

## **Private enforcement by lawyers and their appointment and replacement**

Dr. Ariel Flavian

The Resolution of Mass disputes Conference paper – 26.11.2015.

### **Who should lead a class action?**

There are a few collective action models, each of which takes a different view of the agency question. Thus, in the representative model, the agency may be an administrative authority or a public body, such as the attorney general. In the organisational agency model, class representation is entrusted in the hands of organisations such as consumer organisations.

Based on a survey conducted by the European community, it appears that consumers assigned the highest ranking to private collective redress and a better score to independent organisations over public authorities.<sup>1</sup>

Fabrizio Cafaggi and Hans-W. Micklitz conducted a survey on Administrative and Judicial Collective Enforcement of Consumer Law in the U.S. and in the European Community.<sup>2</sup> In their survey they noted that in some European countries, such as Austria and Germany, consumer organisations are the sole players in enforcing such areas as unfair terms and unfair commercial practices, whereas in other European countries such as the Scandinavian countries, administrative bodies, such as the Consumer Ombudsman, play the major role in consumer law enforcement,

Professor Rachael Mulheron, uses the phrase ‘ideological claimant’ when referring to ‘a body that has a special expertise or background that enables it to be an appropriate and adequate class representative’.<sup>3</sup> Other scholars mention that legal actions taken by associations may offer a way to mitigate problems surrounding a potential principal-agent conflict, which is particularly true in cases of widespread damage.<sup>4</sup>

Prof. Christopher Hodges promotes a new and innovative idea in his article: "From Class Actions to Collective Redress: A Revolution in Approach to Compensation."<sup>5</sup>

According to this approach, the leading role in collective cases should be handed to public authorities, who would operate on a far more immediate, flexible and responsive basis, involving incentives for restitution rather than delayed weighty financial penalties."<sup>6</sup>

### **Lawyers as entrepreneurs**

Lawyers may perform a public role by acting as private attorney general<sup>7</sup> when doing so they further public goals<sup>8</sup> especially in areas where public enforcement does not function well enough and where there is under enforcement. The typical cases are NEV actions<sup>9</sup>.

---

<sup>1</sup> Special Eurobarometer 298 consumer Protection in the Internal market Publication, October 2008.

<sup>2</sup> EUI Working Papers law 2007/22 European University Institute.  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1024103](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1024103) accessed 21.11.2015 .

<sup>3</sup> Professor Rachael Mulheron, Prof. Rachael Mulheron, Reform of Collective Redress in England and Wales: A Perspective of Need (Civil Justice Council, 2008).

<sup>4</sup> Hans-Bernd Schaefer, ‘The Bundling of Similar Interests in Litigation: The Incentives for Class Action and Legal Actions taken by Associations’ [2000] 9(3) European Journal of Law & Economics 183.

<sup>5</sup> Civil Justice Quarterly 2009, page 41.

<sup>6</sup> “From class actions to collective redress: A revolution in approach to compensation,” Christopher Hodges, Civil Justice Quarterly 2009, 28 (1) pg 41.

The Supreme Court in Israel has acknowledged the entrepreneurial role of a lawyer and found that there is no bad faith for a lawyer to search for appropriate representative plaintiffs<sup>10</sup>.

In class proceedings, unlike typical cases, it is often the lawyer who initiates the proceedings. Only on rare occasions does the representative appoint the group's lawyer.

Since the attorney is behind the action, it has been suggested that the class lawyer should be permitted to act also as the class representative<sup>11</sup>.

One of the major requirements in group proceedings is that the group receives adequate representation. It should be noted that the group representative is not normally appointing the class lawyer and does not supervise the actions of the lawyer then the court has to make sure that the class lawyer will be adequate for the task.

The problem is that a decision in Class action proceedings binds all class members even though they did not take any part in the proceedings. The CAL provides that the lawyer owes his duties to the class in general.<sup>12</sup> Therefore it was held by the district court that the representative plaintiff cannot dismiss the class lawyer even if there are serious disagreements between them.<sup>13</sup>

The involvement of lawyers in private enforcement may be exploited by dishonest or unqualified lawyers and in those cases the courts should step in and replace the lawyers where needed.

#### **Lawyers appointment and replacements by the courts:**

Under the Israeli CAL a motion to certify a class action should be approved only if there is a reasonable basis for concluding that the interests of the class will be represented and managed in an appropriate manner<sup>14</sup> Where the case seems to be sound on its merits a denial of the action due to the lawyer misconduct may be unfair on the class members<sup>15</sup>. Therefore the court should intervene in some cases in order to secure the adequate representation of the class.

---

<sup>7</sup> The definition of "Attorney General" in *Black's Law Dictionary* (6th edn, 1990) states as follows: "The 'private attorney general' concept holds that a successful private party plaintiff is entitled to recovery of his legal expenses, including attorney's fees, if he has advanced the policy inherent in public interest legislation on behalf of a significant class of persons." See also: William B. Rubenstein, 'On What a "Private Attorney General" Is-And Why It Matters' [2004] 57 Vand. L. Rev. 2129

<sup>8</sup> Myriam Gilles and Gary B. Friedman: '*Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*' 155 U. PA. L. REV. 103, 106-08 at page 133.

<sup>9</sup> Lucian A. Bebchuk and Alon Klement, 'Negative-Expected-Value Suits' (2009) in Chris Sanchirico (ed), *Procedural Law and Economics* (2011); Harvard Law and Economics Discussion Paper No. 656. <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1534703](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1534703)> accessed 22.11.2015.

<sup>10</sup> Case no 8037/06 Barzilai V. Prinir Published in Nevo 4.9.2014. See also a supporting position of the Israeli attorney general in case no 3698/2011 Shlomo Transportation V. Shamgar Enforcement Services - available at: <http://index.justice.gov.il/Pubilcations/News/Documents/PositionAttorneyGeneralLawClassActions.pdf> accessed on the 22.11.2015.

<sup>11</sup> Jean Wegman Burns, *Decorative Figureheads: Eliminating Class Representatives in Class Actions*, 42 *Hastings L.J.* 165, 185-86 (1990). This idea was rejected in Israel see *Adv Shilo V. Sprint motors* Published in Nevo decision dated 18.2013.

<sup>12</sup> Class Action Law 5766-2006, s 17 (Israel).

<sup>13</sup> Case No. 4263-03-11 (Central District Court) *Eshel Hayeor v. Adv Shilo and Partner* (5 March 2012) (Judge Groskopf).

<sup>14</sup> Class Action Law 5766-2006, s 8(A)3 (Israel).

<sup>15</sup> In a recent decision of the Israeli district court (Case no 1469-02-13 **Levy V. Pasta Nona** - decision dated 26.11.2014) Judge Inbar provided inter alia, that the appointment of lawyers by the courts is time consuming and is not part of the court regular work therefore the courts should act to replace a lawyer only in exceptional cases where nonintervention may cause severe and immediate damages to the interests of the class).

Normally the courts are reluctant to disqualify a lawyer from representing the class<sup>16</sup>. There are some circumstances where it seems clear that the interests of the class require lawyer's replacement.

Lawyer misconduct- In one U.S case, the court imposed sanctions against the representing attorney and went as far as stating that "Counsel's performance in these proceedings demonstrates an inability to adequately and competently represent a single plaintiff, much less a class of plaintiffs."<sup>17</sup>

Where the representatives requested to voluntarily dismiss the action. In such cases, the court may approve the dismissal, though appoint other representatives to continue the action<sup>18</sup> if the action seems to be meritorious or beneficial to the public.

It is also said that the lawyer should be replaced where there is a conflict of interest. However, conflict may be dealt with by dividing the class into subclasses and appointing a lawyer for each subclass.<sup>19</sup>

There is a very profound debate on the proper response to counsel's violation of ethical rules: whether it should lead to the rejection of a class action or to the replacement of the class counsel.<sup>20</sup>

### **How should the court replace a lawyer:**

The Israeli law like other jurisdictions which deal with lawyer appointment is silent on the question of how to decide who will replace the representative. It only provides that a notice should be published to the general public and a suitable representative or a lawyer may put himself forward as a class representative.<sup>21</sup>

In the U.S, some guidance is provided:<sup>22</sup> According to the American criteria there are considerations which the court must consider and others which are left to the court's discretion.

In the event that there are a few candidates well-suited to leading the action, an auction for the best fee agreement provides a possible solution<sup>23</sup>. The auction procedure is an approach which

---

<sup>16</sup> In fact the Israeli courts have never made any use with their power to replace lawyers, instead the courts have ordered the lawyer who was found to be inadequate to employ another lawyer who is more experienced. See for example:

Case no 2718/09 **Gadish V. Elsint** Published in Nevo 28.5.2012

Case no 1134/95 **Shemesh V. Reichart** Published in Nevo 15/10/1996

Case no 1065/05 **Shaul V. Tadiran** Published in Nevo 31/5/2005

This result is not satisfactory as it leaves the appointment decision in the hands of a lawyer who the court found to be inadequate. See for example:

<sup>17</sup> Hatch V. Reliance Insurance Co. 758 F2d 409, 416 (9<sup>th</sup> cir 1985).

<sup>18</sup> Class Action Law 5766–2006, s 16(D) (Israel).

<sup>19</sup> Class Action Law 5766–2006, s 10(C) (Israel).

<sup>20</sup> Buecher Kelly, Solicitation in class actions: should class certification be denied because class counsel solicited the class representative <http://www.allbusiness.com/legal/1079831-1.html>.

<sup>21</sup> See for example: Class Action Law 5766–2006, s 16 (Israel).

<sup>22</sup> Rule 23(g), Federal Rules of Civil Procedure.

<sup>23</sup> Andrew K Niebler, *In Search of Bargained For Fees for Class Action Plaintiffs' Lawyers: The Promise and Pitfalls of Auctioning the Position of Lead Lawyers*, 54 *The Business Lawyer*, 763 (1999). See also: Third circuit task force report on selection of class counsel 108 F.R.D 237. And: Fisch Jill E, *Lawyers on the auction block :evaluating the selection of class counsel by auction*, 102 *Columbia Law rev.* 650, 693(2002).and: LAURAL L.

appeared in the U.S. in 1990. The first judge to use an auction procedure was Judge Vaughn Walker of the Northern District of California, in *In re Oracle Securities Litigation*.<sup>24</sup> In some states in the U.S. the auction procedure for the role of lead lawyer was adopted.<sup>25</sup>

With regard to the auction procedure, it should be remembered that the first stage of the auction concerns the quality and reputation of the lawyer – the fees are not in question at that stage. The fee should be considered in the second stage. The auction idea is not sound from criticism in the U.S.<sup>26</sup>

Macey and Miller<sup>27</sup> suggested a different system of auctioning the class action. According to this idea the action is sold in an auction procedure for the best lawyer bidder. Under this model, the action is sold altogether in an auction either to a lawyer or to any person who will own the action.<sup>28</sup> This idea is academic only at the moment<sup>29</sup>

---

HOOPER & MARIE LEARY, AUCTIONING THE ROLE OF CLASS COUNSEL IN CLASS ACTION CASES: A DESCRIPTIVE STUDY (2001), reprinted in (2002) 209 F.R.D. 519

<sup>24</sup> *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 689–90 (N.D. Cal. 1990).

<sup>25</sup> Laural L. Hooper and Marie Leary, ‘Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study’ August 29, 2001 reprinted in (2002) 209 F.R.D. 519.

<sup>26</sup> See for example: Lucian Arye Bebchuk, *The questionable caser for using auctions to select lead counsel*, Washington University Law Quarterly, pp 889-899 (2002). Third circuit task force report on selection of class counsel 108 F.R.D 237

<sup>27</sup> Jonathan R. Macey and Geoffrey P. Miller, ‘The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform’ [1991] 58 U Chi L Rev 1, 105.

<sup>28</sup> The auction procedure is also raised by some other scholars:

Leo Herzel and Robert Hagan ‘Plaintiff Attorneys Fees in Derivative and Class Action’ (1981) 7. No. 2 Litigation. 25 ; J C Coffee Jr, ‘Understanding the Plaintiff’s Attorney: The Implication of Economic Theory for Private Enforcement of Law through Class Action and Derivative Actions’ [1986] 86 Columbia Law Review 669; Janet Cooper, ‘Do the Merits matter? A study of settlements in securities class actions’ [1991] 43 Stanford Law Review 497; R. S. Randall S. Thomas and Robert G. Haugen, ‘Auctioning Class Action and Derivative Lawsuits: A Critical Analysis’, (2003) 87 Nw. U. L. Rev. 423 (1993); J. R. Macey and G. P. Miller, ‘Auctioning Class Action and Derivative Suits: A Rejoinder’ [1993] Northwestern University Law Review 458; Jill E. Fisch, ‘Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction, (2002) 102 COLUM. L. REV. 650; Alon Harel and Alex Stein, ‘Auctioning for Loyalty: Selection and Monitoring of Class Counsel’ (2004) 22(69) Yale Law & Policy Review available at: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=497342](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=497342)> accessed 21.11.2015.

<sup>29</sup> Hans-Bernd Schaefer, ‘The Bundling of Similar Interests in Litigation: The Incentives for Class Action and Legal Actions taken by Associations’ [2000] 9(3) European Journal of Law & Economics 183 at page 197.