

The ANNALS of the American Academy of Political and Social Science

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The ANNALS of the American Academy of Political and Social Science 2009; 622; 346
DOI: 10.1177/0002716208330190

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QUICK READ SYNOPSIS

The Globalization of Class Actions

Special Editors: DEBORAH R. HENSLER,
Stanford Law School

CHRISTOPHER HODGES,
and

MAGDALENA TULIBACKA
Oxford University

Volume 622, March 2009

Prepared by Herb Fayer, Jerry Lee Foundation

DOI: 10.1177/0002716208330190

The Globalization of Class Actions: An Overview

Deborah R. Hensler, Stanford Law School

Background

Around the world, individuals, nongovernmental organizations (NGOs), and public officials are turning to courts for remedies for mass harms including

- mass injuries caused by defective products or environmental exposure to toxic chemicals;
- mass financial losses resulting from violations of antitrust (anticompetition) law; and
- securities law, consumer protection statutes, and historical and contemporary civil rights and human rights abuses.

NOTE: The rise of an entrepreneurial plaintiff's bar provided the engine to power class actions for money damages and a media-centric mass culture created an environment in which such litigation could flourish.

Group Litigation

By agreeing to represent many individuals in separate lawsuits and then bundling those lawsuits during the pretrial development process and during settlement negotiations, attorneys are able to achieve huge economies of scale.

- Consolidation of claims also opens the doors to vast numbers of claims of questionable or of small value seeking a free (or at least inexpensive) ride to the settlement fund.
- As a consequence, aggregate litigation is likely to settle for a substantially larger amount of money.

- Stanford Conference* In December 2007, Stanford Law School and the Oxford Centre for Socio-Legal Studies, with support from the American Academy of Political and Social Science, organized an international conference on the worldwide spread of class actions and group litigation procedures.
- The long-term goal was to initiate an empirical research project directed at assembling and disseminating descriptive information about the evolution of class actions and aggregate litigation worldwide.
 - The country reports in this volume of *The Annals* are the first products of this long-term empirical project.
- Opt In versus Opt Out* Allowing one or a few parties to come forward and act on behalf of many others who are absent from court is an exceptional practice for most modern legal systems. The possibility that absent parties will lose rights or be bound to accept unsatisfactory remedies drives the need for an opt-in/opt-out system.
- To opt out, class members must be notified that litigation is going forward and have an opportunity to exclude themselves.
 - Those who opt out are free to litigate individually thereafter.
 - Only those who opt in will partake of any benefits of the class—or be barred from future litigation if defendants prevail.
- NOTE: To date, countries that provide for representative litigation by private actors have divided almost equally with regard to this issue.
- Funding* A critical issue for all private civil litigation is how to pay for the litigation.
- In the United States, each party is responsible for paying its own costs. The plaintiff does not incur any direct financial risk as a result of suing beyond paying its own lawyer's fees and expenses.
 - The situation outside the United States is different: losing parties must pay their opponents' fees, although often the amount they must pay is determined by the court and may be less than the actual costs.
- NOTE: Without changes in the funding regimes in most of the world, it would seem unlikely that many individuals would come forward to represent a class—especially in consumer cases, where individual losses typically are small—and unlikely also that many law firms would prosecute class litigation.
- Opposition and Tensions* U.S.-style class actions are vigorously opposed by business interests everywhere.
- Multinational corporations with experiences of defending themselves in U.S. courts are often the most vigorous opponents.
 - Consumer and investor advocates often argue strongly for opt-out class actions but propose other procedural features or rules as an antidote to what they see as the excesses of U.S. class action litigation.
 - Often, these class action proponents settle for opt-in actions or strict limits on the circumstances in which class actions may be prosecuted.
 - Business interests fear class actions because class action procedures tend to increase the frequency and breadth of litigation against them.
- Concluding Questions* It is not clear why so many diverse jurisdictions are turning to representative and aggregated litigation.
- Is this simply a practical response to an increase in mass harms, which is itself a by-product of economic globalization?

- Is it a response to the erosion of public regulation in an era of resurgent market capitalism?
- Does enthusiasm for private litigation reflect increased desire for decentralized decision making and dispersed power?
- Does this enthusiasm reflect instead the spread of entrepreneurial lawyering across borders, fed in part by the U.S. class action bar?
- Do jurisdictions feel competitive pressure to provide class action or aggregated litigation procedures so that lucrative litigation will not migrate to more attractive public or private venues elsewhere?

What Are People Trying to Do in Resolving Mass Issues, How Is It Going, and Where Are We Headed?

Christopher Hodges, Oxford University

Background

This article seeks to take an overview of some intriguing issues that emerge from the national reports regarding class actions and their solution to mass issues raised in courts.

- Since 2000, altered or even competing models of the U.S. legal model have begun to emerge.
- It is now clear that many jurisdictions have followed a distinctive representative action model, limited to enforcement of certain aspects of the consumer law that has been enacted since the 1960s.
- Although the U.S. model might deliver money transfer to consumers or investors, it involves huge cost, conflicts of interest between intermediaries and claimants, settlements that are unjust, and imposition of an unnecessary drag on the economy.
- Attempts have been made both to refine the U.S. model by introducing controls against abuse into the procedure and to consider alternative means of dealing with the underlying issues.

Underlying Issues

The underlying issues regarding controls against abuse are as follows:

- *Judicial economy*: A considerable literature has developed on justification for class actions in some countries.
- *Increasing access to justice*: Aggregating legal actions is a powerful means of increasing the throughput of the legal system.
- *Behavioral modification*: Class actions can impose pressures on behavior that are degrees of magnitude greater than individual actions.
- *Public and private enforcement*: In a system with limited emphasis on, or confidence in the effectiveness of, public regulation, class actions provide an important source of potential regulation.

Court Procedures

Advanced societies and economies need court procedures; the question is what sort of court procedures are appropriate.

- The sociopolitical role of access to courts in issues of wide concern is important in all societies.

- In cases of political stasis, the courts may be the safety valve through which the aggrieved challenge the status quo.
- The desire of judges to exercise revolutionary zeal can be expected to be less important in states with an effective democratic system for introducing legislative reform.

NOTE: These considerations should logically have some effect on the degree of openness and liberality of a system of aggregate litigation. How much of a safety valve is required, especially to react to new issues such as concerns related to social or sexual equality or environmental quality?

Difficulties in Procedures

Courts face difficulties when they have no extant procedure for dealing with mass problems that involve sociopolitical solutions.

- Where there is no formal aggregation procedure, legal systems have to be inventive with such traditional tools as they possess.
- It has been left to the courts to begin to evolve rules on these aspects over time, grappling with filling out some difficult and controversial aspects, assisted by a common law tradition and the courts' constitutional power to regulate their own process.

Encouraging Settlement

A notable feature of the current situation is renewed emphasis on producing an outcome by encouraging settlement.

- Settlement offers the advantages of speed and lower cost.

Funding

Students of civil litigation know that procedures require effective funding and balanced rules to operate; this is particularly true of collective procedures.

- Currently, rules on funding and costs remain mostly static. Other jurisdictions have not yet introduced features of the U.S. system such as contingency fees, no cost-shifting, or punitive damages.

The Future

Jurisdictions across the globe have no single model to apply toward mass disputes; rather, they are experimenting with different approaches.

- We can expect more tinkering with court-based mechanisms, whether to increase efficiency or control against abuse.
- Powerful changes are afoot in funding options for litigation in advanced economies that will give rise to issues of consumer fraud and a need for regulation. These changes may transform the landscape.
- We can expect continued interest in settlement, mediation, alternative dispute resolution (ADR), voluntary arrangements, compensation schemes, and so on.
- We can expect more cross-border issues to arise, given the global nature of trading and some corporations.

NOTE: Above all, there is a new debate about the goals of a system. Is the objective just compensation, or is it facilitating social and political change or economic competitiveness? Second, what options exist, how well does each work, and how might they be combined within an integrated system?