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# GROUP LITIGATION UNDER FOREIGN LEGAL SYSTEMS: VARIATIONS AND ALTERNATIVES TO AMERICAN CLASS ACTIONS

*Edward F. Sherman*

## INTRODUCTION

The class action is a uniquely American procedural device. It allows plaintiffs to sue not only for injury done to themselves but on behalf of other persons similarly situated for injury done to them. It serves the interests of economy by not having to try the same issues again and again in separate cases. It also serves the interests of consistency and finality by avoiding the possibility of inconsistent outcomes in separate trials of similar cases and resolving all claims in a single case that is binding on all class members. On the other hand, if there is insufficient commonality of interest between the class members, class treatment can deprive them and the defendant of an individualized determination of their disputes. It also affects the bargaining power of the parties, enabling plaintiffs to command more litigation resources by combining their cases and giving them much greater leverage by compounding the defendant's risk of loss.<sup>1</sup>

Other countries have eyed the American class action with both admiration and suspicion. There is recognition that the traditional single-party model of adjudication is not well-suited to situations today when the claims of many individuals arise from the same basic conduct of a defendant. Not only does this involve a waste of judicial resources, but it can also effectively deny legal recourse when the cost of individual litigation would exceed any possible recovery.<sup>2</sup> Until recently, the latter concern was tempered in many developed countries

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1. "[C]ertification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant would be found liable and results in significantly higher damages awards." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). See also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied*, *Grady v. Rhone-Poulenc Rorer, Inc.*, 516 U.S. 867 (1995) (noting that class action certification may force defendants to "bet the company").

2. The dual missions of the class action rules were described by Professor Benjamin Kaplan, Reporter of the Civil Rules Advisory Committee, as

(1) to reduce units of litigation by bringing under one umbrella what might otherwise be many separate but duplicating actions; (2) even at the expense of increasing litiga-

by the availability of welfare programs and administrative remedies for injuries that are often handled through private litigation in the United States.<sup>3</sup> In addition, many countries had generous governmental legal aid programs making access to the courts available for individuals with limited means. But as the scope of welfare and legal aid programs has declined in the last several decades, the American market approach to fashioning legal remedies and permitting aggregation of claims has taken on added attraction abroad.

Many countries have procedures that permit, in certain circumstances, standing to sue in the place of others, aggregation of similar claims, or suits filed in some kind of representative capacity. However, such procedures fall short of the broad sweep of the contemporary American class action with its incentives to litigate on behalf of a class. "Representative proceedings" have been available under English court rules for over two hundred years, but have been used infrequently as a result of early narrow interpretation by the courts and limitations on group-wide determination of damages.<sup>4</sup> Australia and Canada had similar practices and in the last several decades have adopted broader rules more clearly modeled on the American class action.<sup>5</sup> They have not, however, experienced the same mushrooming of class action practice as in the United States. This might be explained by such legal differences as the absence of juries, a career judiciary, less activist and entrepreneurial attorneys, and the "loser-pays" rule for shifting attorneys' fees. As will be discussed, Australia and Canada both rely on and deviate from American class action precedents and practice and offer a useful source for comparison with U.S. procedures.

Most European countries eschewed American class action practice until quite recently, although some had distinctive procedures permitting expanded standing and aggregation through "group litigation." In 1998, a directive of the European Parliament and Council required the member countries to implement certain forms of group litigation by the end of the year 2000, and that Directive is being implemented in different ways by the various European Union (EU) countries. A number of non-EU countries have also experimented with, or are considering, broader rules to permit group litigation or representative

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tion, to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.

Benjamin Kaplan, *A Prefatory Note to "The Class Action"—A Symposium*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969).

3. See generally CAROL HARLOW & RICHARD RAWLINGS, *PRESSURE THROUGH LAW* (1992).

4. See *infra* text accompanying notes 79-97.

5. See *infra* text accompanying notes 98-157.

suits, including Brazil, India, and Indonesia.<sup>6</sup> Consideration of those developments is beyond the scope of this Article, but they too offer interesting sources for comparative study.

While other countries display a growing interest in American class action practice for litigation arising from defective products, deceptive trade practices, and environmental conditions, they tend to react negatively to the American litigation landscape. Horror stories about an overly litigious society, entrepreneurial plaintiff attorneys, runaway jury verdicts, abusive class action practices, and legal blackmail through meritless suits that drive up business costs are well-known abroad.<sup>7</sup> Whether or not such stories convey an accurate picture, most other countries view American class actions as a Pandora's box that they want to avoid opening. Thus, a good deal of attention is being devoted these days to studying and experimenting with procedures for aggregation of cases that can avoid the perceived excesses of the American experience.

## II. AMERICAN CLASS ACTIONS

The American class action was the invention of equity, allowing certain groups of individuals with common interests to enforce their rights in a single suit.<sup>8</sup> When the Federal Rules of Civil Procedure

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6. *E.g.*, the Supreme Court of Indonesia and Indonesian Center for Environmental Law held the International Conference on Class Action Procedures and Their Implementation in the Indonesian Courts in Jakarta on February 18-20, 2002. On April 26, 2002, the Chief Justice of the Indonesian Supreme Court issued Regulation Number 1 of 2002 Concerning Class Action Procedures permitting "filling a claim in which one or more persons representing a class files a claim having questions of fact or law in common among class representatives and class members concerned, for himself/herself or themselves and at the same time representing a large group of people." *INDON. SUP. CT. REG. NO. 1, art. 1 (2002)*. See also Antonio Gidi, *Class Actions in Brazil: A Model for Civil Law Countries*, 51 *AM. J. COMP. L.* (forthcoming 2003) (account of fifteen years of experience with a class action statute reflecting both civil law and American influences); 3 *COMMISSION OF INQUIRY INTO THE AFFAIRS OF THE MASTERBOUND GROUP AND INVESTOR PROTECTION IN SOUTH AFRICA* 651-953 (recommending class actions).

7. One proposal suggests:

A major reason for the Australian reticence about class actions is the horror stories from the United States. A Fortune Magazine headline says it all—*Lawyers from hell: slip up and guys like these will bankrupt your company*. A picture is painted of aggressive plaintiff lawyers conjuring massive class claims based on spurious product faults, ruining a company financially with no social benefit. The lawyers are regarded as the villains, often being the main financial beneficiaries of the litigation . . . . The poor reputation of the US procedure has prompted many commentators in Australia to deliberately use the term "representative proceeding" rather than class action.

*Proposal for a New Supreme Court Rule on Representative Proceedings in NSW to the Supreme Court Rule Committee*, 1998 *CENTRE FOR LEGAL PROCESS OF THE NSW L. FOUND. & PUB. INT. ADVOC. CENTRE* 12.

8. See STEPHEN YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

were adopted in 1938, the equitable class action was extended to all actions in federal courts under the merger of law and equity. The new rules provided for three kinds of class actions, depending on the nature of the rights asserted. Under all three categories, individuals had to choose affirmatively to be a party (that is, opt in), and only parties could share in any recovery. The first two categories—"true,"<sup>9</sup> which were limited to suits concerning "joint rights," and "hybrid,"<sup>10</sup> which were limited to suits concerning rights in a specific property—involved a strong identity of interest between class members and thus, were only available in a small number of cases. The third category—the "spurious class action"—involved a weaker identity of interest, requiring only that the class members shared a "common" question of law or fact. This had the potential for use in many suits, but it was treated with suspicion. Unlike the other two categories, spurious class actions were not accorded a binding effect on class members, making the possibility of settlement unattractive to defendants. It was used primarily to avoid jurisdictional obstacles in accomplishing joinder and was rarely resorted to. From 1938 until the class actions rules were amended in 1966, class actions were few and far between.

#### A. *Categories of Class Actions*

The 1966 amendments to the class action rules occurred as the United States went through its civil rights revolution and as a variety of new causes of action were emerging from common law and constitutional decisions of courts and statutory changes.<sup>11</sup> The amendments established three kinds of class actions, distinguished by functional tests and not mutually exclusive.

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9. A "true" class action, the most compelling category for group litigation, had to litigate the "joint rights" of the class members. This was exemplified by the 1921 case *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), in which certain certificate holders of a fraternal organization were allowed to sue on behalf of all 70,000 certificate holders to overturn a reorganization that reclassified their certificates and thus injured their joint property interests.

10. A "hybrid" class action was allowed when "several" rather than "joint" rights were asserted against a specific property, a fairly limited situation.

11. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (describing a new "public law model" of litigation in which "the object of litigation is the vindication of constitutional or statutory policies," seeking "complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge's continued involvement in administration and implementation," as in "school desegregation, employment discrimination, and prisoners' or inmates rights cases").

### 1. "Incompatible Standards" or "Impeding of Interests" Class Actions

The first category presents particularly compelling situations for class action treatment. A Rule 23(b)(1)(A), or "incompatible standards" class, is available if separate suits would risk inconsistent adjudications that would establish "incompatible standards" for the party opposing the class.<sup>12</sup> An example is when separate suits by quarrelling beneficiaries of a trust might impose incompatible standards on the trustee concerning distributions to the beneficiaries. A Rule 23(b)(1)(B), or "impeding of interests" class, is applicable if separate suits would, as a practical matter, impede the ability of other persons to protect their interests in a common property or right.<sup>13</sup> The classic example is the "limited fund," where the claims of the class members exceed the defendant's assets and separate suits could leave nothing for other potential class members.<sup>14</sup> Because these situations are so limited, Rule 23(b)(1) accounts for only a tiny percentage of American class actions.

### 2. Injunctive Class Actions

A Rule 23(b)(2) class is available where injunctive or declaratory relief is sought against a party who has acted or refused to act on grounds generally applicable to the class.<sup>15</sup> The paradigm are the "civil rights" suits of the 1960s and 1970s that brought an end to segregation and enforced the new federal civil rights acts, and the "institutional reform" suits of the 1970s and 1980s that enforced a wide range of constitutional and statutory standards against institutions like prisons and mental hospitals.

Resort to Rule 23(b)(2) class actions has decreased since the mid-1980s as the Supreme Court and federal courts imposed stricter substantive standards and procedural limitations on constitutional and public law reform causes of action. However, there has been some increase in Rule 23(b)(2) class action filings in recent years as plaintiffs' lawyers have sought to avoid increasingly stringent limitations

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12. FED. R. CIV. P. 23(b)(1)(A).

13. FED. R. CIV. P. 23(b)(1)(B).

14. This category has resulted in few class actions, in part because the federal rule has been read to exclude damage suits. See *Alexander Grant & Co. v. McAlister*, 116 F.R.D. 583 (S.D. Ohio 1987) (holding the "(b)(1)(B) class action is not available when there is only the possibility of multiple damage suits, as opposed to injunctive or declaratory actions that would subject the defendant to competing decrees as to future conduct"). A few intermediate state courts in Texas have deviated from this interpretation. See *Morgan v. Deere Credit, Inc.*, 889 S.W.2d 360 (Tex. App. 1994).

15. FED. R. CIV. P. 23(b)(2).

placed by some courts on class action suits for money damages. Money damages may be recovered in a Rule 23(b)(2) class action only if they are “incidental” to the injunctive relief,<sup>16</sup> and some class actions have been structured to seek primarily injunctive relief for class members, like “medical monitoring” for persons who were exposed to hazardous substances or took allegedly dangerous medical drugs.<sup>17</sup> Some federal courts have blunted these attempts by giving a restrictive reading to the “incidental to the injunctive relief” requirement in Rule 23(b)(2), causing conflict among various courts, which has not yet been resolved.<sup>18</sup>

### 3. “Common Question” Class Actions

The third category is a catch-all to allow class treatment when close identity of interest is not present but there is enough commonality among persons similarly situated that class treatment would serve the interests of fairness and efficiency. Unlike the other two categories, it was contemplated that these would be suits for damages. A Rule 23(b)(3) class is available when a court finds that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”<sup>19</sup> Today, a very high percentage of American class actions are Rule 23(b)(3) class actions. They have become the vehicle for damage class action suits across a broad spectrum of antitrust, civil rights, securities fraud, consumer, mass tort, environmental, and product liability claims. Unlike the first two categories of class actions, the members of a Rule 23(b)(3) class must be given “the best notice practicable” that the class action is being proposed and a right to “opt out” of the class if they choose.<sup>20</sup>

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16. The Advisory Committee Notes on Rule 23 state that class certification under Rule 23(b)(2) “does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.” FED. R. CIV. P. 23 advisory committee’s note.

17. An injunction requiring that defendant provide “medical monitoring” is appropriate when plaintiffs were significantly exposed to a proven hazardous substance through defendant’s negligence and, as a proximate result, suffer significantly increased risk of contracting a serious disease that makes periodic examinations for early detection and treatment reasonably necessary. *Abuan v. Gen. Elec. Co.*, 3 F.3d 329, 334 (9th Cir. 1993); *In re Paolli R.R. Yard PCB Litig.*, 916 F.2d 829, 850 (3d Cir. 1990). See also Samuel Issacharoff, *Preclusion, Due Process and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1051, 1073-80 (2002).

18. Compare *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998), with *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001).

19. FED. R. CIV. P. 23(b)(3).

20. FED. R. CIV. P. 23(c)(2).

In the first couple of decades after the 1966 amendments, the predominant class actions for monetary damages were cases brought under federal antitrust, securities, and civil rights laws. These were often national classes not presenting serious problems as to conflict of laws, identity of interests, or determination of damages.<sup>21</sup> Since that time, consumer class actions have blossomed against practices in such industries as insurance, banking, credit cards, and telecommunications. Courts have differed markedly in their willingness to certify such class actions.<sup>22</sup>

The most contentious arena for class actions today involves tort law, including mass accidents (like plane or railway crashes or collapse of a building), environmental disasters (like the escape of toxic chemicals into the air or water), and defective products (like asbestos, prescription drugs, appliances, vehicles, or computer hardware/software). The drafters' notes to the 1966 rule amendments stated that mass torts are inappropriate for class certification,<sup>23</sup> but situations in which large numbers of individuals are harmed by the same conduct, condition, or product have led many courts to certify classes across the broad spectrum of tort law.<sup>24</sup> In the mid-1990s, a number of federal appellate courts, increasingly followed by state courts, took a more critical view

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21. National or multi-state class actions offer the advantage of economies of scale and avoidance of inconsistent results from state to state. However, unless the cause of action is based on federal law (as most mass-tort and consumer suits are not), differing state laws could make a unitary trial impossible. The Sixth Circuit, in *In re Am. Med. Sys.*, 75 F.3d 1069, 1085 (6th Cir. 1996), found that a judge would face an impossible task in instructing a jury on the relevant law if more than a few laws of the states differ. The Fifth Circuit, in *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 739 (5th Cir. 1996), noted that in a multi-state class action, variations in state law may swamp any common issues and defeat predominance. However, a number of state and federal courts have determined that the relevant laws do not differ among the states or that one state's law can be applied under appropriate choice of law doctrines, and have certified national or multi-state class actions.

22. See Edward F. Sherman, *Class Action Practice in the Gulf South*, 74 TUL. L. REV. 1603, 1616-18 (2000).

23. Comments of the Federal Rules Advisory Committee on the 1966 Amendments to Rule 23, 39 F.R.D. 69, 103 (1966) (warning that "a 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action," and "would degenerate in practice into multiple lawsuits separately tried").

24. Professor Charles Alan Wright commented eighteen years after the 1966 amendments:

I was an ex officio member of the Advisory Committee on Civil Rules when Rule 23 was amended, which came out with an Advisory Committee Note saying that mass torts are inappropriate for class certification. I thought then that was true. I am profoundly convinced now that that is untrue. Unless we can use the class action and devices built on the class action, our judicial system is not going to be able to cope with the challenge of the mass repetitive wrong.

Transcript of Oral Argument (July 30, 1984) at 106, *In re Asbestos Sch. Litig.*, 594 F. Supp. 178 (E.D. Pa. 1984), reprinted in 3 H. NEWBERG, *NEWBERG ON CLASS ACTIONS* § 17.06 (3d ed. 1992).

Similarly, Judge Jack Weinstein noted, regarding the Advisory Committee note:



of class actions. In 1995, a U.S. Circuit Court of Appeals, in rejecting a class action on behalf of hemophiliacs who were infected with HIV from tainted blood manufactured by the defendant companies, commented on a "blackmail" impact that too loose class certification standards could have on defendants.<sup>25</sup> Mass tort class actions continue to be filed in large numbers<sup>26</sup> with courts differing markedly on whether to certify an action as a class.

### B. American Class Action Practice

In the thirty-five years since the 1966 amendments, class actions have occupied an increasing share of American courts' attention.<sup>27</sup>

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As authority for this warning against attempts to use class actions in torts, the note cites an article [I] wrote as a law professor. As a judge [I have] been forced to ignore this indiscretion when faced with the practicalities of mass tort litigation. In the earlier 1960's we did not fully understand the implications of mass tort demands on our legal system.

Jack B. Weinstein & Eileen B. Hershenov, *The Effects of Equity on Mass Torts*, 1991 U. ILL. L. REV. 269, 288.

25. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

26. A principal lobbying organization for insurers cited congressional and committee testimony that in 1998, "corporations are facing a 300% to 1,000% increase in class action lawsuits," and that "Ford Motor Company's general counsel observed that his company, which in the past might have fought a half-dozen class action suits at a time, as of 1997 faced nearly 70 such actions." ALLIANCE OF AMERICAN INSURERS, CLASS ACTION LITIGATION: PROBLEMS AND SOLUTIONS 11 (2001).

27. For informative views of American class action practice, see Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79 (1994); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000); Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479 (1997); Deborah R. Hensler & Thomas D. Rowe, Jr., *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Actions Reform*, 64 LAW & COMTEMP. PROBS. 137 (2001); Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765 (1998); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858 (1995); Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995); Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615 (1997); George L. Priest, *Procedural versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order out of Chaos*, 80 CORNELL L. REV. 837 (1995); Roger H. Trasgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69; Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461 (2000); Mark C. Weber, *A Content-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. 1155 (1998). Symposia on class actions include Symposium, *Lessons in State Class Actions, Punitive Damages, and Jury Decisions Making*, 36 WAKE FOREST L. REV. 871 (2001) (articles by Francis E. McGovern, Laura J. Hines, Richard A. Nagareda, Elizabeth J. Cabraser, Joan Steinman, and Theodore Eisenberg & Virginia A. Canipe); Symposium, *Class Actions in the Gulf South*, 74 TUL. L. REV. 1603 (2000) (articles by Edward F. Sherman, Martin L.C. Feldman, Samuel Issacharoff, Francis E. McGovern, Geoffrey P. Miller, Linda S. Mullenix, Richard A. Nagareda, Charles Silver, Jack Ratliff, Richard P. Ieyoub, Theodore Eisenberg, William H. Pryor, Jr., and Edward Brunet); Symposium, *The Institute of Judicial Administration Research*

They have spawned lucrative practices for a sophisticated group of plaintiffs' firms and attracted the ire of defendant, insurance, and business organizations. A number of proposals to alter the American class action have been proposed over the years, either through stricter requirements, limitations on judges' discretion, heightened procedures, or removal to federal courts which are perceived to be less sympathetic to class actions than state courts.<sup>28</sup> The principal features of American class action practice that are often singled out for criticism are described below.

### 1. *Self-Appointed Class Representatives*

A class action is begun by a person (or persons) filing suit as class representative for a defined class. The class representatives are self-appointed, having talked with a lawyer and decided that they want to sue on behalf of the class. This may be done for a variety of reasons. The person suing may genuinely feel that the defendant whose conduct harmed him should also have to answer to other persons similarly harmed. Or, on talking with a lawyer, he may have learned that his possible recovery in an individual suit is too small to justify the expense of the litigation, and he can only get a lawyer to take the case if the lawyer can obtain his fees and litigation expenses out of the benefits to a class as a whole. Many class actions are primarily the creation of a lawyer or law firm that recruit the representative plaintiffs and finance the costs of the suit.<sup>29</sup> Indeed, "entrepreneurial litigation," in which the class attorneys are the primary interested parties in the suit, is the subject of much debate in the American class action scene.<sup>30</sup>

Concern that attorneys are the prime force in creating a class action, with the ability to select and manipulate the representative plaintiffs, led to statutory limitations on securities fraud class actions. Securities fraud litigation was alleged to be abusive in having "straw men" representative plaintiffs, and in 1995, Congress imposed a number of restrictions on eligibility to serve as a class representative. The Private Securities Litigation Reform Act included a requirement that the named plaintiffs did not purchase the security at the direction of

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*Conference on Class Actions*, 71 N.Y.U. L. REV. 1 1996 (articles by Samuel Estreicher, Edward H. Cooper, Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, Thomas D. Rowe, Jr., David Rosenberg, George Rutherglen, Judith Resnik, et al., Nancy Morawetz, Brian Wolfman & Alan B. Morrison, Geoffrey P. Miller, and Larry Kramer).

28. See HENSLEY ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 15-37 (Rand Institute for Civil Justice 2000) [hereinafter Rand Report].

29. *Id.* at 402-07.

30. See John Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987).

counsel or to participate in a securities fraud suit, a preference for shareholders with the largest financial interest to serve as lead representative plaintiffs and a prohibition on plaintiffs receiving more than their *pro rata* share of the recovery.<sup>31</sup>

## 2. Notice and "Opt-Out" Provisions

Before certification of a suit as a class action, the members of the class, in certain categories of class actions, must be given notice. Individual notice is not mandated in Rule 23(b)(1) and Rule 23(b)(2) class actions. However, in a Rule 23(b)(3) class action, the representative plaintiff must give the putative class members "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."<sup>32</sup> In many consumer and product liability class actions where there are insufficient records of purchase, notice must be made through publication in newspapers, periodicals, radio, television, or through posting in places calculated to be seen by class members. Proposed amendments to the federal class action rules attempt to make notice more meaningful to potential class members.<sup>33</sup>

The 1966 amendments abandoned the "opt-in" requirement of the old rule. In a Rule 23(b)(3) suit for damages, the notice to the putative class members will tell them that they need not take any action if they want to be a member of the class, and that unless they mail in an "opt-out" form, they will be bound by the results of the litigation. If one "opts out," she will be excluded as a member of the class and can pursue the claim on her own if she wishes. In such case, she may hire her own lawyer and file a separate suit. The percentage of "opt outs" in most class actions is small, which could be explained by the fact that many class members, particularly in consumer and product liability cases, are content to have the case brought on their behalf, or simply by the natural inclination of people toward inaction in such situations. Insurance and business interests have signaled a major campaign to

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31. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995). See also Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (limiting the conduct of securities class actions brought under state law).

32. FED. R. CIV. P. 23(c)(2).

33. In August of 2001, the U.S. Judicial Conference published proposed changes for public comment, including a new requirement for notice in all three categories of class actions at the judge's discretion (the present rules only require it for Rule 23(b)(3) classes) and that all notices be in "plain, easily understood language." The Federal Judicial Center is preparing forms of notice in plain language. The Class Action Fairness Act of 2001, H.R. 2341, 107th Cong. § 1715 (1st & 2d Sess. 2001), and Class Action Fairness Act of 2002, S. 1712, 107th Cong. § 1716 (1st & 2d Sess. 2002), would impose requirements in terms of language, format, and content for written, television, or radio notices of proposed settlements.

change the “opt-out” provisions in the class action rules to require an affirmative act to “opt in.”<sup>34</sup>

### 3. Attorney’s Fees and Entrepreneurial Incentives

American class action practice is often driven by the financial incentives for lawyers to take a case and, not infrequently, to finance the litigation. After a successfully litigated class action, the judge will determine the amount of attorney’s fees to be paid out of the “common fund” deemed to have been created for the benefit of the class.<sup>35</sup> One method for calculating attorney’s fees in class actions is the “lodestar,” with fees based on reasonable hours expended plus a possible “multiplier” to reflect such factors as the degree of risk and success in the case. A second method increasingly being used is to allow recovery of a “percentage of the fund” created for the class (a benchmark is approximately 25%, although the award may be adjusted higher or lower depending on the specific facts of a case).<sup>36</sup> A high percentage of certified class actions are settled with the parties agreeing on the

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34. See Testimony of Alfred W. Cortese, Jr., on Behalf of Lawyers for Civil Justice, to the Advisory Committee on Civil Rules (Feb. 13, 2002):

Many significant problems of fundamental fairness, due process, justiciability, and the right to trial by jury are created because the default mechanism under Rule 23(b)(3) is opt-out rather than opt-in. The inertia is, in effect, shifted in favor of inclusion in the class, the individual plaintiff’s right to control the litigation is undermined, defendants are precluded from raising individual defenses, and fundamental issues of liability, causation, injury, and damages disappear in the crush to get a result.

*Id.* at 3.

35. See Rand Report, *supra* note 28, at 77-79. When a class action is settled, the amount of the class counsel’s fee is often stated in the settlement, but it must be approved by the court after a “fairness” hearing in which it assesses the overall terms of settlement.

36. An increasing number of federal courts are using the “percentage of the fund” method. See, e.g., *In re Thirteen Appeals Arising out of the San Juan Du Pont Plaza Hotel Fire Litig.*, 56 F.3d 295, 304-08 (1st Cir. 1995). A Task Force has described the lodestar method as a “cumbersome, enervating and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar.” Court Awarded Attorney Fees, Report of the Third Circuit Task Force, 108 F.R.D. 237, 255 (1986). It said that the lodestar method consumed enormous judicial resources by requiring courts to review attorney billing information, gave attorneys little incentive to settle early, and “reward[ed] plodding mediocrity and penalize[d] expedient success.” *Id.* Judge Posner, writing in *In re Continental Illinois Securities Litig.*, 962 F.2d 566, 568 (7th Cir. 1992), argued that “it is not the function of judges in fee litigation to determine the equivalent of the medieval just price. It is to determine what the lawyer would receive if he were selling his services in the market rather than being paid by court order.” Courts using the percentage method have typically awarded fees in the 25-35% range. See FEDERAL JUDICIAL CENTER MANUAL FOR COMPLEX LITIGATION THIRD § 24.121, 187-91 (1995); *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378 (N.D. Cal. 1989) (stating that “absent extraordinary circumstances that suggest reasons to lower or increase the percentage, the rate should be set at 30%”).

amount of the class attorney's fees, subject to the approval of the court. Attorney's fees can be very large.<sup>37</sup>

Class action practice is often criticized when the lawyers receive fees in the millions of dollars while each class member receives a small sum. However, the advisory committee that drafted the 1966 rules noted that class actions provide means for vindicating the rights of people who individually lack effective strength to bring their opponents into court. Thus, the "superiority" of a Rule 23(b)(3) class action<sup>38</sup> may be based on the fact that there is little incentive for class members to sue individually for small sums (for example, overcharges on utility bills averaging fifty dollars per customer). Class action critics argue that in such "negative value" cases, only the lawyers benefit.<sup>39</sup> The supporters' response is that such class actions are needed for both deterrence and disgorgement of wrongful profits: if class actions on behalf of persons who are only entitled to receive small sums were not allowed, there would be little incentive to sue wrongdoers who overcharge or injure a large number of people only in small amounts.

#### 4. Prerequisites for Class Treatment

After holding a hearing, a court will rule on whether a suit can be certified as a class action. The following four prerequisites must be satisfied: numerosity (that the class is so numerous that joinder of all class members is impracticable);<sup>40</sup> commonality (a common question of law or fact); typicality (the claims of the class representative have the same general characteristics as those of the class); and representativeness (the representative is dedicated to pursuing the litigation in the interests of the class, class counsel is competent and financially able to conduct the litigation, and there are no antagonisms between

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37. See, e.g., *In re Combustion*, 968 F. Supp. 1116 (W.D. La. 1997) (36% of \$127 million); *In re Lease Oil Antitrust Litig.* (No. II), 186 F.R.D. 403 (S.D. Tex. 1999) (25% of \$190 million). See also Rand Report, *supra* note 28, at 434-37, 490-93 (comparing attorney's fees versus recovery by individual plaintiffs).

38. FED. R. CIV. P. 23(b)(3) (a class action must be "superior to other available methods for the fair and efficient adjudication of the controversy").

39. The 1997 Proposed Amendments of the Judicial Conference's Advisory Committee on the Civil Rules, which were not adopted, would have changed Rule 23(b)(3) to require consideration of whether the probable relief to individual class members justifies the costs and burdens of class litigation.

40. A rule of thumb is about twenty-five, although varying according to the circumstances. See *Swanson v. Am. Consumer Indus., Inc.*, 415 F.2d 1326, 1330, n.3 (7th Cir. 1969) (holding joinder of forty impracticable); *Ark. Educ. Ass'n v. Bd. of Educ.*, 446 F.2d 763, 765 (8th Cir. 1971) (finding class of seventeen black teachers was sufficiently numerous because of their "natural fear or reluctance" to bring separate actions); *Utah v. Am. Pipe & Constr. Co.*, 49 F.R.D. 17 (C.D. Cal. 1969) (holding joinder of 350 public entities was not impracticable).

the interests of the representative and the class members).<sup>41</sup> Additionally, in recent years, class definitions have been particularly scrutinized with insistence that the class be clearly ascertainable by reference to objective criteria.<sup>42</sup> This reflects the growing desire of American courts to corral expansive class actions by imposing the strict threshold requirement of an adequate class definition.

The commonality requirement tends to dominate defendants' challenges to class action suits. In Rule 23(b)(1) and Rule 23(b)(2) class actions, the commonality threshold is low, requiring only one or more common issues of law or fact. The very nature of those forms of class actions—where “incompatible standards” or “impeding of interests” would result from separate suits, or where injunctive or declaratory relief is sought<sup>43</sup>—suggests a high degree of identity of interest. However, Rule 23(b)(3) class actions lack such an obvious identity of interest, and the battleground in these suits is how to apply the additional requirement that “questions of law or fact common to the members of the class predominate over questions affecting only individual members.”<sup>44</sup> American courts devote a great deal of attention to whether there is sufficient identity of interest or cohesiveness among the class members, particularly when separate transactions, acts, or omissions are involved.<sup>45</sup>

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41. FED. R. CIV. P. 23(a).

42. See *Ford Motor Co. v. Sheldon*, 22 S.W.3d 444 (Tex. 2000) (holding a definition based on what class members alleged would require court “to inquire individually into each proposed class member’s state of mind to ascertain class membership”); *Intratex Gas Co. v. Beeson*, 22 S.W.3d 398 (Tex. 2000) (stating that “[w]hen the class definition is framed as a legal conclusion, the trial court has no way of ascertaining whether a given person is a member of the class until a determination of ultimate liability as to that person is made”).

43. See *supra* text accompanying notes 12-15.

44. See *supra* text accompanying note 19.

45. In consumer cases involving individual transactions, some courts have been willing to find predominance of common questions based on a common course of fraudulent conduct. See *Adams v. Reagan*, 791 S.W.2d 284 (Tex. App. 1990) (“[W]here the defendant is alleged to have engaged in a common course of conduct, the commonality requirement is met and class certification is appropriate . . . . Fraud perpetrated on numerous persons through the use of similar misrepresentations may be suitable for class action.”). But see *Wallace v. Smith Barney*, 1997 WL 137412 (Tex. App.—Beaumont 1997) (unpublished opinion) (holding allegations that plaintiffs were induced to invest by similar misrepresentations and omissions failed to establish predominance because substantial questions to determine each member’s right to recover remained). Environmental cases often involve separate circumstances of exposure, creating predominance problems. Compare *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988) (certifying class of persons within discrete area whose water was contaminated by leakage from defendant’s chemical waste burial site), with *Blake v. Chemlawn Serv. Corp.*, No. 86-3413, 1988 WL 6151 (E.D. Pa. Jan. 26, 1988) (refusing to certify class of persons exposed to pesticides applied by defendants to lawns, citing different incidents in time, place, and conditions). Likewise, product or medicine cases often involve separate transactions relating to circumstances of purchase or possession, use, causation, and injuries. Compare *In re Am. Med. Sys.*, 75 F.3d 1069

The test for predominance of common issues is whether common issues will be the focus of most of the efforts of the litigants.<sup>46</sup> Its purpose is to determine whether a unitary class trial can be conducted with primarily class-wide (as opposed to individualized) evidence and not break down into multiple trials of issues and facts relevant to only individual class members. Even if there are many common issues, class treatment will not lead to the efficient termination of the litigation if significant issues must still be resolved individually.<sup>47</sup> Issues that may require individualized evidence include proof of “reliance” in consumer cases involving fraud or misrepresentation and proof of “causation” in environmental and product liability cases. Courts have differed markedly in their willingness to certify such class actions.<sup>48</sup>

### 5. Damages

Determining damages in a class action may require individualized evidence, such as proving each class member’s personal injuries in a tort case or expectation damages in a contract case. On the other hand, damages may sometimes be susceptible to generalized proof applicable to the entire class through such methods, necessarily supported by expert testimony, as models, formulas, extrapolation, and

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(6th Cir. 1996) (refusing to certify where class members used different models under different circumstances), with *In re* Teletronics Pacing Sys., Inc., 172 F.R.D. 271 (S.D. Ohio 1997) (certifying class of users of nearly identical pacemakers manufactured by one company).

46. *Life Ins. Co. of Southwest v. Brister*, 722 S.W.2d 764, 772 (Tex. App. 1986). “The test for predominance is not whether common issues outnumber uncommon issues but . . . ‘whether common or individual issues will be the object of most of the efforts of the litigants and the court.’” *Southwest Ref. Co. v. Bernal*, 22 S.W.3d 425, 434 (Tex. 2000) (quoting *Cent. Power & Light Co. v. City of San Juan*, 962 S.W.2d 602, 610 (Tex. App. 1998)).

47. *Castano*, 84 F.3d at 745.

48. See *Henry Schein, Inc. v. Strombe*, 2002 WL 31426407, at \*7 (Tex. 2002) (in consumer case, reliance is an element of proof for common-law fraud, as well as “claims of breach of express warranty (to a certain extent), negligent misrepresentation, promissory estoppel, and [Deceptive Trade Practices Act violations]”). See also *In re Am. Med. Sys.*, 75 F.3d 1069. Class certification was sought for a nationwide class of persons who suffered damages from implants of allegedly defective penile prosthesis manufactured by the defendant. The complaint sounded in strict product liability, negligence, breach of implied and express warranties, and fraud. The circuit court found that individualized issues would predominate, making a class action unmanageable, noting that class members had used at least ten different models of the prosthesis and that the legal claims would “differ depending upon the model and the year it was issued.” *Id.* at 1081. It said:

In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause applied to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy.

*Id.* at 1084. However, many product liability cases have been certified as classes, including such products as automobiles, computer hardware and software, and pharmaceutical products.

standard price manuals.<sup>49</sup> Even if proof of damages may require individualized evidence, a class action is not necessarily foreclosed. Some courts have certified classes to determine liability in a common trial and have severed out damages to be determined later through such methods as individual or small-group trials or some form of administrative determination.<sup>50</sup> Courts differ, however, on their willingness to find that such methods comport with standards of efficiency and fairness.

Some courts have also approved dividing up liability issues to be tried in separate phases. For example, in 1986, a federal appellate court in *Jenkins v. Raymark Industries, Inc.*<sup>51</sup> approved the certification of a class action for persons exposed to asbestos. The trial court ordered a class-wide trial of common issues relating to the defendant manufacturer's conduct, but left for later "phased trials" such individualized issues as the exposure of each class member, affirmative defenses like statute of limitations, and damages.<sup>52</sup> This has been referred to as bifurcation, trifurcation, or polyfurcation.<sup>53</sup> In cases where causation through exposure to defendant's product is a central disputed issue (such as asbestos cases), courts have even approved

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49. See *Southwest Ref. Co.*, 22 S.W.3d at 437, stating:

With the help of models, formulas, extrapolation, and damage brochures, plaintiffs may indeed be able to present their case in an expeditious manner. Likewise, [defendant] may choose to present a timely and efficient defense, making arguments presenting evidence on only a generalized, class-wide basis. But, while [defendant] may not be entitled to separate trials, it is entitled to challenge the credibility of and its responsibility for each personal injury claim individually.

*Id.*

50. See discussion of "Bifurcation and Trifurcation" in RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 836-50 (3d ed. 1998).

51. 782 F.2d 468 (5th Cir. 1986).

52. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 472-73 (5th Cir. 1986). See also *In re Shell Oil Refinery*, 136 F.R.D. 588 (E.D. La. 1991), *aff'd sub nom. Watson v. Shell Oil Co.*, 979 F.2d 1014, 1017 (5th Cir. 1992) (failing to reach challenges to a four-phase trial where details had not yet been determined by trial court, but upholding a phase two determination of punitive damages by trying claims of eleven class members together with evidence about the claims of thirty illustrative plaintiffs and expert testimony about damages to the entire class). "Hybrid" class actions, in which some claims are certified for class treatment and others are severed for later individual treatment, have been approved by some courts. *Compaq Computer Corp. v. Lapray*, 79 S.W.3d 779 (Tex. App.—Beaumont 2002) (certifying only claim for breach of warranty based on defective disc drives).

53. See, e.g., *In re Bendectin Litig.*, 857 F.2d 29 (6th Cir. 1988) (approving trifurcation of causation, liability, and damages for consolidation of eight hundred cases seeking damages for allegedly defective anti-nausea drug); *Symbolic Control, Inc. v. Int'l Bus. Mach. Corp.*, 643 F.2d 1339 (9th Cir. 1980) (approving bifurcation of antitrust suit in appropriate circumstances but rejecting a phase one trial of causation where violation was improperly assumed).



“reverse bifurcation” by which the issue of generic causation<sup>54</sup> is determined in the first phase, and liability is addressed in the second phase.<sup>55</sup> This ordering is based on the belief that once there has been a determination that the defendant’s product could cause the injury (for example, exposure to asbestos could be the cause of asbestosis or smoking could be the cause of lung cancer), the parties are more likely to settle without the need for a full trial. However, when different juries will be used for different phases, some courts have found a violation of the defendant’s right to trial by jury under the Seventh Amendment.<sup>56</sup>

One federal district court relied on random sampling and probability analysis in an attempt to avoid the necessity for individual trials in later phases of an asbestos class action.<sup>57</sup> The court ordered that issues susceptible of common proof be tried first and that damages be determined in individual trials of 160 plaintiffs randomly selected from the five asbestos disease categories. The average damage award for each category was extrapolated to all class members in that category.<sup>58</sup> The federal appellate court found the “extrapolation” phase improper, holding that it violated the defendants’ Seventh Amendment right to individualized evidence as to causation and dam-

54. The question of “generic causation” is whether the product is capable of causing the disease or injuries alleged, while “individual causation” is still required to show that an individual plaintiff was actually exposed to the product that caused his injuries.

55. See *Jenkins*, 782 F.2d at 473 n.8 (stating that “[r]everse bifurcation” . . . is a modified bifurcated trial format whereby plaintiffs in the first trial prove only that exposure to some asbestos product has caused their damages. Thereafter, either the cases are settled or remaining issues are resolved in second or third trials.”).

56. See *Castano*, 84 F.3d at 337.

A second jury, or a number of “second” juries, will pass on the individual issues [such as proximate causation, comparative negligence, reliance, and compensatory damages, to be tried in the second phase], either on a case-by-case basis or through group trials of individual plaintiffs. The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues. Thus, the Constitution allows bifurcation of issues that are so separate that the second jury will not be called upon to reconsider findings of fact by the first.

*Id.* (citing *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978)). See *In re Rhone-Poulenc*, 51 F.3d at 1303.

[M]ost of the separate “cases” that compose this class action will be tried, after the initial trial in the Northern District of Illinois, in different courts, scattered throughout the country. The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have jurable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact.

*Id.*

57. *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990), *rev’d*, 151 F.3d 297 (5th Cir. 1998).

58. *Cimino*, 751 F. Supp. at 653.

age issues for each class member.<sup>59</sup> It is possible that some state courts will still take a different approach, but it appears that the creative use of probability analysis to avoid determining damages in individual trials received a fatal blow.

If a class action goes to a trial and judgment is awarded, the court may establish a claims process for paying the awards to the class members. Class members would receive notice that they must return a claim form to prove that they were injured by the defendant's conduct or product; for example, proof that they paid overcharges on utility bills or purchased and used defendant's product.<sup>60</sup> Most class actions are settled, and settlement agreements typically establish procedures for paying the class members, often through a claims process.

### 6. Settlement Practices

The class action rule requires judges to approve all settlements after a fairness hearing. However, it may be difficult for a court to get an accurate picture of the strengths and weaknesses of a case when the parties have signed on to a settlement. Although defendants may initially oppose class certification, they may be willing to settle upon the certification of an extremely broad class that will preclude all litigation by class members in the future. In the 1997 case *Amchem Products, Inc. v. Windsor*,<sup>61</sup> the Supreme Court vacated a class settlement that included hundreds of thousands of persons who had been exposed to the defendant's asbestos products, but had not manifested harmful effects. It found that such "future claims" class actions failed to satisfy the Rule 23 class action requirements.

Two years later in *Ortiz v. Fibreboard Corp.*,<sup>62</sup> the Court rejected a global settlement of an asbestos class action brought as a mandatory "limited fund" class, finding improper the unequal distribution of funds to different class members. Similarly, "coupon" settlements, in which the class members receive a coupon for a discount in purchasing another of the defendant's products while the class attorneys receive large cash attorney's fees, have been rejected by many courts.<sup>63</sup> Proposed rule changes and legislation would impose strict standards for approving class action settlements. The rule amendments proposed in

59. *Cimino*, 151 F.3d at 321.

60. See Rand Report, *supra* note 28, at 454-59. A claims process, however, cannot necessarily substitute for a jury finding of causation and injury to each class member. See *Becton Dickinson & Co. v. Usrey*, 57 S.W.2d 488, 495-96 (Tex. App.—Fort Worth 2001).

61. 521 U.S. 591 (1997).

62. 527 U.S. 815 (1999).

63. See *Gen. Motors Corp. v. Bloyed*, 916 S.W.2d 949 (Tex. 1996); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

2001 would require a judge to find that a settlement is “fair, reasonable, and adequate” and would allow Rule 23(b)(3) class members to “opt out” of a settlement, even if they had not previously opted out at the time of class certification.<sup>64</sup>

### III. EUROPEAN UNION GROUP LITIGATION

In 1998, the European Parliament and Council issued the “European Directive on Injunctions for the Protection of Consumers’ Interests,” which had to be implemented into national law by the end of 2000. The directive provided that rights of action would be assigned to “qualified entities” that are either organizations (such as consumer associations) or independent public bodies (such as administrative agencies). Such entities would be allowed to file “group litigation” on behalf of a specifically defined group of people adversely affected by a defendant’s conduct.

The title of the directive is something of a misnomer, as an injunction, as well as damages, may be sought in some countries in certain situations. The term “consumers’ interests” is broadly interpreted, comprehending suits to vindicate rights under consumer protection, competition, and fair contract practices. However, European “group representation” is much more limited than the American class action, requiring advance determination of the right to serve as a representative rather than allowing the American “self-selective” approach.

The European group representation model differs dramatically from the American model in its conception of who should be empowered to sue on behalf of others and what degree of cohesiveness is required to qualify as a group for purposes of representation. Professor Harald Koch<sup>65</sup> has described the philosophy behind the EU approach:

There is no method of self-appointment of an individual champion (plaintiff) and no concept of an individual private Attorney General, whose initiative is fostered by fee incentives or by an alluring contingency fee arrangement. To be sure, this may be well deserved because of the risk assumed and the attorney’s hard work; however, in the European tradition—although this may be slightly over-simplified—we entrust the public interest to public institutions rather than to private law enforcers. By doing so, we must put up with all of the problems of a poorly-motivated, cumbersome, and perhaps understaffed bureaucracy, as well as the question of legitimacy of representation. Under such a system, the interests of indi-

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64. FED. R. CIV. P. 23(e) (Proposed Amendment 2001).

65. Professor of Law, Law Faculty, Rostock University, Germany.

vidual victims of unlawful behavior tend to be neglected in larger and more autonomous organizations.<sup>66</sup>

### 1. Germany

The European directive is being implemented in a variety of ways by EU countries. In Germany, it has been incorporated into the Standard Contract Terms Act and the Unfair Competition Act, providing for a right of action for consumer associations (*Verbandsklage*).<sup>67</sup> Those eligible must be placed on a list drawn up by the Federal Administrative Office and communicated to the EC-Commission. There has been talk of enacting a comprehensive law on collective remedies, but that has not happened, and group representation remains limited essentially to the consumer area.<sup>68</sup> It is also limited to injunctive relief consistent with the civil law perception that the function of damages is to compensate the individual victim while “the public interest primarily stands for regulation and control and thus focuses on the violator and effective sanctions.”<sup>69</sup> The unavailability of damages considerably reduces incentives for American-style entrepreneurial litigation. In France and Greece, however, association’s suits can be brought for damages under certain circumstances.<sup>70</sup>

The types of private groups or organizations that are empowered to sue vary from country to country. In Germany, consumer organizations are the principal recipients of the right of action. In other countries, it can be assigned to organizations such as business federations, unions, environmental associations, and chambers of commerce. “This type of collective action is used for the control and enforcement of competition and business standards, industrial property rules, environmental law, etc.”<sup>71</sup> Governmental agencies can be assigned the right to sue in many countries.

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66. Harold Koch, *Non-Class Group Litigation Under EU and German Law*, 11 DUKE J. COMP. & INT’L L. 355, 357-68 (2001).

67. *Id.* at 356.

68. *Id.*

69. *Id.* at 360.

70. The French notion of damages is more in the nature of “a nominal, or a non-material, lump-sum” having a symbolic meaning (apparently like “nominal damages” in an American defamation suit). *Id.* “Recently, however, the awards in “*actions civiles*” brought by associations have become increasingly larger and sometimes take the character of deterrent or punitive damages.” *Id.* In Greece, the association may sue for “intangible losses that are usually awarded in a lump-sum and must be used only for charitable purposes.” Koch, *supra* note 66, at 361.

71. *Id.* at 360.

## 2. Sweden

In May 2002, the Swedish Parliament passed the Act on Group Actions which provides for three forms of group action.<sup>72</sup> First, “organizational” actions can be brought by affiliations of consumers or wage-earners against businesses or by non-profit environmental organizations or professional federations in the fishing, farming, or forestry industries seeking injunctions or compensation for environmental impairment.<sup>73</sup> A second form of group action can be brought by an authority stipulated by the government. A third form, an “individual” group action, can be brought by a person who is a member of a group. This is the closest to the American class action. When a member applies to the court to proceed with a group action, those who fit the plaintiff’s description of the group are given notice and an opportunity to “opt in.” Those who do not “opt in” will not be bound by a decision in the case. Prerequisites for group status sound very much like the American class action rule: the group must be adequately defined; the suit must be based on one or more facts or questions of law that are common to the group members; the representative must be suitable to represent the group; the case must be dealt with effectively and purposefully; and group litigation must be the best available procedural alternative.<sup>74</sup> The representative is empowered to make a settlement on behalf of the group if it is approved by the court.

The Swedish rule has been said to have more in common with Canadian class actions, which are “bound neither to the American no-fee rule and contingency fees, nor to an extreme tort law and discovery, with ambulance chasers and extremely powerful judges.”<sup>75</sup> Since Sweden follows the “loser pays” rule, the representative bears the risk of having to pay the opponent’s costs if the group loses. Group members, on the other hand, will not be taxed with such costs unless they intervene to become a party. An interesting feature is that a group representative and an attorney can make a “risk-agreement” by which the attorney’s fees are contingent on finding liability, but unlike American practice, the fee will be based on an hourly rate.

The European assignment to organizations of rights to pursue group litigation removes the complaint of inadequate cohesiveness often made concerning American class action practice that allows any-

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72. Henrik Lindbolm & Roberth Nordh, *Scandinavian Developments: The New Swedish Act on Group Actions 2* (paper delivered at the Toronto Symposium on Class Actions, Sept. 13-14, 2002). Similar proposals are being discussed in Norway and Finland. *Id.*

73. *Id.* at 3.

74. *Id.* at 4.

75. *Id.* at 1.

one to become a representative plaintiff if he has a claim typical of that of other class members. The European limitation of group litigation to organizations, however, restricts individuals' access to courts for "negative value" class actions. It also stymies the entrepreneurial incentives that have encouraged American lawyers to undertake the costs and risks of taking on huge and powerful industries, like insurance and tobacco.

Aspects of attorney's fees and costs particularly differentiate the EU model from the American. First, in the EU class action context, there is no tradition of attorneys taking and financing group cases in anticipation of sizable fees. Indeed, attorney's fees are generally regulated, and contingency fees are not allowed.<sup>76</sup> Furthermore, EU countries follow the "loser pays" rule requiring the losing side to pay the other side's attorney's fees, in contrast to the "American rule" by which the parties pay their own attorney's fees.<sup>77</sup> The risk that group litigation plaintiffs will have to pay their opponent's attorney's fees if they lose clearly provides a disincentive to group litigation. Professor Koch comments:

Collective and public interest litigation needs some kind of discharge of the plaintiff's risk, as the individual plaintiff obviously does not litigate for his own economic advantage. The respective cost rules for most European countries can be arranged in two categories. The first is public funding of the associations and their lawyers and/or no fees for public interest litigation. The second is financing "via the market" or abiding by the European rule of costs (the loser pays principle).

However, following this market rule, even in public interest litigation by associations, there could be a major obstacle to the efficient use of procedural remedies. In particular, if courts' expenses and attorneys' fees are calculated by a percentage of the amount in controversy (which is the rule in Germany), the risk involved in losing a case of great public importance and then having to pay all the costs (including the opposing attorneys' fees) would severely reduce these semi-public and necessary control activities. Therefore, in

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76. As with class actions, there is a great deal of interest abroad, although coupled with apprehension, in the American practice of contingent fees. Scotland has long allowed contingent fees in limited situations, and England has recently moved towards limited contingent fees. Continental countries are still resistant, but interested. Canada and Australia allow a broader contingent fee practice. The "loser pays" rule, however, may still impose considerable restraint on resort to contingent fees.

77. See Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 *TEX. L. REV.* 1863 (1998).

light of the law enforcement functions served by the associations' suits, they should at least be co-financed by public subsidies.<sup>78</sup>

### 3. *United Kingdom*

The manner in which the United Kingdom carries out the European Union directive will be interesting. An English procedure for "representative proceedings" has been available for over two hundred years at common law, although it was used infrequently because of narrow court interpretations. It permitted a person to take legal action on behalf of persons who had "common issues" arising from "the same interest" in a claim against the same defendant. It was given a definitive interpretation in the House of Lords decision *Duke of Bedford v. Ellis*<sup>79</sup> in 1901. In that case, a group of market stallholders were allowed to pursue a class action to assert a statutory right in relation to allocation of certain stalls in Covent Garden. Lord MacNaughten said that the requirement of "the same interest" is satisfied if the representative can show a common interest or common grievance and that the relief sought is beneficial to all.<sup>80</sup> However, in a series of later cases, the requirement of common interest was used to give the rule a more restrictive application. In *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*,<sup>81</sup> a member of the majority in the English Court of Appeals stated that the requirement for a "common interest" meant there must be issues common to all group members *and* the relief sought must be the same.<sup>82</sup> Representative proceedings were therefore not available where the sole relief sought involved damages that would have to be proved individually.<sup>83</sup>

In recent years, there has been a modest reshaping of the restrictive interpretations and increased interest in invoking representative proceedings. The practical significance of the unavailability of the procedure where damages are sought has been diminished by the use of declaratory or injunctive relief.<sup>84</sup> In *EMI Records v. Riley*,<sup>85</sup> damages were allowed to be claimed on the basis that it was procedurally simpler and more convenient to determine a global figure for the class

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78. Koch, *supra* note 66, at 365-66. See also Thomas D. Rowe, Jr., *Shift Happens: Pressure on Foreign Attorney-Fee Paradigms from Class Actions*, 13 DUKE J. COMP. & INT'L L. (forthcoming Spring 2003).

79. 1 A.C. 1 (1901).

80. *Id.* (per Lord MacNaughten).

81. 2 K.B. 1021 (C.A. 1910).

82. *Id.*

83. *Id.*

84. An example is *Prudential Assurance Co. Ltd. v. Newman Indus.*, 1 Ch. 229, 251 (1981).

85. 2 All E.R. 838 (Ch. 1981).

affected by a breach of copyright.<sup>86</sup> By 1989, it was accepted that claims for damages were not automatically excluded from the operation of the rule merely because they were made severally by numerous plaintiffs.<sup>87</sup>

Like American class actions, representative proceedings can begin without the court's permission, and the representative does not need to be appointed or elected by the group.<sup>88</sup> Curiously, there seems to be less court supervision than in the United States; the court does not monitor nor normally need to approve settlements.<sup>89</sup> Limitations on damages, however, have been said to be "the reason why the English representative action remains a procedural backwater rather than a flourishing style of multi-party litigation."<sup>90</sup> Damages cannot be awarded without reference to the particular loss suffered by members of the class, and "the arithmetic of individual loss must be totted and tabulated painfully and precisely."<sup>91</sup> The court can award damages in a representative action only where: (i) the class members' loss can be readily ascertained at the time of judgment; or (ii) the class members have waived their rights to individual receipt of damages and instead wish their compensation to be paid to a body enjoying care of their interests."<sup>92</sup>

Given the shortcomings of English representative actions, amendments to the Civil Procedure Rules were made in 2000 to allow courts to issue Group Litigation Orders providing for "the case management of claims which give rise to related issues of fact or law." This is essentially a consolidation device that has elements of the American transfer of federal court cases with common questions to a single court by the judicial panel on multidistrict litigation.<sup>93</sup> A court may delineate a cluster of claims as appropriate for a Group Litigation Order. The court to which the cases are assigned is the "management court," although different judges can be responsible for managing various facets of the litigation. The solicitors are expected to form a Solicitors' Group. Parties who want to join the group litigation must "opt in," in

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86. *Id.*

87. The fact that claims arise under separate contracts was found to be no bar to the use of a representative action in *Irish Shipping Ltd. v. Commercial Union Assurance*, 2 Q.B. 206 (C.A. 1991). In 2002, a UK group litigation order was issued for "economy class syndrome" cases. *Class Action Litigation Reporter* (BNA), Mar. 15, 2002.

88. Neil Andrews (Barrister), *Multi-Party Proceedings in England: Representative and Group Actions*, 11 DUKE J. COMP. & INT'L L. 249 (2001).

89. *Id.* at 252.

90. *Id.* at 253.

91. *Id.*

92. *Id.* at 262.

93. 28 U.S.C. § 1407 (1994).



contrast to representative proceedings that “can effectively take place behind the backs of class members without their knowledge, participation or control.”<sup>94</sup> A group member is liable, if the group loses, to pay “an equal proportion, together with all the other litigants, of the common costs,” as well as “the amount of individual costs incurred by the defendant in meeting that particular litigant’s claim.”<sup>95</sup>

Representative proceedings and group litigation orders continue to develop in the United Kingdom, but are still a far cry from American class actions.<sup>96</sup> In addition, limitations on contingent fees and the “loser pays” rule considerably curtail the entrepreneurial aspects of American practice. Lord Steyn, a Lord of Appeal in Ordinary, explained at a conference that English senior judges “are opposed to a ‘litigious society,’ that is, an over-excited tendency for citizens and businessmen to ‘blame and claim’ by bringing actions in the ordinary courts rather than pursuing grievance procedures through political systems of democratic accountability, pressure groups, ombudsmen, arbitration, conciliation, etc.”<sup>97</sup> Nevertheless, growing EU interest in group litigation, the influence of huge British solicitor firms capable of undertaking class actions, and internal pressure in the United Kingdom for more fluid forms of legal practice (as seen in proposals to allow limited contingent fees and to give solicitors greater rights of audience at court) seem to militate in favor of an expansion of UK representative or group procedures.

#### IV. AUSTRALIAN REPRESENTATIVE PROCEEDINGS

All Australian jurisdictions have some form of “representative proceedings” contained in court rules that briefly restate the English common law practice.<sup>98</sup> In the last few decades, rules and court practice in the Australian Federal Court and the courts of a number of

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94. Andrews, *supra* note 88, at 260.

95. *Id.* at 262.

96. For recent accounts of UK practice, see C.J.S. HODGES, *MULTI-PARTY ACTIONS* (2000); Mark Mildred, *Cost-sharing in Group Litigation: Preserving Access to Justice*, 65 *MOD. L. REV.* 597 (2002).

97. See Andrews, *supra* note 88, at 266.

98. SUP. CT. R. O19 r10 (ACT); SUP. CT. R. r18.02 (NT); SUP. CT. R. Pt8 r13 (NSW); SUP. CT. R. O18 r12 (WA); SUP. CT. R. 3 r10 (Qld); SUP. CT. R. O18 r9 (Tas). The New South Wales, Western Australia, and Queensland rules are identical, while the Australian Capital Territory and Northern Territory rules are more abbreviated, but in similar terms. The Tasmanian rule is much more restrictive—requiring seven or more persons, a “same or common right” against the same person, and a “same or common interest,” in relation to a common fund or property. Constitutional challenges to various aspects of representative proceedings have been unsuccessful. See *Mobil Oil Austl. Pty Ltd v. Victoria* (2002) H.C.A. 27 (upholding the Victoria representative proceedings law); *Femcare Ltd v. Bright* (2000) 100 F.C.R. 331 (upholding the validity of Part IVA of the Federal Court of Australia Act, 1976 (Cth)).

Australian states have been more closely patterned on the American class action model.

Until recently, the effect of narrow interpretations of the representative proceedings rule in England was to preclude representative actions where separate transactions were involved and damages claimed. In 1986, an additional restriction was imposed by the Victorian Supreme Court, precluding representative actions where the claims involved separate contracts.<sup>99</sup> Given these restrictions, few representative proceedings were filed.<sup>100</sup>

The Australian High Court reversed that position in its 1995 decision *Carnie v. Esanda*,<sup>101</sup> supporting a broad interpretation of the state of New South Wales's rule allowing representative proceedings. The Carnies, wheat farmers, brought proceedings on behalf of themselves and eighty-eight other persons who had taken out loans with the defendant. They challenged defendant's method of calculating interest as invalid under the state's credit act. The High Court decision made it clear that representative actions can proceed under the rule even where there are separate contracts with the defendant: "It has now been recognized that persons having separate causes of action in contract or tort may have the same interest in the proceedings to enforce those causes of action."<sup>102</sup> The High Court also indicated that class actions can be commenced where the case includes a claim for damages, as precluding damages would be inconsistent with the purpose of the rule.

The Federal Court of Australia has especially fostered the expansion of representative practice. The provisions for representative proceedings in the Federal Court of Australia Act of 1976 were amended in 1992 to set out comprehensive procedures.<sup>103</sup> "The Federal Court

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99. In 1981 the High Court of Australia held, in a case involving a joinder application (not a class action), that separate contracts held by a number of abattoir owners were not a "series of transactions." *Payne v. Young* (1981) 145 C.L.R. 609. The Victorian Supreme Court relied on this decision when it ruled that a group of borrowers could not proceed with a representative action against a finance company because there were separate contracts. *Marino v. Esanda LTD* [1986] V.R. 735.

100. For a discussion of the history of class actions in Australia, see PUBLIC INTEREST ADVOCACY CENTER (PIAC) FOR THE COALITION FOR CLASS ACTIONS, PROPOSAL FOR ENHANCED REPRESENTATIVE PROCEEDINGS (1991); PIAC & COALITION FOR CLASS ACTIONS, REPRESENTATIVE PROCEEDINGS (Supp. Aug. 1997) [hereinafter REPRESENTATIVE PROCEEDINGS], CENTER FOR LEGAL PROCESS OF THE NSW LAWS FOUNDATION & PIAC, PROPOSAL FOR A NEW SUPREME COURT RULE ON REPRESENTATIVE PROCEEDINGS IN NSW TO THE SUPREME COURT RULE COMMITTEE (Mar. 1998).

101. *Carnie v. Esanda Fin.* (1995) 182 C.L.R. 398.

102. *Id.* at 404, per Mason C.J., Deane and Dawson, J.J. Similar comments were made by Brennan, J. at 407-08, Toohey and Gaudron J.J. at 417-21, and McHugh J. at 430.

103. Federal Court of Australia Act, 1976. Part IVA, § 43(1A) (Austl.).

procedure has proven to be useful for a range of interests—consumers, small businesses, and immigration applicants. An explosion of class action litigation, repeatedly predicted ever since the procedures were introduced, has not occurred.”<sup>104</sup> Its use in product liability cases has also been significant.<sup>105</sup> A survey by a law firm engaged in representative proceedings found that approximately ninety actions have been commenced in the federal court under the rule.<sup>106</sup>

The federal rule requires that seven or more persons have a claim against the same person and that the claims “arise out of the same, similar or related circumstances,” and “give rise to a substantial common issue of law or fact.”<sup>107</sup> It applies even if individual damages are claimed and if the proceedings involve separate transactions, acts, or omissions.<sup>108</sup> Interestingly, the Australian federal rule does not follow the American rule of requiring “predominance” of common questions.<sup>109</sup> The requirements for “same, similar, or related circumstances” and a “substantial common issue”<sup>110</sup> seem to have been adequate to determine whether there is sufficient cohesiveness for representative proceedings. One justice expressed the view that a predominance test would “encourage respondents to raise artificial non-common issues,” while the focus should be on whether non-common issues would be likely to swamp the common issues.<sup>111</sup>

It is not necessary for a judge to certify a class in Australia. “An action that is commenced as a class action goes forward on this basis unless a judge orders otherwise.”<sup>112</sup> The Australian rules do not set out precise categories for class treatment. “Class actions may be brought in respect of any type of claim and regardless of the type of order sought from the court.”<sup>113</sup> Unlike the American rule that pro-

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104. REPRESENTATIVE PROCEEDINGS, *supra* note 100, at 5.

105. “Class actions are increasingly important given the trend to mass production of goods and services; when a faulty product or service is released onto the market the impact might be felt by hundreds of people.” *Id.*

106. See Peter Cashman (of the law firm Maurice Blackburn Cashman, in Sydney, Australia), *Class Actions from the Plaintiff's Perspective* (paper presented to the Annual Conference of the Australian Insurance Law Association, Sydney, Apr. 5-7, 2000).

107. Federal Court of Australia Act, 1976, § 33(c)(1) (Austl.).

108. *Id.* § 33(c)(2).

109. Federal Rule of Civil Procedure 23(b)(3) requires that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” FED. R. CIV. P. 23(6)(3). See *supra* text accompanying note 19.

110. Federal Court of Australia Act, 1976, Part IVA, § 33C(1) (Austl.).

111. Justice M. Wilcox, *Representative Proceedings in the Federal Court, A Progress Report (1996-97)*, 15 AUSTL. B. REV. 91, 93-94 (1997).

112. Justice Murray Wilcox, Address at the Indonesian Legal Reform Program: International Seminar on Class Actions 3 (Feb. 18-20, 2002).

113. *Id.* at 1.

vides for a separate category for injunctive actions, “there is only a need to use the class action procedure in a case where it is intended to ask the court to make orders in favour of particular individuals, for example, damage payments.”<sup>114</sup> Australian courts have not drawn as fine lines as have the American courts concerning when individual damages will defeat class treatment.<sup>115</sup> “As damages claims are always personal to the individual claimant, damages claims can never be identical.”<sup>116</sup> Several large class actions have used American-style aggregate methods for determining damages and claims processes although these have generally been pursuant to settlement. Something akin to American “phased” or “bifurcated” trials has been accepted, without the American anguish over when they can be used (perhaps in part because there is no right to trial by jury).<sup>117</sup> Justice Murray Wilcox of the Federal Court of Australia comments:

If there are substantial common issues, it is generally good policy for the judge to ensure these issues are considered first. Once the common issues are decided, the litigation will probably be resolved. If the applicant fails on the major common issues, it is likely that the proceeding will have to be dismissed; so there will be no need to consider individual damages claims. If the applicant succeeds on the major common issues, the defendant is likely to wish to settle the damages claims, and so avoid further legal costs.<sup>118</sup>

The Australian federal rule gives class members a right to “opt out” after notice has been given, in consonance with the American rule.<sup>119</sup> There are differences, however, among the various Australian states. The state of South Australia provides that one will be a member of a class unless he “opts out,”<sup>120</sup> while the state of Victoria requires that “all persons represented must give written consent, which must be filed at the same time as the originating application, and the represented persons must be named in the originating process.”<sup>121</sup> Notice procedures are similar to the American procedures, requiring individual notice when practicable, but allowing publication when necessary.<sup>122</sup>

114. *Id.*

115. See *supra* text accompanying notes 16-18.

116. Wilcox, *supra* note 112, at 2.

117. See *supra* text accompanying notes 47-52.

118. Wilcox, *supra* note 112, at 3.

119. See *supra* text accompanying note 34.

120. SUP. CT. R. 34 (SA).

121. Supreme Court Act, 1986, §§ 34, 35 & 18.02 (Vict.).

122. Wilcox, *supra* note 112, at 3-4.

The application and final court order must “describe or otherwise identify” the group members.<sup>123</sup> Class definitions under the Australian federal rule have not been subjected to the same scrutiny applied in American practice, with the courts applying pragmatic standards as to whether the definition is sufficiently definite. Thus, classes might be defined in terms of persons injured by an environmental condition or defective product with the details concerning the identity of class members left to later stages of the proceedings.<sup>124</sup>

Procedures governing settlement, establishment of a fund for distribution of damages, appeals, and costs are specifically provided in the Australian federal rule. Like the American rule, settlements must be approved by the court. However, American problems with unfair or collusive settlements have not arisen. There has been discussion of adding more specific provisions regarding settlement, perhaps in anticipation of the kind of problems experienced in the United States.<sup>125</sup>

Although the Australian federal rule provides a broad and liberal mechanism for representative proceedings, one feature of the Australian legal system provides a substantial deterrent to its use. Under the “loser pays” rule,<sup>126</sup> the plaintiffs in a representative proceeding will be liable to pay the other side’s attorney’s fees if they lose (the absent class members, however, cannot be required to pay).<sup>127</sup> Attorney Peter Cashman comments that “the representative applicant must be aware of the potential adverse cost consequences of losing the litigation.”<sup>128</sup> However, the Australian federal rule provides that attorneys cannot be subjected to “loser pays” demands. Representative plaintiffs who qualify for legal aid are unlikely to be subjected to attorney’s fees cost shifting. Cashman notes:

[I]f legal aid is potentially available (which is unlikely in the present economic and political climate), the representative applicant should be able to satisfy appropriate means test requirements if they are applicable. In some jurisdictions legal aid may be granted, independently of the means test, if certain public interest or test case requirements are met.<sup>129</sup>

It is interesting that despite the risk of being saddled with paying the other side’s attorney’s fees, individuals are increasingly willing to

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123. Federal Court of Australia Act, 1976, §§ 33H(1)(a), 33ZB (Austl.).

124. See actions cited in Cashman, *supra* note 106, at 4; *Dompter v. Mobil Oil Austl.* (2000) (Fed. Ct. Austl.) VG27 of 2000 (action arising out of a contaminated aviation fuel); *Spice v. Pacific Dunlop Ltd & Ors*, N1027 of 1996 (action arising out of defective pacemaker leads).

125. See Cashman, *supra* note 106, at 20.

126. See Sherman, *supra* note 77, at 1863-77.

127. *Wilcox*, *supra* note 112, at 5.

128. Cashman, *supra* note 106, at 6.

129. *Id.*

serve as representative plaintiffs. Justice Murray Wilcox gives as possible reasons for this that others may be “contributing to a fund to finance the case” or that “a large claim, on behalf of many people, is more likely to be taken seriously and settled than a claim by just one person.”<sup>130</sup> But the “loser pays” rule would seem to be a disincentive to robust representative proceedings in Australia, and there is considerable discussion as to how it might be reconciled with class actions.

## V. CANADIAN CLASS PROCEEDINGS

Canada adopted what are called “class proceedings” later than Australia, and like Australia, it has followed the American model with a few differences. Quebec legislation in 1978 provided for class proceedings,<sup>131</sup> but they were rarely used.<sup>132</sup> In 1982, the Ontario Law Reform Commission issued a Report on Class Actions, expressing the objectives of affording greater access to justice, improving judicial efficiency, and achieving behavioral modification among manufacturers and other entities.<sup>133</sup> Class proceedings “became a major force in Canada with the passage of the Ontario Class Proceedings Act in 1995<sup>134</sup> and the subsequent British Columbia Class Proceedings Act in 1995<sup>135</sup> (which in many, but not all respects, mirrors the Ontario legislation).”<sup>136</sup>

Five provinces now have class proceedings (Quebec, Ontario, British Columbia, Newfoundland & Labrador, and Saskatchewan),<sup>137</sup> and proposals have been made for adopting them in the Federal Courts of Canada, Manitoba, and Alberta.<sup>138</sup> Alberta has an old style “representative action,” but not a class action, rule. Nevertheless, the Supreme Court of Canada, in a 2001 decision,<sup>139</sup> held that in the absence of comprehensive legislation, the courts should fill the void under

130. Wilcox, *supra* note 112, at 5.

131. QUEBEC CODE CIV. P., R.S.Q., ch. C-25, § 1000 (1978) (Can.).

132. Garry D. Watson, *Class Actions: The Canadian Experience* 4 (presented to the Supreme Court of Indonesia/Indonesian Center for Environmental Law International Conference on Class Action Procedures and Their Implementation in the Indonesian Courts, Feb. 18-20, 2002).

133. ONTARIO LAW REFORM COMMISSION, REPORT ON CLASS ACTIONS, in 3 SUMMARY OF RECOMMENDATIONS § 56 (1982).

134. Class Proceedings Act, S.O., ch. 6 (1992) (Can.).

135. Class Proceedings Act, S.B.C., ch. 21 (1995) (Can.).

136. Watson, *supra* note 132, at 4.

137. QUEBEC CODE CIV. P., R.S.Q., ch. C-25, § 1000 (1978) (Can.); Ontario Class Proceedings Act, S.O., ch. 6 (1992) (Can.); British Columbia Class Proceedings Act, S.B.C., ch. 21 (1995) (Can.); Class Actions Act, S.N.L., ch. C-18.1 (2001) (Newfoundland & Labrador); The Class Actions Act, S.S., ch. C-12.01 (2001) (Saskatchewan).

138. Watson, *supra* note 132, at 13.

139. *W. Can. Shopping Cent. v. Dutton*, [2001] S.C.R. 534. See also *Hollick v. Toronto*, [2001] S.C.C. 68; *Rumley v. British Columbia*, [2001] S.C.C. 69.

their inherent power to establish rules of practice and procedure. Viewing the class action as an important procedural tool to insure access to justice, it ruled that it should be allowed under the representative action rule so long as the class is capable of clear definition, issues of law or fact are common to all class members, success for one class member means success for all, the representative adequately represents the interests of the class, and there are no countervailing considerations that outweigh the benefits of class treatment. In addition, “because the courts (particularly in Ontario) have permitted national classes (*i.e.*, actions in which the class as defined is not limited to Ontario residents, but any Canadian resident), the effect has been to extend the class action regime even to those provinces that have not enacted class action legislation.”<sup>140</sup>

Canadian class proceedings follow the American model by relying upon “lawyer-entrepreneurs to initiate and drive class actions, [and] allowing lawyers to risk non-payment for losing cases in the hopes of recovering substantial court-awarded contingency fees when the cases are successful.”<sup>141</sup> Professor Garry Watson comments that “in certain respects the Canadian legislation is more liberal in facilitating class actions than its American counterpart.”<sup>142</sup> Under the Canadian rules, there must be an identifiable class of two or more persons; the claims must raise common issues; class proceedings must be the preferable procedure; and the representative plaintiff must fairly and adequately represent the interests of the class, not have a conflict, and have a workable plan for the action.

Notice of certification and any settlement “is normal but not mandatory.”<sup>143</sup> Canada follows the American practice of requiring class members to “opt out” or be bound by the judgment. Like the United States, but not Australia, a court must certify a class, and this is usually the battleground for defendants’ challenges to class proceedings. Although some two hundred class actions have been filed in Ontario since 1993 (a tiny number by American standards),<sup>144</sup> Professor Watson notes that courts have sometimes “refused certification for reasons having little to do with the statutory criteria—judges identify an action as a ‘bad class action.’”<sup>145</sup> The reasons given have a familiar ring to an American—lack of commonality, too numerous individual

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140. See Watson, *supra* note 132, at 7.

141. *Id.* at 4.

142. *Id.*

143. *Id.*

144. *Id.* at 8.

145. *Id.* at 9.

issues,<sup>146</sup> or oral misrepresentations made to different class members by different agents.<sup>147</sup>

Not surprisingly, many of the major class actions in the consumer and product liability areas that have been filed in the United States have spilled over to Canada. Thus, large class actions involving breast implants,<sup>148</sup> pacemakers,<sup>149</sup> and Hepatitis C-contaminated blood<sup>150</sup> have been prosecuted on behalf of Canadian citizens in Canadian courts. American lawyers have sometimes succeeded in including foreign citizens in class actions in American courts (attractive because of American jury verdicts), but Canadian-only class actions are often counterparts to similar suits against the same companies in the United States.

Canadian class action settlements have not drawn the same level of criticism as have settlements in the United States, but Canadian courts recognize the possible tradeoffs of defense counsel's desire to define settlement classes as broadly as possible and the desire of plaintiffs' counsel for substantial attorney's fees. Professor Watson notes that Canadian courts

are still not sufficiently aware of potential conflicts of interest, or of the potential for the parties in mass tort cases to "sell out" future claimants in favor of present claimants (which is now a well recognized problem in the United States), but early indications show that Canadian courts are perhaps doing a better job of supervising the approval of settlements than are their U.S. counterparts.<sup>151</sup>

For example, a court refused to approve a \$1.5 billion settlement in the Hepatitis C class litigation until changes were made.<sup>152</sup>

Perhaps the most striking difference between Canadian and American class action practice is in the size of attorney's fees received by class counsel. In the Hepatitis C case, plaintiffs' counsel were awarded fees in the 2-4% range, although fees more closely approximating the American range of 25% have sometimes been awarded by courts in British Columbia and Quebec.<sup>153</sup>

146. See *Rosedale Motors Inc. v. Petro-Canada Inc.*, [1998] 42 O.R.3d 776.

147. See *Williams v. Mut. Life Assurance Co. of Can.*, [2000] O.J. 3821 (Ont. Sup. Ct.), 100 A.C.W.S.3d 387 (Can.) (denying certification in "vanishing premium" case against insurance company). As in the United States, the same class might still be certified for settlement. See *Dabbs v. Sun Life Assurance Co. of Can.*, [1998] 40 O.R.3d 776 (certifying "vanishing premium" class action for settlement).

148. See *Servaczek v. Med. Eng'g Corp.*, [1996] 3 C.P.C.4th 386.

149. See *Nantais v. Teletronics Proprietary (Can.) Ltd.*, [1995] 129 D.L.R.4th 110.

150. See *Parsons v. Can. Red Cross Soc'y*, [1999] 40 C.P.C.4th 151 (Ont. Sup. Ct.), 101 A.C.W.S.3d 694.

151. Watson, *supra* note 132, at 10.

152. *Parsons*, 40 C.P.C. 4th at 10 n.76.

153. Watson, *supra* note 132, at 11.



Like other “loser pays” countries around the world, Canada’s fee shifting rule can have an adverse effect on class actions. Canadian class action rules provide that, if the class loses, only the representative plaintiff is liable for the defendant’s attorney’s fees and costs. However, the degree and conditions of liability vary among the provinces. Ontario allows costs to be ordered against the representative plaintiff unless it finds that the action was a “test case, raised a novel point of law or involved a matter of public interest.”<sup>154</sup> Ontario has a Class Proceedings Fund to relieve representative plaintiffs from liability for defendants’ costs, but it has been called “a failure in that, due to inadequate financing, it has given funding to very few class actions (approximately six to date).”<sup>155</sup> Quebec now requires only nominal costs to be awarded against the class representative.<sup>156</sup> British Columbia is the most lenient, having adopted a recommendation of the Ontario Law Reform Commission making the class representative liable for costs only if the action is “frivolous or vexatious.”<sup>157</sup> Canada, like Australia, continues to struggle with the problem of unduly disincentivizing persons from becoming representative plaintiffs in class actions through the application of the “loser pays” rule.

## VI. CONCLUSION

The pace of experimentation by other countries with group, representative, or class litigation devices has increased enormously in recent years. This has resulted in studies and proposals in those countries that are likely to provide interesting comparative opportunities for Americans. Among the most criticized features of the American class action are the self-appointed nature of class representatives, the procedure by which one is a class member unless he affirmatively “opts out,” the vague standards for determining whether there is adequate cohesiveness between class members, the preference given to “negative value” class actions, the strong incentives for attorney’s fees and entrepreneurial litigation, and unfair or collusive settlements. These aspects are being dealt with in differing ways by the other countries that have moved towards group litigation or representative proceedings. Now that the class action can no longer be said to be an exclusively American device, there is a potentially rich source of comparative study and experimentation that should benefit all countries involved.

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154. Class Proceedings Act, S.O., ch. 6 § 31(1) (1992) (Can.).

155. Watson, *supra* note 132, at 6.

156. *Id.* at 5.

157. *Id.*