VII. Class Action Suits In the U.S.: Comparative Procedural and Substantive Analysis

Between 1973 and 1989, 28,524 class actions were filed in the United States Federal District Courts. Roughly 18,000 class suits have been filed at the state level during that time. Americans have been eager to seize upon the commonality of interest between group members as justification for joint litigation. Interestingly, instead of creating more bureaucracy, the U.S. Congress as well as the State Legislatures have passed laws on various subjects and authorised class suits as primary enforcement tool. Some examples are Federal Trade Commissions Act, Truth In Lending Act, Magnuson-Moss Consumer Product Warranty Act, Fair Debt Collection Practices Act etc.

The American experience is that the availability of action by class has spurred the development of substantive rights which otherwise might have gone wanting.

As pointed out above, Federal Rule 23 prescribes the procedure for class action suits in the U.S. 23(a) lays down prerequisites to a class action which are: One or more members of a class may sue or be sued as representative parties on behalf of all only if
(1) the class is so numerous that joinder of all members is impracticable
(2) there are question of law or fact common to the class
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class and
(4) the representative parties will fairly and adequately protect the interests of the class.

(Emphasis supplied)\(^4\). This rule was amended in 1966 and the above was substituted for the old rule. Most of the states too have adopted this rule.

If these prerequisites are satisfied, an action may be maintained as a class action under the following three circumstances (types) under the rule:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) adjudications with respect to individual members of the class which would as a practical matter
be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the funds, meets the problem. The same reasoning applies to an action by a creditor to set aside a fraudulent conveyance by the debtor and to appropriate the property to his claim, when the debtor's assets are insufficient to pay all creditor's claims. Similar problems can arise in the absence of a fund either present or potential.

(2) An action may be maintained as a class action if the stated prerequisites of such an action are satisfied and, in addition, the party opposing
the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Illustrations are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration. An action looking to specific or declaratory relief could be brought by a numerous class of purchasers, say retailers of given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers, say retailers of another description, when the applicable law forbids such a pricing differential. So also a patentee of a machine, charged with selling or licensing the machine on condition that purchasers or licensee also purchase or obtain an ancillary unpatented machine, could be sued on a class basis by a numerous group of purchasers or licensees, or by a numerous group of competing sellers or licensors of the unpatented machine, to test the legality of the "tying" condition.
(3) Finally, an action may be maintained as a class action if the stated prerequisites of such an action are satisfied and, in addition, the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

For instance, a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class.  

One will find that though somewhat differently worded the essential conditions of numerous persons and similar interest found in O.1 R.8 of C.P.C. are also the essential conditions in the U.S. The notice requirement, permission of the court requirement is also there. The volume of class action and its use in different substantive areas of law in the U.S. is however much higher than in India. Some areas where class action suits are widely filed are Consumer, Environmental, Civil and Public Rights, Investors, Competitors, Property 129
owners, Co-owners, Mass tort actions. As far as the last i.e. mass tort actions are concerned they have become popular particularly in product liability cases. The single incident mass tort when a catastrophic event (like Bhopal Gas Disaster) causes multiple harms, class action has been used in the U.S.

Some distinguishing features may however be noted. Federal rule 23 allows an action to be brought or maintained as a class action with respect to particular issues or a class may be divided into subclasses and each sub class treated as a class and the provisions of the rule applied accordingly. We do not see such a provision in 0.1 R.8, which can allow greater scope for the class action in part. Should plaintiff's class definition be too broad in the sense of including groups with substantially different legal relationships viz-a-via the defendant, the court may divide the class into subclasses and permit the plaintiff's attorney to join representatives of each subclass.

Another method adopted by the courts there is appointing "lead" Counsel in cases with a multiplicity of class representatives. Further, when the class action is certified only on specific
issues, trial is normally split into two distinct segments, for example, liability to the class is first assessed and should that be positive, a mechanism implemented for proof of individual damages either in court or before a special court appointed master.9

It may also be noted that the courts have often determined that unnamed parties who benefit from a class action must contribute to the expenses of the proceedings, including the fee for the attorney for the named parties. 10

Another distinguishing feature is that in the third type of class action suit above where class action is certified because questions of law or fact common predominate the individual, those who do not wish to be members of the class can after notice request the Court so. The decision in the suit will not affect them in any way. This class is termed as opt out class. No such provision is there in Indian representative suit which can and does many a times discourage class actions in the United States if the opt-out class is going to be too large as compared to the class in the suit. In India, those with notice cannot exclude themselves like this. If they have any objection to the representative they can raise objections
and can be joined in the proceedings and the Court will see to it that their interests are not adversely affected.

Two landmark cases of mass tort class action suits may be taken to clarify and understand the American use of this legal device:

(1) In re "Agent Orange" Product Liability Litigation:¹¹

Plaintiffs, Vietnam war veterans and members of their families claimed to have suffered damages as a result of the veterans' exposure to herbicides in Vietnam. Defendants allegedly produced these herbicides. Plaintiffs sought to use class action to redress injuries caused by "Agent Orange". Defendants contended that causation was not common to the class since each veteran, spouse and offspring brought to the case there respective unique history. Each veteran was exposed if at all, at different times, at different places and under different circumstances. They suggested that if the class is certified, it should be limited to the only issue which they see common in the entire class i.e. the government contract defense.

Chief Judge Wieniestein of the Eastern District of New York, showing a lot of creativity and innovativeness certified the class and reasoned
that the trial is likely to emphasize critical common defenses applicable to the plaintiffs' class as a whole. Certification would therefore be justified to prevent relitigating these defenses over and over again in individual cases. 12

For the purpose of the causation issue the court ordered that plaintiffs' counsel choose representative claimants for each type of injury alleged. A determination adverse to the plaintiffs in all categories could resolve the litigation and save considerable judicial and lawyers' time. Even if there is a finding of no causation as to less than all of the types of damages alleged, that determination alone would be likely to resolve tens of thousands of individual claims.

Thus, in a mass tort situation like this at least two issues will be common issues of law and fact viz. liability creating conduct on the part of the same defendant and causation. The class was defined as: those persons who were in the United States, New Zealand or Australian Armed Forces at any time from 1961 to 1972 who were injured by exposure to Agent Orange and spouses, parents, and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure.
Judge Wienstein found predominantly common questions in certain defenses raised by the chemical manufacturers and the question whether "Agent Orange" could cause the types of injuries alleged. He had an eye on settlement and knew that defendant manufacturers would settle only if the bulk of the class remained intact, a likelihood because of the tenuous nature of the class members' legal claim. Notice was economically feasible because only a small percentage of the class had to be served by mail, the bulk being notified through newspaper, magazine, radio and television announcements. At the end, the defendants did settle for $180 million, the settlement was approved by J. Weinstein and the Second Circuit and periodic payments are currently being made to approximately 16,000 veterans pursuant to the approved distribution plan.

(2) In re School Asbestos Litigation: 13

School districts brought suits seeking compensatory and punitive damages as well as injunctive relief stemming from compliance with Asbestos School Hazard Detection and Control Act, and cases were consolidated. The United States District Court of the Eastern District of
Pennsylvania certified nationwide mandatory class for punitive damages and opt-out class for compensatory damages, and appeals were taken. The Court of Appeals held that opt-out class on compensatory damages was properly certified. It agreed with the District Court's finding that all these claims arise out of the same nucleus of operative facts relating to defendants' conduct and the nature of asbestos product viz: the health hazards of asbestos, the defendants' knowledge of those dangers, the failure to warn or test and the defendants' concert of action or conspiracy in the formation of and adherence to the industry practices. The court also believed that the proof of these matters would not vary widely from one class member to another.

The Court, however, did not allow a nationwide mandatory class for punitive damages. It reasoned that the District Court made no factual findings at all as to the potential amount and scope of punitive damages in contrast with the detailed findings on the subject in re Agent Orange. Another reason was that the class was under inclusive and did not include property damage and personal injury suits. In contrast in "Agent Orange" litigation all the claims against the defendants were
concentrated in one case.

Following are typically the stages in a class action suit in the U.S.:
1. Developing a special schedule for resolving rule 23 issues,
2. Holding pre-certification conferences
3. Ordering and reviewing fact stipulations
4. Managing rule 23 related discovery
5. Deciding, after hearing, whether to certify and preparing written findings and conclusions
6. Deciding periodically whether good cause exists to decertify case as class action
7. Defining and redefining periodically common issues
8. Determining the content and method of communicating initial notices to class members after considering parties' positions
9. Consolidating pending related cases, choosing one as class vehicle, and selecting class attorneys, often including a search for additional counsel
10. Replacement or supplementation of class members
11. Ruling on motions to intervene by class members
12. Creating subclasses after identifying intra-class conflicts
13. Supervising attorney communications with class members, including control orders, certification
notices and settlement notices and supervising record-keeping on these matters

14. Determining opt out period, judging requests for late opt outs, maintaining inventory and dealing with communications to the court by class members

15. Judging settlement proposals after notices and hearing,

16. Adjudicating attorney fees after notices and hearing and

17. Supervising distribution of class judgement to its members

The above stages, the division of class actions into three types indicate the amount of depth and details with which an American class action is carried out. Though, the provision in India has not made the types and detailed provisions the essential conditions of numerous persons and same interest are the same from which we can very well conclude that in all the three types, a representative suit will lie in India.

Before we leave this topic, it may be noted that class action in the United States as will be clear from the aforesaid figures is a speciality of federal courts and federal bars in spite of liberality of the procedural rules even in the states. This will indicate that use of this device
needs special efforts from the bench as well as the bar. We will get back to this discussion when we turn to the solutions to the problems in utilisation of this legal device in India.
Footnotes on Class Action suits in the U.S.

(1) Annual Reports of Director of Administrative Office of United States courts.

(2) See generally, Prof. Richard Cappalli, "Class Actions for continental Europe ? a preliminary inquiry", manuscript available with the weifer.


(4) This rule was amended in 1966 and the above was substituted for the old rule. Most of the states too have adopted this rule.

(4A) 59 Am Jur 2d, parties, section 66.


(6) Supra: Notes of Advisory Committee.

(7) Ibid Notes.

(8) Supra. Prof. Cappalli, foot note 2.
(9) For example, see In re Agent Orange, Product Liability Litigation, 100 F.R.D. 718, 729-31(1983), aff'd, 818 F.2d 145 (2d Cir.1987)

(10) 59 Am Ju 2d Parties, Section 91, 48 Boston L Rev 409, Gamboni v Otoe Country, 159 Neb 417, 67 NW 2d 489)


(12) See Schuck, "The role of judges in settling Complex Cases: The Agent Orange Example", 53 U.Chi.L.Rev. 337, 342, (1986). This article gives an insight into the topic of judicial activisim through class action in the United States.

(13) 789 F.2d 996 (1986).

(14) Meaning class members entitled to exclude themselves from the class after notice.

(15) Id. Prof.Cappalli's article foot note 2.
My aim is to bring in limelight the legal device of representative suits and to assess if it can become an effective legal device to increase the access to justice of Indian people. In part I have narrated maximum fact patterns where representative suits have been used in India. The record is however dismal. After going through all the possible sources of cases under the Code of Civil Procedure, I could get only some areas of law where this device has been used. As against that the number of such cases filed in the U.S. and the fact patterns are very high so much so that I had to just name those areas and give examples from one such area. I am well aware of the differences in politics, economy, culture and society in the two countries. Yet, both share a common British heritage and for the purpose of our discussion a similar legal provision. In the last two decades Public Interest Litigation has grown in India and has become a significant legal device which is also a type of representative proceeding in the interest of public at large.

This creates the need of answering some questions about representative suits as to its utility, its comparison with Public Interest
Litigation, problems in its application in India and remedies. Part II deals with these aspects.