

Per Henrik Lindblom  
 Professor Emeritus of Civil and Criminal Procedure  
 Uppsala University, Faculty of Law  
 P.O. Box 512  
 SE-751 20 Uppsala, Sweden  
 E-mail:perhenrik.lindblom@jur.uu.se

December 6, 2007

## **The Globalization of Class Actions**

Oxford Conference, December 12–14, 2007

### **National Report: Group Litigation in Sweden<sup>1</sup>**

1	The Swedish Civil Litigation System ...	p. 2
1.1	The Role of Courts in Sweden ...	p. 2
1.2	The Court System ...	p. 3
1.3	Swedish Civil Procedure – A Civil or Common Law system? ...	p. 3
2	Formal Rules for Group Litigation in Sweden ...	p. 5
2.1	Non Representative Group Litigation ...	p. 5
2.2	Representative Group Litigation ...	p. 6
3	The Group Proceedings Act of 2002 ...	p. 8
3.1	Legislative Background ...	p. 8
3.2	Character of the Act ...	p. 9
3.3	Structure and Main Content of the Act ...	p. 10
3.4	Special Case Management Procedures etc. ...	p. 14
3.5	Costs and Funding of Group Actions ...	p. 16
3.5.1	Litigation Costs ...	p. 16
3.5.2	Risk Agreements ...	p. 16
3.5.3	Financing and Funds ...	p. 17
3.6	Practice under the New Act ...	p. 20
3.6.1	Group Actions Initiated in General Courts ...	p. 20
3.6.2	Outside Court ...	p. 25
3.6.3	“Group Actions” at the Public Complaints Board ...	p. 27
4	The Swedish Experience – Summary and Conclusions ...	p. 28
	References ...	p. 36
	Appendix: Group Proceedings Act, issued on 30 May 2002 ...	p. 39

---

<sup>1</sup> The report answers all questions in the “Protocol for National Reporters,” but it was not practicable to structure the report to correspond precisely to the questions in the order given.

## 1 *The Swedish Civil Litigation System*<sup>2</sup>

### 1.1 The Role of Courts in Sweden

From a comparative perspective, the position of the Swedish courts has been constrained. The historical fetters have been a mixture of political arguments for democracy and principles of equality, a firm belief in state supervision and control instead of court actions, the existence of a great variety of alternative mechanisms for dispute resolution and behavior modification, and, at least in the first half of the 20<sup>th</sup> century, well-founded suspicion regarding the willingness of courts and judges to participate actively in building the welfare state based on the Social Democratic model.<sup>3</sup> All this, and likely a great deal more (such as a strict positivistic attitude with only limited scope for judicial lawmaking and judicial review), has contributed to making the Swedish courts less influential in civil matters than courts in many other countries, despite the comparatively high number of judges.

However, the role of the Swedish courts has grown in importance during the last decade of the 90s and the first years of the new millennium. Despite restrictions in public legal aid and private legal insurance, this evolution is set to continue future years, for a variety of reasons. One is that when you start from the bottom, there is nowhere else to go but up. Secondly, regardless of disparate attitudes to a strict division of powers in the spirit of Montesquieu, we are all moving from a kind of *separation* of powers toward a post-Montesquieuan *balance* of power: a system of “reciprocal checks and controls” including expanded or “new” tasks for the Swedish judiciary such as judicial review and lawmaking. Further, the traditional functions of civil procedure, i.e. behavior modification and individual compensation (prevention and reparation), have been complemented with the use of courts as an arena for legal policy debate and a forum for moral discourse. Thirdly, rapid technological and social progress tends to generate a spate of new laws that must be interpreted and clarified. The increased use of a legislative technique involving framework laws and general clauses of a

---

<sup>2</sup> Re Scandinavian civil procedure and court administrations in the Scandinavian countries, see *PROCEDURAL LAW – COURT ADMINISTRATIONS*, *Scandinavian Studies in Law. Volume 51*, 2007. Re the role of the Swedish courts, see P.H. Lindblom, “The Growing Role of the Courts and the New Functions of Judicial Process – Fact or Flummery?”, *id.* pp. 281 *et. seq.*

<sup>3</sup> Re the similar Canadian background, see W.A. Bogart, “Questioning Litigation’s Role - Courts and Class Actions in Canada,” in: 62 *Indiana Law Journal* (1986-1987) p. 665 *et. seq.*

very open nature has a similar effect. Fourthly, the impacts of Sweden's entry into the European Union and resulting influences from abroad have included, to a certain extent, the judicialization of politics and politicization of law. Finally, by advancing the fulfillment of all of these functions, the new Swedish Group Proceedings Act of 2002 (in force from January 2003) has already brought the judiciary into somewhat sharper focus.

## **1.2 The Court System**

There are three types of courts in Sweden: general courts (fifty-five district courts, six courts of appeal, and the Supreme Court); special courts (the Labor Court and the Market Court); and special and general administrative courts (in three instances). The general courts handle both civil and criminal cases. Criminal and administrative actions will not be discussed here.

## **1.3 Swedish Civil Procedure – A Civil or Common Law System?**

Sweden is a member of the European Union. EC law has considerable influence on and is incorporated into national law in the Member States, thereby diminishing the differences between civil law and common law in Europe. Nevertheless, substantial differences still exist.

Scandinavian *private* law in a restricted sense (contracts, torts etc.) is no doubt seen as a variant of civil law in all the Scandinavian countries, but *procedural* law is different. Only a few of the typical features of civil law procedure are present, but some - certainly not all - of the characteristics of common law procedure are discernible. The adversary principle, rather than the inquisitorial, is upheld in civil cases amenable to out of court settlement. An extremely concentrated trial built on the requirements of orality, immediacy, and concentration is the norm; all oral evidence is taken during "the main hearing" (the trial). The structure of the trial and witness examination (direct, cross, and redirect) in Swedish courts resemble their Anglo-American counterparts, although examination techniques are not as extensively developed. The English rule on costs is applied. In contrast, other features of common law, such as pretrial discovery and group actions, were absent from Swedish general courts for a very long time. The Group Proceedings Act brought a paradigm shift with respect to group actions, but not the discovery mechanism.

Twentieth-century trends in Swedish civil procedure reform coincide nicely with a dialectical pattern. The *thesis* was the old Code of Judicial Procedure from 1734 that did not permit free evaluation of evidence and imposed numerous restrictions on bringing evidence. There was no trial worthy of the name; the procedure can be described as a lazy, winding river that

ended in a vast and shallow delta where seafarers and litigants often ran aground. Orality, concentration, and immediacy were words seldom heard.

The absolute *antithesis* was the “new” Code of Judicial Procedure (in civil and criminal cases) that has been in force since 1948. No form of evidence was barred other than written depositions from witnesses, and the rule of free evaluation of evidence had its definitive breakthrough. To create the best possible conditions for applying the rule, the three principles of orality, immediacy, and concentration were introduced and exercised with utmost rigidity: the judgment could be based only on what was orally presented during a trial, which had to be concentrated so that the judge and lay assessors could remember everything that occurred. The inquisitorial judge of old was replaced by a passive chairman and the parties were entrusted with far-reaching possibilities to dispose of the case and the proceedings.

At first, everyone – other than certain traditionally minded judges – was very proud of the new 1948 Code. But as time went by, critical voices were heard. The rules were too rigid, the costs to the public purse and the parties too high, the courts were not concentrating on their appointed tasks, some people were abusing the unlimited right to appeal and some (many) citizens were denied any real access to the courts. The assessment was that the legislature overdid it in 1948; the antithesis was an overreaction. Consequently, since 1948 and especially in recent decades, the reform trend may be classified as a pursuit of *synthesis*, an endeavor that has become manifest in, and distilled into, two concepts: flexibility and access to justice.

*Flexibility* means that since the end of the 1980s the principles of orality, immediacy, and concentration are not upheld with the same merciless consistency as before. The pretrial stage can be conducted in writing when that is to be preferred, the trial can be omitted when there is no need for it, witnesses can be examined by phone, etc. The judge is responsible for making sure the case is settled or concluded within a reasonable time; the principle of party disposition does not deter the judge from active participation – but only within the substantive boundaries drawn up by the parties. The judge must manage every case with due regard to what is needed in the specific case. The right of appeal to the second and last instances has been sharply restricted.

Real and equal *access to justice* presupposes certain things, including reducing *economic* barriers for the parties to go to court. In Sweden, the English rule on costs is applied in ordinary cases. The losing party has to pay the winning party’s costs, including attorney’s

fees. The exception is small claims cases (maximum value of about €2,000) where the American (no fee) rule on costs is applied. The parties have to abstain from counsel or pay their own attorney's fees, win or lose. New rules on legal aid and economic possibilities to initiate proceedings were introduced for almost everyone, other than the rich, in the 1960s and 70s (the "first wave" of the access to justice movement). But public legal aid has been drastically cut in recent years and replaced (privatized) by private litigation insurance – usually limited to a maximum of about €10,000 – to cover the losing party's costs and the obligation to pay the costs of the winning party in cases worth more than €2,000. Naturally, this precludes going to court in unclear or complicated cases that require extensive preparation and investigation, especially when the defendant advertises his intention to appeal the judgment if he loses in the district court.

Until 2003, the protection of collective, diffuse, and fragmented interests – the "second wave" of the access to justice movement<sup>4</sup> – was either largely neglected or managed through extrajudicial control by state and municipal administrative agencies, ombudsmen, etc. and ADR (e.g. the Public Complaints Board in consumer cases, special tribunals in environmental matters and the Labor Court and Market Court). General courts had formerly not been an arena for these kinds of cases. The notion of instituting class actions and other forms of group actions in the general courts became a hotly debated subject in Sweden in the early 1990s, eventually leading to introduction of the Group Proceedings Act of 2002 (see section 3 below).

## **2            *Formal Rules for Group Litigation in Sweden***

### **2.1            Non Representative Group Litigation**

There are no special rules in Swedish law on "non-representative group litigation" resembling the English Group Litigation Order ("GLO"). The options for intense case management and pleadings, scheduling, development of evidence, motion practice, test cases, handling of preliminary matters, etc. are the same in all individual civil cases. Test cases offer no special alternatives; the proceedings are the same as usual and the judgment has legal force only between the formal parties.

---

<sup>4</sup> Re "the third wave", see P. H. Lindblom, "ADR – the opiate of the legal system?", *European Review of Private Law*, 2008.

Of course, several similar individual cases are sometimes handled together at the same time and by the same judge. The applicable rules on joinder of parties and consolidation of cases in Chapter 14 of the Code of Judicial Procedure are about the same today as when the Code came into force in 1948. Some of the rules on joinder and consolidation are mandatory. All parties act for themselves only, but sometimes through joint counsel. Since 1987 the Supreme Court has the right to decide that joinder and consolidation may take place even between cases pending in two or more district courts or courts of appeal and decided by one of them (Ch 14 Sect 7 a).

A situation similar to non-representative group litigation may arise in criminal cases where there is more than one aggrieved person with claims for damages against the defendant. When the claims are based on an offense subject to public prosecution, the prosecutor, if requested by the aggrieved persons, is also required to prepare and present the aggrieved persons' actions for damages in conjunction with the prosecution, provided no major inconvenience will result and the claim is not manifestly devoid of merit (Chapter 22 of the Code of Judicial Procedure). The aggrieved persons are normally not required to take part in the proceedings related to the claims for damages. However, when actions for individual claims have been consolidated with the prosecution in this manner, the court may order the action to be managed in the manner prescribed for civil actions, if further joint adjudication would cause serious inconvenience (for instance, if there are many aggrieved persons). Representative group litigation may occur in this situation. This was the background for the first group action under the new Swedish Group Proceedings Act (*Bo Åberg v Kefalas Elfeterios*, see section 3.6.1).

## **2.2 Representative Group Litigation**

Various forms of representative group litigation have existed for several decades in the special courts, but not the general courts. However, only public and organization group actions were permitted. A "true" class action, brought in a general court by a member of the group and allowing claims for not only injunctive relief but also individual damages for the group members, did not exist in Sweden (or modern Europe) until the Group Proceedings Act entered into force on January 1, 2003.

As mentioned, there are two *special* courts in Sweden: the Labor Court and the Market Court. The highly regarded Labor Court ("*Arbetsdomstolen*") was established as long ago as 1928 and is of great importance. Procedural rules are largely the same as in the Code of Judicial

Procedure but include what might be called a radical form of organization action. A large majority of all wage earners in Sweden are union members. The labor unions have primary standing as plaintiffs – and standing with their members as defendants – in the Labor Court in individual as well as collective disputes concerning the interpretation of collective agreements in the labor market. Individual members are bound by the judgment and have a right to intervene in the action. They also have standing, but only a secondary one: if the union decides not to take action the individual member may initiate proceedings in a general court of first instance, whose rulings may be appealed to the Labor Court. The Labor Court decides about 300 cases as the first and last instance and about 100 appeals from the general first instance courts every year.

The reasons for the rather far-reaching rules on procedural representation in the Labor Court are said to be three: to prevent a single member of the union from acting in an unprofessional way, resulting in an unfavorable judgment with persuasive effect (albeit without legal force) for other members and the union itself; to obtain a preliminary examination of the claim (by union specialists) and eliminate bad or unfounded claims, thereby reducing the workload of the Labor Court; to relieve the labor union of the inconvenience of obtaining powers of attorney from individual members when large numbers are involved.

The Market Court (*Marknadsdomstolen*) almost exclusively hears public actions, along with a few organization actions, but not (private) class actions. The court has sole jurisdiction in disputes concerning the Marketing Practices Act, the Consumer Contracts Act, and the Competition Act. The cases brought before the Market Court are of a purely prospective nature. For instance, a judgment forbidding certain contract clauses does not affect the validity of pre-existing contracts. Claims for damages are not permitted and individual consumers have no standing in the Market Court; standing is granted to the Consumer Ombudsman and the Ombudsman for Free Trade. These government agencies have primary standing; only if they decide not to go to the Market Court can individual merchants, or organizations of consumers or merchants and labor unions, take action. Thus, contrary to the situation in the Labor Court, organizations only have secondary standing. For its first 20 years, about twenty public actions and one organization action were brought before the court every year. Nowadays, the Market Court hears about fifty cases a year, mainly disputes related to the Marketing Practices Act brought by the Consumer Ombudsman.

As mentioned, representative group litigation was not allowed in the *general* courts before the Group Proceedings Act was introduced in 2002. Private, public, and organization class actions involving claims for injunctions and individual damages are now permitted under the Act. The rest of the report will be devoted entirely to this form of representative group litigation in the general courts.

### **3            *The Group Proceedings Act of 2002***

#### **3.1            Legislative Background**

The concept of a Swedish class action in the general courts was introduced into Swedish legal thinking far later than the Code of Judicial Procedure of 1948. In 1974, the Swedish Consumer Ombudsman – coming home from the United States and eager to gain the opportunity to sue in the general courts on behalf of consumers – wanted my opinion of the Federal Rules of Civil Procedure (Rule 23) Class Actions. Unfortunately, I couldn't give him the answers he was looking for, because no one in Sweden had ever heard of class actions back then. Many years later in 1989, I published a book (in Swedish) about class actions in the United States, the United Kingdom, Australia, and Canada. The book inspired the government to appoint a Swedish Commission on Group Actions in 1991.<sup>5</sup> In 1995, the Commission submitted its extensive report and proposals (1,400 pages) *Group Actions, SOU (Swedish Government Reports) 1994:151 Part A–C* (with a summary in English in Part A) to the Swedish Minister of Justice. The report proposed an act introducing group actions into Swedish law, in three categories: private actions, organization actions, and public actions.

In accordance with the Commission's terms of reference, the inquiry had emphasized consumer and environmental law and gender-based pay discrimination. The Commission discovered that in these areas, and most likely in many other areas of law, there were evident difficulties in obtaining access to justice for group claims.

One of the major conclusions of my book and the Commission report was that a modern Swedish Viking, eager to explore America and bring home new forms of civil procedure, would be advised not to follow Christopher Columbus to the West Indies and the United States. A better route would be Leif Eriksson's to Baffin Island, Labrador, then

---

<sup>5</sup> It should be noted that I served as chairman of the Commission; consequently, the following text might be somewhat biased. However, I was not involved in the subsequent legal drafting process at the Ministry of Justice or the legislative process in the Riksdag leading up to passage of the Government Bill.

Newfoundland and onwards into Quebec, Ontario, and British Columbia. Sweden has much more in common with Canada than with the United States, and Canadian examples show us that the class action need not be bound to either the American no-fee rule and contingency fees or extreme tort law or pretrial discovery.<sup>6</sup>

Hard lobbying against the notion of introducing class actions in Sweden, especially private group actions, began immediately after the book was published and accelerated in 1995 when the official report and proposal were circulated for comment.<sup>7</sup> The report, which proposed an extensive law combining private class actions, public actions, and organization actions for injunctions as well as damages, was hailed by consumer advocates, environmentalists, labor unions, and other groups. On the other side, it was attacked by corporate interests and defense attorneys, as well as by certain academics and judges. The opposition was very well organized and funded, mainly by business. It was argued that reform was unnecessary; that reputable corporations “voluntarily paid all justified claims without anyone having to go to court and disreputable companies would not be able to pay anyway”; that the courts would likely be drowned in frivolous actions; and that the proposal was a threat to class members, defendants, and traditional tort law.

I have been told that the Minister of Justice was not impressed by the criticism, but she had many other interests, mainly having to do with EC law, to deal with at the time. So, the idea of a Swedish class action was seeded, but the pregnancy was to be almost as long as in Ontario, Canada: not nine months but nine years from the official report to valid law. In May 2002, after hard labor, all parties in the Parliament except the biggest conservative party (“Moderaterna”) voted for a somewhat simplified and less powerful proposal than the original one and thus gave birth to the first Swedish Group Proceedings Act, including private class actions and the option to claim damages on behalf of the group members. The details of the Act will be presented below and the official English translation of the Act is appended.

---

<sup>6</sup> See note 3.

<sup>7</sup> The question arises: Why are public and organization actions (at least for injunctions) easily accepted by corporate Sweden – but not class actions? After all, the class action is more in line with traditional liberal civil procedure; the class action plaintiff is a member of the concerned group and has a personal interest in the case. The plaintiff is an entrepreneur in a free market, while the public action can be seen as a socialist solution and the organization action as a corporatist model. One possible explanation is that public actions and organization actions have long been an established practice in the Labor Court and the Market Court (see above, section 2.2).

### **3.2 Character of the Act**

The Swedish Act can be characterized in terms of the “three P’s” of its pluralism, pragmatism, and procedural character:

*Pluralism.* The Act is pluralistic in three respects: it provides for private class actions as well as organization actions and public group actions; claims are permitted for injunctions as well as monetary compensation for group members; and the Act is not restricted to consumer law or environmental law. It is applicable in all cases normally brought in general courts of first instance.

*Pragmatism.* The action should be used only when it is practical, manageable, and the best procedural alternative (“superiority”). If the claim does not meet these demands in practice, it is not accepted as a group action.

*Procedural.* The Act is purely procedural. It does not affect the content of substantive law. There are no new rules on causation, calculation and distribution of damages, etc. If the Act results in too much or too little compensation for the group members, one must blame the substantive law, not the procedure, i.e., the group action.

### **3.3 Structure and Main Content of the Act**

#### *The structure and scope of the Act*

The English translation of the Act is appended. In the body of the report I will present only basic information and the more significant differences between the Swedish Act and what is generally common to group action law.

The Act consists of 50 sections in about seven pages of text. The provisions of the Code of Judicial Procedure on civil cases apply to group proceedings, except for the rules on small claims cases, unless otherwise stated in the Group Proceedings Act.

The Group Proceedings Act is not restricted to certain areas of civil law. Any legal issue that can be litigated in the form of a traditional individual action in general court may also be taken to a general district court or an environmental court (some district courts in a specific composition) as a group action.

#### *Competent courts*

The district courts designated by the Government are competent to try cases under the Act. There is at least one competent district court in each county. Group actions in environmental law are tried by the district courts with jurisdiction in environmental cases.

#### *Initiating proceedings*

An action for a group is initiated in accordance with the Code of Judicial Procedure's rules concerning applications to commence actions. The application is treated in the usual manner in relation to the Court's consideration of general prerequisites for initiating proceedings, issuing the summons, and so on. Certain special preconditions for group actions are mentioned in Sections 8 and 11 of the Act, and should be specified by the plaintiff in the application for summons and by the defendant in the answer. But there are no rules requiring any special leave or ruling to initiate proceedings in group actions ("certification").

It may transpire during litigation of an ordinary individual case that a group action would be a more appropriate procedural alternative. For this reason, the plaintiff is given the opportunity to make a special application to the court requesting that an individual suit be enlarged to a group action.

#### *Forms of group actions and standing*

The Swedish Act contains three forms of group action: private, organization, and public actions.

*Private* group (class) actions may be initiated by a member of the group, who may be a natural or legal person, meaning the plaintiff must have standing to be a party to the proceedings with respect to one of the causes of action.

*Organization* group actions are restricted to two areas of law: consumer law and environmental law. In consumer law, group actions may be instituted by non-profit organizations of consumers or wage-earners in disputes with business operators concerning goods, services, or other utilities offered in the course of business to consumers, primarily for personal use. In environmental law, non-profit organizations dedicated to nature conservation and environmental protection (and professional federations in the fishing, farming, reindeer husbandry, and forestry industries) have the right to initiate actions for injunctions and/or damages for environmental impairment. All non-profit organizations with the stated objectives have the right to initiate group actions. There are no restrictions concerning authorization by the

government or the size, age, etc. of the organization. A new organization with only a few members can be set up one day and sue the next, provided the organization's financial affairs are in good order and the court thinks the organization is a good representative of the group. The organization may petition for injunctions and damages for the members of the organization as well as all other members of the group concerned.

Finally, any public authority stipulated by the government, such as the Consumer Ombudsman or the Swedish Environmental Protection Agency, may initiate *public* group actions.

The plaintiff in organization and public actions is not a member of the group. If an organization or public authority has a claim of its own and consequently is a member of the group, the action is treated as a private group action, not an organization or public action.

#### *Remedies*

In all three forms of group actions under the Act, the plaintiff can petition for injunctions as well as damages for injury suffered by individual members of the group. Customary substantive rules on causation in tort law and calculation of damages are applied. The court is not empowered to award collective damages for post-trial distribution among group members.

#### *Special preconditions*

The Act contains certain special preconditions for cases when group actions should be permitted:

- The action must be based on one or more circumstances or matters of law that are common or similar with respect to the claims of the members of the group, and group proceedings must not appear inappropriate because the grounds for some group members' claims differ materially from other claims.
- A group action should be the best available procedural alternative to litigate the majority of the claims in court ("superiority").
- The group must be adequately defined with regard to the circumstances in the case.
- The financial affairs of the group representative must be judged in good order and the representative considered suitable to represent the group.
- As a further guarantee of protection of group members in private actions and organization actions, plaintiffs must be represented by an admitted member of the bar.

This is the only situation in Swedish civil procedure when plaintiffs are not allowed to represent themselves and attorneys must be members of the bar.

#### *Group members, opt in, notice and legal force (res judicata)*

Contrary to the situation in the United States, Canada and most other countries, membership in the group is always conditional on the member making an application to the court to join the action. It is an *opt-in*, not an opt-out system.

Those who fit the plaintiff's description of the group must be informed (normally by the court) about the action, by personal notice or some other suitable way (such as leaflets or advertisement in the newspapers or on radio), and afforded the opportunity to inform the court that they wish to opt in. Notices to members of the group must be given in the manner the court finds appropriate and comply with the Code of Judicial Procedure. The court may order a party to perform the notice if it will significantly facilitate the proceedings. In such case, the party is entitled to public reimbursement for expenses.

People who fit the description of the group but do not apply – do not opt in – by the stipulated deadline are no longer considered group members and are not bound by any future decisions on the matter.

Group members (those who have opted in) are not parties and are not liable for costs unless they have intervened as parties to the group action. However, members are regarded as parties with respect to things like matters of evidence and execution of the ruling. The ruling takes legal force (*res judicata*) both for and against all who have opted in as if they had personally sued.

#### *Appeal*

Group members have the right to appeal the judgment and certain decisions during the trial.

#### *Settlement*

Although the authority of group representatives to act on behalf of group members is strictly procedural, they are empowered to settle on behalf of the group. However, group members are

not bound by the settlement unless it is approved by the court. The court is not permitted to approve the settlement if it can be considered discriminatory against some group members or is otherwise obviously unreasonable.

*Liability for Costs, Risk Agreements, Funds*

See 3.5 below.

### **3.4 Special Case Management Procedures etc.**

There are no features of the traditional Swedish civil litigation system that fundamentally facilitate or deter the prosecution of cases tried as representative or non-representative group actions.

The Group Proceedings Act contains no special case management procedures related to pleadings, scheduling, development of evidence, motion practice, test cases, or preliminary matters. The ordinary rules in the Code of Judicial Procedure also apply to group actions. However, some of the special rules in the Act might be of interest in this connection, such as those on changing the form of action, extension of the action, subgroups, substitution of the plaintiff, and postponement of consideration of a particular issue. These are:

**Section 10** A person who is the plaintiff in proceedings can, by written application to the district court, request that the case should be transformed into group proceedings. In that event, the provisions of Section 9 and Chapter 42, Sections 2-4 of the Code of Judicial Procedure shall apply. An application may only be granted if the defendant consents to this or if it is manifest that the advantages with group proceedings outweigh the inconvenience that such proceedings may be deemed to entail for the defendant.

The application shall be served on the defendant for views. If the application is unfounded, the court may dismiss it immediately.

If the district court where a case is pending is not competent to deal with the group action, the application shall be transferred to a competent court. If the application is manifestly unfounded, the court may immediately reject the application instead of transferring it.

**Section 18** The court may allow the plaintiff to extend a group action to comprise other claims on the part of the members of the group or new members of the group, provided this can be done without it causing any significant delay to the determination of the case and without other substantial inconvenience for the defendant. An application for an extension of an action shall be given in writing and contain such details as are referred to in Section 9.

**Section 20** The court may assign someone, besides the plaintiff or instead of the plaintiff, to conduct the action on a particular issue or a part of the substantive matter that only applies to the rights of particular members of the group, if this promotes an appropriate processing. Such an assignment may be given to a member of the group or, if this is not possible, someone else. The parties and members of the group affected shall be given an opportunity to express their views before the court makes a decision, provided this is not manifestly unnecessary. The court shall specify in the decision what part of the group and the issue or part of the substantive matter that the appointment relates to.

The provisions of this Act concerning plaintiffs also apply in relevant respects to a person that has been appointed to conduct an action in accordance with the first paragraph.

**Section 21** If the plaintiff is no longer considered to be appropriate to represent the members of the group in the case, the court shall appoint someone else who is entitled to bring action in accordance with Sections 4-6 to conduct the group's action as plaintiff.

If no new plaintiff can be appointed in accordance with the first paragraph, the group action shall be dismissed. If the plaintiff is the appellant's counterparty in a superior court, the court may appoint someone else who is considered appropriate to conduct the group's action as plaintiff.

**Section 27** If it is appropriate taking into consideration the investigation and it can be done without significant inconvenience for the defendant, the court may issue a judgment that for particular members of the group constitutes a final determination of the substantive matter and which for other members of the group involves the postponement of the consideration of a particular issue.

The court shall order each member of the group for whom the case has not finally been determined to request, within a particular period, that the remaining issue is considered. On issues concerning the members of the group who have submitted such a request, the court

shall decide in accordance with Section 24, second and third paragraphs, on separation and concerning the future processing. If a member of the group does not submit a request for consideration of the remaining issue, the action of the member shall be rejected, unless the defendant has consented to the request or it is manifest that the action is founded.

**Section 50** Notifications to members of the group in accordance with this Act shall be made in the manner considered appropriate by the court and observing the provisions contained in Chapter 33, Section 2, first paragraph of the Code of Judicial Procedure.

The court may order a party to attend to a notification, provided this has significant advantages for the processing. The party is in such a case entitled to compensation from public funds for expenses.

The provisions contained in the second paragraph also apply when notification is given by service.

### **3.5 Costs and Funding of Group Actions**

#### **3.5.1 Litigation Costs**

As mentioned, the English rule on costs is normally applied in Swedish general courts except in small claims cases, when the parties must either represent themselves or pay their own attorney's fees, regardless of the outcome. In group actions the English rule applies regardless of the value of the case, and counsel is required. Thus, the group representative (the plaintiff) assumes the risk of being ordered to pay the opponent's costs, including attorney's fees, if the group loses the case. But a group member bears customary liability for the opponent's litigation costs only if she has intervened as a party to the action. Normally, group members are not supposed to intervene or appear personally in group proceedings.

#### **3.5.2 Risk Agreements**

To reduce plaintiffs' cost risks under the English rule, it is explicitly permitted for group representatives and attorneys to reach fee agreements, meaning that the attorney's fees are based on the extent to which group members' claims are satisfied. Under these "risk agreements," fees are *conditional* on liability but, in contrast to U.S. practice, are not primarily *contingent* fees, e.g., one-third of the recovery, as is customary in the United States. Fees are based on a customary hourly rate and a set formula; for example, the attorney will be paid double or triple the rate if the action is successful and half the rate – or nothing – if the group action fails.

The risk agreement is not binding on the defendant. A losing defendant cannot be ordered to pay fees for the plaintiff's counsel that are higher than the customary hourly rate, possibly adjusted on the basis of the attorney's special qualifications, the scope of the action, or the difficulty of the case. If the defendant has been ordered to compensate the plaintiff for litigation costs and if the defendant cannot pay, the members of the group affected are liable to pay these costs. The same applies to additional costs in connection with risk agreements. Each member of the group is liable for their share of the costs but is not liable to pay more than he or she has gained through the proceedings.

Group members are bound by a risk agreement only if it is approved by the court. Risk agreements may only be approved if they are reasonable in view of the nature of the substantive matter. The agreement must be made in writing and specify how fees will depart from customary fees if the claims of the members of the group are granted or dismissed completely. As noted, risk agreements cannot be approved if fees are based solely on the value of the case.

### **3.5.3 Financing and Funds**

Under the Group Proceedings Act (Section 8 Para 5), the plaintiff must meet conditions for adequacy of representation to be accepted as a group representative. The requirements include having the "financial capacity" to prosecute a group action. The rule was designed to protect group members and defendants, as well as the court to a certain extent. In order to prosecute an acceptable case, the plaintiff must be able to pay the ongoing costs of litigation in advance (e.g. for investigations and counsel, if the attorney requires a retainer).<sup>8</sup> But the plaintiff is not required to prove full capacity to pay the other side's costs, such as attorney's fees, if the defendant wins. It is a general rule in Swedish law that plaintiffs cannot be required to provide surety for the opponent's litigation costs. The *travaux préparatoires* of the Group Proceedings Act presume that it should suffice that the plaintiff's financial affairs are "in order," which is understood to mean e.g. that the plaintiff has a reasonable annual income and access to public legal aid or private legal insurance, although both are usually limited to an amount equal to

---

<sup>8</sup> Note however that, unlike in the United States, the court both issues and pays for notice to group members in group actions under the Swedish Act.

customary attorney's fees for about 100 hours of work. Naturally, the affluent need not have legal insurance to be accepted as plaintiffs in group actions.

Unless the plaintiff is absolutely sure of winning the case, the risk of having to pay both parties' costs (including costs for counsel) in a losing action is a strong deterrent for anyone thinking about prosecuting a group action. The possible exception would be potential plaintiffs who are unusually affluent or can rely on funding from other sources. But in contrast to the situation in e.g. some Canadian provinces, there are as yet no state or private funds to which plaintiffs can apply for reimbursement of ongoing and final legal expenses in group actions.

Based on these considerations, it was presumed when the legislation was drafted that private group actions would be rare and confined mainly to cases involving large individual damages. Accordingly, the drafters presumed that the majority of the ten or so group actions they estimated would be initiated every year would be public and organization actions. Plaintiffs in such actions have no personal pecuniary interests and the drafters assumed the main aims would be to achieve better behavior modification on the general level (prevention) and legal development.

As discussed in section 3.6.1, these predictions did not pan out. The total number of group actions has been considerably lower than presumed: nine over the course of four and a half years. The distribution among the categories of group actions is also completely contrary to expectations. Not one organization action has been initiated so far, despite very liberal rules on standing in organization actions (even small and recently formed non-profit organizations with an acceptable purpose have standing in organization actions; see section 5 above and the Swedish Environmental Code, Chapter 32 Section 14). Only one public group action has been brought, by the Consumer Ombudsman in *Kraftkommission* (see section 3.6.1 below). The other eight cases were all private group actions. Thus, there have been more private group actions and considerably fewer organization and public group actions than estimated.

How then were the eight private group actions financed? I do not have enough information to fully answer that question. But it is noteworthy that non-profit organizations have both appeared as plaintiffs and provided other support, even in proceedings that were not organization actions in the strict sense (see *Skandia*, *Wine-import* and *Arlanda* , discussed in

section 3.6.1). Instead, claims have been litigated as private group actions; in *Skandia* as a sort of “false” organization action.

The explanation is that in “true” organization actions, the organization cannot also be a group member; if the organization is a group member, the lawsuit is treated as a private group action.<sup>9</sup> Legal persons, such as non-profit organizations, may initiate private group actions (see section 4). A group of people who want to initiate a group action may form an organization or foundation solely for the purpose. By transferring one of the members’ claim for damages, or only part of it, to the legal person (the organization), becomes a member of the group. By this means, the organization gains standing to initiate a private group action (but not an organization action) on behalf of everyone who opts in, whether or not they are members of the organization. While the organization’s finances must be “in order” according to Section 8 Paragraph 5 of the Act for the organization to be accepted as a plaintiff, this can be arranged by collecting dues or other funding from the association’s members (such as a limited guaranty). By this means, the members can limit their financial risk. Nor do members run any risk of being required to pay the opponent’s costs; as the named plaintiff – the organization – bears the entire risk. The “transfer method” is also open to already existing organizations, foundations, and other legal persons not formed solely for the purpose of litigating a claim.

Organizations and other legal persons are not eligible for public legal aid or private legal insurance. But private fundraising may be arranged among group members or in public appeals to fund both “true” and “false” organization actions, as well as “normal” private group actions. In one case (*Arlanda*), a municipality close to the airport contributed by awarding a “grant” to the organization formed to support a group action. Plaintiffs planning to initiate a group action under consumer or environmental law may also approach relevant large and established private organizations with appeals for funding or assistance with the action, e.g., by providing pro bono trial counsel. However, no organizations of that type have so far initiated organization actions of its own, which may indicate anemic interest in contributing. I have been told that the assumption of financial risk, exacerbated by the loser’s liability for the opponent’s costs under the English Rule, is a crucial factor even in connection with public and organization actions. A major trial devours time and money. As neither the Consumer

---

<sup>9</sup> See section 3.3.

Ombudsman, the Environmental Protection Agency, nor any established consumer or environmental organizations have resources in their budgets for such purposes, legal expenses would be unforeseen expenditures that must compete with the organization's other needs when the budget is made. So far, allocating resources to initiate a group action has not been awarded high priority in that competition.

A funding method that has been used in one case is to prosecute a private group action, but with multiple (6) named plaintiffs, who thus share the financial risk (*Arlanda*, see 3.6.1). This is probably acceptable because the defendant also benefits if the plaintiff's finances are sound. The approach may also make it possible for the plaintiff group to utilize coverage under multiple legal insurance policies. However, insurers are entitled to refuse legal insurance benefits for more than one plaintiff in cases involving trial of similar claims.

So far, it is more accurate to say the insurance companies have thwarted rather than supported the group action mechanism and their policyholders interested in using the new option for litigation. When the law was being drafted, the primary insurance industry organization was among the most active and antagonistic referral bodies. When the law went into force, one of the biggest insurance companies (Trygg-Hansa) immediately excluded coverage for plaintiffs (but not defendants) in group actions! It is highly uncertain whether companies that have not introduced similar exclusions would allow policyholders who are plaintiffs in a group action to exhaust not only their own benefits, but also those of one or more other group members, even though by opting into the group action, they waived the right to litigate personal claims in the matter, and thus will never otherwise make claims against the policy. The ruling in the group action case will naturally constitute *res judicata* in later actions. On the other hand, the insurance companies often allow multiple policies to be utilized in connection with joinder of claims, as well as in ordinary individual actions if the case can be regarded as a test case for other policyholders who do not want to sue personally, but are willing to put their legal insurance at the disposal of the plaintiffs. Insurance companies can take this route to force unmanageable and costly mass litigation involving a large number of plaintiffs, despite that a group action would have been preferable for both parties and the court from the cost standpoint and to facilitate management of all similar claims. Still worse: the insurance companies' stance is an obstacle to justice that may head off litigation altogether.

## 3.6 Practice under the New Act

### 3.6.1 Group Actions Initiated in General Courts

The law has now (December 2007) been in force for five years. As far as I know, group actions have been initiated in the general courts in nine cases.<sup>10</sup> Another case appears imminent. 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 in section 3.6.2. 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 cases that have been dealt with or are pending in general courts.

- *Bo Åberg v Elfeterios Kefales ("Air Olympic")*.<sup>11</sup> 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.<sup>12</sup> 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 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 euro) to the passengers. 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

---

<sup>10</sup> The number may be higher; there are no official statistics on the matter.

<sup>11</sup> Stockholm District Court, case number T 3515, 2003; the case has now been transferred to the Nacka District Court, case number T 1281, 2004.

<sup>12</sup> See section 2.1 above.

which the attorney would be paid twice his hourly rate if he won, but only half the usual rate if he lost.<sup>13</sup> The victims would probably not have had their claims tried in court if they could not be litigated a group action. An individual case would have been managed under the special rules for small claims (see 1.3), 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.

- *Guy Falk and Lisbeth Frost v NCC AB* (“NCC”).<sup>14</sup> 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 October 2007 for settlement negotiations between the parties.
- *Grupptalan mot Skandia v Försäkringsaktiebolaget Skandia* (“Skandia”).<sup>15</sup> 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 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 about €15 and the organization rapidly amassed capital of about €200,000, which was considered more than adequate to cover running litigation expenses and to demonstrate to the court that the organization's finances were in good order. One board member transferred his claim for compensation to the organization, which thus became a group member and

---

<sup>13</sup> 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.

<sup>14</sup> Göteborg District Court, case number T 7211, 2003.

<sup>15</sup> Stockholm District Court, case number T 97, 2004.

thus gained standing to initiate the action for the entire group affected (that is, not only the members of the organization). Consequently, the action was brought as a private group action, not an organization action.<sup>16</sup> The media covered the case extensively. However, the organization dropped the suit after an agreement was made to resolve the matter of the capital transfer between the parent and subsidiary in arbitration between the two companies. The organization has been permitted to attend the arbitration proceedings in the capacity of reporter (arbitration proceedings and awards are generally not public in Sweden). The stated reasons for choosing arbitration included that the case would be resolved sooner than if the claims were litigated in a general court.<sup>17</sup> As well, the policyholders and the organization did not have to pay for the arbitration proceedings between the companies. But the arbitration also turned out to be protracted and no award has been handed down yet (as of December 2007). The organization is free to initiate a new group action if it feels the need. It is commonly believed that the insurance companies' inside agreement over the heads of policyholders would never have been tried in court or arbitration proceedings if a group action on the matter had not been possible.

- *Linus Broberg v Aftonbladet Nya Medier AB ("Aftonbladet")*.<sup>18</sup> 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. I understand the ruling has been appealed to the Court of Appeal.
- *The Consumer Ombudsman v Kraftkommission i Sverige AB ("Kraftkommission")*.<sup>19</sup> 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

---

<sup>16</sup> See 3.1 regarding this method.

<sup>17</sup> Arbitration is sometimes a long and drawn out procedure - as well as a very costly one. The current status of the case is that the award is expected to be handed down in 2008. Total costs will amount to about 150 million Swedish kronor (nearly 15 million euro), including 25-40 million in attorney's fees. The company (parent or subsidiary) that loses the dispute must pay all of these costs.

<sup>18</sup> Stockholm District Court, case number T 10992, 2004.

<sup>19</sup> Umeå District Court, case number T 5416, 2004.

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. In the meantime, the case has been stayed in the District Court.

- *Peter Lindberg v Municipality of Järfälla et al (“Järfälla”)*.<sup>20</sup> 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 (see case 5) 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.
- *Devitor v TeliaSonera AB (“Telia”)*.<sup>21</sup> *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.
- *Pär Wihlborg v The Swedish State through the Chancellor of Justice (“Wine-import”)*.<sup>22</sup> 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

---

<sup>20</sup> Stockholm District Court, case number T 9893, 2006.

<sup>21</sup> Stockholm District Court, case number T 5254, 2006.

<sup>22</sup> Nacka District Court, case number T 1286, 2007

400 members of this organization. A large number of goods have been confiscated by 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.

- *Carl de Geer et al v The Swedish Airports and Air Navigation Service (“Arlanda”).*<sup>23</sup> 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 (December 2007) ruled on the motion.

The sum total is that private group actions have been initiated in eight 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 *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*), Swedish government agencies in two cases (*Arlanda* and *Wine-import*), a number of Swedish municipalities in one case (*Järfälla*), 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 one case (*Air Olympic*) has been resolved (in a settlement favoring the plaintiff and approved by the court).

---

<sup>23</sup> Nacka District Court, Environmental Court, case number M 1931, 2007.

The cases all involve very large aggregate claims, billions of Swedish kronor in one (*Skandia*).

The District Court has dismissed the suits in three cases. In every other case, 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. In some cases, the matter of whether a group action is acceptable is pending in the Court of Appeal. 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.

### **3.6.2 Outside Court**

As mentioned in 3.1, 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*).<sup>24</sup> 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 in 3.6.1. 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

---

<sup>24</sup> A Google search for the terms *gruppåtal* (group action) and *grupprättegång* (group litigation) restricted to pages in Swedish returns about 70,000 and 10,000 hits, respectively.

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 a couple of cases 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. In one case, *Falck Security*, a security firm, had created a database of suspected but not convicted “taggers.” The other 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.<sup>25</sup>

---

<sup>25</sup> See P.H. Lindblom in *Svensk Juristtidning* 2005, section 5 and M. Oker-Blom in *Tidskrift utgiven av Juridiska Föreningen i Finland* 2006 p. 96 f.

### 3.6.3 “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, which 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 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 section 3.6.1 above).

### **3            *The Swedish 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.<sup>26</sup>

A radical new order emerged when the Group Proceedings Act took effect in 2003. The law 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.<sup>27</sup> Similar but not identical rules will take effect in

---

<sup>26</sup> 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.

<sup>27</sup> 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.

Norway on January 1, 2008.<sup>28</sup> The Consumer Ombudsman in Finland recently (October 2007) was granted the possibility to litigate claims in a limited form of public group action. Rules similar to those in Sweden and Norway will be in force in Denmark from January 2008. While the Scandinavian countries are in the forefront, reforms are in progress in many other countries.<sup>29</sup>

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.<sup>30</sup> 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. In most cases, 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 paid for by the public (the court), not the parties. Notifications to members of the 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 from public funds for expenses.

Pretrial discovery 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.

---

<sup>28</sup> For instance, the Norwegian rules allow the possibility of using the system in certain cases with automatic group affiliation coupled with the right to opt out.

<sup>29</sup> Re group actions in consumer law on the European level, see *Final Report*, chapter 5.

<sup>30</sup> 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).

Another difference is that under Swedish law, the losing party is customarily liable to pay the opponent's litigation costs, including attorney's fees.<sup>31</sup> This also applies to group actions. "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.

There is normally no special ruling on "certification" required to prosecute a group action 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.

The 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. All parties represented in the 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 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").

---

<sup>31</sup> But see section 1.3 re small claims.

3. There is potential harm to group members: they could, all 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) 25 States of the Union can agree on common rules. This is a stratagem of exploiting European cooperation as an alibi for holding up progressive proposals or out-and-out paralyzing national procedural reforms in the EU. Others see the European project as an opportunity, and the Union as an arena for national initiatives that may lead other states to follow suit and down the line to harmonized regulations to the benefit of all. That a group action mechanism has been instituted in Sweden and is on the way in several other countries is consistent with such favorable development.

#### *Distorted tort law?*

The Swedish Group Proceedings Act is purely *procedural* legislation (see 3.2). Changes to the individualist system of Swedish tort law would require reforms of *substantive law* through legislation or judicial lawmaking. There is reason to advocate such changes in the long term, e.g., with regard to using standardized amounts to calculate damages and simplifying distribution of damages. While reforms like these might make it easier to use the group action

mechanism in certain situations, they are not prerequisites for its practical use, which is already apparent in case law.

*Legal blackmail, lower investments?*

There is less risk of being the victim of legal blackmail in a group action under the Swedish Act than in ordinary individual litigation. This is ensured by the special protective rules on the plaintiff's adequacy of representation, mandatory representation by an attorney who is a member of the bar, special preconditions for proceedings in Section 8 (such as "superiority"), court approval of settlements, etc. The risk of legal blackmail is generally milder in Sweden than in countries where enormous damages, the American (no-fee) Rule, contingent fees, and extensive pretrial discovery are the norm. The investment climate in the United States, Canada, and Australia does not seem to have been harmed by their strong class action systems. The same applies to foreign investments in our country. Why then would a Swedish law have such effects? In the long run, Sweden gains nothing by affording generous conditions to fly-by-night businesses and limiting her citizens' procedural options to assert their rights and thereby contributing to civil enforcement of substantive law.

*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?*

Nine 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?*

Nine 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, eight 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.<sup>32</sup> (The financial aspects were discussed in 3.5.2.)

In some respects, it is too soon to draw any far-reaching conclusions from case law only a few 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 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 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.

---

<sup>32</sup> See e.g. Weinstein p. 837.

But even if we are dealing with “only” nine 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.<sup>33</sup> 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 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.<sup>34</sup> As with an effective military defense, the 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; we must have “real and equal” access to justice 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,<sup>35</sup> 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.

---

<sup>33</sup> See Hensler, p. 467 f., Watson, p. 269 et.seq. and Bratt & Harling p. 30 et.seq..

<sup>34</sup> Re the preventive effect, see *Final Report* p. 264 f., for a sceptical approach to the deterrent effect of collective actions, see Hodges id. p. 341.

<sup>35</sup> This refers to judicial review and judicial control of whether a national law is consistent with EC law.

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 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.

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. 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 a typically

Swedish cautiously reform-oriented development 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 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 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 has been 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 will also assess whether the provisions included especially to protect the interests of defendants can be deemed useful and appropriate. The investigator has also been 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 will review group actions handled by the courts so far, even when the proceedings did not lead to judgment. She will also follow up settlements reached in such cases, attempt to determine the extent to which threats of initiating a group action have been used to bring pressure to bear outside the courtroom, and form an opinion of whether the business and investment climate in Sweden has been affected by the Group Proceedings Act. The investigator will propose statutory amendments if she feels there is a need. The investigator, present at this conference, will consult with the relevant government agencies and representatives of consumer and business interests before submitting a report to the government by March 31, 2008.

-----

## References

### **The official *travaux préparatoires* to the Swedish Group Proceedings Act:**

*Grupprättegång. Betänkande av Grupptalanutredningen.* Del A–C. SOU 1994:151, Part A–C. (The official report in three volumes, with a summary in English in part A.)

*Regeringens proposition 2001/02:107. Lag om grupprättegång.* (The final Government Bill submitted to the Riksdag.)

### **Literature:**

Basedow & Hopt & Kötz & Baegte (ed.), *Die Bündelung gleichgerichteter Interessen im Prozess*, Tübingen 1999.

Bratt, P & Harling, K, Fordelene er større end olemperne, *Advokaten* (Denmark), Nr 7/06, p. 30 et.seq.

Bogart, W A, Questioning Litigation's Role - Courts and Class Actions in Canada, 62 *Indiana Law Journal* (1986-1987) p. 665 et. seq.

*Final Report. An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings.* A Study for the European Commission, Health and Consumer Protection Directorate-General Directorate B – Consumer Affairs

prepared by The Study Centre for Consumer Law – Centre for European Economic Law Katholieke Universiteit Leuven, Belgium. Tender Specification: SANCO/2005/B5/010 Contract No.: 17.020100/05/419291 Leuven, January 17, 2007.

Hensler, Deborah R et al, *Class Action Dilemmas. Pursuing Public Goals for Private Gain*. Rand Institute for Civil Justice, Santa Monica 2000.

Hodges, Christopher, Multi-Party Actions: A European Approach, *Duke Journal of Comparative and International Law* 2001, p. 341 et seq.

Lindblom, Per Henrik, *Grupptalan. En studie av det anglo-amerikanska class actioninstitutet ur svenskt perspektiv. (Group actions. The Anglo-American class action suit from a Swedish perspective)*, with a summary in English. Stockholm, 1989.

Lindblom, Per Henrik, Individual Litigation and Mass Justice: A Swedish Proposal on Group Actions in Civil Procedure. *XLV The American Journal of Comparative Law*, 1997, pp. 805 et.seq.

Lindblom, Per Henrik, Lagen om grupprättegång – bakgrund och framtid. (The Group Proceedings Act – Background and Future.) *Svensk Juristtidning* 2005 pp. 129 et. seq.

Lindblom, Per Henrik & Watson, Garry D, Complex Litigation – a Comparative Perspective. *Civil Justice Quarterly* 1993 pp. 33 et. seq.

Mulheron, Rachael, *The Class Action in Common Law Systems. A Comparative Perspective*, Oxford 2004.

Nordh, Roberth, Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms, and a Forthcoming Proposal. 11 *Duke Journal of Comparative & International Law*, 2001, pp. 381 et.seq.

Watson Garry D, Class Actions: The Canadian Experience, 11 *Duke Journal of Comparative and International Law*, 2001, pp. 269 et. seq.

Weinberg, Jack B, Some Reflections on United States Group Actions. 45 *The American Journal of Comparative Law*, 1997, pp. 833 et. seq.

## Appendix: Group Proceedings Act, issued on 30 May 2002

### Swedish Code of Statutes

SFS 2002:599

issued by the printers in June 2002

#### Group Proceedings Act

issued on 30 May 2002.

The following is enacted in accordance with a decision 1 by the Swedish Riksdag.

#### Introductory provisions

##### Group action

**Section 1** In this Act, group action means an action that a plaintiff brings as the representative of several persons with legal effects for them, although they are not parties to the case. A group action may be instituted as a private group action, an organisation action or a public group action.

Group means the persons for whom the plaintiff brings the action.

##### Group proceedings

**Section 2** Proceedings where a group action is brought are referred to as group proceedings. Group proceedings can relate to claims that can be dealt with by a general court in accordance with the rules contained in the Code of Judicial Procedure on civil cases.

The provisions of the Code of Judicial Procedure on civil cases apply to group proceedings, except for Chapter 1, Section 3 d, unless otherwise stated in this Act.

Group proceedings may also be brought in accordance with special provisions contained in the Environmental Code.

#### How a group action is instituted, etc.

##### Competent courts

**Section 3** The district courts designated by the Government shall be competent to process cases under this Act. There shall be at least one competent district court in each county.

##### Right to bring an action

**Section 4** A private group action may be instituted by a natural person who, or legal entity that, himself, herself or itself has a claim that is subject to the action.

**Section 5** An organisation action may be instituted by a not-for-profit association that, in accordance with its rules, protects consumer or wage-earner interests in disputes between consumers and a business operator regarding any goods, services or other utility that the business operator offers to consumers.

In the first paragraph

*consumers*: means natural persons who acted primarily for purposes outside business operations,

*business operator*: a natural person or legal entity that acted for purposes that are connected with their own business operation.

An organisation action referred to in the first paragraph may also include a dispute of another kind, provided there are significant advantages with the disputes being jointly adjudicated taking into consideration the investigation and other circumstances.

**Section 6** A public group action may be instituted by an authority that, taking into consideration the subject of dispute, is suitable to represent the members of the group. The Government decides which authorities are allowed to institute public group actions.

**Section 7** The right to represent the group does not end if there is a change to the circumstances on which the right to institute the action in accordance with Sections 4-6 has been founded.

#### Special preconditions for proceedings

**Section 8** A group action may only be considered if

1. the action is founded on circumstances that are common or of a similar nature for the claims of the members of the group,

2. group proceedings do not appear to be inappropriate owing to some claims of the members of the group, as regards grounds, differing substantially from other claims,
3. the larger part of the claims to which the action relates cannot equally well be pursued by personal actions by the members of the group,
4. the group, taking into consideration its size, ambit and otherwise is appropriately defined, and
5. the plaintiff, taking into consideration the plaintiff's interest in the substantive matter, the plaintiff's financial capacity to bring a group action and the circumstances generally, is appropriate to represent the members of the group in the case.

#### **Content of the application**

**Section 9** An application for a summons shall, in addition to the provisions of Chapter 42, Section 2 of the Code of Judicial Procedure, contain details concerning

1. the group to which the action relates,
2. the circumstances that are common or similar for the claims of the members of the group,
3. the circumstances known to the plaintiff that are important for the consideration of only some of the claims of the members of the group, and
4. other circumstances that are important for the issue of whether the claims should be processed as group proceedings.

The plaintiff shall state in the application the names and addresses of all members of the group. Such details may be omitted if they are not necessary for processing the case. The plaintiff shall also provide details of circumstances that are otherwise important for notifications to the members of the group.

#### **Change of form of action**

**Section 10** A person who is the plaintiff in proceedings can, by written application to the district court, request that the case should be transformed into group proceedings. In that event, the provisions of Section 9 and Chapter 42, Sections 2-4 of the Code of Judicial Procedure shall apply. An application may only be granted if the defendant consents to this or if it is manifest that the advantages with group proceedings outweigh the inconvenience that such proceedings may be deemed to entail for the defendant.

The application shall be served on the defendant for views. If the application is unfounded, the court may dismiss it immediately.

If the district court where a case is pending is not competent to deal with the group action, the application shall be transferred to a competent court. If the application is manifestly unfounded, the court may immediately reject the application instead of transferring it.

#### **Attorneys**

**Section 11** A private group action and an organisation action shall be brought through an attorney who is an advocate. If there are special reasons, the court may allow the action to be brought without an attorney or through an attorney who is not an advocate.

**Section 12** A power of attorney that relates to proceedings generally does not empower the attorney to institute a group action or to receive a summons in group proceedings.

#### **Notifications to the members that group proceedings have been instituted**

**Section 13** If the plaintiff's application to commence group proceedings is not dismissed, the members of the group shall be notified of the proceedings.

The notification shall, to the extent considered appropriate by the court, contain

1. a brief description of the application
2. information about
  - a) group proceedings as a form for processing,
  - b) the opportunity for the members to personally participate in the proceedings,
  - c) the legal effect of a judgment in group proceedings, and
  - d) the rules applicable to litigation costs,
3. details of the names and addresses of the plaintiff and attorney,
4. notice of the date determined by the court for notices in accordance with Section 14, and
5. information about other circumstances that are important for the rights of the members of the group.

**Definition of the group**

**Section 14** A member of the group who does not give notice to the court in writing, within the period determined by the court, that he or she wishes to be included in the group action shall be deemed to have withdrawn from the group.

**Status of the member of the group**

**Section 15** A member of the group shall be equated with a party when applying the rules of the Code of Judicial Procedure on disqualification situations, pending proceedings, joinder of cases, examination during the proceedings and other issues relating to evidence.

**Disqualification**

**Section 16** A member of the group who is not a party may, even if he or she has not entered into the proceedings as an intervenor, present an objection regarding disqualification of a judge within two weeks from the date when he or she became aware that the judge is participating in the processing of the case. If the circumstance on which the disqualification is founded was not then known to the member, the objection may be presented within two weeks from the date when the member became aware of the circumstance.

**Subsequent processing****Obligations of the plaintiff**

**Section 17** When conducting the action, the plaintiff shall protect the interests of the members of the group.

On important issues, the plaintiff shall afford the members of the group an opportunity to express their views, if this can be done without great inconvenience. If a member of the group so requests, the plaintiff shall provide such information as is of importance for the rights of the member.

**Extension of action**

**Section 18** The court may allow the plaintiff to extend a group action to comprise other claims on the part of the members of the group or new members of the group, provided this can be done without it causing any significant delay to the determination of the case and without other substantial inconvenience for the defendant. An application for an extension of an action shall be given in writing and contain such details as are referred to in Section 9.

**Transfer of the subject to which the dispute relates**

**Section 19** If the plaintiff or a member of the group transfers the subject to which the dispute relates to someone else, the provisions of Chapter 13, Section 7 of the Code of Judicial Procedure shall apply as regard the right and obligation of such person to enter as a member of the group.

**Sub-groups**

**Section 20** The court may assign someone, besides the plaintiff or instead of the plaintiff, to conduct the action on a particular issue or a part of the substantive matter that only applies to the rights of particular members of the group, if this promotes an appropriate processing. Such an assignment may be given to a member of the group or, if this is not possible, someone else.

The parties and members of the group affected shall be given an opportunity to express their views before the court makes a decision, provided this is not manifestly unnecessary. The court shall specify in the decision what part of the group and the issue or part of the substantive matter that the appointment relates to.

The provisions of this Act concerning plaintiffs also apply in relevant respects to a person that has been appointed to conduct an action in accordance with the first paragraph.

**Substitution of plaintiff**

**Section 21** If the plaintiff is no longer considered to be appropriate to represent the members of the group in the case, the court shall appoint someone else who is entitled to bring action in accordance with Sections 4-6 to conduct the group's action as plaintiff.

If no new plaintiff can be appointed in accordance with the first paragraph, the group action shall be dismissed. If the plaintiff is the appellant's counterparty in a superior court, the court may appoint someone else who is considered appropriate to conduct the group's action as plaintiff.

**Section 22** In cases other than those referred to in Section 21, another person may only take over the plaintiff's action if the plaintiff has transferred their part of the subject of dispute or if there are other special reasons.

### **Discontinuation of group proceedings or part of them**

**Section 23** If the plaintiff withdraws the group action within the time period for notice, in accordance with Section 14, the case shall be written off in its entirety. If the plaintiff, within the period, withdraws the case regarding a part that refers to a claim of a particular member of the group, that claim shall be written off.

Should, at the expiry of the period for notice, an issue arise concerning the writing off of the case in its entirety or dismissal of the group action, the court shall afford the parties and the members of the group an opportunity to express their views, unless this is manifestly unnecessary.

The second paragraph also applies if an issue arises concerning the writing off of the case or dismissal of an action in a part referable to a particular claim of a member of the group.

**Section 24** The court may decide a period within which a member of the group shall give notice to the court in writing that they, if the group proceedings as regards their claim are discontinued, wishes to enter as a party and bring the action concerning their rights.

If a notice concerning entry is made in accordance with the first paragraph, the court shall separate the plaintiff's case to which the notice applies and decide on the future processing. The court may, subject to the preconditions referred to in Chapter 1, Section 3 d of the Code of Judicial Procedure, decide that the case should be dealt with applying that section.

The court can transfer a separated case to another competent court, if this is best taking into consideration the investigation and the other circumstances.

**Section 25** If an appeal is withdrawn or shall be dismissed for reasons other than it having been delivered too late, the provisions contained in Section 23, second and third paragraphs and Section 24, first and second paragraphs shall apply.

If an appeal has lapsed owing to the plaintiff failing to attend a session for a main hearing, the case shall be reinstated in accordance with Chapter 50, Section 22 of the Code of Judicial Procedure upon the application of a member of the group, even if the plaintiff does not have legal excuse for their absence. The application of the member of the group may be limited to a particular claim.

### **Settlement**

**Section 26** A settlement that the plaintiff concludes on behalf of a group is valid, provided the court confirms it by judgment. The settlement shall at the request of the parties be confirmed, provided it is not discriminatory against particular members of the group or in another way manifestly unfair.

### **Postponement of consideration of a particular issue**

**Section 27** If it is appropriate taking into consideration the investigation and it can be done without significant inconvenience for the defendant, the court may issue a judgment that for particular members of the group constitutes a final determination of the substantive matter and which for other members of the group involves the postponement of the consideration of a particular issue.

The court shall order each member of the group for whom the case has not finally been determined to request, within a particular period, that the remaining issue is considered. On issues concerning the members of the group who have submitted such a request, the court shall decide in accordance with Section 24, second and third paragraphs, on separation and concerning the future processing. If a member of the group does not submit a request for consideration of the remaining issue, the action of the member shall be rejected, unless the defendant has consented to the request or it is manifest that the action is founded.

### **Content of the determination**

**Section 28** The court shall specify in a judgment the members of the group to which the judgment refers. This also applies to a decision, if this is necessary having regard to the nature of the issue.

### **Legal force**

**Section 29** The determination of the court in group proceedings has legal force in relation to all members of the group who are subject to the determination.

### **Special rules on litigation costs, etc.**

#### **Right to compensation and liability for costs**

**Section 30** A person who has been appointed in accordance with Section 21, second paragraph, to conduct the action of a group as plaintiff, is entitled to compensation from public funds corresponding to the costs for the preparation of the proceedings and the conduct of the action and also fees for attorney or counsel, provided the costs were reasonably incurred to protect the rights of the members of the group. Compensation shall also be paid for the plaintiff's own work and time consumed owing

to the proceedings. A hearing for the presentation of an issue in a dispute that is directly relevant to the action brought shall be deemed to be a measure for the preparation of the proceedings.

The court may decide on advance payment of compensation with a reasonable amount if this is reasonable considering the amount of the costs or the work that the assignment has involved, the time that the proceedings can be estimated to continue and the other circumstances.

**Section 31** A person who has been appointed in accordance with Section 21, second paragraph, to conduct the action of a group as plaintiff is not liable to pay compensation for the other party's litigation costs in cases other than those referred to in Chapter 18, Section 6 of the Code of Judicial Procedure. Instead, the person who was previously the plaintiff in the case shall, as a party, be liable for these litigation costs. He or she shall also compensate the State for that which has been paid from public funds in accordance with Section 30, to the extent the appellant or someone else is not liable to pay such compensation.

If someone has in connection with an appeal or thereafter taken over the plaintiff's action in cases other than those referred to in the first paragraph, he or she is liable as a party only for litigation costs that have arisen in the superior court. For litigation costs in the lower court, the person who was previously the plaintiff in the case shall instead be liable.

**Section 32** The provisions contained in the Code of Judicial Procedure concerning liability for litigation costs shall also be applied on issues concerning compensation from public funds that are paid to a plaintiff in accordance with Section 30. Compensation for such costs shall be paid for by the State. The court shall consider the issue of compensation without being requested to do so.

#### **Liability for costs of a member of the group**

**Section 33** A member of the group who is not a party to the proceedings is only liable for the litigation costs regarding such cases as referred to in Sections 34 and 35.

**Section 34** If the defendant has been ordered to compensate the plaintiff for litigation costs or pay such costs to the State as referred to in Section 32 and if the defendant cannot pay, the members of the group affected are liable to pay these costs. The same applies to additional costs in connection with risk agreements that the defendant has, in accordance with Section 41, not been ordered to pay. Each member of the group is liable for their share of the costs and is not liable to pay more than he or she has gained through the proceedings.

**Section 35** A member of the group who is not a party to the proceedings should indemnify the costs that the member has caused by any measure referred to in Chapter 18, Section 3, first paragraph of the Code of Judicial Procedure or by such carelessness or oversight as referred to in Section 6 of the same chapter.

**Section 36** If a member has entered as a party in the group proceedings in conjunction with an appeal or thereafter, the member is only liable as a party for the costs that have arisen in the superior court.

#### **Separation of plaintiff's case**

**Section 37** If a plaintiff's case has been separated in accordance with Section 24, the plaintiff and the member of the group are jointly liable for the litigation costs that have arisen prior to the separation. The member of the group is solely liable for costs that have arisen thereafter.

If the plaintiff or the member of the group has caused the litigation costs by carelessness or oversight, he or she shall be solely liable for the costs.

#### **Risk agreement**

**Section 38** If the plaintiff has concluded an agreement with an attorney that the fees for the attorney shall be determined having regard to the extent to which the claims of the members of the group is successful (risk agreement), the agreement may only be asserted against the members of the group if it has been approved by a court.

**Section 39** A risk agreement may only be approved if the agreement is reasonable having regard to the nature of the substantive matter. The agreement shall be concluded in writing. The agreement shall indicate the way in which it is intended that the fees will deviate from normal fees if the claims of the members of the group were to be granted or rejected completely. The agreement may not be approved if the fees are based solely on the value of the subject of dispute.

**Section 40** The issue of the approval of a risk agreement shall be considered in pending group proceedings by the court upon the application of the plaintiff. If the legal matter covered by the risk agreement has not been instituted at court, the person who wishes to bring the group action shall request that the issue of the approval is considered by a court that is competent to consider the dispute.

If it is not possible to determine which court is competent, the issue of approval shall be considered by Stockholm City Court.

An approval in accordance with the first paragraph ceases to apply, if group proceedings have not been commenced within six months from the approval. If there are reasons to do so, the court may extend this period.

**Section 41** When considering what litigation costs are indemnifiable according to Chapter 18, Section 8 of the Code of Judicial Procedure, regard shall not be taken to such additional costs that have arisen owing to a risk agreement.

#### **Appeals**

**Section 42** When consideration of a particular issue has been postponed in accordance with Section 27, the court shall decide if the judgment may be appealed against separately regarding the part where the determination is not final. However, such part of the judgment may in every case be appealed against separately if an appeal, for or against a group, is made regarding the part of the judgment that is final.

If a judgment is appealed against separately in accordance with the first paragraph, the court may order a stay of proceedings pending the judgment entering into final legal force.

**Section 43** The decision of the district court as a result of the withdrawal of the action may not be appealed against, if the withdrawal has been made within the period for notices in accordance with Section 14. However, a decision on issues concerning litigation costs that has been issued in conjunction with the writing off may be appealed against.

**Section 44** A decision by a district court to appoint a new plaintiff may be appealed against by the former plaintiff and by a member of the group who has proposed another plaintiff. A decision by a district court to reject a request for the exchange of plaintiff may be appealed against by a member of the group who has proposed such a change. The provisions contained in Chapter 49, Sections 4 and 11, first paragraph of the Code of Judicial Procedure shall apply to issues of appeal.

**Section 45** A decision by a district court during the proceedings may, in addition to the provisions of the Code of Judicial Procedure and Section 44, be appealed against separately, if the district court has in the decision

1. rejected the plaintiff's request to be allowed to bring a private group action or organisation action without an attorney or through an attorney who is not an advocate,
2. considered an issue in accordance with Section 19 concerning entry as a member of the group, or
3. considered an issue of approval of a risk agreement in accordance with Section 39.

A person who wishes to appeal against a decision referred to in the first paragraph shall first give notice of dissatisfaction. The notice shall be given immediately, if the decision has been issued at a session and otherwise within one week of the date when the appellant received the decision. A person who fails to do so is no longer entitled to appeal against the decision. If someone gives notice of dissatisfaction, the court may declare a stay of the proceedings pending consideration of the appeal, if there are special reasons.

**Section 46** The provisions contained in Sections 44 and 45 also apply in connection with appeals against the decision of a court of appeal that is not final on issues referred to in those sections and which arose in the court of appeal or which have been appealed against to the court of appeal.

**Section 47** A member of the group may appeal against a judgment or final decision on behalf of a group and also a decision on approval of a risk agreement in accordance with Section 39.

A member of the group is also competent to appeal, on their own behalf, against a judgment or a decision that concerns their rights.

**Section 48** A notice of dissatisfaction by a member of the group who is not a party to the proceedings may be made within one week of the date for the decision provided the decision has been pronounced at a session to which the member has not been summoned nor has attended nevertheless. The same applies if the decision has not been pronounced at a session and not served on the member.

#### **Notifications to the members of the group**

**Section 49** The court shall, in addition to what is prescribed by other provisions, notify a member of the group affected of a judgment or a final decision and also of a settlement that is subject to a request for confirmation in accordance with Section 26.

If it is necessary taking into consideration the importance the information may be deemed to have for the rights of the member, the court shall also notify a member of the group affected if

1. the plaintiff has been substituted with a new plaintiff,
2. the plaintiff has appointed a new attorney,
3. the plaintiff has waived the action,
4. that an issue has arisen concerning the approval of a risk agreement,
5. that a judgment or decision has been appealed against, and
6. other decisions, measures and overall situation.

**Section 50** Notifications to members of the group in accordance with this Act shall be made in the manner considered appropriate by the court and observing the provisions contained in Chapter 33, Section 2, first paragraph of the Code of Judicial Procedure.

The court may order a party to attend to a notification, provided this has significant advantages for the processing. The party is in such a case entitled to compensation from public funds for expenses. The provisions contained in the second paragraph also apply when notification is given by service.

---

This Act enters into force on 1 January 2003.