or more facts or questions of law must be common or similar to the entire class. Some facts can be specific for some members and common facts need not outnumber individual facts. A decision to allow a class action will be based on the quality of the common facts rather than on quantity.
- The group action should be the best available procedural alternative (typically compared to consolidation or a pilot case).
- The group representative must be a suitable representative of the group, ie must have the financial means to pursue the case (see section on legal costs below) and have no personal interest that conflicts with the group's interests. The group representative must be represented in court by an attorney, unless waived by the court. The court will hear group members prior to approving the group representative.

### **Definition of the group**

There are two ways to define the group in a class action:

- “Opt-in” — These class actions require the registration of class members. Only class members who have given written notice to the court and have thus chosen to opt in will be allowed to participate in the proceedings.
- “Opt-out” — These class actions do not require registration of class members. Members will automatically be included unless they inform the court that they do not want to be included in the group action.

The Swedish Act is based on the “opt-in” solution. The original proposal included “opt-out” for some group actions, but was changed due to questions of its constitutionality.

The court will usually inform possible group members based on the details provided by the plaintiff in a writ of summons. In principle, the representative needs to inform the court of the names and addresses of the group members, but depending on the nature of the class action the court can lower the thresholds. For example, it could be sufficient to define the group in the suit as “all buyers of energy from company ABC”.

The court can decide that the plaintiff or the defendant – not the court – should inform group members and bear the costs involved, which could be substantial in the case of large groups. In most cases, the court will inform group members. In this respect, the Swedish Act favours the plaintiff more so than in the United States, where class actions can be stopped when the plaintiff cannot afford these upfront costs.<sup>2</sup>

Group members are free to withdraw from the class action at any time, even with a pending settlement. When a case is settled, class members are bound by the ruling but may still appeal on an individual basis.

### **Settlements**

The authority of the group representative to act on behalf of the group is largely procedural, however the group representative may settle the case for all or part of the group. The settlement is binding for group members, however, only on order from the court.

Judgments in class actions are subject to appeal to the same extent as decisions in normal legal proceedings. The decision can be appealed by the group representative or by any group member. If the court rules that the conditions for a class action have not been met, an appeal can be treated as an individual case.

### **Legal costs**

According to the procedural code, the losing party is required to pay the legal costs of the winning party (“loser pays” principle).

In a group action, the group representative acts as the plaintiff. In this capacity, he or she will be entitled to compensation from the defendant, but risks having to pay the defendant’s legal costs in addition to his/her own legal costs if he/she loses. The group representative alone is responsible for legal costs; class members have none to bear.

The Swedish Group Proceedings Act introduces contingency or risk agreements into law. The Act allows the group representative and their legal representative to agree that the legal fee is contingent upon a successful outcome of the class action suit. The fee cannot be linked to the size of the award but must be based on an hourly rate. A risk agreement must be approved by the court.

### **Experience**

Despite fears that allowing class actions would trigger a sharp rise in cases and politicise the process, the use of class actions appears to be modest. According to law professor Per Henrik Lindblom,<sup>3</sup> only eight class actions have been filed in the first three years since the Act

was introduced.<sup>4</sup> Seven of these are private group actions and one is a public group action filed by the Swedish Consumer Ombudsman. At the time of writing, none of these group actions had led to a final judgment.<sup>5</sup> In addition, the grounds for several of the group actions are still being investigated.

### **Class actions in Norway** <sup>6</sup>

The Norwegian parliament decided on a new article on class actions on 6 June 2005. The Act is expected to take effect in 2007. The Norwegian Group Proceedings Act is similar to the Swedish class action law, but also contains the following differences.

#### **Types of group actions**

The same types of group actions are allowed as in Sweden. Organisational class actions, however, are not restricted to consumer and environmental law. Further, a class action for public entities may be brought only if the legally defined scope for the entity concerns individuals, such as the Norwegian Consumer Council.

Unlike Swedish law, group proceedings may also be used to sue a group of defendants if one or more common facts apply.

#### **Definition of the group**

The Norwegian class action act allows for both “opt-in” and “opt-out” as dictated by the court. Upon its approval, the court will also ensure that notice of the class action is given to those who qualify to join it, as well as those who are already included in the action but have not registered with the court.

Opt-in is thought to be the majority rule — opt-out is only possible in cases in which individual claims involve amounts or interests too small to be raised as individual actions, such as disputes over financial, telecom, and transportation services, power and water supply, and newspaper subscriptions.

#### **Settlements**

Unlike Sweden, the Norwegian court does not need to approve settlements unless the group has been defined through opt-out.

#### **Legal costs**

In most cases, the “loser pays” principle applies in Norway, with the group representative serving as the plaintiff and being responsible for paying the legal costs of the proceedings.

Unlike Sweden, however, the group representative is entitled to compensation of his/her legal costs from registered group members. To protect group members, the court decides on the maximum legal costs for each registered member. In opt-out proceedings, the group representative is not entitled to compensation for any of his/her legal costs from group members.

In cases in which the group representative is successful but the defendant is unable to pay legal costs, the group representative is entitled to a share of the indemnity amount up front.

### **Class actions in Denmark** <sup>7</sup>

In December 2005, a working group set up by the Danish Ministry of Justice submitted a proposal on group actions that was sent to a number of interest groups for comments. The draft proposal does not differ substantially from the Swedish law and the Norwegian laws and covers most civil suits.

Highlights from the Danish proposal include:

- Three different types of group actions are suggested: private, organisational and public group actions. (The last is only possible if the public agency/entity by law is mandated to act as group representative. The proposal suggests that the Consumer Ombudsman is given this legal mandate.)

- The court must approve the group action and nominate the group representative. In private group actions the court may require that the group representative retain legal counsel.
- Group actions are initiated by lodging a writ of summons at the court registry. The group members must be identified so that they may be informed about the group action, even for opt-out actions.
- As with the Norwegian proposal, both opt-in and opt-out group actions are suggested. Opt-out will be available only for public group actions, and only if the court approves such actions.
- The “loser pays” principle applies. The court may ask the group representative for a letter of credit to secure the payment of legal costs if the group representative loses. If the group representative is unable or unwilling to comply, the group action will be dismissed. The court may also request a letter of credit from each group member, as the group representative is entitled to compensation of his/her legal costs within a limit pre-determined by the court. The letter of credit must cover the maximum amount allowable.

### **Class actions in Finland** <sup>8</sup>

Two attempts to introduce class action laws in Finland have been unsuccessful despite considerable debate throughout the 1990s.

On 1 April 2005, a working group set up by the Finnish Ministry of Justice submitted a report on the positive and negative aspects of introducing class action in Finnish law but made no recommendations. Discussions have continued throughout 2006.

### **Comparison between the Nordic legal procedural systems and the US system** <sup>9</sup>

The Nordic class action systems are more limited in scope, as opt-in will be the primary plan and the only one allowed in Sweden. This is a fundamental difference to the American system and is expected to prevent most “coupon class actions”<sup>10</sup> like those seen in the United States.

Just as important, there are fundamental differences between the Nordic civil procedural and compensation systems and the US system — differences that traditionally place the Nordic peoples among the less litigious compared with other developed countries.

#### • ***The cost issue and the role of lawyers***

All four Nordic court systems are based on the “loser pays” system and the court decides legal costs. In exceptional cases, the court may also rule that both parties bear their own costs.

Even though legal costs are quite moderate within the Nordic area compared to the United States, the risk of having to bear the cost if one loses prevents most people from defending their right in court if the monetary value is limited. Further, the Nordic systems limit legal blackmail or junk lawsuits that are more common in the United States.

In some cases, plaintiffs will have access to legal aid insurance, though insurers may decide to limit or restrict legal aid insurance for group actions — a position that has been criticised by those in favour of class action system reform.<sup>11</sup>

Another key difference are contingency fees, which are not allowed in any of the four Nordic countries except for Sweden, and then only in rare cases and when approved by the court.

In recent years, some law firms specialising in compensation have begun adver-

tising for clients; however, US-style “ambulance chasing” is generally avoided. Lawyers play a much less aggressive role within the Nordic tort systems than in the United States, where some plaintiff attorneys actually initiate class actions.

- **Pre-trial discovery**

The Nordic legal systems operate within strict guidelines regarding the writ of summons. Pre-trial discovery is rare — a writ of summons will be dismissed unless it contains details of the claim as well as submissions and evidence. Normally, the summons cannot be changed during the trial. Expert witnesses are also typically used only when the court allows it.

- **Damages**

In the Nordic countries, a claimant can only be compensated for the actual loss. There are no punitive damages. As a consequence, there is far less incentive to sue than in the United States.

- **Juries**

Civil cases are tried before a judge and not a jury. Lay judges and juries are typically used only in criminal cases.

### Conclusion

It seems that class actions constitute a natural development of the Nordic legal systems. They have been introduced to support suits that would probably not make it to court as single suits due to the limited monetary effect for each individual. This seems to be supported by the few known cases in Sweden.

Despite some basic similarities with the US class action system, fundamental differences between the procedural and compensation systems mean there is no need to fear the mass tort class actions and legal blackmail that occur in the United States. Swedish experience, although still limited, seems to support this view.

Insurers and reinsurers must nevertheless follow this development carefully in order to establish a pricing component to pay for losses that were not contemplated when the policy was originally issued. Experience in Sweden seems to suggest that the overall pricing component is still limited, but some parts of the industry and some organisations as well as some insurance products such as directors and officers liability, professional liability for financial institutions, and products liability for consumer-oriented products seem to be more exposed than others.

### Notes

- <sup>1</sup> See Susan T. Spence “Looking Back ... In a Collective Way.” American Bar Association. Volume 11, number 6, July/August 2002. <http://www.abanet.org/buslaw/blt/2002-07-08/spence.html>.
- <sup>2</sup> Per Henrik Lindblom. Svensk Juristtidning (SvJT) 2005.
- <sup>3</sup> Per Henrik Lindblom. Nordisk Forsikrings Tidsskrift (NFT) 2, 2005, SvJT 2005 and written correspondence with Per Henrik Lindblom, March 2006.
- <sup>4</sup> Please refer to Appendix 1 for a short description of these eight cases.
- <sup>5</sup> The fact that none of the group actions has led to a final verdict is not that different from the experience in Ontario, where only two out of 200 cases are reported to have led to a final decision.
- <sup>6</sup> Andrew Bingham in Lovells’ “European product liability review.” Issue 9. December 2002.
- <sup>7</sup> Betänkning (proposal) no 1468/2005.
- <sup>8</sup> Lovells’ “European product liability review.” Issue 19. June 2005.
- <sup>9</sup> For more information on class actions in the United States see also “The Class Action Fairness Act of 2005” and “Understanding Class Actions in the United States”.
- <sup>10</sup> In cases yielding a coupon settlement, the coupon provides the class member with a discount toward the purchase of a new product made or sold by the defendant.
- <sup>11</sup> Per Henrik Lindblom. NFT 2, 2005. For a defence see Anders Beskow and Mats Homerson + Mats Ericsson in NFT 3, 2005.

**Appendix 1**

<b>Class action experience in Sweden</b>	
Kefalas	Private group action involving 500 people against the travel agency Eleferios Kefalas following the collapse of Aer Olympic. Travellers are seeking compensation for unused tickets and compensation tickets bought.
Dataregister I	A listed Swedish security company kept computer files of their arrests of graffiti hooligans. The registration was found to be in breach of the Swedish Data Protection Act. 11 individuals have claimed some EUR 3 000 each but the register contained information on 658 people.
Skandia Liv	Probably the best known case so far. Approximately 16 000 policyholders sued the life insurance company Skandia Liv in connection with the sale of the capital company SAM to a Norwegian bank in 2002. The group action has been withdrawn since Skandia Liv agreed to initiate a survey and negotiations if the survey finds that the policyholders should be compensated. The case potentially involves EUR 400 000 000 in compensation.
Aftonbladet	During the European football championships in 2004 the newspaper Aftonbladet offered a game on their Internet page for a fee. Due to IT problems the game was closed for a couple of days. Seven people sued for compensation of EUR 20 each. The court appears to have declined the group action due to an incomplete writ of summons.
Kraftkommissionen	Public class action against Kraftkommissionen AB — a utility company — for non-delivery of electricity for a pre-agreed price. A court decision to allow the class action has been appealed against by Kraftkommissionen. The group consists of 700 people, each seeking compensation between EUR 100 and EUR 1 000.
NCC	Swedish construction company NCC has been sued in a private group action by 35 property owners on the basis that a pleasure craft harbour was not what was promised in a building prospectus.
Spritimporten	Private group action brought by 350 people against the Swedish state, claiming that confiscation of liquor bought on the Internet is against EU legislation.
TeliaSonera	Private group action based on over-billings against telecoms company TeliaSonera.

**Appendix 2: See next side →**

Class action systems in Nordic countries		
	Sweden	Denmark
	Group Proceedings Act in effect since 1 January 2003	In December 2005 a working group submitted a proposal on group actions that was sent to a number of interest groups for comments.
Types of group actions	<ul style="list-style-type: none"> <li>Private or individual group actions</li> <li>Organisational class actions</li> <li>Public or state group actions</li> </ul> Only plaintiff actions allowed	= Sweden
Court approval	Class action has to be approved by the court, conditions: <ul style="list-style-type: none"> <li>Adequately defined group</li> <li>One or more facts or questions of law must be common or similar to the entire class</li> <li>Group action should be the best available procedural alternative</li> <li>Group representative must be approved by the court</li> </ul>	= Norway
Definition of group	<ul style="list-style-type: none"> <li>Opt-in solution</li> <li>No minimum requirement as to number of group members</li> </ul> Group members are free to withdraw from the class action at any point in time before the court has decided on the case	= Norway, but opt-out only possible in public group actions, initiated by groups that are legally mandated
Withdrawal		= Sweden
Group representative	<ul style="list-style-type: none"> <li>Must be a suitable representative of the group, must be member of group in private action</li> <li>Must have the financial means to pursue the case</li> <li>Needs to be represented in court by a lawyer in private actions unless the court approves otherwise</li> <li>Before approving the group representative the court will hear group members</li> </ul>	= Sweden
Settlements	<ul style="list-style-type: none"> <li>Representative is allowed to settle the case on behalf of the entire group or part of the group</li> <li>Settlement is binding for group members only on order from the court</li> </ul>	= Sweden
Legal costs	"Loser pays" principle <ul style="list-style-type: none"> <li>Group representative is the plaintiff, entitled to compensation from the defendant, but also bearing the risk to pay the defendant's legal cost</li> <li>Group representative is entitled to have costs compensated from the indemnity amount won</li> <li>Law introduces contingency or risk agreements</li> </ul>	<ul style="list-style-type: none"> <li>= Norway, except that there is no pre-payment of costs; court can ask the group representative as well as group members for a letter of credit to guarantee the payment</li> </ul>