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# BEYOND OPT-IN AND OPT-OUT: THE LAW AND ECONOMICS OF GROUP LITIGATION*

The main purpose of law and economics, or the economic analysis of law, is to analyse the expected incentive effects of legal institutions.[1] Law and economics models are based on the assumption that we are able to predict these effects, because the simple *rule of demand* remains valid in the field of the law: if a legal institution raises the cost or reduces the benefit of an activity, the level of the respective activity will decrease. (Similarly, the level of the activity will decrease if the benefits derived from an alternative activity increase.) It is well established in economic theory that benefits and costs are not only of a material, financial nature. Furthermore, decision makers are not guided only by selfish or greedy motivations; they have ethical standards and accrue a benefit (e.g. happiness) if they meet these standards.

The law and economics analysis of group litigation or collective litigation or class action follows the same path: the model attempts to demonstrate how the parties' activities in a legal procedure will change if new institutions modify the costs and benefits of lawsuits. The theory attempts to predict how these institutions influence the number of lawsuits initiated and the decisions taken in the legal procedure (e.g. the offer and acceptance of the settlement, the provision of evidence). Economic analysis of law is able to present the difference between the incentive effects related to the different forms of group litigation. Moreover, it assesses the potential effects of group litigation on the basis of the so-called *primary activity*: the incidence of illegal (or seemingly illegal) actions.

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1 Many scholars of law and economics would find this definition too narrow. They would propose another purpose: to define socially efficient institutions as well. See Shavell 2004, p. 593-660; Cooter & Ulen 2012, p. 1-9; Posner 2011, p. 28-36.

## 1. Economic Theory of Group Litigation

In this section, group litigation and collective litigation will be contrasted with the representative action. The *representative action* – where authorized NGOs or public agencies may sue on behalf of the victims even if none of the victims or only a few victims participate – is not group litigation but merely a new form of *public interest litigation* managed by politically or ideologically motivated agencies, associations. For this reason, the key point is participation: why do interested parties participate in an action (opt-in or at least not opt-out)? What can they be offered in exchange for their time and effort?

It seems that the key difference between the successful and unsuccessful group litigation methods is that the successful working systems (e.g. Dutch or American class actions) provide some extra advantages, some extra benefits in exchange for participation. The section proves that this advantage, this personal benefit is the most important feature of the working systems. Whether it is an opt-in or an opt-out mechanism, how the litigation is funded, who has standing to sue in the name of the group: these are secondary issues. These policy issues affect the level of the extra benefit; they influence the personal decision on participation; but the most important effects come from the so-called collective action problem.

### *1.1. The Collective Action Problem: Key Question*

Collective action problems are not distinctive features of collective lawsuits: they occur in many spheres of social life. Therefore, it is worth analysing the methods employed in other areas to deal with these problems. The key issue is: why would members of a group (or at least some members of the group) participate in a collective action?

Let us start with the economic concept of public goods and the problem of free-riding – this is the key characteristic leading to the collective action problem. Public goods are situations where two conditions are met:

1. there is a group, the members of which have a common goal (in the case of group litigation they want to overcome the defendant in the courtroom, in other examples they want clean air in a city or a successful national football team); but
2. if their common goal is achieved, it will provide a benefit (not always equal benefits, but some benefits) for all group members – and not only for those who actively participated in achieving this goal. Non-participants cannot be excluded from benefiting from the public goods.

### *1.2. The Free-rider Problem*

This non-excludability results in the free-rider problem. If the benefit is available even without contribution, then the dominant strategy of every single member will be to refrain from taking action – why contribute if the benefit will be available

independently of the personal efforts made? As will be demonstrated, in an extreme case, all members will wait for the others, everybody will attempt to free-ride; and nobody will do anything to produce the public goods (i.e. nobody will sue, nobody will fight for clean air, or nobody will take steps in order to build a strong national football team). Even if everybody will be better off with the public goods, nobody will be personally interested in fighting for them. This is the collective action problem.

**Proposition 1: Group litigation will work only if the collective action problems stemming from its public goods characteristics are solved.**

### *1.3. The types of collective actions – different collective action problems*

The basic problem of group litigation seems to be the same: the interested parties can receive their benefits without participating – as a result, they are not interested in participation. It is substantiated by European collective redress methods: interested parties will not join the action if the authorized NGOs or public agencies launch the process.

However, it is worth further analysing the public goods characteristics in the legal procedure, because this may demonstrate that the collective action problem is not the same in the case of *claims for injunctions* and *compensatory collective actions*: the claim for injunction is more likely to fail due to free-riding, while compensatory claims may be successful even if group members are basically interested in refraining from participating in the action.

### *1.4. The case for injunction*

Imagine a case where there are numerous victims of an extremely noisy music club in the neighbourhood. The public goods effect in cases of injunction is obvious: if any group member sues to close the club or to limit its opening hours and she prevails, the other members are not required to take any further steps such as to sue, to bear litigation costs or risks. The public goods will be available for the non-participants as well: if the opening hours are constrained, then the quiet hours will be quiet hours for participants and non-participants alike. But the public goods characteristics emerge even in the case where the first plaintiff fails. In this case the others receive free information: they learn that litigation will be unsuccessful, without having to bear any litigation costs or risks. In both cases (i.e. enjoying the benefits without contributing and not participating in a failed suit) they are better off, if they are not the first party to sue. And if everybody waits for the others to bring the first suit, then this first suit will not be brought.

### *1.5. Compensatory actions – the res iudicata problem*

The problem is somewhat more complicated in the case of compensatory actions. Suppose the group sues the music club for damages. In this case the decision of the

court can be divided into two parts: the judgment on the liability of the club and the decision on the amount of damages payable to the plaintiffs, the group members. Obviously, damages are not public goods: the non-participants can be excluded, they will not receive compensation. They have to participate in the lawsuit or bring another suit in order to be eligible for compensation.

But what about the part of the judgment regarding liability? How does the decision on the liability (for example, negligence) of the music club affect non-participants? Can they make reference to this judgment in future lawsuits? Will the liability of the club be *res iudicata*? If the answer is yes, the decision will have clear public goods characteristics. It is worth waiting for the judgment to be rendered in the first case and then cite the decision in a second one. The decisions on liability may be referred to without any further cost – similar to the case for injunction.

If the decision does not have a *res iudicata* effect, if the judges in future cases are not bound by the first judgment on the question of liability (for example, because they are independent from other judges they are not constrained by 'precedents'), the public goods effects will be weakened. The parties are less motivated to wait. But this incentive does not vanish entirely; the strategy of waiting yields clear advantages in this case as well: parties will receive free information about the successful (or unsuccessful) litigation strategy. They will be able to repeat the prevailing argument and avoid the failed ones in their own case.

In short, in a compensatory case the public goods effect depends heavily on the definition of *res iudicata* in the given legal system. But this public goods effect always exists, and the group members are always interested in waiting. And if everybody waits for others to bring the first suit, the first suit will not be brought.

**Proposition 2: Public goods characteristics (collective action) are more important in the case of claims for injunction than in the case of compensatory actions. The public goods effect in the case of compensatory collective action depends on the definition of *res iudicata*.**

From the viewpoint of law and economics, the main function of group litigation is to cope with public goods characteristics.[2] It must reduce the incentive to free ride. But fortunately, as aforementioned, this collective action problem is not a unique feature of group litigation – it also appears in other spheres of social life. And this incidence makes it possible to borrow some solutions from other areas.

Two points are worth stressing:

1. The public goods characteristic does not always result in a situation where everybody follows the free-rider strategy – there are groups which are more likely to provide themselves with these public goods than others. This difference among the groups is indicated in group litigation literature as the difference between the so-called *high-value* and *low-value* lawsuits.

[2] For similar analysis see Cassone & Ramello 2012; Cassone & Ramello 2011; Marceau & Mongrain 2003.

2. Even if the incentive for free-riding is strong enough to hinder collective action, effective regulation may provide incentives to join the groups through the so-called personal or club goods method: the participants (who do not follow the free-riders' strategy) receive some extra benefit from group membership. In this context, the most important point in group litigation regulation is to create some extra advantage for participants.

The next section will present the first point, while the subsequent section deals with the second.

### *1.6. Remedying collective action problems*

The law and economics literature of group litigation distinguishes between the groups where the parties have a high enough stake to launch lawsuits individually (but they wait for others in order to benefit from the advantages of the public goods effect) and the groups where the personal stake of each potential group member is very low, so they will not be interested in bringing a suit. The typical case for this second category is the so-called mass tort where the personal expected litigation cost of the victims is higher than the expected benefit resulting from the lawsuits.[3] Under the loser pays rule this personal 'expected litigation cost' is the cost above the amount covered by the contribution from the losing party.[4]

In terms of economic theory, the problem of high-value groups is the so-called game of 'chicken', while the low-value case can be described in terms of the prisoner's dilemma. As will be demonstrated, the high-value cases are more likely to appear in the courts. In these cases, the main role of group litigation is to reduce the time lag so that the first case is filed as early as possible.

### *1.7. Low-value group: the prisoner's dilemma*

In the case of low-value suits, the well-known situation of the prisoner's dilemma appears. In this case the first best option for all parties is to free ride, i.e. they do not participate in the collective action, but the others provide the public goods. The second best option is when all members contribute – the cost of producing the public goods can be distributed among the participants, so the personal litigation cost will decrease. The third best option is where nobody contributes. And the worst option is the single contribution case, because the litigation cost (the cost of providing the public goods) exceeds the expected benefit resulting from the lawsuit.

In this small-claims (or mass tort) case, group litigation will be expected to fail: each potential plaintiff will wait for the others; everybody will attempt to avoid participation. The free-rider problem can be solved only if the group litigation process ensures some personal (non-public goods) benefit for them – advantages which are unavailable to non-participants.

3 For a similar distinction, Wagner 2011, p. 62-66.

4 For similar analysis of the 'loser pays' rule, see Katz & Sanchirico 2012, p. 274.

### *1.8. High-value groups: 'chicken game'*

In the case of 'chicken game', the best option is to free ride on others, and the second best option is when all contribute. The sequence of the other two options is reversed. The third best option is when only the decision maker takes steps, and the worst option is when nobody takes steps. The difference comes from a feature of the high-value cases: because of the low litigation cost, bringing the first suit is better for the first mover than the case of no suits.

It is easy to demonstrate that in this case it is better to be the single contributor and bear the cost and risk of the actions than the lack of the public goods (for example the lack of injunction against the noisy disco). Therefore, after some time, one of the group members will sue, because even a one-sided action (lacking the partners' participation) yields sufficient benefit. The only question is: who will be the contributor and who will free-ride? In this case the role of the rules of group litigation is to reduce this time lag, to induce early litigation.

**Proposition 3: Group litigation (regulatory assistance) is necessary not only in the case of low-value claims (e.g. consumer protection, cartel cases) but in high-value claims as well.**

### *1.9. Necessary incentives: personal benefits for participants*

The legal system can cope with the collective action problem if it provides additional personal or club benefits[5] for participants (and only for the participants). This reshapes the incentives: the benefit from single or joint participation (or the cost of non-contribution) must increase – it includes not only the public goods (*res iudicata* problem), but some benefits which are unavailable outside the group. Therefore, the key issue is what kind of extra benefit group litigation can provide for the participants.

**Proposition 4: The collective action problem can be solved only if participation yields some personal benefit (not public goods).**

The first (seemingly most obvious) potential advantage is *cost reduction*: in the case of collective action the per capita cost is expected to be lower than the litigation cost of individual lawsuits, because this litigation cost can be distributed among

[5] The economic literature distinguishes personal and club goods. In this case both are enough. Personal goods are benefits where the benefit is individualized – each member gets something different. For example, the money that Plaintiff A receives cannot be given to Plaintiff B at the same time. (If Plaintiff B is eligible for the same amount, she will receive different money; the defendant must pay double the damages – once for Plaintiff A and once for Plaintiff B.) In the case of club goods, the group members receive the same goods – but this benefit is unavailable for non-participants. (For detailed analysis of club goods: Cullis & Jones 2009, p. 68-71).

numerous members. But it is quite an unrealistic expectation that those who do not bring individual lawsuits will take part in a collective action just because its cost is lower. The cost of non-participation is zero – consequently it will be lower than the reduced cost of the collective action.

Moreover, in some cases, group litigation does not reduce but much rather increases costs. The group has to face many problems which are unknown to individual cases: organizational and agency problems occur. The organizational costs are obvious: the members, the parties joining the group, must be registered. But what is the agency cost? The agency cost is the problem of the conflict of interests between the principal and her agent. This conflict may also appear in the case of individual litigation, but collective action enlarges this problem. In the case of individual litigation, a single defendant (she) must control the actions of her lawyer (him) – but because she knows that she is the only principal, she will control him. However, in the case of group litigation, this issue of control causes collective action problems: if any member of the group (she) is able to monitor the actions of the group representative or the lawyer (him), and if she is able to ensure that his decisions are consistent with her own goals, then all group members are saved from his misuse of power. Therefore, the problem of free-riding is back: it is possible that everybody will wait for the others to monitor him; consequently, control will be ineffective.[6]

Moreover, the interests of the different subgroups or members may be in conflict. The subgroups can be interested in different actions of the lawyer, the representative. The group must find a solution for this conflict of interests – and finding this solution (negotiation, elaborating rules of games within the groups, etc.) will be costly.

**Proposition 5: Cost reduction is not enough to induce participation. Other additional personal benefits are needed.**

The main form of these additional personal benefits is the settlement payment. The expected per capita amount of the settlement offered by the defendant will be higher in the case of group litigation.

[6] The agency cost is one of the most widely discussed issues in law and economics literature on group litigation. The literature focuses on the effects of lawyer fees on the actions of the lawyer and the representative. For arguments in favour of contingent fees, see Backhaus 2012, p. 127-128; Cassone & Ramello 2012, p. 117-121; Emons & Garoupa 2006; Issacharoff & Miller 2012, p. 54-59; Macey & Geoffrey 1991. Arguments against contingent fees, see Brickman 2003a; Brickman 2003b; Cooter & Rubinfeld 1989; Gravelle & Waterson 1993; Rickman 1994; Sacconi 2012 and Swanson 1991.

### *1.10. The role of settlement: the problem of the enrichment of the victim*

If cost reduction does not effectively induce participation, the increase of benefits stemming from the lawsuit can be effective. Consider first *compensatory claims*. Why would the participants receive higher damages as group members than what they could draw as individual plaintiffs in future lawsuits? Law and economics literature (and various empirical findings) demonstrate that this is possible because collective action modifies the litigation and settlement strategies of the parties. Both the plaintiff (the group) and the defendant will devote more resources to convince the court, and group litigation increases the prevailing chances of the plaintiffs.[7] The basic reason for this change is that while in the case of individual lawsuits there is an unavoidable asymmetry in the calculation of the defendant (she) and that of the individual plaintiff (he), this asymmetry decreases in the case of group litigation. In individual cases, only the defendant can recognize and consider the effects of the current lawsuit on future ones. He will know that the evidence he collects and provides in the current case regarding liability may be used in future lawsuits as well. At the same time, she deals only with the expected benefit stemming from the current case. This asymmetry in the parties' stakes increases his chances to prevail. As this asymmetry weakens, her winning chances increase in collective actions. But this increase in her winning chances is not a personal benefit – as aforementioned it has public goods characteristics (depending on the *res iudicata* effects). In order to induce participants to join, these benefits must be transformed into personal advantages. This transformation is possible through settlements: the participants can expect a higher settlement offer in the case of group litigation than in the case of individual lawsuits. The basic rationale behind this expectation is very simple: if the defendant has a higher chance of losing the case, he will offer more to avoid litigation.[8]

At first sight, this extra benefit seems to be missing in *claims for injunctions*. However, settlement is a realistic option in those cases as well. The defendant can offer some compensation for continuing the action (or reducing the activity level and paying some compensation to the plaintiffs in exchange for allowing that level of activity). In this case the effects of a settlement offer are similar to the former case: the music club promises to pay a given amount of compensation if the plaintiffs settle and allow the club to work until late into the night.

**Proposition 6: The most obvious benefit for participants is personal (financial) compensation through a settlement or through a higher amount of damages awarded by the court.**

However, in order to induce participation, this high amount of a settlement must be in private or club goods, it must be unavailable to non-participants. Yet, the legal

7 For the analysis of the expected litigation cost: Katz 1988.

8 For detailed analysis of the effect of this asymmetry: Rosenberg 2002, p. 853; Hay & Rosenberg 2000, p. 1379 and 1383; Coffee 1987, p. 899 and Coffee 2000, p. 416.

system can impede the appearance of such private or club goods characteristics. Judges, and legal scholars too, may find it unacceptable that a group members receive higher compensation than non-participants. The enforcement of such settlements is likely to be refused, or to be expanded to non-participants as well. In this case the appearance of such additional personal benefits necessary to induce participation will be prevented: no relevant advantage deriving from participation will remain in the system.

Moreover, because of this new balance of power, the settlement offer in the case of group litigation may be higher than what the participants are expected to receive in an individual lawsuit.[9] The defendant will be willing to pay a higher amount if she can avoid the litigation cost through settlement. But this extra payment is sensitive to court's mistake: it is easy to be misinterpreted and declared an unjust over-compensation which is prohibited according to the Section 31 of the EU Recommendation[10]:

> The compensation awarded to natural or legal persons harmed in a mass harm situation should not exceed the compensation that would have been awarded, if the claim had been pursued by means of individual actions.

## 2. Law and Economics of some Regulatory Problems

Section I demonstrated that the success of group litigation reform depends mainly on the amount of personal benefit in the collective action process. However, these personal benefits are determined basically by such features (i.e. *res iudicata*, legal acceptance of high settlement payments) which are outside of the normal area of laws on civil procedure. Therefore, Section II now focuses on the incentive effects of some of these normal regulatory choices in the group litigation reforms: the formation of groups (opt-in system vs. automatic group membership), exit or opt-out options and required characteristics of the group representatives.

### *2.1. Opt-in or Automatic Membership*

The EU Recommendation elaborates an opt-in system:

> The claimant party should be formed on the basis of express consent of the natural or legal persons claiming to have been harmed ('opt-in' principle). (Section 21)

The first criticisms emphasized that this opt-in method conflicts with the current opt-out systems in several European countries (e.g. Denmark, the Netherlands,

[9] For example, Samuel Issacharoff and Geoffrey P. Miller argue that in order to induce participation the payment according to the settlement has to be higher than the damage the party would expect from an individual action. Issacharoff & Miller 2012, p. 63.

[10] Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms (**vervolledigen?**).

Portugal). But this contrast is misleading. The Recommendation itself requires the opt-out option, too:

> A member of the claimant party should be free to leave the claimant party at any time before the final judgement is given or the case is otherwise validly settled, subject to the same conditions that apply to withdrawal in individual actions, without being deprived of the possibility to pursue its claims in another form, if this does not undermine the sound administration of justice. (Section 22)

The real alternative, the real contrast to the opt-in systems is not the opt-out mechanism, but a system in which group membership is established automatically.[11] The national regulations in several European countries such as those just mentioned and the American class action system conflict with the Recommendation because they are built on automatic group membership. In the recommended European system, the potential members have two decisions: first about the entry and afterwards about the exit. This opt-out choice (the opt-out) is made in better knowledge of the consequences of group membership and of the alternative opportunities.[12]

As the opt-in and opt-out systems do not exclude each other, it is worth separating their law and economics analysis. Focus on the choice between the opt-in system and automatic group membership and start with the *advantage of automatic group formation*. Several articles[13] demonstrate the link between the success of the group litigation system and automatic membership because opt-in systems reduce the personal benefit for the group members. In the case of automatic membership the plaintiff group is expected to be larger, the larger groups are more likely to prevail and therefore the defendant will be willing to offer a higher amount per capita as settlement – the personal benefits for participants are higher in the case of automatic membership.[14]

The other main argument for automatic membership is the reduction of the administrative cost. Remember, low-value cases are not brought, because of the very small personal benefit and high litigation cost. All forms of group litigation reduce this personal litigation cost, but the reduction in the case of automatic membership is larger: because registration is not required.

But automatic group membership is not the better solution in all situations – it has its own *problems*. The choice between the opt-in and automatic membership is similar to what Richard Posner has mentioned with regard to contract formulation:

11 It is inevitable that this view of unavoidable choice between opt-in and opt-out mechanisms is widely accepted, and this misunderstanding influences some European reforms. For example, Fabrizio Cafaggi and Hans-W. Micklitz state that the Swedish system was transformed from an opt-out system into an opt-in system at the last moment before the enactment because the legislators feared that the unwanted consequences of the American class action system would appear if an opt-out system were established (Cafaggi & Micklitz 2007, p. 30).

12 Coffee 2000, p. 424-425.

13 See for example Issacharoff & Miller 2012, p. 59-65; Ulen 2012, p. 85.

14 Issacharoff & Miller 2012, p. 63.

does the acceptance of an offer require an explicit agreement or is silence (the lack of refusal) enough?[15] In this case the 'offer' comes from the representative; the opt-in system requires explicit agreement, while the automatic group membership (with an opt-out option) is a system where silence is acceptance. According to Posner, the optimal default rule depends on whether the number of acceptances exceeds the number of refusals. This argument returns in the law and economics literature of group litigation: in case of the low level of exit the average parties are more likely to accept the 'offer', so silence should be enough for acceptance.

Analysing this regulatory choice, the literature often applies the models of *bounded rationality*. According to this theory, the default rule (group membership in the case of automatic membership, or non-membership in opt-in systems) heavily influences the result. There are potential members whose membership depends entirely on this default rule: in the case of automatic membership they will be members (they do not exit), while under the opt-in system they would not participate (they do not enter). According to bounded rationality theory, this stickiness of the default rule comes from the fact that the potential members do not understand the consequences of their choice (about entry or exit), so even if the default rule provides less benefit, they do not change the situation (they do not exit or they do not enter).

### *2.2. Opt-Out*

Even if opt-out seems to be a necessary point in the group litigation system (especially if it is based on automatic membership), there are some group litigation (class action) systems without exit options. For example, the US class action did not know an exit option before 1966, and today there are 'mandatory classes' (meaning there is no mechanism for individual class members to opt-out). Richard A. Nagerda describes the Norwegian and Danish systems as ones where exit is possible only if the members have no real chance to join another group or start an individual action in the future.[16] And there are reform proposals which would deprive the exiting parties of some of their rights; for example, they would have no right to file new lawsuits.[17]

The legal argument for the opt-out option is that the parties must be able to influence their own lawsuit. Since in the case of group litigation many people have to make decisions collectively, the individual plaintiff is not able to ensure that the group decisions will be the best for her. She is not able to change these decisions; but the exit option provides an opportunity to leave the group if these collective decisions (or the decisions of the representative or of the lawyer) are against her own interests. The law and economics arguments are similar, but they distinguish two problems: the conflict of interests within the group and the agency problem.

15 Posner 2011, p. 128.
16 Nagerda 2009, p. 29-30.
17 Issacharoff & Miller 2012, p. 63.

The opt-out system protects against the agency problem because each member has the right to leave the group who thinks that the representative or the lawyer accepts a settlement or will achieve a judgment that is worse for her than the expected results of an individual action or of another group litigation.[18]

However, although this opt-out mechanism exists in many legal systems, it is rarely used. The main reason is the rational ignorance and rational apathy of the group members: if the stakes in exiting the group are very low, then it is not worth gathering information about the settlements, about the expected judgment or about other options. The group member will not exit in order to ensure only a few euros of expected extra benefit. Implicitly, this rational apathy can be proved if the exit rate increases as the stakes increase – the literature presents several findings consistent with this expectation.[19]

As the last point it is worth stressing that the option to exit affects the defendant's willingness to settle. Without the option to exit (or with high costs of exit because of the aforementioned sanctions) the defendant will expect that the problem he faces with the plaintiffs will be solved once and for all with the settlement or a lawsuit. Therefore he is willing to make a higher settlement offer (higher payment per capita). This increasing willingness to settle implicitly appears in 'null and void clauses': the defendant is free to denounce the settlement, if the rate of exit reaches a given level.

### *2.3. The role of non-profit organizations as representatives*

In Section 4, the Recommendation requires that the representative must be a non-profit organization.

> The Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility. These conditions should include at least the following requirements:
> (a) the entity should have a non-profit making character;
> (b) there should be a direct relationship between the main objectives of the entity and the rights granted under Union law that are claimed to have been violated in respect of which the action is brought; and
> (c) the entity should have sufficient capacity in terms of financial resources, human resources, and legal expertise, to represent multiple claimants acting in their best interest.

The non-profit form is mistakenly seen as a panacea in many fields of law. Contrary to the general view, the lack of dividend does not mean that non-profit organizations will not be able to abuse their position. Even if they cannot divide the extra revenue (profit) among the managers of the organization, they are able to pay it directly to the managers as a 'management fee'. They can spend this extra revenue for buying personal goods used by the managers. Therefore, these organisations can be interested in accepting far from the best settlements if it is lucrative for them.

[18] Coffee 2000, p. 422-428; Hay & Rosenberg 2000, p. 1399; Ulen 2012, p. 85.
[19] Eisenberg & Miller 2004, p. 1563.

Moreover, this misunderstanding of the consequences of the lack of profit-motive may lead to an unreasonable overconfidence – while the for-profit institutions are viewed with suspicion and therefore the group members attempt to control them, the non-profit organizations are able to avoid this control because the group members do not keep in mind the danger of abuse by them.

Naturally this hidden profit-motive is often weaker, and the main motivation of these organizations is often not profit-seeking but something determined by social or ideological goals. For example, green organizations (consumer organizations) are more interested in protecting the environment (protecting the interests of consumers) than in collecting extra revenue. But this special goal may result in another form of agency problem: these organizations follow their own goals and these goals can be in conflict with the interests of the represented group. Samuel Issacharoff and Geoffrey P. Miller offer the example of chewing tobacco: the manufacturers manipulated the market, and they agreed on supra-competitive prices; but the consumer organization did not take the case to court because in their view chewing tobacco is a dangerous product and they did not want to reduce its price – even if the cartel harms the consumers.[20]

## 3. Summary

So, what is the answer to my opening question? What renders the group member interested in participating in collective actions? When will group litigation work? The key is the extra personal benefit, the advantage secured for the participants who opt-in or who do not opt-out. But does this extra benefit depend primarily on the choice between the opt-in or the opt-out system? Does this extra benefit depend primarily on the question of who has the power to sue? Does this extra benefit depend primarily on the system of funding? It seems not. Then, what does it depend on? It depends on the handling of the settlements – especially when they 'overcompensate' the plaintiffs.

[20] Issacharoff & Miller 2012, p. 52. See *In re Massachusetts Smokeless Tobacco Litigation* No. 30-5038-BLS1 (Mass. Cup. Ct. 7 April 2008).

## Bibliography

**Backhaus 2012**
Backhaus, J.G., 'Class Action Finance and Legal Expense Insurance', in Backhaus, J., Cassone, A. & Ramello, G.B. (eds.), *The Law and Economics of Class Actions in Europe,* Cheltenham, UK: Edward Elgar, 2012, p. 127-130.

**Brickman 2003a**
Brickman, L., 'Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees', *Washington University Law Quarterly,* 2003, Vol. 81, p. 653-736.

**Brickman 2003b**
Brickman, L., 'The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?', *Cardozo Law Review,* 2003, Vol. 25, p. 102-165.

**Cafaggi & Micklitz 2007**
Cafaggi, F. & Micklitz, H.-W., 'Administrative and Judicial Collective Enforcement of Consumer Law in the US and the European Community', EUI Working Paper 2007/22.

**Cassone & Ramello 2011**
Cassone, A. & Ramello, G.B., 'The Simple Economics of Class Action: Private Provision of Club and Public Goods', *European Journal of Law and Economics.* 2011, Vol. 32, p. 205-224.

**Cassone & Ramello 2012**
Cassone, A. & Ramello, G.B., 'Private, Club and Public Goods: The Economic Boundaries of Class Action Litigation', in Backhaus, J., Cassone, A. & Ramello, G.B. (eds.), *The Law and Economics of Class Actions in Europe,* Cheltenham, UK: Edward Elgar, 2012, p. 101-126.

**Coffee 1987**
Coffee, J.C., Jr., 'The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action', *The University of Chicago Law Review,* 1987, Vol. 54, p. 877-937.

**Coffee 2000**
Coffee, J.C., Jr., 'Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation', *Columbia Law Review,* 2000, Vol. 100, p. 370-439.

**Cooter & Rubinfeld 1989**
Cooter, R.D. & Rubinfeld, D.C., 'Economic Analysis of Legal Disputes and Their Resolution', *Journal of Economic Literature,* 1989, Vol. 27, p. 1067-1097.

**Cooter & Ulen 2012**
Cooter, R. & Ulen, Th., *Law and Economics*, 6th edn., place: Addison–Wesley, 2012.

**Cullis & Jones 2009**
Cullis, J. & Jones, Ph., *Public Finance and Public Choice: Analytical Perspectives,* Oxford: Oxford University Press, 2009.

**Eisenberg & Miller 2004**
Eisenberg, Th. & Miller, G.P., ' The Role of Opt-out and Objectors in Class Action Litigation: Theoretical and Empirical Issues. 57 Vanderbilt Law Review, 2004 p. 1528-1567.

**Emons & Garoupa 2006**
Emons, W. & Garoupa, N., 'US-Style Contingent Fees and UK-Style Conditional Fees: Agency Problems and the Supply of Legal Services', *Managerial and Decision Economics,* 2006, Vol. 27, p. 379-385.

**Gravelle & Waterson 1993**
Gravelle, H. & Waterson, M., 'No Win, No Fee: Some Economics of Contingent Legal Fees', *The Economic Journal,* 1993, Vol. 103, p. 1205-1220.

**Hay & Rosenberg 2000**
Hay, B. & Rosenberg, D., '"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy', *Notre Dame Law Review,* 2000, Vol. 75, p. 1377-1408.

**Issacharoff & Miller 2012**
Issacharoff, S. & Miller, G.P., 'Will Aggregate Litigation Come to Europe?', in Backhaus, J., Cassone, A. & Ramello, G.B. (eds.), *The Law and Economics of Class Actions in Europe,* Cheltenham, UK: Edward Elgar, 2012, p. 37-68.

**Katz 1988**
Katz, A.W., 'Judicial Decision Making and Litigation Expenditure', *International Review of Law and Economics,* 1988, Vol. 8, p. 27-143.

**Katz & Sanchirico 2012**
Katz, A.W. & Sanchirico, C.W., 'Fee Shifting', in Sanchirico, C.W. (ed.), *Procedural Law and Economics,* Cheltenham, UK: Edward Elgar, 2012, p. 271-307.

**Macey & Geoffrey 1991**
Macey, J.R. & Miller, G.P., 'The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform', *The University of Chicago Law Review,* 1991, Vol. 58, p. 1-118.

**Marceau & Mongrain 2003**
Marceau, N. & Mongrain, S., 'Damage Averaging and the Formation of Class Action Suits', *International Review of Law and Economics,* 2003, Vol. 23, p. 63-74.

**Nagerda 2009**
Nagerda, R.A., 'Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism', *Vanderbilt Law Review,* 2009, Vol. 62, p. 1-52.

**Posner 2011**
Posner, R.A., *Economic Analysis of Law*, 8th edn., New York: Aspen Law and Business, 2011.

**Rickman 1994**
Rickman, N., 'The Economics of Contingent Fees in Personal Injury Litigation', *Oxford Journal of Economic Policy,* 1994, Vol. 10, p. 34-50.

**Rosenberg 2002**
Rosenberg, D., 'Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases', *Harvard Law Review,* 2002, Vol. 115, p. 831-897.

**Sacconi 2012**
Sacconi, L., 'Good Law and Economics Need Better Microeconomic Models: The Case Against "Contingent Fees" as Application of Agency Models to the Professions', in Backhaus, J., Cassone, A. & Ramello, G.B. (eds.), *The Law and Economics of Class Actions in Europe,* Cheltenham, UK: Edward Elgar, 2012,p. 178-218.

**Shavell 2004**
Shavell, S., *Foundations of Economic Analysis of Law,* Cambridge: Belknapp, 2004.

**Swanson 1991**
Swanson, T.M., 'The Importance of Contingent Fee Agreements', *Oxford Journal of Legal Studies,* 1991, Vol. 11, p. 193-226.

**Ulen 2012**
Ulen, Th., 'The Economics of Class Action Litigation', in Backhaus, J., Cassone, A. & Ramello, G.B. (eds.), *The Law and Economics of Class Actions in Europe,* Cheltenham, UK: Edward Elgar, 2012, p. 75-98.

**Wagner 2011**
Wagner, G., 'Collective Redress – Categories of Loss and Legislative Options', *Law Quarterly Review,* 2011, Vol. 127, p. 55-82.