

**1. Have there been any important statutory or rule changes in your jurisdiction's class action or other group litigation procedure since 2010?**

On 1 January 2008, the Dispute Act of 2005 entered in into force.<sup>1</sup> This was also when the rules on class actions, which make up chapter 35 of the Dispute Act, were introduced as an option for Norwegian litigants. Thus far, none of the provisions concerning class actions have been subject to amendment or change. The legislation does not provide for a specific procedure for other existing forms of group litigation, such as the “Norwegian representative litigation” and pilot cases.<sup>2</sup> The procedural rules governing such lawsuits are therefore the same as for other civil proceedings, and have not been amended in any manner that affects the handling of claims that involve groups of similarly affected parties.

**2. Have there been any judicial decisions interpreting or re-interpreting the class action/group litigation law or rules in important ways?**

Since the rules on class actions were adopted, there have been several cases in Norwegian courts concerning the question of whether the lawsuit meets the requirements for class actions in chapter 35. Among the published decisions, the most frequently disputed question has been whether or not the lawsuit meets the requirement of similarity laid down in section 35-2 litra a).<sup>3</sup> This provision states the following:

“A class action can only be brought if several legal persons have claims or obligations whose factual or legal basis is identical or substantially similar.”

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<sup>1</sup> Lov 17. juni 2005 nr. 90 om mekling og rettergang i sivile tvister (tvisteloven).

<sup>2</sup> Camilla Bernt, *Class Actions, Group Litigation & Other Forms of Collective Litigation in the Norwegian Courts*, 2007, p. 3 and pp. 10-11.

<sup>3</sup> LB-2009-184874, LB-2012-164963, LB-2013-169072, LB-2017-34099, LG-2011-14894, LG-2013-138827 and HR-2010-393-U.

The court decisions have not led to any re-interpretations or interpretations of the provision that seem to differ from the viewpoints found in the preparatory works, but illustrate the difficulties with determining the extent of similarity between the claims. In 2010, the Appeals Selection Committee of the Supreme Court (*Høyesteretts ankeutvalg*) had to decide if a lawsuit initiated by 89 unit owners in a condominium could be approved as a class action.<sup>4</sup> The lawsuit was brought against the contractor *Selvaagbygg*, and the unit owners claimed that they were entitled to a price reduction and damages for loss caused by defective bathroom floors. While 37 of the unit owners had a contract directly with the contractor, the rest had bought the property at a later time from previous owners who had contracts with the contractor. The question therefore arose as to whether the claims had a substantially similar factual and legal basis. The Appeals Selection Committee agreed with the appeal court's decision to approve the class action. Even though only a minority of the unit owners had a contract directly with *Selvaagbygg*, the Norwegian Sale of Real Property Act<sup>5</sup> section 4-16 contains a subrogation rule which allows a buyer to enforce the seller's claims against a previous contracting party. The factual and legal basis for the claims was therefore considered to be substantially similar.

Although it can be difficult to assess if a lawsuit meets the requirement of similarity, the courts sometimes seem to solve this by dismissing the class action on the ground that class procedure is the most appropriate way of dealing with the claims, cf. section 35-2 litra c).<sup>6</sup> In cases of doubt, there have been examples where the court has started to consider if the claims have a substantially similar basis, but then decided to not conclude on the question.<sup>7</sup>

**3. Have there been any changes in substantive law rules or procedural rules that affect the use or potential rules of class actions/group litigation in important ways? We are thinking here particularly of funding and financing rules but also changes**

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<sup>4</sup> HR-2010-393-U.

<sup>5</sup> Lov 3. juli 1992 nr. 93 om avhending av fast eigedom (avhendingslova).

<sup>6</sup> Tore Schei, Arnfinn Bårdsen, Dag Bugge Norden, Christian Reusch and Toril M. Øie, *Tvisteloven kommentarutgave*, 2nd ed., 2013, p. 1267.

<sup>7</sup> Cf. especially LB-2013-169072.

**in substantive law that expand or limit access to the courts or to collective remedies.**

The ‘loser pays’ principle applies to class actions as well as other forms of group litigation.<sup>8</sup> Chapter 35 specifies how liability for costs is regulated in class action cases. It follows from section 35-12 and 35-14 that the class representative has a right and a duty in respect of the costs of the class action, but that class members in *opt-in* class actions are liable towards the class representative for these costs. The class members are not liable towards the class representative in *opt-out* class actions.<sup>9</sup>

These rules have not been changed, nor have any other procedural rules that affect the use of class actions or other forms of group litigation. To my knowledge, there have also not been any important changes in substantive law that expand or limit the access to the courts for any of the forms of collective litigation.

- 4. How many class actions (or other formal group litigation procedures) have been filed annually in the past several years, in what substantive legal areas? We would be very grateful if you could point us in the direction of any official statistics that are publicly available or connect us with any academics who have tabulated these data. If there are no official statistics we would welcome your best estimates.**

The statistics below are taken from the National Courts Administration (*Domstolsadministrasjonen*). These show the number of registered and decided cases concerning class actions in the district courts and the courts of appeal since 2008.<sup>10</sup> The Supreme Court has not yet issued rulings in class action cases, although the Appeals Selection Committee of the Supreme Court has considered if a lawsuit fulfils the requirements for

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<sup>8</sup> Ot.prp.nr.51 (2004-2005) p. 498.

<sup>9</sup> Tore Schei, Arnfinn Bårdsen, Dag Bugge Nordén, Christian Reusch and Toril M. Øie, *Tvisteloven kommentarutgave*, 2nd ed., 2013, p. 1297.

<sup>10</sup> Some authors have questioned whether the data (at least up until 2012) is completely correct, as some class actions appear to be missing, cf. Borgar Høgetveit Berg and Andreas Nordby, *Gruppesksmål – Tvistelova kapittel 35 med kommentarer*, Gyldendal Juridisk: Oslo, 2012, p. 18.

class actions in set out in chapter 35 and the general requirement of legal interest in section 1-3.<sup>11</sup>

The numbers show that most class actions were filed during the first years after class actions were introduced in Norwegian law. Some have stated that these numbers show that the rules on class actions have had a greater practical importance than was expected when chapter 35 was adopted.<sup>12</sup> However, there does appear to be a significant decrease in the number of filed cases in the most recent years.

#### **District courts**

<b>Year</b>	<b>Registered cases</b>	<b>Decided cases</b>
<b>2008</b>	<b>11</b>	<b>2</b>
<b>2009</b>	<b>12</b>	<b>16</b>
<b>2010</b>	<b>7</b>	<b>4</b>
<b>2011</b>	<b>13</b>	<b>13</b>
<b>2012</b>	<b>9</b>	<b>9</b>
<b>2013</b>	<b>2</b>	<b>5</b>
<b>2014</b>	<b>6</b>	<b>6</b>
<b>2015</b>	<b>6</b>	<b>4</b>
<b>2016</b>	<b>4</b>	<b>7</b>

#### **Courts of appeal**

<b>Year</b>	<b>Registered cases</b>	<b>Decided cases</b>
<b>2008</b>	<b>0</b>	<b>0</b>
<b>2009</b>	<b>1</b>	<b>0</b>
<b>2010</b>	<b>0</b>	<b>1</b>
<b>2011</b>	<b>1</b>	<b>0</b>
<b>2012</b>	<b>1</b>	<b>1</b>

<sup>11</sup> HR-2010-393-U and HR-2016-2406-U.

<sup>12</sup> Christian Reusch, 'Bokanmeldelse: Anne Robberstad: Sivilprosess' in *Tidsskrift for Rettsvitenskap*, 2010, vol. 123, p. 203.

<b>2013</b>	<b>0</b>	<b>1</b>
<b>2014</b>	<b>0</b>	<b>0</b>
<b>2015</b>	<b>0</b>	<b>0</b>
<b>2016</b>	<b>0</b>	<b>0</b>

A review of the published cases shows that most of the class actions have been brought against private parties, although some have been brought against the state as well. In *LB-2009-106980* the plaintiff brought a lawsuit against the state, claiming that a group of students had a right to have their student loans forgiven. This lawsuit was dismissed because class procedure was not considered the most appropriate way of dealing with the claims, cf. section 35-2 litra c). The class action was approved in *TOSLO-2009-204651-I*, which concerned the question of state liability for breaches of EEA law.

Most of the class actions that have been brought against private parties concern breaches of contractual obligations. Several of them have been dismissed.

In *LB-2009-137369* a class action was brought against two banks and a fund management group. The claim was that that some loan agreements and management agreements were invalid, and that the class members were entitled to damages for past financial loss and future financial loss. The lawsuit was dismissed because class procedure was not considered the most appropriate way of dealing with the claims, cf. section 35-2 litra c). The lawsuit was dismissed for the same reason in *LB-2012-164963*, where the plaintiff – a group consisting of 36 persons – filed a lawsuit claiming they were entitled to price reduction and damages for loss caused by a faulty construction of a parking facility.<sup>13</sup> A lawsuit was dismissed because it was not possible to nominate a class representative pursuant to section 35-9(3) in *LB-2009-187688*, where a group of former franchisees filed a lawsuit against the franchisor, claiming that the franchisor had to disclose certain accounting documents.

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<sup>13</sup> The lawsuit was also dismissed on the ground that the claims were not considered to be substantially similar. This part of the decision has been criticized, and is most likely incorrect in light of recent case law, cf. NOU 2014:6 Revisjon av eierseksjonsloven, p. 76 and HR-2010-393-U that is referenced above.

A very thorough assessment was made by the court in *LB-2013-169072*. The class action was brought by a group of authors who claimed that they were entitled to royalty payments for books that were sold after the publishing company went bankrupt and the inventory was transferred to a different company. The lawsuit was dismissed because the claims were not considered to be substantially similar, cf. section 35-2 litra a). The court also held that *joinder of parties* would be a better way of dealing with the claims. The Appeals Selection Committee recently also dismissed a lawsuit against a tour operator in *HR-2016-2406-U* because the requirement of legal interest was not met.

Among the class actions that have been brought against private parties and that have been approved by the court is *HR-2010-393-U*, which has been referenced above. In *LG-2011-14894* a similar class action was approved by the Gulating Court of Appeal. A case concerning the interpretation of an agreement on pension rights for a group of workers in the oil industry was able to proceed as a class action in *LG-2013-138827*.

The largest class action in Norwegian history, which is still ongoing, has been brought against the Norwegian bank DNB by the Norwegian Consumer Council (*Forbrukerrådet*) on behalf of 180 000 small investors.<sup>14</sup> The Consumer Council claims that DNB has to reimburse part of the fund management fees that were paid by the shareholders. The value of the claim is NOK 690 000 000.<sup>15</sup> While there has not yet been issued a decision on the merits of the case, the Borgarting Court of Appeal has decided that the case can move forward as a class action because the claims are substantially similar.<sup>16</sup> The appeal by DNB has been rejected by the Appeals Selection Committee.<sup>17</sup>

**5. Is there anything else an academic or practitioner interested in class actions and group litigation would want to know about recent developments in your jurisdiction?**

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<sup>14</sup> LB-2017-34099.

<sup>15</sup> The case has received widespread media attention. For a more thorough summary of the case, see <https://www.forbrukerradet.no/side/consumer-council-sues-norways-largest-bank-on-behalf-of-150000-consumers/>. For the latest update, see e.g. <https://www.reuters.com/article/us-norway-dnb-lawsuit/norwegian-supreme-court-allows-class-action-lawsuit-against-bank-dnb-idUSKCN1BF1QP>.

<sup>16</sup> LB-2017-34099.

<sup>17</sup> HR-2017-1668-U.

With regard to recent developments concerning class actions and other forms of group litigation, most have already been mentioned above. One of the developments is that there is a tendency in the courts to solve questions about the requirement of similarity by including the question in the broader assessment of whether class procedure is the most appropriate way of dealing with the claims. Some have been critical of this development because the conclusion to the question of similarity is considered fundamental when handling class actions.<sup>18</sup>

Another question that has been raised is if the rules on class actions have proved to be more beneficial to the defendant than to the plaintiff.<sup>19</sup> This viewpoint was based on an analysis of the case-law in the first few years after the rules entered in to force. According to the authors, class actions have not necessarily been the best option for the plaintiffs in many of these cases because other forms of group litigation could have secured their interests in a more appropriate way. The defendant, on the other hand, has had the benefit of only having to stick to one plaintiff.

Apart from this, the class action against DNB is scheduled to go to trial in Oslo District Court in November of this year. It will be the first time an *opt-out* class action of this size is treated by a Norwegian court.

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<sup>18</sup> Ingrid Walmsnæss Skjæret, 'Gruppesøksmål - særlig om likhetsvilkåret' in *Tidsskrift for forretningsjus*, 2010, p. 34.

<sup>19</sup> Borgar Høgetveit Berg and Andreas Nordby, *Gruppesøksmål – Tvistelova kapittel 35 med kommentarer*, Gyldendal Juridisk: Oslo, 2012, p. 20-21.