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# **GROUP CLAIM: THE REALITY AND POSSIBILITIES OF ADAPTATION TO THE PROCEDURAL LEGISLATION ON THE EXAMPLE UKRAINE**

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## **ABSTRACT**

*The results of the radical reform of the civil and administrative procedural legislation of Ukraine are analyzed. The inconsistency between the possible access of "indefinite range of persons" in Ukraine to justice and the real state of affairs of this issue is accented. Approaches to legislative regulation of the possibility to practice an experience of the group claims in Ukraine must be improved. The certain issues of legal regulation of group claims from the practical examples are given. The provisions of international law on these matters are analyzed. The main ways to optimize Ukrainian legislation to ensure the possibility to fix an institution of the group claims and to provide its active practical use are suggested. It turns out that the need for implementation of the institution of the group claims to the procedural legislation of Ukraine is conditioned by an increase in the public necessity at the present stage of the society functioning. This need is also confirmed by the broad*

*perception of the institution of "group claims" in the world. "Group claims" at the international level are associated with the rapid development of economy and the expansion of urbanization, the necessity for strengthening of the control of environmental pollution, etc. The definition of the group claim is given. Based on the researches of the scientists it is concluded, that a group claim, as an independent procedural and legal phenomenon, is aimed at protecting the violated, unrecognized or challenged subjective rights and interests of a non-personified social group of individuals. The consequences of implementation of an institution of group claim are analyzed.*

**Key words:** Group claim, Adaptation, Legislation, EU integration

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## 1. INTRODUCTION

The concept of a group claim, the possibility of its adaptation to the civil and administrative procedural law of Ukraine. Outline and search for an optimal model of group claims in the sphere of civil and administrative procedural legislation of Ukraine. The problems of the access of society in the form of "indefinite range of persons" to justice and ways to overcome them. The purpose of the article is to study the features of the concept of group claim from the point of view of modern civil and administrative procedural law of Ukraine and to determine the possibility of adaptation of group claims in civil and administrative procedural legislation of Ukraine. Scientific researches of the grounds and features of the mechanism of formation of group claims, the process of joining such actions, the procedure for proving, the direct consideration of this category of cases, the problems of adaptation of such claims in the procedural law of Europe and Ukraine, in particular, were carried out by such specialists, as M. Tarruffo (2001), L. Friedman (2002), M. Bronsthen, O. Fiss (2003), A. Sidi (2005), K. Claremont (2005), U. Bernam (2006), V. Spencer (2007), Collagan (2008), P. Larsson (2009), B. Zhurbin (2013), as well as domestic researches N.Huzheieva (2009), Yu. Bilousov (2010), Yu. Trah (2010), Mykolaiets (2014), A. Hubska (2014), N. Romaniuk (2015), K. Fesyk (2017) and others.

## 2. METHODS

The methodological basis of the article is a set of methods and techniques of scientific cognition. As a general scientific method, a systematic approach was used, which allowed us to determine the problematic issues of adaptation of group claims in civil and administrative procedural legislation of Ukraine. Documentary analysis made it possible to develop proposals and recommendations for further development of the civil and administrative procedural legislation of Ukraine regarding the issue of implementation of the institution of the group claim to the functioning of the judiciary in Ukraine. With the help of logical semantic method approved the need to monitor compliance of the current legal provisions of Ukraine to the needs of society and its dynamic development. In the process of the analysis of the civil and administrative procedural legislation of the European countries, the USA, Canada and another states, a comparative legal method was used. The authors also addressed the relevant practical experience of consideration of the cases based on the group claims of

the plaintiffs from the international experience. Assessing the historiography of the problem, it is necessary to recognize the existence of certain theoretical studies, which developed the considered problematic to a certain extent.

### 3. RESULTS

Despite the radical reform of the civil and administrative procedural legislation of Ukraine by the Law No. 2147-VIII dated October 3, 2017, the provision of access to justice and the possibility of protecting the rights and interests of society in the form of "indefinite range of persons" has not been put into practice today. A separate problem is the lack of sufficiently developed normative base in Ukraine [1]. At the same time, in Europe, the USA, Canada (end of the XX - the beginning of the XXI century) in terms of expanding access to justice, its efficiency in the area of litigation in matters of protecting the rights of society as a procedural entity with the status of an indefinite range of persons, was characterized by that a new type of claim was introduced in these countries, which, in the absence of the only common name for today, are referred to, for example, in England and Wales as "group claims" or "claims with similar interest" [2], in the US as "class claim"[3] in Canada as "individually unfavourable claims"[4], in Ireland as "multiparty litigation". In countries of continental law, the term "protection of group rights" is favoured [5,6]. In Ukraine, such claims are called "representative"[7], "lawsuits of an indefinite range of persons" [8], "mass claims"[9]. Meanwhile, it is obvious that the objective factors, such as the adopted legislation, have a major impact on social rights [10].

Such terminological diversity is due to the fact that in the countries of Europe, the USA, as in Ukraine, civil justice has traditionally been dealing with personified identified parties. And although the mass (group) claim was first introduced in the United Kingdom in the XVIII century (justice courts), but its serious perception in Europe occurred in the 90s of the 20th - the beginning of the 21st century (1994 - the Netherlands, 1995 - Portugal, 2001 - Spain, 2002 - Sweden). At the beginning of the XXI century they were joined by France, Germany, Belgium, Finland, Norway, Denmark. In the United States, group actions were lawfully introduced in 2005, in Canada in 1992, in Australia in 1991. Group claims became subject to judicial proceedings in Belarus (2005) and the Russian Federation (2009). In Ukraine, group claims were first mentioned during the adoption of the Law of Ukraine "On Protection of Consumer Rights" dated May 12, 1991.

Such a broad perception of the institution of "group claims" in the world is associated with the rapid development of economy, the expansion of urbanization, the strengthening of the control of environmental pollution, the drive for consumer product quality, health of the population, etc. In each such spectrum of people's struggle for their rights, spontaneous social unions became their consolidated basis, the core of which was the unanimity interest, determined, as a rule, rather numeric, but not personified group of individuals. At the same time, such unanimity interest was not limited neither by space nor time. It was not influenced by the diverse educational, social, life or political level of each such group. It is on this basis that each subsequent person, having the same type in its content of social interest, could join such an associate group, thereby increasing its number. Thus, the concept of "group claim" was formed, the initiative of which was a group of individuals that formed an associate union, representing the interests of the latter in court in the freelance way.

Thus, along with traditional subjects who could have a right to apply to the courts for the protection of an indefinite range of persons: a public prosecutor, an ombudsman, trade unions, public associations, state bodies, self-government bodies, lawyers, an individual person, in a number of countries a new subject - an initiative group of an associate union of citizens emerges. It is this feature of an indefinite range of persons contributed to the entry of quite

different models of mass (group) action. From these grounds, scientists give the concept of a group action in different ways. Thus, some authors believe that a group claim should be considered as a procedural institution, which allows one or more individuals to sue in defence of the rights of a group of individuals or an indefinite range of persons [11]. Others consider a group claim only as an effective, special procedural mechanism that fulfils the following main tasks: it provides an opportunity for expanded access to justice, saving procedural time, and affects the behaviour of the offender [12]. Some authors argue that a group claim is an action in defence of the interests of a large group of people[13]. There is a view on a group claim as a claim of individuals with identical demands [14]. There are also those who consider it scientifically unfounded to allocate group claims in independent proceedings [15], since the institution of group claims has not been adapted to existing procedural legislation [16]. It is on these grounds such actions look like an ideal, a declaration, because for this purpose it is needed specific procedures and institutions of legal proceedings, which are absent in the CPC of Ukraine [17]. Certainly, each scientist is right in one way or another. Therefore, based on their researches, we can say that a group claim, as an independent procedural and legal phenomenon, is aimed at protecting the violated, unrecognized or challenged subjective rights and interests of a non-personified social group of individuals, where the question of law or fact, from the point of view of their interest, the subject and the grounds are common to them, and the ways of protection and the questions of jurisdiction and suability are of the same type.

We also proceed from the assumption that a group claim, as a procedural institution, on the one hand enhances the access of the general population to justice, while providing the court with great opportunity to save on procedural time, and on the other hand, it is a rather elastic structure that enables the formation of diverse models depending on the development of the judiciary system and the reasonable adaptation of the rules of the group (mass) claim to the domestic procedural law. This conceptual formula should become the basis for the procedural legislation of our state in relation to the settlement of mass (group) claims.

#### **4. DISCUSSION**

The analysis of scientific works, legislation of the USA and European countries indicate that the process of adaptation of group claims in the sphere of historically existing judicial procedures, their consideration on the basis of such legislation, as well as issues related to the execution of court decisions, is one of the most disputable problems, both civil and administrative legal proceedings. The problem is not in the civil or administrative proceedings itself, but in those world trends that are associated with the rapprochement of the Romano-Germanic and Anglo-Saxon systems of litigation in the area of mass (group) claims. It is on this basis that a number of countries with the Romano - German civil justice system are making the first steps of the adaptation of the institute of group claims in the procedural law, which in each country, in terms of the mechanism of the civil procedure, has its own peculiarities. At the same time, not every time such an adaptation is a good one. This can be seen from the example of Scotland, where an attempt to adapt a group claim to an existing judicial mechanism has not succeeded [17]. The practice of Lithuania in adapting the Anglo-Saxon model of group claim to the existing model of procedural legislation showed: these issues are not sufficiently consistent with each other. In practical terms, such inconsistency entailed a number of procedural complications, both in terms of the formation of an initiative group and in terms of the emergence of disagreements between the members of the initiative group itself, as well as between them and the associated members in whose interests such actions were filed [18]. We believe that litigation for mass (group) claims is possible both through additions to the existing procedural legislation, and at the expense of a separate law, as it is the case in Sweden, where the Group Proceedings Act of 2002 acts, which was added

to the Code of Legal Procedure of 1948. In the USA, the recognition of a group claim took place in the Federal Regulations of 1842. Today, the institution of group claims is formalized in Rule 23 of the Federal Rules of Civil Procedure of the USA of 20.12.1937. Jurisdiction of the federal district courts in the area of group claims was enshrined in Class Action Fairness Act of 2005 [19]. The peculiarity of group claims litigation at the federal level of the judiciary system is conditioned of the fact that the price of such actions cannot be less than 5 million USD, and the group of participants, having a common issue of law and fact, must exceed 100 people. Based on this, it would be appropriate to consider the characteristics of such group claims also in terms of ways to protect the rights and interests of an indefinite range of persons in the Anglo-Saxon judicial system, as this will also allow us to look at Ukrainian legislation in the area of the possibilities for rapid adaptation of mass (group) claims to the procedural legislation of Ukraine.

In the Anglo-Saxon legal system, the typical remedies include actions: a) for compensation for damage; b) for compensatory payments for material losses. Such methods of defence are also well-known by domestic legislation. In accordance with Part 2, Clauses 8 and 9 of Article 16 of the Civil Code of Ukraine the remedy of civil rights and interests of individuals may be claims for compensation for damages or other means of compensation for property or moral (non-property) damage. According to Part 1 of Article 5 of the Civil Procedural Code of Ukraine: "in the administration of justice, the court protects the rights, freedoms and interests of individuals, the rights and interests of legal persons, state and social interests in the manner prescribed by law or agreement". According to Part 1 of Article 2 of the Code of Administrative Justice of Ukraine: "the task of administrative legal proceedings is the fair, impartial and timely resolution by the court of disputes in the field of public-legal relations in order to effectively defence the rights, freedoms and interests of individuals, the rights and interests of legal entities from violations on the side of authorities".

Despite the fact that these norms refer to the protection of the rights and interests of a person, these norms are generally-declarative. On the basis of their declarative nature, we can say that both in general and administrative courts should be also considered mass (group) actions, because the legislator keeps talking about the protection of the rights and interests of "individuals", using the concept of individual in plural. But in reality, this is just the logic of our judgments, since further, the procedural codes includes neither the concept of a group action, nor the grounds for recognizing an action as a group one, nor the very mechanism for judicial review of such actions and execution of court decisions relative them. Moreover, Part 1 of Article 4 of the Civil Procedural Code of Ukraine and Part 1 of Article 5 of the Code of Administrative Proceedings of Ukraine indicate that only "person" may apply to general and administrative courts. That is, every time it concerns the protection by the court of the violated individual rights and interests of a particular individual.

However, in order to recognize a claim as a group one, in the Anglo-Saxon system, six conditions must be respected (two of the conditions were formed by the judicial practice, another four have already been formulated in clause "a" of Rule No. 23 of the Federal Rules of the Civil Procedure (Table 1).

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**Table 1** Conditions for recognition a claim as a group one in the Anglo-Saxon system

1	the plaintiff is obliged to specify in detail the group of persons whom he represents and on whose behalf he will conduct the trial
2	the representative of the group protecting its interests must be included in this group
3	the group should be so numerous that the participation of all its members would be practically impossible
4	questions of law and fact are common to the whole group
5	the claims or objections of the representatives of the group are typical with those presented by the group
6	the representatives of the group are recognized by the court as impartial and in such a manner as to protect the interests of the group in good faith

After the compliance of the group claim with the six above-mentioned conditions is established, the court determines whether a group proceeding have significant advantages over other procedural forms of defence, with the determination of the categorical nature of the claim. In this regard, the legislator has provided three different types of group claims in their content. In accordance with Part 1 of Rule 23 (B) the first category includes group claims where there is the assumption that the consideration in a separate proceeding of individual claims of a member of a group poses a risk of uncoordinated or different in content actions or decisions relative to other individual members of such group which does not took part in the case, which could significantly weaken their ability to protect their violated rights and interests. The second category includes: a) cases for compensation for health damage; b) cases on establishment of court bans; c) cases concerning the need for the interpretation of contracts and other acts [20]. The third category includes actions under Part 3 of Rule 23 (B), and related to cases for consumer rights protection [21].

Despite the seemingly long and positive legal precedents on the application of group claims in the United States and the clear interest of European countries in the possible borrowing of mass (group) claims in the area of their procedural legislation, the European Parliament, in its resolution as of 2 February 2012 "To a Coherent European Approach to Collective Defence of Rights," said that "Europe should refrain from introducing a system of American-type group actions or another system that does not conform to the European legal traditions" [22]. Of course, such a resolution of the European Parliament is based on the fact that countries of continental law have traditionally been dealing with the plurality of participants in the trial based on the classical institution of procedural joinder and procedural representation.

In this regard, K. Zweigert and H. Ketz note that despite the fact that the American private group claim is attractive, but there are great doubts about the feasibility of introducing this institution into the German legal space [23]. Although the German processualists say that it is impracticable to implement the American model of group claim in German justice, they still do not rule out the possibility of introducing other models of a group claim into their procedural law. At the same time, a number of Russian scientists believe that a group claim is simply a combination of the institution of judicial representation and procedural joinder [24], which is a kind of "hybrid" of complicity and representation [25], a special procedure of procedural joinder [26].

The legal precedents of the general and administrative courts of Ukraine shows that, in fact, group claims are also held in the Ukrainian legal system, where in the capacity of plaintiffs often stand a large number of personified persons.

Thus, on March 30, 2016, Okhtyrka Municipal Court of Sumy Oblast considered a complaint of six persons for non-pecuniary damage in connection with air pollution in Pidloziivka village, Okhtyrka region with wastes of pig-breeding farm. 1,500 people reside in

this settlement [27]. On September 27, 2016 Galician District Court of Ivano-Frankivsk oblast has considered the claim of fifteen plaintiffs to Bolshevik village council of Galician region on declaring illegal and reversal of the decisions of the sessions of Bolshevik village council of Galician region [28].

On November 17, 2016, Obukhiv Regional Court of Kyiv oblast reviewed the action of four plaintiffs to BRSM Nafta Ltd. for compensation for moral damage caused by the fire that took place at the petroleum station in the summer of 2015, as a result of which it was contaminated with carcinogens the lower layers of soil in Glevakha village Vasylkiv region of Kyiv oblast where about fifteen thousand people reside [29]. There are cases of a larger number of plaintiffs (over 67 [30], 71 [31], 96 [32]). As we see, the practice of joining actions in one proceeding is typical for the courts of different regions of Ukraine. At the same time, such an approach requires considerable procedural time for combining separate claims in one proceeding and large efforts to organize the litigation due to the absence of one or the other person - plaintiffs. But if the group claim were available in civil proceedings, the number of plaintiffs in the same Pidloziivka or Glevkha would increase significantly, as a large number of people, together with the plaintiffs, also suffered from pollution of air or soil, and on these grounds they could join the action of the initiative group even without participation in trial, or even at the stage of execution of a court decision.

Two basic types of procedural joinder in the group claims are reflected in the Table 2.

**Table 2** Basic types of procedural joinder in the group claims

↓	↓
joining a person to an action already filed in court	joining the court decision after its adoption, since an associate group may include people who may not have known about the trial of a group claim that is of interest to them

In this regard, the position of G.O.Abolonin is justified, who notes that a group claim is characterized by too large amount of the plaintiffs, in which the individual participation of each plaintiff in the trial during the consideration of the case becomes practically impossible [33]. Thus, in a group claim, personal involvement in the trial of each member of the associate group is not mandatory. Thus, the representation of their interests is carried out by the applicants in a non-contractual manner. If we are talking about procedural joinder, then each plaintiff is an independent party to the case, because he/she has his/her own interest. In a group action, the interest of the whole group is joint - similar, therefore defence of the interests of all, and everyone is ensured in one case. Thus, a group claim is significantly different from procedural joinder. Despite criticism and scepticism about the Anglo-Saxon model of the proceedings of group claims, the European community is still showing keen interest in an indefinite range of persons as an associate subject in the judicial process, realizing that it is simply impossible to find a standard for a procedural - legal model that would satisfy all the countries of Europe, in view of their historical, national, cultural, customary features. It was from these grounds that European countries did not begin to copy the American model of group claims while developing their public, private and organizational group actions. At the same time, such group claims do not cover all social relations, affecting only their certain areas, as a rule, it is the securities market, consumer market, environmental protection [34].

However, Sweden, in accordance with the adopted Group Proceedings Act, has taken to its proceedings all three types of group claims: private, organizational and public. The

Swedish model of group claims [35] was successfully adapted by Finland, Norway and Denmark (Table 3).

**Table 3** Swedish model for recognition a claim as a group one

1	the basis of the action are circumstances that are common or similar in accordance with the requirements of the group members
2	a group trial is considered appropriate, despite the fact that some requirements of the group members are different from other requirements
3	a significant part of the claims, to which the action relates, cannot be considered just as well as in the case of filing individual claims by members of the group
4	the group cannot be properly defined in terms of its size or certain limits
5	the plaintiff represents the members of the group in the case, taking into account his/her own interests, financial possibilities and circumstances as a whole (Community of consumers and public associations, 2009)

As it was already noted at the beginning of this work, the term "procedural entity with the status of an indefinite range of persons" has a different name - from the class, mass, group to the claims of an indefinite range of persons. But in our opinion, none of them definitely does not reveal the nature of such an action. For these reasons, we believe that the most precise would be to call such lawsuits "jointly - legal", since in such actions, the appeal to the court is carried out by the community, and it is in its interests a group litigation is taking place, in which the legal defence of the violated, unrecognized or disputed legal rights of the entire community is carried out [36].

## 5. CONCLUSION

In the process of historical development of the society, judicial protection of personified rights and interests of the person was mainly local in nature, since in court proceedings it was always a matter of judicial protection of violated, unrecognized or disputed personal rights and interests of a particular individual. Adaptation of group claims in the civil and administrative procedural legislation of Ukraine would make it possible to talk about the gradual transition of a democratic society to the stage of civil society. From the procedural point of view, this would allow the court to establish large-scale legally significant facts, which, in turn, would give the opportunity to speak about a wide range of civil-legal and administrative-legal protection in relation to a personalized indefinite range of individuals. In particular, in the sphere of conservation and protection of nature and its resources, illegal housing development, protection and defence of consumers' rights and interests, and not only in relation to a specific person, but the entire territorial community, residential complex or residential quarter.

The content of protective legal relationships in group claims is the rights and obligations of their subjects, which can be divided into two components: a) an inalienable subjective right that belongs to each and everyone, which is realized in unconditional compliance with the current legislation with observance of the principles of justice, fairness and reasonableness; b) the subjective obligation of each and everyone in the commission of certain actions is to comply with the rules of the current legislation. Under the procedural mechanism of judicial defence of violated, unrecognized or disputed rights and interests of personalized indefinite range of individuals in the sphere of social legal relations, it is necessary to understand the procedural-legal procedure by which the rights and interests of individual persons, provided for in the material and procedural law of Ukraine, should be realized. At the same time, such a



mechanism should be structured, with the interaction of all its elements, which would enable the court to consider a group claim gradually, moving from one stage to another.

In this regard, the structure of the object of judicial defence in group claims should be characterized by the existence of procedural implications obtained by the court at each stage of the trial. The results of each such stage have a feature that consists in the gradual accumulation and formation on this basis of the general object as a joint benefit for the entire personalized indefinite range of individuals. Taking into account these circumstances, the court practice of foreign countries in the sphere of group claims now develops in the direction of several independent procedural proceedings, which include: a) a group claim of a private nature, under which each person has the right to sue in court to protect his/her own interests, but he/she should be a member of the group of identically interested plaintiffs; b) an organizational-group claims, according to which each non-government organization or association or trade union has the right to appeal to the court to protect the violated right of an indefinite range of individuals without pursuing its own interests; c) a public group claim, in which plaintiffs can be only persons with a statutory right to apply to the court for motives for the protection of violated rights and interests of a certain group of persons. According to the authors, in Ukraine, the legislator is not yet ready to accept mass (group) claims as an objectively existing problem, despite the fact that the development of the foundations of civil society requires the adoption of legal decisions in the sphere of simultaneous judicial protection of the rights and interests of large groups of people, if their matter of fact and the right are coincided.

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