



## **NIGERIAN INSTITUTE OF ADVANCED LEGAL STUDIES**

### **COMMUNIQUE ON THE ROUNDTABLE ON CLASS ACTION**

#### **LITIGATION IN NIGERIA**

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#### **INTRODUCTION**

The affirmative signal that corporations that negligently cause serious harm and grievance to persons in the course of providing goods and services can be judicially punished undoubtedly makes it imperative to critically appraise the Nigerian situation in line with emerging global developments in corporate responsibility and the need to ensure that business concerns remain accountable to consumers. Class action litigation is a form of lawsuit in which a large group of people collectively bring a claim to court and/or in which a class of defendants is being sued. In Nigeria, the first and successful class action suit was instituted in 2001 and concluded in 2010 by Mr. Lucius Nwosu SAN on behalf of Ejama-Ebubu community in Tai Eleme Local Council of Rivers State of Nigeria which clearly shows that despite its many advantages, paucity of legal provisions on class action litigation seem to create a murky environment that somewhat impedes such suits in Nigeria.

Therefore, in its characteristic manner of ever questioning and probing legal concepts with deep hidden meanings towards delivering its mandate of providing information, training, supervision, guidance and advice at the highest level of policy formulation on legal matters, the Nigerian Institute of Advanced Legal Studies organized a one day roundtable on the above subject matter. The roundtable which brought together erudite jurists as well as the most brilliant legal luminaries represented by Senior Advocates of Nigeria and Law Professors, deliberated on the ramifications of class action litigation in Nigeria. At the roundtable, several observations were made and recommendations accordingly proffered on how to move the country forward in terms of developing and expanding the landscape of class action litigation in the country. Recommendations capture the fact that class action litigation will find very lucrative breeding ground in Nigeria and will indeed catch up fast if appropriate legal regime is developed.

## **OBSERVATIONS**

1. Class Action litigation began in the English Court of Equity as a Bill of Peace in the 17<sup>th</sup> century when feudalism began to fade and the renaissance was beginning to take place in England. Modern day class action is nonetheless more directly traceable to developments in the USA, with the introduction of Rule 23 of the Civil Procedure Rules which inevitably expanded and changed the landscape of class action litigation. However, it is a concept that is evolving in the Nigerian jurisprudence.
2. The courts in England would allow a Bill of Peace to be heard in the following circumstances; (a) where the number of litigants is so large that joining their claims in a

law suit was impossible; (b) members of the group possess common/joint interest in the question to be adjudicated; and (c) parties named in the suit could adequately represent the interests of persons who were absent from the action but whose rights would be affected by the outcome. This is because if a court allows a Bill of Peace, all members will be bound by the judgement resulting from the litigation.

3. Class action is a procedural device which allows litigants to author a form of group litigation in relation to a range of substantive areas such as mass torts, securities, anti-trust and human rights.
4. Class action represents a lawsuit in which the convenience of either of the public or of the interested parties requires that the case be settled through litigation by or against only a part of the group of similarly situated persons and in which a person whose interests are or may be affected does not have an opportunity to protect his or her interests by appearing personally or through a selected representative. Principally, it allows multiple parties in a civil litigation to sue a perpetrator on common grounds of infringements.
5. Class action makes litigation possible by enabling an attorney to pool group's claims together into one large case and then take a fee from what is recovered in the aggregate.
6. Principally, class action suit was designed to prevent multiplicity of suits that might otherwise be brought by or against persons sharing common rights or obligations.
7. Class action is important because violations of rights have moved beyond the realm of occurring at individual levels into a realm of large numbers of people. Thus, such global violations in the economic and political spheres can hardly be remedied outside of the machinery of class action.
8. Class action is normally used as means of reforms and or social transformation.

9. Class action is the most effective engine to remedy mass wrong and works well for those who cannot afford high cost of litigation. Bulk of its advantages lie in aggregate claims.
10. Class action is an instrument for ameliorating regulatory failures. It helps to alter regulatory incentives that work in favour of corporate organizations.
11. It is a cautionary tale of sort. It was developed in England as a tool for the rich to exert influence on the poor. The modern class action is an inverted class action that was prevalent in the 17<sup>th</sup> century England. It can be a double edged sword which can encourage corporate malfeasance.
12. There are great hurdles in Nigeria with regards to class action as many people do not even know their rights due to illiteracy, multiculturalism and absence of the rule of law.
13. For a class action litigation to be initiated, a would-be representative must first make a successful motion to a court for class certification.
14. Class action law suit differs significantly from a conventional law suit in that the plaintiff in a class action suit is a representative of a group all of who will be bound by the outcome of the suit.
15. Class actions are most common in situations involving very small legal claims, as each individual class member in such circumstances do not have sufficient economic incentive to remedy the alleged harm. Accordingly, class action has been lauded as “anti-subordination device” used in galvanizing the struggle for equal justice under the law. They became prevalent throughout the 1990s because they offer a way of empowering individuals with small claims.

16. Class action is also recognized as an instrument for ameliorating regulatory failure especially in Nigeria where corporate impunity against the consumer is rampant.
17. Class actions usually cover a large variety of claims such as actions against employers for personal injury, transport disaster claims, claims of environmental nuisance, pharmaceutical product liability claims and financial loss by investors from alleged negligence.
18. In some European jurisdictions, changes have been made that allow consumer organizations to bring claims on behalf of large groups of consumers.
19. In Nigeria, there is no regard for consumer satisfaction as telecommunication companies, airlines, banks and other service providers on a daily basis carry out their activities and do so remorselessly with little or no care for customer satisfaction.
20. Prerequisite for maintaining a class action, as adequately contained in the Federal Rules of Civil Procedure (FRCP) of the United States include:
  - the class must be so large that individual suits would be impracticable;
  - there must be a legal or factual questions common to the class;
  - the claims or defences of the representative parties must be typical of those of the class; and
  - the representative parties must adequately protect the interest of the class
21. Other than in the US, class actions are permitted in some form in many countries including Canada, France, Germany, Italy and Spain, while in countries like Switzerland, forbid any type of class action litigation.
22. In Nigeria, the law of the land often refer to 'representative action' as the concept of 'class action' barely exists.

23. Nigerian legal jurisprudence emphasizes joinder of parties, causes and actions; and representative suits in its loose and wide connotation under the various Rules of Courts.
24. The major difference between class action and suit brought in a representative capacity is that while in representative action, authorization to sue or defend on behalf of a community must emanate from the class members and cannot be imposed on the community by anybody, not even the court, the Plaintiffs in a class action can institute the suit once he receives certification by court and the members of the class who do not want to be bound by the outcome of the class action. In a class action, it is sufficient for members of the class to have common issues albeit in a representative action- persons to be represented must have the exact same interest.
25. In representative action, the parties to be represented are necessarily ascertained; but under class action, the parties are unascertainable or even where they are ascertainable cannot be found.
26. Class action is a bar against future litigation on the same cause of action by other members of the class
27. Under the US law, after the consideration of the prerequisite of class action, the Court will then consider whether the time, effort and money saved by litigating all the claims at once will outweigh the relinquishment of any individual's constitutional right to bring suit against the opposing party in the future. Where it does, the court would allow a class action to be instituted.

28. In jurisdictions where class action has considerably developed, actions that are commenced as class action rarely go to trial and are usually settled through a process of negotiation and compromise.
29. Class actions are novel to our jurisdiction. In its wide and technical ramifications, class actions are not clearly developed, although in substance, the concept is not alien to our jurisprudence.
30. Class action made its first debut in the Federal High Court (Civil Procedure) Rules 2009, Order 9 Rule 4. As such, litigators in Nigeria have not fully embraced it, as has been done in other jurisdictions.
31. Under the above Order 9, it would seem that class action was permitted only in cases concerning trademarks, copyrights, patents and designs. The Civil Procedure Rule of Lagos, 2012 limit the scope of application of class action to administration of estate, property subject to a trust, land held under customary laws or family property and construction of any written instrument, including a statute. Clearly, the scope of class action litigation in Nigeria is by rules of court, limited. The courts in practice however, have relied on this provision to widen the scope of cases which they can certify as class action.
32. For a suit to qualify as a class action under the Civil Procedure Rules, the person represented or class of persons being represented cannot be ascertained or even when persons ascertained cannot be found.
33. There is no gainsaying the fact that there is a dearth of provision under the Rules to guide the Court in class action procedure, however, Order 56 Rule 8 of the Federal High Court

(Civil Procedure) Rules 2009, provides that the Court shall adopt such similar procedure in other Rules as will in its view do substantial justice between the parties concerned.

34. There is some ambiguity in the provision of Order 9 as it gives a person or member of the class an option to opt in or opt out. The confusion created by the said provision is that in the event of a judgment obtained in a class action lawsuit under the Federal High Court Rules, those litigants who have been admitted into the suit by way of an opt in basis may contend that the judgment sum is only for them and not for the entire class.
35. An appraisal of the justice system in Nigeria will show that the jurisprudence and rules are getting confusing as it relates to class action and representative action.
36. Also the Rules of Courts did not limit the scope of actions to be commenced in a representative capacity; but it may seem that the rules expressly limits the action that could be commenced by way of class action, but in practice this limitation has been removed by ingenious interpretation.
37. Class action litigation has been criticised because;
  - The resultant procedural speed is in danger of being misplaced in certain circumstance.
  - Class action can allow a situation whereby legitimate due process is affected.
  - Corporations may be coerced into settling out of court by members of the class without the case actually decided on the merits.
  - There is lack of adequate provisions on class actions under our procedural laws. This leads to complications and challenges in reaching decisions.



- In countries with a more advanced class action system, enormous fees may be payable to the attorneys, while leaving the class members with little or no value.

38. There are some ethical and transparency issues that present themselves in class action litigation. Due to the fact that a large number of individuals are involved, ethical issues arise in situations where;

- A part of the class feels that their opinions are not being considered. This may result in some members of the class objecting to the suit in its entirety or several members engaging in collusive settlement discussions.
- The parties do not agree on the amount of to be paid as the lawyer's fees.
- The judiciary has to determine the amount of punitive damage to be awarded in each claim. Since punitive damages are not based on mathematical calculations, the court will have to consider the motive behind the harmful act and whether the prospect of the amount of profits to be made by them outweighs any consideration for the resulting consequences suffered by the affected persons.
- It has to be determined whether the award made should be shared amongst identified and unidentified persons pro rata or otherwise.

39. It has been argued that the rigid rules of *locus standi* expounded by our courts and our rules of court have tended to restrict public litigation, including class action litigation.

40. The most typical of a class action lawsuit ever instituted in the history of Nigeria and concluded at the High Court was filed in 2001 by Mr. Lucius Nwosu SAN in respect of

an oil spillage in 1970 which affected about 256 hectares of land and water areas in Ejama-Ebubu Community in Rivers State, for which 15.4 Billion Naira was awarded.

41. Class action is a powerful means of exploitation by lawyers. It can be a device for lawyers to feather their own nests. It could result in bounty hunting.
42. Since the landmark case of *Hansbery v Lee*, the law of class action has been infected with a fear that class actions create a huge risk of collusive suits in which the class representative sells out the interests of the class.
43. Class action litigations can be more expensive and antithetical to development as they are likely to bankrupt corporations and undemocratic but this is rebuttable. As well, most members of the class never make effort to sue as they may be unaware that they are certified.
44. With class action litigations, there is opportunity for fraudulent and collusive actions in which the class representatives sell out the interest of the class. This is because one of the major characteristics of class action is that majority of the concerned aggrieved parties are usually not before the court.
45. Awards from a class action are in two categories, punitive and compensatory damages. Compensatory damages are meant to address the defendants who are being sued; these funds will be used to address the actual damages caused by the defendants, such as illness, loss of life or pain and suffering. Punitive damages on the other hand are a form of punishment for the company committing illegal acts, or causing harm.

46. The class actions avoids a situation where different court rulings could create incompatible standards of conduct for the defendant to follow
47. Class action addresses procedural inequality in a situation where a powerful corporation is involved as litigant ensuring that various litigants regardless of their status can be adequately protected by the law.
48. One of the problems of the applicability of class action in Nigeria is the environment itself: poor technology and dearth of information and exposure are mitigating factors affecting the use of class action.
49. There are difficulties in differentiating between typical and replete class actions in Nigeria. This is made complex by the doctrine of estoppel as well as the 'opt in opt out' policy which must be seriously considered.
50. In Nigeria today, the various High Court Rules provide for forms of dispute resolution like arbitration and conciliation/ mediation, outside the regular litigation process which is popular. In the FCT High Court Rules for example, Order 17 provides for ADR, while Order 52 deals with Arbitration.
51. The reform of the court rules has led to the provision for references to either arbitration or ADR in the Court rules, which creates the possibility of class arbitration to emerge from a court reference, aside from the class action arbitration occurring voluntarily between the plaintiffs and the defendant(s).
52. Class arbitration is an alternative to a class action lawsuit in which a group of plaintiffs settles its differences with a defendant in the form of arbitration; it enables plaintiffs to recover for damages they incur without the need for a case to go to court.

53. Class arbitration is less common than class action lawsuit but does occur in certain situations. The California Arbitration Act gives the California courts authority to consolidate arbitrations and on this authority, the courts routinely certified class wide arbitrations and send them to arbitrators for adjudication. In the United States, the Court's decision in the case of *Green Tree Financial Corp v Bazzle* (539 US at 444,(2003)) has led to the incorporation of class action arbitration in the Arbitration Rules of the American Arbitration Association (AAA). This decision also places where the arbitration agreement is silent with respect to the availability of class-wide proceedings, the determination of whether or not a contract forbids class arbitration, within the purview of the arbitrator and not the court.
54. In all arbitral proceedings, the agreement to arbitrate which is can be in a contract or a separate clause, is critical and this may pose a challenge to class action arbitration because the parties do not agree to arbitration. However, in the spirit of the reforms of the court rules, judges attempt to encourage parties to go for arbitration or adopt any of the ADR processes.
55. The Various High Court Rules provide for ADR without express reference to how class action should be handled.

## **RECOMMENDATIONS**

Arising from the forgoing observations, the following recommendations were made;

1. There is need to adopt class action litigation in Nigeria because they can be 'game changer' in Nigeria where regulatory authorities are either ineffective or complacent. For

example, they can potentially re-enforce the duty of care imposed on manufactures and producers of goods and services to produce the highest quality of goods and services, and also be a coercive incentive to government to be more accountable to the people. In the same vein, class action can provide adequate avenue for redress.

2. Vigorous class action litigation need to be developed and encouraged in Nigeria considering that everything is often done by businesses and corporations to maximise profits at the expense of the health, safety and wellbeing of Nigerian consumers. This is to check the excesses of manufacturers and producers of goods and services.
3. If justice system in Nigeria must develop its class action procedure then it must put in place a robust legislation which will guide class action cases in line with international best practices.
4. To achieve a serene atmosphere that allow class action litigation, Nigerian laws must either be amended or re-enacted to give proper eminence to class action litigation.
5. Training and retraining of members of the bench on the need to make class action the norm rather than the exception cannot go wrong.
6. For any group of persons to institute class action in Nigeria, it is important for member (s) of the group to be well informed about the conditions for such actions to be brought before a court of law, i.e. there must be common interest, common grievance and relief (s) sought must be beneficial to all class of persons.
7. Directives and provisions stipulated in the Rules of Courts regarding class action and or representative action should be strictly adhered to so as to avoid the law suit being struck out.

8. We need a modification of our Court Rules to make for efficient practice of class action litigation, by -
- Broadening the scope of class action practice.
  - Clearly state class action procedures in High Court Rules
  - Setting timelines for opting in or out
  - Setting clear cut procedures for distribution of damages
  - Training of judges.
9. Furthermore, other than the provision for ADR, specific reference should be made to class action. Although Lagos has made some progress in this regard and should be commended, the scope is rather restrictive and should be expanded to include tortious liability and labour issues.
10. The Nigerian jurisprudence on class action would benefit from the similar provision in the California Arbitration Act which provides for consolidation of arbitration proceedings in cases of multiple parties. Therefore, the country should leverage on that.
11. In the absence of consolidation, the Nigerian Courts should adopt the principle in *Bazzle* which is, where appropriate, the courts should hold that in the absence of express exclusion clause, where there are two separate agreements dealing with the same issues, class action arbitration should be permissible.
12. Our Consumer protection organisations need to be strengthened so as to improve the customer satisfaction indices in our country.
13. The rigid rules of *locus standi* which tends to restrict public litigation can be addressed through practice directions without really having to embark on any large scale amendments.

14. Legislation dealing specifically with the human rights of plaintiffs in class action litigation should be developed to protect vulnerable class members.
15. We must embrace the Issue of Notice in class action litigation to improve awareness in Nigeria to enable parties opt out. The Consumer protection Council can help in this regard, especially considering that Lawyers are prohibited from advertising by the provisions of the Rules of Professional Ethics.
16. All settlements reached in class action cases should be brought before the court as a means of judicial supervision to ensure that the settlement is equitable. This is the practice in England to protect the rights of the members of the class.
17. In the alternative, a specified percentage should be fixed by the legal system as it is done in the through the issue of practice direction.
18. Transparency in class actions can be improved by ensuring that; (a) claim rates in completed cases are made easily available to parties, absent members and the general public, (b) parties are made to attach a clear accounting to any proposed class action settlement, identifying with specificity the amounts intended to go to the plaintiff class, third parties and class counsel, with any reversion possibilities noted; (c) notice in class action litigation is adopted in other to improve awareness on any intended class action to enable prospective parties to opt in or opt out; and (d) every final judgment in a class action should include a provision requiring parties to file a detailed final account with the court at the conclusion of the distribution period. This would provide precedent for judges and lawyers in future cases.
19. Class actions can be quite expensive to run so it is suggested that they are managed on the basis of a contingency fee agreement.

20. Consumer protection Council should be more alive to its responsibilities and recall that it does not exist to protect the service providers but rather, the consumers.
21. Beyond the fact that it is an instrument for social justice, it is also an important resource for those who fight for the disenfranchised. Therefore all group members in a class action should be informed of the intricacies of the action as well as their rights and protection under the law.
22. If class action is to be developed in the country, its pros and cons must be assessed and be adapted to suit our unique situation
23. Our regulatory framework is still very weak to cater for the current state of class action in Nigeria. There can be a reverse regulation. Regulation in Nigeria takes care of post action. Class action is a shift that is political. This so because, to be out of the class, you must willingly default (opt out). Otherwise, you are bound by the action and everything that comes with it including damages.
24. Although it is easier to regulate pricing, entry and exit into a business, it is difficult to regulate quality of service, e.g. drop calls etc. Therefore, measures should be put in place through legal provisions that allow for class action litigation in order to monitor and ensure that citizens are not taken advantage of by service and goods providers.
25. Class action in USA amounts to a refocusing of the economy. It is a matter of philosophy and approach of procedure. This should also be adopted in Nigeria.
26. People keen on class action should check the warrior spirit among class members. For it to function, we must look at a framework for creating incentives for the small class.



27. Post judgement takes care of managerial aspect of the case, i.e. manage files etc. It is therefore not cost effective. This means that legal provisions need to be constructed in such a manner that cost is considered.
28. A well thought out system of class action in Nigeria offering an improved legal process with viable effective cost and time efficient means of dispute resolution mechanism is important.
29. We must also look at punitive damage which is a repertory control. The practice and philosophy must be examined. The law should be wise and think of tomorrow and create laws that will protect the citizens.
30. The need to adopt class action litigation in Nigeria arises from its numerous advantages such as (a) increased efficiency and lower cost of litigation, due to the aggregation to of complaints; (b) it ensures that a defendant who engages in widespread harm but does so minimally against each individual plaintiff, compensates those individuals for their injuries; (c) it may be brought to purposely change the behavior of a class of which the defendant is a member, thereby ameliorating regulatory failure; and (d) it aids decongestion of our courts.
31. Parties should be made to attach a clear accounting to any proposed class action settlement that would identify with specificity, the amounts intended to go to the plaintiff class, third parties and class counsel with any reversion possibilities noted. When a final accounting is developed, it should be presented in a straightforward manner and also made available to the participants and other interested parties.

32. Notice to the class should include the parties' estimates of the likely claims and payout rates, as validated by independent settlement evaluator and presented in decipherable form. The familiar format of nutritional labels found on food could be adopted.
33. Every final judgment in a class action suit should include a provision requiring parties to file a detailed final account with the court at the conclusion of the distribution period.
34. Also, distribution rates should be publicized. Peer review and easily accessed websites where figures can be assessed by individuals should be created and maintained. As well, there should be a clearing house or repository of all distribution details of class action awards which will be handled either by a government parastatal/department or a private organization.