

CLASS ACTIONS AGAINST BANKS UNDER THE NEW
ISRAELI LAW ON CLASS ACTIONS

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I. INTRODUCTION

In March 2006, Israel enacted a modern and far-reaching Class Action Law¹ (the “Class Action Law”) to regulate class action suits in a centralized and exhaustive manner. Prior to the law’s enactment, class actions in Israel were common in various fields,² including banking. The basis for class actions against banks was the Banking (Service to Customer) Law (“the Banking Law”), which contained a chapter on class actions. However, the new Class Action Law abolished this chapter, as well as all other laws concerning Class Actions in different fields, and today the arrangement of class actions is concentrated in the new class action legislation.

The Banking (Service to Customer) Law was enacted in 1981. The Banking Law’s goal was to protect consumers and bank customers. In order to achieve these goals, the drafters of the Banking Law inserted various paternalistic provisions, including: (1) a prohibition against providing misleading information; (2) an obligation to disclose the full details of bank transactions and submit information on commissions; (3) a ban on misleading advertising; (4) regulations concerning advertising to minors; (5) methods for calculating interest and the dates on which credits and debits would be charged to the customer’s account; (6) a requirement to cancel pledges within a certain period of time after the customer has paid pledge-secured debts; and (7) a new customer right to change the repayment dates of a housing loan.³

Breach of the Banking Law’s provisions gives a bank’s customers a cause of action against the bank⁴ and, in some cases is deemed to be a criminal offense.⁵ Under certain circumstances, the senior managers of the bank may also be subject to criminal liability.⁶ In addition, an amendment to the Banking Law allows the Supervisor

¹ Class Action Law, 5766-2006, S.H. 264.

² See Companies Law, 5759-1999, S.H. 189 (applying to class actions in the field of securities); Male and Female Workers Equal Pay Law, 5756-1996, S.H. 230; Joint Investment Trust Law 5754-1994, S.H. 308; Prevention of Environmental Nuisances (Actions by Citizens) Law, 5752-1992, S.H. 184; Restrictive Trade Practices Law, 5748-1988, S.H. 128; Consumer Protection Law, 5741-1981, S.H. 248; Insurance Business (Control) Law, 5741-1981, S.H. 208.

³ Banking (Service to Customer) Law, 5741-1981, S.H. 258 §§ 3, 5, 5(a), 6, 6A, 8, 9A, 9C.

⁴ *Id.* at § 15 (referring to the Civil Wrongs Ordinance, which creates a private right of action).

⁵ *Id.* at § 10.

⁶ *Id.* at § 11.

of Banks to impose financial sanctions.⁷ Furthermore, in 1994, the Banking Law was again amended to apply to guarantors.⁸

In its original form, the Banking Law did not include any reference to class actions.⁹ However, in 1996, a chapter on class actions was added.¹⁰ Initially, very little use was made of this chapter. By late 2000, only a few isolated applications for class action certification had been filed, and all of them were denied by Israeli courts.¹¹

However, beginning in 2001, the number of applications for class action certification pursuant to the new chapter significantly increased as the public gradually became aware of the potential advantages of the class action tool.¹² Aside from applications filed under the Banking Law, applications were also filed pursuant to the Restrictive Trade Practices Law, 5748–1988,¹³ on the grounds that restrictive arrangements between banking corporations or credit card companies violated this legislation.¹⁴ Nevertheless, the vast majority of these applications were denied,¹⁵ and only a small percentage of

⁷ *Id.* at § 11A.

⁸ *Id.* at § 17A.

⁹ See Banking (Service to Customer) Law, 5741-1981, S.H. 258.

¹⁰ Class Actions Law (Legislature Amendments), 5756-1996, S.H. 306.

¹¹ Sinai Deutch, *A Decade of Consumer Class Action: Difficulties and Proposals for Solutions*, 20 BAR-ILAN L. STUDIES 299, 316 (2004); see also Motion 4017/95 Reshef v. Union Bank [1998] Takdin DC 1998(3) 2862.

¹² Letter from the Israeli Courts Administration regarding the data on which these findings were based (Nov. 13, 2006) (on file with author).

¹³ See Restrictive Trade Practices Law.

¹⁴ See ACA [application for civil appeal] 2616/03 Isracard v. Reis [2005] IsrSC 49(5) 701 (The applicant claimed that the credit card companies collected an excessive clearing commission from businesses and took advantage of their monopolistic status in the credit card industry. In addition, it was claimed that the large banks, which control the credit card companies, made restrictive arrangements regarding the collection of the commission, while exploiting small businesses. Although the district court allowed the application, the Supreme Court ultimately denied the application.).

¹⁵ See CF [civil file] (TA) 1613/03 Aviv Legal Servs. Ltd. v. Bank Hapoalim [2005] www.lawdata.co.il (<http://www.lawdata.co.il/lawdata/default.asp>); MCA [miscellaneous civil application] (TA) 8232/03 Lock v. United Mizrahi Bank Ltd. [2005] www.lawdata.co.il (<http://www.lawdata.co.il/lawdata/default.asp>); MCA (TA) 20303/02 Rachman-Nony v. Bank Leumi [2005] www.lawdata.co.il (<http://www.lawdata.co.il/lawdata/default.asp>); MCA (TA) 2158/02 Elma'alem v. Israel Discount Bank [2004] www.lawdata.co.il (<http://www.lawdata.co.il/lawdata/default.asp>); MCA (TA) 17027/01 Troim v. Bank Leumi [2003] Takdin DC 2003(1) 5988; MCA (Hi) 16250/01 Zilberman v. Leumi Mortgage Bank Ltd. [2003] www.lawdata.co.il (<http://www.lawdata.co.il/lawdata/default.asp>).

applications passed the certification stage.¹⁶ Furthermore, the few certifications that were issued were subject to an appeal that was docketed¹⁷ or settled, due to the bank's desire to end the proceedings against it.¹⁸

To date, not a single class action against a bank or credit card company has reached a final judgment.¹⁹ One reasonable conclusion, based upon a study of this data and the reasoning provided by Israeli courts for denying class action applications, is that the courts generally tend to deny these applications even in cases where they should be allowed. In my opinion, judges appear to fear certifying unjustified class actions that could cause enormous damage to the defendants. Also, they appear to fear that the real winner of the proceedings will be the representative's lawyer instead of the class. While the class action proceeding imposes an onerous burden on the court, if the court's approach to class action litigation is too stringent, effective use of the class action law will not be possible.²⁰

In recent years, the need arose for the enactment of a modern and uniform law relating to class actions to replace the existing group of deficient class action provisions embodied in several laws. Consequently, in March of 2006, the Class Action Law was enacted. It is a modern law, important and far-reaching in scope, and intends to regulate the subject of class actions in a comprehensive and

¹⁶ MCA (TA) 12904/00 Sagiv v. Bank Leumi [2003] www.nevo.co.il (<http://www.nevo.co.il/serve/home/index.asp>), *appeal docketed*, ACA 1074/04 Bank Leumi v. Sagiv [2004] www.court.gov.il (<http://www.court.gov.il/heb/home.html>) (This is one of the few judgments in which the application for the filing of a class action was approved.); MCA (TA) 3063/02 Ezrat Isr. Dormitories v. Mercantile Disc. Bank Ltd. [2003] www.nevo.co.il (<http://www.nevo.co.il/serve/home/index.asp>), *appeal docketed*, CA 11200/03 Mercantile Disc. Bank Ltd. v. Ezrat Isr. Dormitories [2003] www.court.gov.il (<http://www.court.gov.il/heb/home.html>).

¹⁷ *Id.*

¹⁸ CF (TA) 1646/04 Zomer v. Gadish Provident Funds Ltd [2006] www.nevo.co.il (<http://www.nevo.co.il/serve/home/index.asp>); Lock, www.lawdata.co.il (this was a special settlement between the bank and the Supervisor of Banks); Troim, Takdin DC 2003(1).

¹⁹ Letter from the Israeli Courts Administration, *supra* note 12.

²⁰ See Deutch, *A Decade of Consumer Class Action: Difficulties and Proposals for Solutions*, *supra* note 11, at 304-305; see also Sinai Deutch, *Consumer Class Actions: Are They a Solution for Enforcing Consumer Rights? The Israeli Model*, 27 J. CONSUMER POL'Y, 179, 202 (2004); see also Hillel Sommer, *A Hand Grenade With its Pin Removed? The First Decade of the Consumer Class Action*, 1 HAIFA L. REV. 347, 353 (2004).

exhaustive manner. Accordingly, this article explores the implications of the new Class Action Law for class action litigation against banks and will attempt to assess whether the law will bring about a significant change to the current situation. Specifically, Part II shall discuss the causes of action available to serve as a basis for a class action suit against a bank, the expansive nature of the Class Action Law, and the major differences between the Class Action law and its predecessor, the Banking Law. Part III will discuss the parties eligible to serve in representative capacities in filing class actions against banks. Finally, Part IV will thoroughly analyze the courts' conditions for certifying class actions, and will specifically highlight the courts' lack of consistency in their interpretation of the stringency of those conditions.

II. CAUSES OF ACTION FOR CLASS ACTIONS AGAINST BANKS

Pursuant to the Class Action Law, a class action may be filed against a bank in connection with a "matter between it and the customer, whether they engaged in a transaction or not."²¹ This wording is very broad, particularly in light of the narrow language existing prior to this recent legislation. Specifically, under the Banking Law, a class action could be filed solely in respect to the above causes of action listed in the Banking Law itself.²²

While the Banking Law contains a number of important causes of action, as set forth above,²³ there are still many important causes of action that were not included. Notable omissions include: (1) the collection of interest at a rate higher than that permitted under the Interest Law, 5717-1957;²⁴ (2) non-compliance with the rules for the early repayment of housing loans, as set forth by the Banking Ordinance;²⁵ (3) non-compliance with the dormant deposit rules set

²¹ Class Action Law, Second Schedule § 3.

²² See Rachman-Nony, www.lawdata.co.il at D (The court held that a class action could be filed under the Banking Law, and can be based on its regulations and rules. The case dealt with a violation of the Banking (Service to Customer)(Due Disclosure and Delivery of Documents), 5752 – 1992, K.T. 1512.).

²³ Banking (Service to Customer) Law, 5741-1981, S.H. 258 §§ 3, 5, 5(a), 6, 6A, 8, 9A, 9C.

²⁴ The Interest Law, 5717 – 1957, S.H. 50; MCA 2188/04 Tefahot Isr. Mortgage Bank Ltd. v. Migrish, [2005] [lawdata.co.il](http://www.lawdata.co.il) (<http://www.lawdata.co.il/lawdata/default.asp>) (this was the reason for the denial of the application in this case).

²⁵ Banking Ordinance, 5701-1941, I.R. 69 § 13; see also The Banking Order (Early Repayment Commissions),

forth by the Banking Ordinance that require a bank to invest, on its own initiative, the funds “lying around” in dormant deposits in order to prevent a loss to the customer;²⁶ (4) causes of action permitted pursuant to the Debit Cards Law, 5746–1986;²⁷ (5) breach of the provisions of the Regulation of Investment Counseling, Investment Marketing and Portfolio Management Law, 5755 – 1995;²⁸ and (6) breach of instructions set forth by the Supervisor of Banks,²⁹ who regulates numerous issues relating to banks and their customers.³⁰

In addition, under the Banking Law, a class action lawsuit could not be filed if it involved causes of action recognized under the other laws. Examples of such general causes of action include: (1) the tort of negligence, under the Civil Wrongs Ordinance;³¹ (2) breaches of a banking contract by a bank;³² (3) defects in the making of a banking contract, such as the inclusion of misleading information;³³ (4) a claim pursuant to the Making of Unjust Enrichment Law, 5739 – 1979;³⁴ (5) a breach of the duty of good faith under the Contracts (General Part) Law;³⁵ (6) a violation of an accepted practice between parties;³⁶ and (7) a bank’s breach of its fiduciary duty which, pursuant to Israeli law, is inherent in the bank–customer relationship and applies to all actions and transactions performed by the customer.³⁷

5762 – 2002, K.T. 915; Rachman-Nony, www.lawdata.co.il at D.

²⁶ Banking Ordinance § 13B; *see also* The Banking Order (Dormant Deposits), 5760 – 2000, K.T. 414.

²⁷ The Debit Cards Law, 5746 – 1986, S.H. 187.

²⁸ Regulation of Investment Counseling, Investment Marketing, and Portfolio Management Law, 5755 – 1995, S.H. 745.

²⁹ *See* Bank of Israel, *Proper Conduct Banking Business Regulations*, http://www.bankisrael.gov.il/deptdata/pikuah/nihul_takin/eng/main.htm.

³⁰ CA 4415/03 Aharanshtam v. Bank PAGI [2004] IsrSC 59(1) 779 (holding that a breach of the instructions the Supervisor of Banks confers on the customer or guarantor, creates an independent cause of action against the bank.).

³¹ Civil Wrongs Ordinance (New Version), 5728 – 1968, D.M.I. 266 § 35-36.

³² Contract Law (Remedies for Breach of a Contract), 5731 – 1970, S.H. 16.

³³ Contracts (General Part) Law, 5733 – 1973, S.H. 118 § 15.

³⁴ *See* Making of Unjust Enrichment Law, 5739 – 1979, S.H. 42.

³⁵ Contracts (General Part) Law §§ 12, 39.

³⁶ *See* RICARDO BEN-OLIEL, BANKING LAW—GENERAL PART 34 (1996) (regarding the accepted practice being a normative source in the Israeli banking laws).

³⁷ *See* Ruth Plato-Shinar, *The Bank’s Fiduciary Duty: An Israeli-Canadian Comparison*, 22 BANKING & FINANCE L. REV. 1, 5-6 (2006); *see also* Ruth Plato-Shinar, *To Whom Does the Bank Owe a Fiduciary Duty?*, 29 QUARTERLY BANKING REVIEW 67 (2004, Booklet 154).

In addition, problems have arisen regarding the causes of action set forth in the Banking Law itself. The main cause of action set forth in the Banking Law is Section 3, which prohibits bank actions that could potentially mislead a customer.³⁸ However, Section 3 has been interpreted by Israeli courts as applying solely to the pre-contractual stage before a banking contract is made between the parties.³⁹ Thus, claims regarding misleading activities that occurred after a contract had been signed between the bank and the customer or guarantor could not be based on section 3. Although a possible solution involves classifying such events as a breach of contract, or more precisely, a breach of the bank's undertaking, such a classification is ineffective since these causes of action are not included in the Banking Law.⁴⁰

Another section of the Banking Law that occasionally appears in class action suits is Section 4, which prohibits the exploitation of a customer's distress in order to conclude a transaction upon unreasonable terms.⁴¹ Section 4 also prohibits the use of a transactional consideration that is unreasonably different from that used in standard practice.⁴² Notably, case law has interpreted the terms of Section 4 in a stringent manner. For example, while a literal reading of Section 4 indicates that it applies to cases of ignorance or lack of experience on the part of the customer, case law demands proof of distress or extreme

³⁸ Banking (Service to Customer) Law § 3 (prohibiting a bank from performing "by way of act or omission, in writing, orally, or in any other manner, an act which could mislead a customer in any material matter regarding the provision of a service to the customer . . .").

³⁹ Aviv Legal Servs. Ltd., www.lawdata.co.il at ¶ 5; *see also* CA 3955/04 Reizel v. Bank Leumi [2005] www.court.gov.il ¶ 8(f) (<http://www.court.gov.il/heb/home.html>); Elma'alem, www.lawdata.co.il at 4; MCA (TA) 14205/01 Aviram v. Tefahot Isr. Mortgage Bank Ltd. [2003] www.nevo.co.il 4 (<http://www.nevo.co.il/serve/home/index.asp>); *see contra* Deutch, *A Decade of Consumer Class Action: Difficulties and Proposals for Solutions*, *supra* note 11, at 348 (criticizing this interpretation).

⁴⁰ Banking (Service to Customer) Law § 16A(a).

⁴¹ Banking (Service to Customer) Law § 4 ("A banking corporation shall do nothing - by an act or an omission, in writing, orally or in any other manner - that involves taking advantage of the distress of a customer, his mental or physical weakness, his ignorance, his unfamiliarity with a language or his inexperience, or the exertion of undue influence on him, all in order to bring about a service transaction on unreasonable conditions or to give or receive a consideration unreasonably different from the normal consideration.").

⁴² *Id.*

inferiority.⁴³ In addition, I believe that it is doubtful that a cause of action concerning the exploitation of distress would be suitable to serve as a basis for a class action suit, in which it is necessary to prove similar factual circumstances for each member of the class.

Another problem created by the Banking Law is that its sole remedy was monetary compensation.⁴⁴ A customer could not seek cancellation of a contract and/or restitution.⁴⁵ The cancellation remedy is particularly suitable for guarantors who seek the cancellation of guarantees and not compensation from the bank. Yet it is presumably possible to circumvent this problematic limitation by awarding such a guarantor compensation in an amount equal to the sum he is required to pay pursuant to his guarantee, thereby offsetting the amounts.⁴⁶ However, this artificial circumvention method has already undergone criticism.⁴⁷

The Class Action Law addresses all of the problems and limitations contained in the Banking Law. The Class Action Law does not restrict class actions against banks to causes of actions permitted under the Banking Law or any other legislation.⁴⁸ Rather, any “matter” between the bank and the customer may serve as a basis for a class action suit.⁴⁹ Additionally, the Class Action Law expressly states that a class action may be filed even if no agreement was reached by the parties.⁵⁰ Furthermore, the Class Action Law does not restrict remedies.⁵¹ Accordingly, this new legislation could significantly increase the number of certifications granted by the courts, since many past applications were denied due to the non-existence of a cause of action available under Israeli Law.

⁴³ Isracard, IsrSC 49(5) at ¶ 34; Rachman-Nony, www.lawdata.co.il at ¶ F.

⁴⁴ Banking (Service to Customer) Law § 15.

⁴⁵ *Id.*

⁴⁶ See CA (Jer) 31/90 Lipart v. Tefahot Isr. Mortgage Bank Ltd. [1990] IsrDC 5751(2) 56, 63-64 (adopting this method but later overturned on other grounds in CA 1304/91 Tefahot Isr. Mortgage Bank Ltd. v. Lipart [1993] IsrSC 47(3) 309 (the question of the remedy did not arise on appeal)).

⁴⁷ Ruth Plato-Shinar, *Book Review: “Banking Law: Guarantees Given to Banks and the Pledge of Movable Property and Securities by Professor Ricardo Ben-Oliel,”* 1 HAIFA L. REV. 559, 564 (2004).

⁴⁸ Class Action Law, Second Schedule § 3.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Class Action Law § 20 (Regarding the question of the remedy in a class action, the Law discusses “financial compensation or another remedy for the members of the class.”).

In one respect, however, the Class Action Law is more limited than the Banking Law. The Second Schedule of the Class Action Law regarding claims against banks expressly refers to a “customer” and thus ostensibly denies a guarantor the possibility of filing a class action against a bank.⁵² Previously, under the Banking Law, guarantors could file a class action suit against a bank. Thus, pursuant to the Pledges Law, a person who pledged his asset to secure the obligation of another was treated as a guarantor of that obligation and permitted under the Banking Law to file a class action suit against a bank.⁵³

The Legislature may simply have made a mistake when it limited class action rights against banks to customers. After all, if the purpose of the Class Action Law is to expand the use of class actions, it is difficult to understand why the range of potential plaintiffs would be so limited.⁵⁴ It is also unlikely that Israeli courts will interpret the term “customer” to include “guarantors”, as the Supreme Court has already answered this issue in the negative when applied to the Banking Law.⁵⁵ However, the Legislature did not favor this result and chose to amend the Banking Law to expressly include its application to guarantors. Accordingly, in order to avoid interpretive challenges, the Legislature should promptly amend the Class Action Law by expressly including guarantors in the class entitled to file class actions. In light of the conservative tendency of Israeli courts in matters pertaining to the certification of class actions, it is possible that until the Class Action Law is amended in this manner, courts will take advantage of this drafting defect by denying applications filed by guarantors.

In any event, neither the Class Action Law nor its predecessor permit the filing of banking class actions by third parties.⁵⁶ However, Israeli courts have recently begun to expand the liability of banks by recognizing third party claims against banks.⁵⁷

⁵² Class Action Law, Second Schedule § 3.

⁵³ Pledge Law, 5727–1967, S.H. 48 § 12; see Ruth Plato-Shinar, *The Bank's Duty of Disclosure to a Pledgor of an Asset Securing an Obligation of Another*, 49 HAPRAKLIT, Ch. C (forthcoming May 2007)

⁵⁴ Class Action Bill, 5765 - 2005, H.H. 234; Class Action Bill Memorandum, p. 14, available at www.court.gov.il.

⁵⁵ Tefahot Israel Mortgage Bank Ltd., IsrSC 47(3) at 333; see also CA 1570/92 United Mizrahi Bank Ltd. v. Ziegler [1995] IsrSC 49(1) 369, 393-394.

⁵⁶ Class Action Law, Second Schedule § 3; Banking (Service to Customer) Law § 16A(a).

⁵⁷ With regard to this approach, see MICHAL RUBINSTEIN & BOAZ OKON, SHAMGAR BOOK—THE BANK AS A SOCIAL AGENCY 819 Articles, Part C (2003).

A salient example is the imposition of liability on banks that provide project financing to building contractors, vis-à-vis the buyers of flats from the contractor, even if such buyers are not bank customers.⁵⁸ I have expressed criticism of this approach in several articles,⁵⁹ and I believe that in such cases buyers should not be permitted to file class actions against banks.

III. THE REPRESENTATIVE FILING THE ACTION

Section 4(a) of the Class Action Law allows the following entities to be plaintiffs or representatives in a class action: (a) a person (including a corporation)⁶⁰ who has a personal cause in the subject-matter of the action; (b) a public authority listed in the law, in a matter relating to its public purposes; and (c) an organization that acts in furtherance of a public purpose and in a manner pertaining to its public purposes, provided that the court is satisfied that it would be difficult for the application to be filed by a person as aforesaid.⁶¹

With respect to public authorities, the public authorities presently listed in the Class Action Law are not connected to the banking field and are thus, not relevant to class actions against banks.⁶² It is worth noting that the Bank of Israel was specifically mentioned in the Class Action Bill, 5765–2005⁶³ as one of the authorities permitted to file a class action.⁶⁴ However, the Bank of Israel was omitted in the final draft of the Class Action Law and according to the text of the Class Action Law, the Bank of Israel may, at most, join an existing proceeding.⁶⁵ Accordingly, the Bank

⁵⁸ CA (TA) 2539/01 Josef Ovadia & Sons Ltd v. Discount Bank [2005] www.nevo.co.il (<http://www.nevo.co.il/serve/home/index.asp>); CF (TA) 1794/95 Haik v. Bank Hapoalim [2002] Takdin DC 2002(4) 840.

⁵⁹ Ruth Plato-Shinar, *Construction Loans in Israel: Bank's Liability Toward Third Parties*, 23 INT'L CONSTRUCTION L. REV. 187 (2006); Ruth Plato-Shinar, *Construction Loans—Does the Bank Owe a Fiduciary Duty to Buyers of Apartments?*, 4 LANDLAW 38 (2005).

⁶⁰ Interpretation Law, 5741 – 1981, S.H. 302 § 4.

⁶¹ Class Action Law § 4(a).

⁶² Class Action Law, schedule 1 § (The authorities listed in the Law include the Commission for the Equality of Rights for People With Disabilities, the Authority for the Preservation of Nature, and the Commission for the Equality of Opportunities at Work); Class Action Law § 30 (authorizes the Minister of Justice to change the list of authorities).

⁶³ Class Action Bill.

⁶⁴ Class Action Bill, Second Schedule § 3.

⁶⁵ See Class Action Law § 6(b).

of Israel may not initiate a representative proceeding by itself, as it could prior to the Class Action Law's enactment.

In this matter, guidance should have been taken from the field of standard contracts. According to the Standard Contract Law⁶⁶ and the Standard Contract Regulations,⁶⁷ the Bank of Israel is authorized to apply to the Standard Contracts Tribunal to abrogate an unfair term in a standard banking contract. By virtue of this authority, a number of important applications that otherwise might have not been filed have recently been filed in the Tribunal by the Bank of Israel.⁶⁸ With regard to class actions, it would be relatively simple for the Bank of Israel's legal department to translate justified complaints made to its Ombudsman's Office into class actions. Accordingly, it is unfortunate that the Class Action Law does not authorize the Bank of Israel to be active in the field of class actions.⁶⁹

The Class Action Law does not limit organizations that advance public purposes, such as consumer protection organizations, from filing an action based solely on the Consumer Protection Law.⁷⁰ Accordingly, those organizations have the power to file actions regarding any consumer-related subject, including consumer banking. Furthermore, under the Banking Law, such consumer organizations were authorized to file class actions against banks as long as their claims conformed with the requirements in the Banking Law.⁷¹

IV. THE CONDITIONS FOR CERTIFICATION OF A CLASS ACTION

⁶⁶ Standard Contract Law, 5743 – 1982, S.H. 8 § 16.

⁶⁷ Standard Contract Regulations, 5743 – 1983, K.T. 1518 § 4.

⁶⁸ SC [standard contracts] (Standard Contracts Tribunal) 8010/02 Supervisor of Banks v. Bank Hapoalim Ltd. [2004] www.court.gov.il (<http://www.court.gov.il/heb/home.html>) (the Tribunal has already handed down a judgment, holding that the banking arrangement is unfair to customers, and should be cancelled); SC 8002/02 Supervisor of Banks v. First Int'l Mortgage Bank Ltd. [2002] (filed) (concerns a contract for the provision of a housing loan and a guarantee for this loan); SC 8011/02 Supervisor of Banks v. Tefahot Isr. Mortgage Bank Ltd [2002] (filed) (concerns a contract for a bank guarantee which the bank provides to buyers of flats under the Sale (Flats) (Guarantee of Investments of Flat Buyers) Law, 5735–1974, S.H. 14).

⁶⁹ Class Action Law § 4(a).

⁷⁰ *Id.*

⁷¹ Banking (Service to Customer) Law § 16A(a).

Pursuant to the new legislation, a class action lawsuit, proceeds in two stages. In the first stage, an application is filed with the court to certify the lawsuit as a class action.⁷² Upon certification, the court will hold a merits hearing and adjudication.⁷³ It should be noted, however, that even though class actions can be filed under the very broad language regulating causes of action, they still need to be certified in accordance with the Class Action Law's requirements. Specifically, the Class Action Law lists conditions that, when taken cumulatively, may support class action certification. These conditions are listed below, along with an examination of how these conditions have been interpreted by Israeli courts.

A. The representative must have a personal interest in the action.⁷⁴

This condition, currently set forth in the Class Action Law, was also present in the Banking Law.⁷⁵ Under this condition, courts examined whether plaintiffs personally had well-established causes of action in filing their claims.⁷⁶ This requirement often served as an obstacle to certification, especially in light of its stringent interpretation by Israeli courts. Israeli courts have repeatedly held that representative plaintiffs had no vested right to file the claim and were instead required to receive the court's consent subject to a "stringent burden of proof."⁷⁷ Accordingly, the courts were not satisfied with a *prima facie* cause of action shown in the statement of

⁷² Class Action Law § 5(a).

⁷³ Class Action Law § 3(b).

⁷⁴ Class Action Law § 4(a)(1) (According to § 4(b)(2) this condition does not apply to an application filed by a public authority or a public organization).

⁷⁵ Banking (Service to Customer) Law § 16(A)(a).

⁷⁶ MCA (TA) 5588/04 *Deutsch v. Isracard*, [2006] Takdin DC 2006(3) 3501, ¶ 6; CF (TA) 1125/02 *T.B.D. Shiputz Michlalim Larechev Ltd. v. United Mizrahi Bank Ltd* [2004] www.lawdata.co.il 11 (<http://www.lawdata.co.il/lawdata/default.asp>), *appeal docketed*, CA 2535/04 *United Mizrahi Bank Ltd v. T.B.D. Shiputz Michlalim Larechev Ltd.* [2004] www.court.gov.il (<http://www.court.gov.il/heb/home.html>); *Reizel v. Bank Leumi*, www.court.gov.il at 6(2).

⁷⁷ *See* ACA [application for civil appeal] 8332/96 *Shemesh v. Reichart* [2001] IsrSC 55(5) 276, 290-291; ACA 4474/97 *Tatzat v. Zilbershatz* [1998] IsrSC 54(2) 577, 586-588 (these last two judgments deal with a class action suit in the field of securities). *T.B.D. Shiputz Michlalim Larechev Ltd.*, www.lawdata.co.il at 10-11.

claim, but rather demanded a relatively high level of proof at this preliminary stage of the proceeding.⁷⁸

One common cause of action in class action suits against banks is the provision of misleading information in violation of Section 3 of the Banking Law.⁷⁹ However, courts have ruled that in order for a plaintiff to recover based on this type of claim, the plaintiff must show that he/she personally relied on the misleading information or publication.⁸⁰ Oddly, although courts have applied this rule for recovery, Section 3 itself does not mandate such a requirement. Section 3 addresses cases in which the bank acted in a manner that “was likely to mislead.”⁸¹ It appears that the courts base their imposition of the reliance requirement on Section 15 of the Banking Law, which ambiguously states that “damage caused to a person under the provisions of the Banking Law shall be deemed to be damage for which compensation is claimable under the Civil Wrongs Ordinance.”⁸² Relying on such language, it seems that courts require plaintiffs seeking recovery under the Banking Law to prove the elements of an ordinary tort claim. Regular tort claims concerning damages for misleading information or a misleading publication require that the injured party prove that he relied personally and directly on a misrepresentation and that such reliance caused the damage at issue.⁸³

⁷⁸ Aviv Legal Servs. Ltd., www.lawdata.co.il at 5; Lock, www.lawdata.co.il at ¶ 32; Reizel, www.court.gov.il f(2), f(6); Elma'alem www.lawdata.co.il at 4; T.B.D. Shiputz Michlalim Larechev Ltd, www.lawdata.co.il at 10-13.

⁷⁹ CA (TA) 1810/04 Arie v. Bank Hapoalim [2006] Takdin DC 2006(4) 1341, ¶ 4(a); Lock, www.lawdata.co.il at 35; Reizel, www.court.gov.il at f(8); Elma'alem, www.lawdata.co.il at 4; T.B.D. Shiputz Michlalim Larechev Ltd, www.lawdata.co.il at 14-16; Hazan v. Bank Hapoalim [2002] www.lawdata.co.il, at 5(2) (<http://www.lawdata.co.il/lawdata/default.asp>).

⁸⁰ FCH [further civil hearing] 5712/01 Barazani v. Bezeq The Isr. Telecomm. Corp. Ltd. [2002] IsrSC 57(6) 385, 410-415; ACA 8851/02 Isracard v. Shlomovitz [2003] www.nevo.co.il (<http://www.nevo.co.il/serve/home/index.asp>) (the source of the reliance requirement lies in a precedent of the Supreme Court, which is based on the corresponding section in the Consumer Protection Law). *See contra* Sinai Deutch, *Consumer Class Actions: The Requirement of Personal Reliance on the Misrepresentation*, 2 NETANYA ACADEMIC COLLEGE LAW REVIEW 97, 99-102, 119-120 (2001-02); *but cf.* Hazan, www.lawdata.co.il at 9, 13 (discussing an unusual approach in this matter).

⁸¹ Banking (Service to Customer) Law § 3.

⁸² Banking (Service to Customer) Law § 15.

⁸³ Deutch, *Consumer Class Actions: The Requirement of Personal Reliance on the Misrepresentation*, *supra* note 80, at 98.

The courts' confusion may stem from the language of Section 15 of the Contracts (General Part) Law, which concerns misleading information relayed during the formation of a contract. This section requires that a contractual agreement follow such a misleading statement.⁸⁴ Hence, it is necessary to prove a causal connection between the contracting party's mistaken belief arising from the misleading statement and the formation of the contract itself.⁸⁵ However, this requirement does not appear in Section 3 of the Banking Law.

The judgment in *Isracard v. Shlomovitz*⁸⁶ is an example of the questionable outcome resulting from the application of both the reliance and causal connection requirements. *Isracard* involves a contradiction between a term regarding the conversion of payments to foreign currencies that was accurately stated in the issuing company's advertising brochure, but inaccurately described in its credit card application form.⁸⁷ The court determined that neither plaintiff had been misled, as one plaintiff read both the brochure and the form and thus received the accurate information and the other plaintiff did not read either document and thus could not have relied on any misstatements.⁸⁸ Thus, under the court's rationale, a diligent, but misled, plaintiff who reads all the relevant documents should be treated in a manner identical to that of a plaintiff who neglects to read any of the documents. Taken further, under the court's stringent analysis, assuming that a significant portion of the public read only the credit card application form, those members of the public would be considered to have been misled. The resulting outcome is an inexplicable anomaly. Accordingly, with the best interests of the general public in mind, the Class Action suit should have been allowed to proceed.

The court also used the personal reliance reasoning to dismiss the claim in the *Rachman-Nony* case.⁸⁹ In that case, the bank charged plaintiffs with an early repayment penalty without first informing them that such a penalty would apply upon early repayment,⁹⁰ and without complying with the full disclosure

⁸⁴ GABRIELA SHALEV, THE LAW OF CONTRACT – GENERAL PART, TOWARD CODIFICATION OF A CIVIL LAW 13 (2005).

⁸⁵ *Id.* at 314.

⁸⁶ See *Isracard*, www.nevo.co.il.

⁸⁷ *Id.* at 1-5.

⁸⁸ *Id.* at 14-17, 20.

⁸⁹ See *Rachman-Nony*, www.lawdata.co.il.

⁹⁰ *Id.* at B.

requirements promulgated by the Governor of the Bank of Israel.⁹¹ Nevertheless, the court denied the plaintiffs' application after ruling that the plaintiffs did not sufficiently prove that they took the loan solely in reliance on a promise or condition that they would not be charged an early repayment commission.⁹² This ruling is problematic because it shows that the court's application of the reliance standard is misplaced and creates an inequitable administration of justice. Because the plaintiffs were not aware of the commission, neither at the time they entered into the loan, nor at the time they made the early repayment, they could not satisfy the reliance requirement. Thus, it appears that the reliance requirement is another means used by the courts to make it more difficult for the representative to comply with the threshold requirements for obtaining approval for the filing of the class action.

B. The action must raise material questions of fact or law that are common to all the members of the class⁹³

This condition, set forth in the Class Action Law, existed in a similar version in the Banking Law.⁹⁴ While the Banking Law required common questions of "fact and law," the Class Action Law requires common questions of "fact *or* law".⁹⁵ Under both laws the questions presented need not be identical; rather it is sufficient for questions to be similar.⁹⁶

As a rule, this condition should not constitute a special restriction, particularly after the plaintiff has overcome the prerequisite of establishing a "personal cause of action." However, this is not always the case. In the above-mentioned *Isracard v. Shlomovitz* case, one of the reasons the court denied the application was that the required homogeneity between the members of the class did not exist.⁹⁷ The class on whose behalf the application was filed included customers who had not studied the contract or the brochure,

⁹¹ Banking (Service to Customer) (Due Disclosure and Delivery of Documents) § 15(5).

⁹² Rachman-Nony, www.lawdata.co.il at ¶ E.

⁹³ Class Action Law § 8(a)(1).

⁹⁴ Banking (Service to Customer) Law § 16B(a)(2).

⁹⁵ Class Action Law § 8(a)(1); Banking (Service to Customer) Law § 16B(a)(2).

⁹⁶ *Sagiv v. Bank Leumi*, www.nevo.co.il, *appeal docketed*, *Bank Leumi v. Sagiv*, www.court.gov.il (This is one of the few judgments in which the application for the filing of a class action was approved.); Hazan, www.lawdata.co.il at 14.

⁹⁷ *See Isracard*, www.nevo.co.il at 13.

customers who had studied both the contract and the brochure, and customers who studied only the contract.⁹⁸ Given that the brochure contained the correct description of the transaction and only the contract contained a misleading description, the court ruled that only the category of customers who only read the contract had been misled.⁹⁹ Since in this case the cause of the misleading information was not common to the entire class on whose behalf the application had been filed, it seems unreasonable to interpret the requirement that there be similar factual and legal questions in such a manner. Such a small-minded approach reflects the conservative policy of the court at issue, as well as that of Israeli courts in general, and demonstrates their efforts to undermine plaintiffs wishing to file class actions.

C. There must be a "reasonable possibility" that the common questions will be determined in favor of the class.¹⁰⁰

This condition, set forth in the Class Action Law, also existed in the Banking Law and relates to the required level of proof at the certification stage.¹⁰¹ Notwithstanding the moderate wording, which requires only a "reasonable possibility" of success on the merits, past experience has shown that the requirement's imposition has resulted in the denial of numerous applications. Israeli courts, in a desire to prevent the certification of class actions, have been very stringent in their application of this condition and in practice, require that the plaintiff prove the factual and legal arguments included in the claim at the certification stage.¹⁰² Despite the above criticism, the court's approach is somewhat justified in that it prevents an expensive and unsuccessful action from progressing to the trial stage and harming the defendant and possibly the representative class. Nevertheless, because it is extremely difficult to present in depth evidence at the certification stage, this requirement should be

⁹⁸ *Id.* at 13.

⁹⁹ *Id.* at 11.

¹⁰⁰ Class Action Law § 8(a)(1).

¹⁰¹ Banking (Service to Customer) Law § 16B(a)(2).

¹⁰² Sinai Deutch, *A Decade of Consumer Class Action: Interim Summary and Future Direction*, 4 SHA'AREI MISHPAT 9, 54 (2005).

applied less stringently than it is currently being applied by courts.¹⁰³

D. A class action must be the most efficient and fair way to settle a dispute, depending on the circumstances of the dispute.¹⁰⁴

This section of the Class Action Law embodies two conditions: fairness and efficiency. Similar language appeared in the Banking Law, which considered whether class actions were “preferable . . . to filing regular suits.”¹⁰⁵ The Law does not specify what considerations should guide courts in determining what is “just” or “fair.” However, we may assume that the law points to considerations that have previously guided courts such as: (1) class size, which appeared in the Banking Law as a separate condition;¹⁰⁶ (2) the scope of the questions common to class members, as compared with the scope of the questions which are not common thereto; (3) the estimated personal damages for each class member; and (4) existence of other possible ways for determining the dispute or other litigation strategies that would be more fair or efficient than a class action.

One such situation occurs when filing separate claims would lead to receiving an adequate remedy in ordinary proceedings.¹⁰⁷ Hence, class actions are optimal when a large number of individuals gives rise to a practical impossibility of joining them all as litigants; or when the harm caused to each individual is too small to justify their filing individual claims. Nevertheless, in a case where harmed customers are so dispersed that the cost of locating and distributing compensation to each customer is more costly than the damage

¹⁰³ Compare Deutch, *A Decade of Consumer Class Action: Difficulties and Proposals for Solutions*, *supra* note 11, at 331 (speaking on a class action by virtue of the Consumer Protection Law).

¹⁰⁴ Class Action Law § 8(a)(2).

¹⁰⁵ Banking (Service to Customer) Law § 16B(a)(3).

¹⁰⁶ Banking (Service to Customer) Law § 16B(a)(1). Although generally class actions have been rarely found justified, filings have been approved where there were hundreds of complaining customers. *Ezrat Isr. Dormitories*, www.nevo.co.il at 9, *appeal docketed*, *Mercantile Disc*, www.court.gov.il. See *MCA (TA) 102262/98 Isr. Consumer Council v. Isr. Co. for the Mfr. of Beverages* [1999] www.lawdata.co.il at 8(b) (<http://www.lawdata.co.il/lawdata/default.asp>) (Finding a class of twenty-five sufficient. This case deals with class action under the Consumer Protection Law).

¹⁰⁷ Class Actions Bill Memorandum at 22.

award itself, application for class action was not approved.¹⁰⁸ Regardless, such a problem is rare in the banking sector because injured customers are easily traceable since they all have bank accounts and compensation can be deposited directly into their accounts. However, class actions should be deemed proper for customers who closed their accounts while litigation was pending, and for guarantors -- assuming they are permitted to file class actions against banks. Forbidding class actions in these contexts essentially releases defendants from all liability because personal claims will not likely be filed by litigants, who individually, suffered only minimal harm.

Furthermore, class action suits should be allowed to protect the public interest and prevent banks from causing harm to the public. The Class Action Law presents a solution in that it authorizes courts to “grant . . . any other remedy in favor of the class, in whole, or in part, or in favor of the public, as [they] shall deem fit.”¹⁰⁹ Courts have used this authority to employ “creative” remedies, such as the establishment of a public welfare foundation or a special fund out of which payment shall be made to injured parties who prove their claims.¹¹⁰

Another concern involves a class action suit that is not the sole legal proceeding being held between the representative of the class and the bank. This situation is common in cases where the bank is suing the representative. Under Israeli law, if both proceedings raise the same or similar issues, a question arises as to whether the class action suit is the most efficient way to determine the dispute. In dealing with this issue, courts have ruled that the class action is not the preferred method.¹¹¹ I believe, however, that if the class action is proper and has surmounted the obstacles posed by the previous conditions, then the public interest and the interest of the members of the class are best served by allowing the class action. Alternatively, the solution may be to order the replacement of the representative.

¹⁰⁸ CA (Hi) 28404/97 Boledo v. Ports and Railways Auth. [1999] IsrDC 5758 (1) 337 (deals with class action under the Consumer Protection Law); *contra* Deutch, *A Decade of Consumer Class Action: Difficulties and Proposals for Solutions*, *supra* note 11, at 343.

¹⁰⁹ Class Action Law § 20(c). An identical draft appeared in the Banking (Service to Customer) Law § 16(I)(b).

¹¹⁰ ACA 3126/00 Isr. v. E.Sh.T. Project Mgmt. & Pers. Ltd. [2003] IsrSC 40(3) 220, 247.

¹¹¹ Zilberman, www.lawdata.co.il.

Pursuant to the Banking Law, a plaintiff who has filed an application to certify its lawsuit as a class action is required to provide notice, in writing, to the Attorney General and to the Supervisor of Banks.¹¹² The Class Action Law does not have a notice requirement. Instead, the law authorizes the Minister of Justice to make the determination as to when notice should be given.¹¹³ A written opinion of the Supervisor of Banks in favor of the representative, or the Supervisor's decision to join the proceedings, gives a plaintiff a significant advantage because it indicates the action's likelihood of success.¹¹⁴ Yet sometimes, as a result of the notification, the Supervisor of Banks decides to do more than submit a written response or join the proceeding, and instead orders the bank to amend the defect and compensate the customers.¹¹⁵ Consequently, there appears to be no point in conducting the action at all, and for this reason the application should be denied.

It is often necessary to carefully examine the circumstances in a case to see whether the Supervisor's intervention is determinative. *Aviram v. Tefahot Israel Mortgage Bank Ltd.* serves as an example.¹¹⁶ In that case, before the application was filed, the Supervisor of Banks ordered the bank to change its method for determining interest rates.¹¹⁷ The court ruled that in light of the Supervisor's intervention, a class action suit was no longer needed.¹¹⁸ The court reasoned that under-enforcement by authorities would have warranted a class action suit.¹¹⁹ Thus, when the appointed authority intervenes, the action becomes superfluous. Although the Supervisor's instructions did not address whether the funds that had already been collected were done so unlawfully or whether the bank should return those funds to the customers, the court maintained that compensation alone is insufficient to justify the use of the class action tool.¹²⁰ *Aviram* represents a good demonstration of courts' unfavorable attitudes toward class actions

¹¹² Banking (Service to Customer) Law § 16F.

¹¹³ Class Action Law § 6(b).

¹¹⁴ See MCA (TA) 15869/03 Ar-On Invs. Ltd. v. First Int'l Bank of Isr. [2006] IsrDC 8560(1) 4.

¹¹⁵ Banking Ordinance § 8(A)(a) (The Supervisor of Banks has this power.).

¹¹⁶ See Aviv Legal Serv., www.lawdata.co.il at 5; see also *Aviram*, www.nevo.co.il.

¹¹⁷ *Aviram*, www.nevo.co.il at 2.

¹¹⁸ *Id.* at 4(a).

¹¹⁹ *Id.*

¹²⁰ See *id.*

and serves as a clear example of the recurring phenomenon whereby courts cling to any possible justification to deny class action applications.

E. There must be a reasonable basis to assume that the interests of the members of the class will be represented in an appropriate manner and in good faith.

This condition, as set forth in the Class Action Law,¹²¹ incorporates two distinct requirements; (1) that the interests of the class be represented in an appropriate manner and, (2) that the interests of the class be represented in good faith. The Banking Law did not expressly incorporate a good faith element, although such a requirement was recognized in its accompanying case law.¹²² In this regard, the Class Action Law ultimately represents little substantive change from the Banking Law. However, in contrast to the Banking Law, where only the plaintiff was required to represent the interests of the class in an appropriate manner,¹²³ the Class Action Law is drafted in broader terms and might extend the good faith representation requirement to the plaintiff's attorney.¹²⁴ The reasoning for the application of this requirement to the plaintiff's legal counsel derives from the fact that in many cases, it is the lawyer who initiates and steers the proceeding rather than the plaintiff himself. Significantly, the Class Action Law permits the court to approve a class action even if the appropriate representation requirement is not satisfied, specifically in cases where it may be possible to resolve the matter by way of joinder or replacement of the representative plaintiff or his lawyer.¹²⁵

¹²¹ Class Action Law §§ 8(a)(3)-(4).

¹²² See, e.g., *Ezrat Isr. Dormitories*, www.nevo.co.il at 10; *Troim, Takdin DC* 2003(1) at C.

¹²³ *Banking (Service to Customer) Law § 16B(4)*. Nevertheless, prior to enactment of the Class Action Law, the courts occasionally examined the representative's lawyer. See *CF (TA) 2439/04 De-Kalo v. Leumi Mortgage Bank Ltd.* [2006] www.nevo.co.il 10-13 (<http://www.nevo.co.il/serve/home/index.asp>); see also *CF (TA) 2458/02 Haran v. Bank Leumi Le-Israel Ltd.* [2003] www.nevo.co.il 5 (<http://www.nevo.co.il/serve/home/index.asp>); *Analyst E.M.S. Trust Funds Mgmt. (1986) Ltd. v. Isr.* [1994] www.nevo.co.il (<http://www.nevo.co.il/serve/home/index.asp>) (application for class action under the former Securities Law).

¹²⁴ Class Action Law §§ 8(a)(3), (4) (stating that "the interests of the members of the class" will be represented in an appropriate manner and in good faith).

¹²⁵ Class Action Law § 8(c); see also *MCA (TA) 8001/04 Rozin v. Mishkan Hapoalim Mortgage Bank Ltd.* [2004] www.lawdata.co.il

A plaintiff need not be a sophisticated investor or proficient in the field of the claim in order to constitute an appropriate representative; it is sufficient for the plaintiff to have a substantive economic interest in the claim.¹²⁶ Indeed, it is well known that plaintiffs' attorneys typically initiate and drive claims of this sort, rendering the actual expertise of the representative plaintiff insignificant. Consequently, the courts tend to focus on whether the representative plaintiff can act with the appropriate degree of vigor in conducting the action, and whether any conflicts of interest exist between the representative plaintiff and the other members of the class.¹²⁷

Courts also evaluate the conduct and level of preparation displayed by the representative and his legal counsel in determining whether the interests of the class are being represented in an appropriate manner.¹²⁸ The preparation of a class action is a difficult task, requiring counsel to clarify facts, obtain and submit expert opinions and economic data, and prepare convincing legal arguments. Where preparation of these elements is insufficient, courts have shown a readiness to deny class action certifications.¹²⁹ The filing of insufficient applications often results from the haste stemming from concerns of both plaintiffs and their attorneys that other plaintiffs will beat them to court and secure representative status. Not surprisingly, the courts have held that this concern provides no justification for a hastily filed and poorly prepared application.¹³⁰ Moreover, in cases of competition between applications, the courts have shown preference for the application

(<http://www.lawdata.co.il/lawdata/default.asp>) (holding that a representative plaintiff appointed to a judgeship after filing his application was no longer an appropriate representative and should be replaced).

¹²⁶ Lock, www.lawdata.co.il at 49-55; Sagiv, www.nevo.co.il at 6.

¹²⁷ Shemesh, IsrSC 55(5) at 302-03; Tatzat, IsrSC 54(4) at 15; Lock, www.lawdata.co.il at 49.

¹²⁹ Troim, Takdin DC 2003(1) (where following rejection of an application for insufficient preparation of the file, the Supervisor of Banks intervened and demanded that the bank compensate all injured customers). *See also* Arie, Takdin DC 2006(4) at 4(c); MCA (TA) 19004/05 Bank Leumi v. Astoria Invs. Ltd. [2005] Takdin DC 2005(4) 3857, 3860; CF (TA) 2375/01 Ben-Hemo v. Mercantile Disc. Bank Ltd. [2003] www.nevo.co.il 13 (<http://www.nevo.co.il/serve/home/index.asp>).

¹³⁰ *Id.*

¹³⁰ Shemesh, IsrSC 55(5) at 326.

that better represents the interests of the class over the application filed first.¹³¹

With regard to the good faith requirement, the courts have made their reservations clear about abuse of the class action instrument for purposes of extortion, vexatious litigation, or the exertion of undue pressure to reach a compromise.¹³² This situation arose before the Class Action Law was enacted, in the *Lock v. United Mizrahi Bank* case.¹³³ Although the application in that case involved a cause of action that justified certification of the claim as a class action, the court denied the application based on its impression that the application had been filed for improper motives after the bank had foreclosed on the mortgage of the plaintiff's home.¹³⁴ On the other hand, some courts have held that a customer's dispute with a bank is not a valid basis for denial of a class action application.¹³⁵ Facing similar circumstances under the Class Action Law, a court may approve the class action application but replace the plaintiff, thus protecting the interests of the class.¹³⁶

Additionally, courts have found a lack of good faith where a representative plaintiff is only nominally interested in an action that is in truth being driven by the interests of a third party.¹³⁷ The presence of a serial plaintiff known to file class action suits on a repeated basis, however, does not constitute a reason to deny a class action application so long as the plaintiff acted in good faith and did not intentionally "cause himself to sustain damages" as a basis for the claim.¹³⁸ The same holds true for lawyers known to file repeated class action claims, whether in their own name or on behalf of their relatives and acquaintances.¹³⁹

¹³¹ See, e.g., MCA (TA) 14936/02 Etzion v. Hershkovitch [2002] Takdin DC 2002(3) 10994, 10996; MCA (TA) 58138/99 Zeltzer v. Org. for the Fin. of the Charter for Soc. Sec. [2002] Takdin DC 2002(2) 2070, 6.

¹³² Arie, Takdin DC 2006(4) at 4(c); Elma'alem, www.lawdata.co.il at 5; Hazan, www.lawdata.co.il at 14.

¹³³ Lock, www.lawdata.co.il at 50.

¹³⁴ *Id.*

¹³⁵ See, e.g., Ezrat Isr. Dormitories, www.nevo.co.il at 9.

¹³⁶ Class Action Law § 8 (c).

¹³⁷ Lock, www.lawdata.co.il at 50 (where the loan at issue was actually used to serve the interests of the plaintiff's son, rather than the plaintiff himself); Elma'alem, www.lawdata.co.il at 5(a) (where a company specializing in the examination of bank accounts was handling the plaintiff's interests).

¹³⁸ ACA 4556/94 Tatzat v. Zilbershatz [1996] IsrSC 49(5) 774, 789.

¹³⁹ CA (TA) 2079/02 Reizel v. Bank Leumi [2005] Takdin DC (2005(1) 8676, 7.

Decisions are split on what actions a plaintiff may permissibly undertake to establish his claim without running afoul of the good faith requirement. In *Sagiv*, after the plaintiff discovered the misrepresentations made by the bank, he opened an additional deposit account upon which he could base his claim.¹⁴⁰ There the court ruled that the plaintiff was entitled to prepare an appropriate factual basis for his claim and take measures to strengthen his arguments.¹⁴¹ In contrast, in *Isracard v. Shlomovitz* a plaintiff's extensive correspondence with a credit card company in order to build a basis for his class action claim served as one of the considerations weighing against acceptance of the application.¹⁴² This contradictory case law seemingly places the plaintiff in a trap, where an application lacking sufficient evidence will be denied, while attempts to obtain evidence may lead to denial of the application due to the deliberate creation of evidence.

The case law is likewise inconclusive where a plaintiff makes only a casual inquiry with the bank about the basis of his potential claim before filing the application, rather than applying more substantial pressure to have the matter resolved.¹⁴³ The courts are split on whether a potential plaintiff has an obligation to give the bank an opportunity to avoid litigation by responding to the customer's inquiry, and in some instances it appears that such a failure on the plaintiff's part has been used by the courts to support a decision based on other grounds.¹⁴⁴

Additionally, there is always the possibility that the bank act in a similar manner, of its own initiative, by responding to the application for the certification of a class action that was filed against it by sending the compensation that is due to the representative in respect of his personal damage. Case law holds that the main consideration for resolution of this matter is the timing of the offer to mitigate the representative's damages.¹⁴⁵ If the defendant's offer was

¹⁴⁰ *Sagiv*, www.nevo.co.il at 6.

¹⁴¹ *Id.*

¹⁴² *Isracard*, www.nevo.co.il at 15-16.

¹⁴⁴ *Compare* *Ezrat Isr. Dormitories*, www.www.nevo.co.il at ¶ 10, *and* *Sagiv*, www.nevo.co.il at 6 (accepting class action applications and holding that a plaintiff's election not to permit the defendant an opportunity to respond does not constitute lack of good faith), *with* *Aviv Legal Servs.*, www.lawdata.co.il at 5 (denying an application and holding that such conduct constitutes a lack of good faith).

¹⁴⁵ *Aviv Legal Servs.*, www.lawdata.co.il at 5.

¹⁴⁵ *See* MCA (TA) 1586/00 *Allergant v. Mifal Hapayis* [2000] Takdin DC 2000(3) 5937; *see also* MCA (TA) 1566/00 *Aharak v. Am. Isr. Gas Co.* [2000] Takdin DC 2000(2) 14639.

submitted prior to the filing of the application for the certification of the claim as a class action, then the representative may not reject this offer, solely in order to retain possession of a cause of action for the purpose of a class action.¹⁴⁶ The court should also consider whether the representative demanded mitigation of the damages before filing the class action. If not, the application in dispute was effectively the first application, and the bank has the right to respond and pay the representative damages.¹⁴⁷

If the court wishes to approve the application on the basis of good faith and appropriate representation, then the condition will not serve as an obstacle. However, if the court wishes to dismiss the claim, as it does in most cases, it will cite that the representative did not satisfy the legal requirements as an additional reason for dismissal. In the *Sagiv* case, for example, the court ruled that the good faith requirement had been satisfied and approved the application even though the plaintiff artificially inflated the claim to one billion shekels, without any legal or factual basis, by demanding global punitive damages in the amount of \$116,000,000.¹⁴⁸

F. When damages is one element of the cause of action, the representative must show it was allegedly damaged.¹⁴⁹

This requirement's wording hints that proof of damage is not always required at the application's approval stage as long as such proof is included in the cause of action. Identical wording also appeared in the Banking Law.¹⁵⁰ However, Section 15 of the Banking Law requires the plaintiff to additionally prove pecuniary damages.¹⁵¹ Conversely, the Class Action Law extends the range of causes of action and is not as restrictive as the Banking Law. Therefore, under the Class Action Law there may be causes of action that do not require the representative to prove any damage. This is particularly true when the representative does not seek financial compensation, but rather seeks a declarative remedy, or the

¹⁴⁶ Allergant, Takdin DC 2000(3) at 10; *see also* Aharak, Takdin DC 2000(2) at C (concerning a class action suit pursuant to the Consumer Protection Law).

¹⁴⁷ Sommer, *supra* note 20, at 391.

¹⁴⁸ Sagiv, www.nevo.co.il at 5.

¹⁴⁹ Class Action Law § 4(b).

¹⁵⁰ Banking (Service to Customer) Law § 16A(b).

¹⁵¹ Rachman-Nony, www.lawdata.co.il at E; *see also* Hazan, www.lawdata.co.il at 13.

r the various members of the class. In one case, a court even ruled that the representative was not required to prove the exact amount or elements of the damage that was caused to him, and it was sufficient for him to show that he did not receive the benefit promised in the bank's publications even though the plaintiff's calculation of total damages caused to all members of the class was incorrect.¹⁵⁶

G. Other Considerations

Even if all of the above-mentioned conditions are satisfied, it is possible that the class action will not be certified. According to the terms of the Class Action Law, courts have the authority to balance the following two issues. First, they should evaluate the damage that the class action proceedings might cause to the public needing the services of the bank or to the general public, as a result of harm to the bank's economic stability. Second, they should consider the expected benefit to both the members of the class and the public. If the court is satisfied that the damage outweighs the benefit, then the court is entitled to take this determination into consideration.¹⁵⁷

¹⁵² Class Action Law § 20(e) (Pursuant to this section, which deals with the stage of determining the remedy in a class action that was determined in favor of the class, the court may not award compensation without proof of damage. Nevertheless, the court may award compensation for damage which is not pecuniary damage).

¹⁵³ For further discussion of this issue, please see Section G "Other Considerations" below.

¹⁵⁴ See Deutch, *A Decade of Consumer Class Action: Difficulties and Proposals for Solutions*, *supra* note 11, at 338 (Such a demand appeared in the past with regard to class actions pursuant to the Consumer Protection Law, and served as a serious obstacle to the certification thereof).

¹⁵⁵ *Id.*

¹⁵⁶ Sagiv, www.nevo.co.il at 4.

¹⁵⁷ Class Action Law § 8(b)(2).

A similar condition also appeared in the Banking Law, which also entitles the court to consider the personal damage that may be caused to the defendant bank itself.¹⁵⁸ Additionally, under the Banking Law the examination of the damage that may be caused to the public needing the bank's services or the general public, is not restricted to harm to the economic stability of the bank.¹⁵⁹

However, this condition raises several problems. First, on principle there are questions as to whether this condition should be used at the preliminary or final stages of the action. For example, there are questions as to whether the Class Action Law's provision authorizing courts to weigh similar considerations when determining the amount of compensation would suffice.¹⁶⁰ If such considerations are taken into account at this preliminary stage, it could constitute a serious impediment to certification of the action. On the other hand, plaintiffs occasionally inflate the value consideration in their applications and if plaintiffs knew that the court may dismiss the action due to the inflation, they would likely file claims in their true amounts.¹⁶¹

On the basis of actual practice, it is unclear as to what this condition is referring. It may be referring either to the damage that could be caused by the action *per se*, or to the damage that could be caused in a decision against the bank. In addition, it not clear what the phrase "damage to all the customers or to the general public" means.¹⁶² It may refer to the fear that the bank will collapse in the wake of the class action and be unable to return deposited funds to its customers or to the fear that the collapse and closure of the bank would reduce the competition between the banks and thus harm to the general public. If the phrase refers to either of those situations, it should be considered in the award compensation stage of the litigation and not at the application approval stage. In any event, if Class Action Law's aim is to encourage the filing of class actions, then this condition should be interpreted in a narrow sense, and it should be recognized at the application for certification stage only in exceptional cases if at all.

H. Summary

¹⁵⁸ Banking (Service to Customer) Law § 16B(b).

¹⁵⁹ *Id.*

¹⁶⁰ Class Actions Law § 20(d)(2).

¹⁶¹ Sagiv, www.nevo.co.il at 5.

¹⁶² Class Action Law § 8(b)(2).

In summary, a review of the case law gives rise to two conclusions. Firstly, Israeli courts tend to interpret most of the conditions presented above in an extremely stringent manner. This is particularly salient with regard to the requirement of the representative's personal interest, the condition regarding the chances of the action ending with success in favor of the class, and the requirement that the class action be the most effective way to determine the dispute. Even if these requirements appear to be reasonable on the surface, the courts' interpretations of them have, on more than one occasion, resulted in the dismissal of a justified application. Secondly, with regard to those conditions that the courts interpret in a less stringent manner, such as the condition requiring appropriate representation and conduct in the proceeding, there is a lack of consistency in the courts' interpretations which is detrimental to the legal certainty in a field where it is of the utmost importance that the rules be known and clear in advance.

A possible explanation for the two above-mentioned conclusions is that courts want to deny the applications and use other conditions to justify the denial. In the few isolated cases where courts have approved applications, the conditions used to justify the denial of other class action do not constitute a real obstacle. If the courts' conservative policy continues, there will be no change in the existing situation.

V. CONCLUSION

The Class Action Law was enacted with the aim of encouraging the filing of appropriate class actions and removing procedural impediments. With regard to the banking sector, the main difference between the Class Action Law and the Banking Law that preceded it is the cancellation of the restrictions concerning the cause of action. Under the Banking Law a class action could be filed solely based on the limited causes of action set forth within the law, while the Class Action Law lifts this restriction and "any matter between the bank and the customer" may serve as a basis for a class action.

On the other hand, the determination of a significant court fee may be a serious obstacle to filing class actions. While the Banking Law expressly determined that the filing of a class action would be exempt from the payment of a court fee,¹⁶³ the Class

¹⁶³ Class Action Law § 44.

Action Law does not regulate this matter, but rather authorizes the Minister of Justice to regulate it in the Regulations, which has yet to occur.¹⁶⁴

In addition, in order for certification of a class action to be granted, it is necessary to comply with the many other conditions set forth in the Class Action Law that are generally similar to those previously set forth in the Banking Law. The question is whether the same conservative policy of interpreting these conditions with excessive stringency will continue and cause the courts to deny justified applications.

In this regard, there is special significance to Section 1 of the Class Action Law, which declares that the purposes of the Class Action Law include: (1) the improvement of protection of rights; (2) the granting of access to the courts, including for those who find it difficult to apply to the court as individuals; (3) the enforcement of the law and deterrence against its violation; and (4) the grant of suitable relief to parties injured by the violation of the law. In Israel it is rare to find a section defining the purpose of a law, and this is particularly true in the field of private law. For this reason, special significance should be attributed to Section 1 of the Class Action Law.¹⁶⁵ Hopefully, the Class Action Law's enumerated purposes will not turn out to be futile rhetoric, and instead the courts will make practical use of its provisions. This will give rise to a change in the reserved, and sometimes hostile, attitude of the courts to the important institution of the class action law suit.¹⁶⁶

¹⁶⁴ Banking (Service to Customer) Law § 16G.

¹⁶⁵ Deutch, *A Decade of Consumer Class Action: Interim Summary and Future Direction*, *supra* note 102, at 49.

¹⁶⁶ Sommer, *supra* note 20, at 353, 399.

