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New Formalities for Casual Labor: Addressing Unintended Consequences of China's Labor Contract Law

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THE NEW CLASS ACTIONS IN JAPAN

Michael J. Madderra †

Abstract: This comment provides the first journal publication on Japan's new class action law, promulgated on December 11, 2013. In the past, Japanese attorneys used rules of joinder and other alternatives to form de facto class action lawsuits. This comment provides insight into the development of Japan's new class action law through a discussion of the historical context in which it was created. After discussing the law and its development, this comment argues that Japan should examine U.S. jurisprudence to prepare for challenges to the new class action system. Comparing Japanese and U.S. class action systems is appropriate because of similarities in their class formulations. This comment analyzes recent U.S. court decisions that show controversy and disagreement about how to interpret the class certification provisions. By looking at difficulties currently facing U.S. courts, Japan can better prepare itself to implement its law. Conversely, this comment presents the alternative proposition that due to the Japanese law's bifurcated structure, U.S. litigants and courts can look to Japan's new law for creative means of litigating class actions.

I. THE EVOLUTION OF CLASS ACTIONS IN JAPAN

This comment provides the first thorough examination of class action law in Japan. Until recently, there was no formalized system of class action lawsuits in Japan.[1] Class action lawsuits were informally processed through the use of joinder and consolidation under the Japanese civil code, but these processes were not widely used for large numbers of plaintiffs.[2] Although injured parties could join cases with similar facts, such parties were plaintiffs who actually appeared in the case—they did not represent those "who did not join in the lawsuit."[3] Japan did not have the simplified opt-in or opt-out systems available in Europe and the United States.[4] While

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[1] Carl F. Goodman, *Japan's New Civil Procedure Code: Has it Fostered a Rule of Law Dispute Resolution Mechanism?*, 29 BROOK. J. INT'L L. 511, 589 (2004); Kengo Nishigaki & Takeshi Yoshida, *The New Class Action Legislation Promulgated in Japan*, BAKER & MCKENZIE 1 (Jan. 24, 2014), http://bakermckenzie.co.jp/e/material/dl/supportingyourbusiness/newsletter/disputeresolution/ClientAlert_201401_DisputeResolution_E.pdf (last visited May 17, 2014).

[2] Nishigaki & Yoshida, *supra* note 1, at 1.

[3] Goodman 2004, *supra* note 1, at 590.

[4] *See generally* FED. R. CIV. P. 23; Katharina Diel, *International Practice: Overview/Comparison of U.S. & E.U. Judicial Class Action Structures*, CONFLICT PREVENTION & RESOL. (CPR) INST. FOR DISP. RESOL., http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/593/International-Practice-OverviewComparison-of-US-EU-Judicial-Class-Action-Structures-Web.aspx (last visited Apr. 16, 2014).

research is available on Japan's previous group litigation methods, such material is sparse due to the system's limited use.

Since 2000, Japan modernized its class action system,[5] as demonstrated by the allowance of injunctive relief for groups of consumers in 2007[6] and the creation of a new class action law in December 2013.[7] This modernization has not come without resistance. Japanese culture tends to prioritize alternate dispute resolution mechanisms, such as mediation, rather than litigation.[8] Despite this reluctance towards class action and litigation generally, Japan will benefit greatly from its new class action system. A formal class action system promotes judicial economy and provides predictability, consistency, and a means for unprotected consumers to obtain judicial remedy. In December 2013, Japan codified a consumer class action system that is set to take effect within the next three years.[9] This law directly impacts consumers' ability to recover from harmful business practices and product defects.[10] Additionally, this law will significantly impact corporations doing business with consumers in Japan.[11]

This author argues that Japan should look to U.S. case law to prepare for unexpected difficulties it may encounter in implementing its new class action law. Providing a defined set of class action rules will encourage lawsuits against those that take actions adverse to consumers' interests;[12] the

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[5] *See generally* JUST. SYS. REFORM COUNCIL, RECOMMENDATIONS OF THE JUSTICE SYS. REFORM COUNCIL – FOR A JUST. SYS. TO SUPPORT JAPAN IN THE 21ST CENTURY (June 12, 2001), *available at* http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html [hereinafter REFORM COUNCIL].

[6] *A New Class Action System in Japan (New Act Enacted and Promulgated in December 2013),* ANDERSON MŌRI & TOMOTSUNE 1 (Jan. 2014), https://www.amt-law.com/en/pdf/bulletins4_pdf/140114.pdf (last visited May 17, 2014); *see generally* Shōhishakeiyakuhō [The Consumer Contract Act], Law No. 61 of 2000, http://www.consumer.go.jp/kankeihourei/keiyaku/file/keiyakuhou_1.pdf (Japan), *translated in* http://www.consumer.go.jp/english/cca/index.html#3-2 [hereinafter Consumer Contract Act translation].

[7] *See generally* Shōhisha no zaisan-teki higai no shūdan-tekina kaifuku no tame no minji no saiban tetsudzuki no tokurei ni kansuru hōritsu [Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers], Act No. 96 of 2013, http://www.caa.go.jp/planning/pdf/130419-2_131213.pdf (Japan) [hereinafter 2013 Class Action Law]; *see also* ANDERSON MŌRI & TOMOTSUNE, *supra* note 6.

[8] *See* Ikuo Sugawara, *The Current Situation of Class Action in Japan*, GLOBAL CLASS ACTION EXCHANGE 3 (2007), http://globalclassactions.stanford.edu/sites/default/files/documents/Japan_National_Report.pdf (last visited Apr. 16, 2014); Nishigaki & Yoshida, *supra* note 1, at 1 (noting that "many consumers are reluctant to file [lawsuits]"); Goodman 2004, *supra* note 1, at 513.

[9] Shōhisha no zaisan-teki higai no shūdan-tekina kaifuku no tame no minji no saiban tetsudzuki no tokurei ni kansuru hōritsu [Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers], Act No. 96 of 2013, *available at* http://www.caa.go.jp/planning/pdf/130419-2_131213.pdf (Japan); *see* ANDERSON MŌRI & TOMOTSUNE, *supra* note 6.

[10] *See* ANDERSON MŌRI & TOMOTSUNE, *supra* note 6, at 1, 4.

[11] Nishigaki & Yoshida, *supra* note 1, at 1.

[12] *See* ANDERSON MŌRI & TOMOTSUNE, *supra* note 6, at 5 (stating that the new law "will increase the risk of litigation for business operators from consumers").

class action system should thus encourage responsible social behavior. In the United States, the class certification system effectuates the legal goals of efficiency, consistency, and consumer protection, but it is subject to controversy and divergent judicial interpretation.[13] The U.S. system, while not perfect, highlights the benefits of a developed class action system, as explained in Part IV, infra.

This comment begins in Part II by introducing the history of class action litigation in Japan. Part III describes the current state of class action lawsuits in Japan, as well as the recently passed law. Part IV explains the class action system used in the United States. Examining the U.S. class action system is appropriate because Japan's legal system post-World War II was influenced by American procedural philosophy and the common law system.[14] This similarity makes direct comparisons possible, and means that the experiments with class actions in one country could inform innovation in the other. Part IV also examines recent difficulties that American courts have faced in interpreting their own class action laws. By examining the issues U.S. judges have faced in interpreting class action law, Japan can prepare itself for similar challenges. In Part V, this comment explains how Japan's new class action law provides a unique opportunity to benefit consumers. Lastly, this comment suggests that Japan's new law, with its bifurcated structure, may provide a blueprint to resolve some of the issues present in U.S. class action litigation.

II. THE JAPANESE LEGAL SYSTEM

This Part discusses the Japanese legal system's structure. First, this Part looks at Japan's Constitution and court system. Though Japanese culture has historically been considered reluctant towards litigation,[15] that perception is slowly changing.[16] Pressure to reform the legal system built up in the 1990s[17] and resulted in the creation of a new Civil Procedure Code,[18] the development of new law schools,[19] and eventually the creation of Japan's new class action law.[20] Before discussing the new class action law, this Part

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[13] *See infra* Part IV.

[14] TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN § 1.03[3] & § 1.04[6][a] (Taniguchi et al. eds., 2d ed. 2009).

[15] *See infra* note 44.

[16] *See infra* note 52.

[17] *See infra* note 50.

[18] *See infra* note 72.

[19] *See infra* note 63.

[20] *See supra* note 7.

addresses the aggregate litigation substitutes that preceded class action in Japan.

A. Basic Principles of the Japanese Legal System

The Japanese legal system incorporates elements of both European and American legal systems.[21] Its adoption of American legal practices can be traced back to the U.S. occupation of Japan after World War II.[22] Carl F. Goodman, law professor at Georgetown University and Tokyo University, explained that between the American post-War occupation and present times, "the Japanese tended to avoid using the legal system to resolve disputes, and instead used more traditional models of alternative dispute resolution . . . characterized by conciliation, compromise and mediation."[23] This avoidance helps explain the lack of a developed class action system in Japan.

In the aftermath of World War II, Japan adopted a new Constitution.[24] The Constitution provided structure to the government and guidance to a new Japanese legal system.[25] The Constitution contains three basic principles: sovereignty rests with the people, Japan desires peaceful cooperation with other countries, and laws must respect fundamental human rights.[26] These principles place Japan's power with its people.[27] The judicial system is headed by a Supreme Court,[28] and is comprised of

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[21] Goodman 2004, *supra* note 1, at 513.

[22] *Id*.

[23] *Id*.

[24] On October 4, 1945, at a meeting with General MacArthur, a Japanese cabinet member asked whether General MacArthur had instructions "about the make-up of the government." *Creation of the Japanese Constitution (1945-1946)*, PBS, http://www.pbs.org/wgbh/amex/macarthur/peopleevents/pandeAMEX102.html (last visited Apr. 16, 2014). Due to a mistranslation, the word "make-up" was replaced with "constitution," and the Japanese cabinet member left the meeting believing that MacArthur ordered the creation of a new constitution. *Id.*

[25] *See id.*

[26] *See generally* NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (Japan), *translated in* http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html) (stating the following: "sovereign power resides with the people[,]"; "we shall secure for ourselves and our posterity the fruits of peaceful cooperation with all nations[,]"; and "[t]he people shall not be prevented from enjoying any of the fundamental human rights.").

[27] Though the legal foundations of the Japanese Constitution are beyond the scope of this comment, the reader might be interested to further study Japan and the rule of law. Some argue that the Japanese Constitution is based on the concept of the rule of law. *See* HIROSHI ODA, JAPANESE LAW 26 (3d ed. 2009). Others argue, however, that Japan has failed to attain the rule of law in its legal system. *See* Setsuo Miyazawa & Hiroshi Otsuka, *Legal Education and the Reproduction of the Elite in Japan*. 1 ASIAN-PAC. L. & POL'Y J. 2, 18 (2000); Setsuo Miyazawa, *Reform in Japanese Legal Education: The Politics of Judicial Reform in Japan: The Rule of Law at Last?*, 2 ASIAN-PAC. L. & POL'Y J. 89, 107 (2001).

[28] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 76 (Japan).

fourteen Justices and a Chief Justice.[29] Beneath the Supreme Court are the inferior courts.[30] The inferior courts include eight High Courts, fifty District Courts, fifty Family Courts, and 438 Summary Courts.[31]

Japan's court system can be thought of as having four tiers. At the top tier is the Supreme Court, which has final appellate review power.[32] Below the Supreme Court sit the High Courts, which conduct appellate reviews.[33] On the third tier are the District and Family Courts.[34] The District Courts are courts of general and original jurisdiction, while the Family Courts handle family matters and juvenile cases.[35] The Summary Courts are part of a quasi-fourth tier.[36] The Summary Courts oversee some civil matters (depending on the monetary amount at stake) and minor criminal cases.[37]

Critics attack the Japanese legal system for its slow process, lack of litigation tools for plaintiffs, and low participation levels by citizens.[38] While many view the United States as a country that favors litigation, Japanese people typically avoid litigation.[39] As one author commented, "[a]

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[29] *Overview of the Judicial System in Japan*, SUPREME COURT OF JAPAN, http://www.courts.go.jp/english/judicial_sys/overview_of/overview/index.html#02 (last visited Apr. 16, 2014) [hereinafter SUPREME COURT OF JAPAN].

[30] *Id.*

[31] *Id.*; Junko Gono et al., *Overview of Legal Systems in the Asia-Pacific Region: Japan*, SCHOLARSHIP@CORNELL LAW, Apr. 10, 2004, at 8-9; Elliott J. Hahn, *Perspective: An Overview of the Japanese Legal System*, 5 NW. J. INT'L L. & BUS. 517, 533 (1983).

[32] SUPREME COURT OF JAPAN, *supra* note 29.

[33] Gono, *supra* note 31, at 8.

[34] SUPREME COURT OF JAPAN, *supra* note 29.

[35] Gono, *supra* note 31, at 8.

[36] *See* SUPREME COURT OF JAPAN, *supra* note 29 (chart showing Summary Courts on the fourth row of the court system).

[37] Gono, *supra* note 31, at 9.

[38] Toshiko Takenaka, *Comparison of U.S. and Japanese Court Systems for Patent Litigation: A Special Court or Special Division in a General Court?*, 5 SYMPOSIUM OF CTR. FOR ADVANCED STUDY & RES. ON INTELL. PROP. 47, 1 (July 2000), *available at* http://www.law.washington.edu/casrip/symposium/number5/pub5atcl6.pdf (stating that "U.S. patent owners and domestic industries have long complained about the slow and inadequate relief provided by Japanese courts in patent infringement cases"); Goodman 2004, *supra* note 1, at 526 (noting that "the Japanese judicial system has drawn its boundaries in a manner less favorable to plaintiffs"); R. Daniel Kelemen & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U. PA. J. INT'L ECON. L. 269, 294-95 (2002) (showing that in 2002 Japan had roughly one lawyer for every 7,000 residents. By comparison, in 2000 the United States had one lawyer for every 300 residents); Carl F. Goodman, *The Somewhat Less Reluctant Litigant: Japan's Changing View Towards Civil Litigation*, 32 LAW & POL'Y INT'L BUS. 769, 797 (2001) [hereinafter Goodman 2001] ("[There are] huge court backlogs and a litigation system wherein cases may take years to try.").

[39] Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, *in* THE JAPANESE LEGAL SYS., CASES, CODES, AND COMMENT. 176, 176 (Curtis J. Milhaupt et al. eds., 2d ed. 2012); *see also* Steve Lohr, *Tokyo Air Crash: Why Japanese Do Not Sue*, *in* THE JAPANESE LEGAL SYS., CASES, CODES, AND COMMENT. 166 (Curtis J. Milhaupt et al. eds., 2d ed. 2012); J. Mark Ramseyer & Eric B. Rasmusen, *Are Americans More Litigious? Some Quantitative Evidence*, *in* THE AM. ILLNESS: ESSAYS ON THE RULE OF LAW 4 (Yale U. Press ed., 2013).

Japanese plaintiff must have knowledge of facts and witnesses to support his or her case before filing a complaint."[40] Potential litigants must take numerous factors into account before filing a lawsuit in Japan. Compared to the United States, monetary damage awards are relatively low.[41] Additionally, Japanese courts do not award punitive damages.[42] These factors contribute to a legal system that makes winning less lucrative for plaintiffs. Even when victory is likely, filing a lawsuit is a lengthy process and may not be worth the expense and time. In Japan, "it is not unusual . . . for complex lawsuits to take more than 10 years to go through the courts."[43] In sum, the Japanese legal system has discouraged lawsuits.[44] Proponents of reforming the Japanese legal system argue that the system needs to better address the Japanese peoples' needs[45] and increase citizens' participation.[46]

Japan has taken steps to liberalize its legal system in order to expedite lawsuits and ensure judicial fairness,[47] but this comment argues that its lack of a developed class action system has harmed consumers. In Japan, "it is difficult to protect the interests of a large number of plaintiffs as with class actions. In this respect, the Japanese system may be insufficient in providing redress to victims. In particular, parties seeking small amounts may simply give up any opportunity of receiving compensation."[48] Plaintiffs have faced an uphill battle in Japan. For example, between 1947 and 1985, no private antitrust lawsuit succeeded in Japanese courts.[49] Mass tort, antitrust, and employment class action claimants remained without the necessary tools to satisfactorily litigate their disputes.

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[40] Goodman 2001, *supra* note 38, at 789.

[41] *Id*. at 794.

[42] *Id*.

[43] Suan Chira, *If You Insist on Your Day in Court, You May Wait and Wait and Wait*, *in* THE JAPANESE LEGAL SYS., *supra* note 39, at 168.

[44] "In Japan . . . the harmony of community is valued most and people go to court only as a last resort." Steve Lohr, *supra* note 39, at 166, 167; Leslie Helm, *A Look at Japan's Efforts to Discourage Lawsuits*, Jan. 14, 1991, http://lesliehelm.com/a-look-at-japans-efforts-to-discourage-lawsuits/ (last visited May 7, 2014); *see generally* Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan's Turn to Litigation*, 35 J. LEGAL STUD. 31 (2006).

[45] One such "need" includes "clarifying legal rules . . . as to ease the resolution of 'various disputes[.]'" George Schumann, *Beyond Litigation: Legal Education Reform in Japan and What Japan's New Lawyers Will Do*, 13 U. MIAMI INT'L & COMP. L. REV. 475, 516 (2006).

[46] *Id.* at 515.

[47] Goodman 2001, *supra* note 38, at 809-10.

[48] Koji Shindo, *Settlement of Disputes of Securities Transactions*, 14 HASTINGS INT'L & COMP. L. REV. 399 (1991). Koji Shindo argues that class action suits are needed to improve Japan's legal system. *Id.* at 403 (stating that "it is urgent that the merits of the introduction of class action suits and a discovery system into Japanese law through legislative amendment be considered").

[49] J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604, 617 (1985).

Pressure to reform the legal system began to boil over following the burst of Japan's economic bubble in the early 1990s.[50] The crisis may have served as a catalyst, revealing to the government that change was needed.[51] The increase in litigation in Japan between 1986 and 2002[52] may have also signaled to the government that reform was necessary.

In 1999, Japan took the first steps towards reforming its legal system.[53] Former Prime Minister Keizo Obuchi proposed creating a reform-orientated advisory council, which was officially established by the Japanese Congress, the National Diet.[54] This Justice System Reform Council, an independent commission,[55] issued numerous recommendations to reform the legal system.[56] One of the recommendations included studying group litigation and comparing it to the Japanese *sentei tojisha* rule.[57] The *sentei tojisha* rule, discussed in Part II.B., is a Japanese alternative to class action. The Council took note of the German and American class action systems[58] and determined that the *sentei tojisha* rule should perform a function similar to a class action system.[59]

These recommendations were not purely political, as several of them resulted in substantive changes to Japan's legal landscape. In 2001, Japan implemented major judicial reform to modernize the judicial system.[60] These initial reforms, including speeding up the judicial process and increasing the availability of attorneys, were designed to make the judicial system more accessible to members of the public.[61] In addition to making changes to the courts, the government implemented a new law school system to overhaul legal training.[62]

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[50] Ginsburg & Hoetker, *supra* note 44, at 36; HIROSHI ODA, *supra* note 27, at 57.

[51] Mariko Fujii & Masahiro Kawai, *Lessons from Japan's Banking Crisis, 1991-2005*, 9 (Asian Dev. Bank Inst., Working Paper No. 222, 2010), *available at* http://www.adbi.org/files/2010.06.29.wp222.lessons.japan.banking.crisis.1991.2005.pdf ("[A]uthorities lacked the legal framework to resolve troubled, large financial institutions.").

[52] *See* Ginsburg & Hoetker, *supra* note 44, at 36-37.

[53] *See* Daniel H. Foote, *Forces Driving and Shaping Legal Training Reform in Japan*, *in* THE JAPANESE LEGAL SYS., *supra* note 39, at 72.

[54] *Id.*

[55] James R. Maxeiner & Keiichi Yamanaka, *The New Japanese Law Schools: Putting the Professional into Legal Education*, 13 PAC. RIM. L. & POL'Y J. 303, 310 (2004).

[56] *Id.*; *see generally* REFORM COUNCIL, *supra* note 5.

[57] REFORM COUNCIL, *supra* note 5, at ch. II pt. 1 § 7.

[58] *Id.*

[59] *Id.*

[60] HIROSHI ODA, *supra* note 27, at 55-56.

[61] *Id*.

[62] *See generally* Maxeiner & Yamanaka, *supra* note 55.

Japan implemented a new law school system in 2004 and created sixty new law schools.[63] According to the Justice System Reform Council, new law schools aimed to be "professional schools providing education especially for training for the legal profession."[64] This means that the new schools focus on training students to think in legal terms, and "provide compulsory instruction in core legal subjects of private and public law."[65] While the new schools have been relatively successful in meeting the Reform Council's goals of "expand[ing] the quality and quantity" of attorneys,[66] they have not met all their stated goals. For example, every person who aspires to be a lawyer in Japan must gain admittance to the Legal Training and Research Institute.[67] To gain admittance, applicants must pass an exam that is administered annually.[68] The exam is extremely difficult; on average, an applicant must take the exam five times before he passes.[69] With the new law schools and a newly implemented bar exam, the Reform Council anticipated that the exam passage rate would increase to between seventy to eighty percent of all applicants rather than the previous system's two to three percent admission rate.[70] The passage rate rose in 2009, but only to 27.6 percent.[71]

In 1996, the Japanese Diet reworked the Civil Procedure Code,[72] which was last amended in 2006.[73] The Code's revisions include additional discovery mechanisms and simplification of small claims procedures.[74] These revisions imply that Japan has begun a transition to improve legal tools for plaintiffs.[75]

The changes to the judicial and law school systems show that the Japanese government wants its legal system to accommodate today's legal needs. The changes have a large impact on the Japanese legal system. Though the new law school system did not create the seventy percent exam

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[63] *Id.* at 303.
[64] *Id*. at 313 (citing REFORM COUNCIL, *supra* note 5, at ch. III, pt. 2, §1).
[65] *Id.* at 318.
[66] *Id.* at 311.
[67] *Id.* at 309.
[68] *Id*. at 310.
[69] *Id*.
[70] *Id*. at 312; Bruce E. Aronson, *The Brave New World of Lawyers in Japan Revisited: Proceedings of a Panel Discussion on the Japanese Legal Profession After the 2008 Financial Crisis and the 2011 Tohoku Earthquake*, 21 PAC. RIM L. & POL'Y J. 255, 272 (2012).
[71] *Id*.
[72] MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] 1996 (Japan), *translated in* http://www.oapi.wipo.net/wipolex/en/details.jsp?id=8909 (last visited Apr. 16, 2014).
[73] *Id*.
[74] Goodman 2001, *supra* note 38, at 797.
[75] Others have argued that factors such as economic liberalization and fragmentation of political authority have contributed to this transition. *See* Kelemen & Sibbitt, *supra* note 38, at 271-72.

passage rate that the Reform Council expected, the jump from three percent to twenty-six percent is sizeable. This has led some commentators to conclude that "the Japanese legal profession has emerged form its insularity and limited social role."[76] This legal transformation will have wide-reaching impact on Japanese business and society.

B. *Before Group Action, there was Joinder, Consolidation, and the* Sentei Tojisha *Rule*

Until the new class action law was promulgated on December 11, 2013,[77] Japan utilized various systems to replicate group litigation.[78] Consumer groups could file for injunctions on behalf of a consumer class[79] but they could not recover damages for consumers.[80] Japan has also relied on a more established system of joinder.[81] Under Article 38 of the Japanese Code of Civil Procedure, when the rights or liabilities for an action are the same and are based on the same kinds of facts and law, then those harmed may sue as co-litigants.[82] This rule is the Japanese version of joinder and may be used for small or large numbers of litigants.[83]

Litigation using joinder procedure is difficult, as courts must name and give notice to each plaintiff individually.[84] The system is not structured to accommodate large numbers of plaintiffs. Additionally, using the joinder procedure is at the court's discretion; the court may instead choose to issue individual judgments or settlements.[85] This discretion may create inconsistent results. Courts treat Japanese plaintiffs filing group actions less like a group and more like individual plaintiffs.[86] This treatment is significant, as Japanese lower court judges face a huge caseload and could benefit from increased judicial efficiency.[87] While joinder allows several

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[76] Aronson, *supra* note 70, at 285.

[77] Nishigaki & Yoshida, *supra* note 1, at 1.

[78] *See generally* Goodman 2004, *supra* note 1; Goodman 2001, *supra* note 38; Nancy L. Young, *Japan's New Products Liability Law: Increased Protection for Consumers*, 18 LOY. L.A. INT'L & COMP. L. J. 893, 900-01 (1996).

[79] Sugawara, *supra* note 8, at 20.

[80] *Id.*

[81] *Id.* at 4.

[82] *Id.*

[83] *Id.*

[84] Ikuo Sugawara, *Japan*, 622 ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI. 280, 281 (2009).

[85] *Id.*

[86] *See* Sugawara, *supra* note 8, at 5 ("When this method is adopt[ed] . . . authorization from each individual party is required.").

[87] John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and Public Trust*, *in* THE JAPANESE LEGAL SYS., *supra* note 39, at 129, 131.

hundred plaintiffs to join a complaint,[88] it creates complicated and difficult legal situations. This is problematic because "depending on the contents of the evidence and the progress of the trial, there is no guarantee that the contents of judgments will be the same for the parties and settlements or withdraw of claims may also happen. Separate appeals to the judgments may also occur."[89] Varying judgments or settlements are not ideal because they could create inconsistency in the legal system. Additionally, separate appeals increase the workload of, and costs to, the judiciary. Although attorneys have been able to use joinder in the absence of a formal class action system, a formalized system could bring more stability and certainty to the legal system.

Japanese attorneys have used two other methods of group action without the benefit of class action. These are *seikyu no heigou* (judicial consolidation)[90] and the *sentei tojisha* rule (chosen party system).[91] If all of the plaintiffs' claims are in one court, that court has the ability to consolidate oral arguments.[92] Consolidation is not always feasible, particularly in consumer products liability cases, because "[g]iven today's mass production and advanced distribution systems . . . users of any single product are likely to be spread out among many districts."[93] This diffusion could preclude plaintiffs from using consolidation, as the claims are not likely to be in the same court.[94]

The *sentei tojisha* rule, enabled by Article 47 of the Code of Civil Procedure,[95] allows a single party to act as the representative on behalf of all plaintiffs.[96] All plaintiffs must authorize the representative party.[97] Further, the decision given to the representative party applies to all group members through the principle of res judicata.[98] This approach puts the power of litigation into the hands of one party[99] and increases the likelihood that the other plaintiffs will either be displeased with the result or discouraged from joining the representative litigation in the first place.[100] Although the *sentei tojisha* rule creates consistent outcomes for plaintiffs, the rule has been

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88 *See* Sugawara, *supra* note 8, at 4.
89 *Id.* at 5.
90 Nishigaki & Yoshida, *supra* note 1, at 1.
91 REFORM COUNCIL, *supra* note 5, at § 7(4)(b).
92 Young, *supra* note 78, at 900.
93 *Id.*
94 *Id.*
95 *Id.* at 901.
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 *See id.*

ineffective as a means of providing relief for large numbers of plaintiffs; usually, *sentei tojisha* representation results in a small group of plaintiffs.[101]

III. THE CURRENT STATE OF JAPANESE CLASS ACTION LAW

This Part looks at the most recent developments in Japanese class action law. It begins by discussing the creation of the Consumer Affairs Agency in 2009 and the 2012 proposed class action legislation. After discussing the components of the proposed law, it examines the law as it was passed in December 2013. Later, the comment argues that Japan should look to the U.S. class action system to examine the benefits of class actions as well as the potential legal complications they can create.

A. The Consumer Affairs Agency Class Action Proposal

The Japanese government created the Consumer Affairs Agency ("CAA") in September 2009.[102] This agency is a central system for investigating consumer complaints.[103] It was formed as a result of several failures by the Japanese government to address public safety concerns, such as an illegal distribution of tainted rice, carbon monoxide poisoning from gas water heaters, and poisoning from certain imported foods.[104] In 2010, the agency began searching for a solution to Japan's disjointed class action system.[105] The CAA formed a study group composed of academics, which proposed four options for a potential class action system.[106]

The CAA officially proposed a new class action system for Japan in 2012.[107] The proposed legislation, called the "Litigation System Relating to

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[101] *Id.*

[102] *For a Society with Security, Safety, and Comfortable Living*, CONSUMER AFFAIRS AGENCY 3 2010, www.caa.go.jp/en/pdf/caa.pdf.

[103] *Id.*

[104] *Id.*

[105] *New Report by the Consumer Affairs Agency Suggests Class Actions May be Coming to Japan*, CLIENT ALERT 1 (DLA Piper Tokyo Partnership) (Sept. 2010) (on file with author).

[106] *Id.*

[107] *See Comments of the U.S. Chamber Institute for Legal Reform on the Consumer Affairs Agency's Proposal entitled Litigation System Relating to Recovering Damages for a Consumer Class*, U.S. CHAMBER INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/uploads/sites/1/Japan_-_ILR_Comments_to_CAA_CA_proposal_9-3-2012.pdf (last visited May 23, 2014); *see generally Shōhi seikatsu ni kansuru kihon-tekina seido ya kankyō-dzukuri o susumemasu* (消費生活に関する基本的な制度や環境づくりを進めます) [*The Litigation System Proposed in Accordance with Collective Consumer Damage Recovery*], SHŌHISHACHŌ (消費者庁) [CONSUMER AFFAIRS AGENCY], http://www.caa.go.jp/planning/index12.html (last visited May 23, 2014) [hereinafter CONSUMER AFFAIRS AGENCY System Proposal].

Recovering Damages for a Consumer Class,"[108] was a much-needed, comprehensive plan of action. To ensure the creation of a class action system appropriate for Japan, the CAA conducted several surveys and reports on the class action systems in various countries.[109] These countries included the United Kingdom, Portugal, South Korea, the United States, Germany, France, Canada, and Brazil.[110] The department created an initial plan for the class action system and allowed a one-month public comment period that ended in September 2012.[111] The comments enabled the CAA to better address concerns of opinions from consumers and businesses directly impacted by the proposed class action system.[112]

The 2012 proposal would have altered existing procedure governed by the Consumer Contract Act.[113] This act, which came into effect in April 2001, aims to "protect the interests of consumers, and thereby contribute to the stabilization of and the improvement in the general welfare and life of the citizens . . . "[114] Pursuant to these goals, the Act was amended in 2007 to allow for the creation and certification of Qualified Consumer Organizations ("QCO").[115] A QCO is certified by the Prime Minister[116] and is given the power to sue for injunctive relief on behalf of consumers.[117] There are currently only eleven organizations certified as QCOs.[118] The 2012 proposal

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[108] *Japan*, U.S. CHAMBER INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/international/japan (last visited Apr. 17, 2014).

[109] The CAA has a sample of surveys and reports conducted on the collective consumer damage systems, including the United States, Canada, Germany, and Brazil. SHŌHISHACHŌ (消費者庁) [CONSUMER AFFAIRS AGENCY], http://www.caa.go.jp/planning/index.html#m01-1 (last visited May 24, 2014).

[110] *Id.*

[111] CONSUMER AFFAIRS AGENCY System Proposal, *supra* note 107.

[112] *Id.*

[113] *See* Shōhishakeiyakuhō [The Consumer Contract Act], *available at* http://law.e-gov.go.jp/cgi-bin/idxselect.cgi?IDX_OPT=1&H_NAME=%8f%c1%94%ef%8e%d2&H_NAME_YOMI=%82%a0&H_NO_GENGO=H&H_NO_YEAR=&H_NO_TYPE=2&H_NO_NO=&H_FILE_NAME=H12HO061&H_RYAKU=1&H_CTG=1&H_YOMI_GUN=1&H_CTG_GUN=1 (Japan), *translated in* http://www.consumer.go.jp/english/cca/index.html#3-2 [hereinafter Consumer Contract Act translation].

[114] *Id.*

[115] Sugawara, *supra* note 8, at 6-7.

[116] The Prime Minister has the authority to certify QCOs under Article 2, paragraph 4 of the Consumer Contract Act. Consumer Contract Act translation, *supra* note 113, at art. 2 (4).

[117] *Id*. at art. 13(1).

[118] Nishigaki & Yoshida, *supra* note 1, at 2.

allowed a Specified Qualified Consumer Organization ("SQCO")[119] to begin the class action process.[120]

The proposal included two stages.[121] In the first stage, a SQCO would file the lawsuit on consumers' behalf and ask the court to determine common issues of law and fact.[122] Only a certified SQCO could file the class action lawsuit[123] and could file the lawsuit only against business operators.[124] Consumers could affect only the initial class action proceedings indirectly. Under the proposal, the SQCO could only bring four types of legal claims against the defendants: 1) unjust enrichment resulting from cancellation of a Consumer Contract; 2) performance of a Consumer Contract; 3) tort liability under the Civil Code; and 4) default of a Consumer Contract or product defect under a Consumer Contract.[125] The proposal limited claims to monetary relief and made criminal charges unavailable.[126] Once the lawsuit and charges were filed, the SQCO would have to prove three elements. First, the SQCO would have to show numerosity—that is, that a significant number of consumers were affected. Second, they would need to prove commonality. That is, that the damages suffered by the consumers resulted from the same cause. Third, the common issues between the consumers would have to be "dominant," and the SQCO would have to demonstrate that the consumers clearly had claims.[127]

If the SQCO succeeded at trial on the common issues, then the lawsuit would move to the second stage.[128] The second stage constituted a damages phase where individual consumers harmed by the defendants could step

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[119] As is explained in the next section, the new class action law as promulgated establishes Specified Qualified Consumer Organizations (SQCO). The difference between a QCO and SQCO is in their fee structure. Some sources refer to SQCOs as Certified Qualified Consumer Organizations, which appears to be a translation difference. For the purposes of this comment, the author refers to these organizations as SQCOs.

[120] An editorial in The Japan Times notes that "[a]s of January 2013, some 30 consumer lawsuits had been filed. But consumer organizations do not have enough funds and experts to file and continue class-action lawsuits." *Protecting Consumers Against Fraud*, JAPAN TIMES, Jan. 13, 2014, *available at* http://www.japantimes.co.jp/opinion/2014/01/13/editorials/protecting-consumers-against-fraud/#. UzJVrq1dV3Y [hereinafter JAPAN TIMES Fraud].

[121] Kozo Kawai et al., *Japan*, *in* THE PRIVATE COMPETITION ENFORCEMENT REV. 254 (Ilene Knable Gotts ed., 5th ed. 2012), *available at* http://www.jurists.co.jp/ja/publication/tractate/docs/PCER_ Fifth.pdf; *Japanese Class Action Legislation – How to Protect your Business*, THE AM. CHAMBER OF COM. IN JAPAN, Nov 12, 2012, http://accj.tajera.com/en/events/details/19340-japanese-class-action-legislation-how-to-protect-your-business (last visited Apr. 27, 2014).

[122] ANDERSON MŌRI & TOMOTSUNE, *supra* note 6, at 2.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 4.

[126] *See id.*

[127] *Id.* at 5.

[128] *Id.* at 2.

forward and receive damages.[129] This stage also included a trial for the individual issues that arose as the consumers claimed damages.[130] The SQCO would provide public notice for consumers to participate in the second stage, and it would be the responsibility of each individual to step forward.[131] The second stage would be a de facto opt-in[132] form of class action, where those who failed to opt in would be excluded from the results of the proceedings. The court would issue a decision at the end of the second stage, choosing to issue an injunction, award damages, or do nothing.[133] After the decision, the parties would then turn to the usual litigation process.[134]

B. The Japanese Government Passes a Class Action Law

On April 19, 2013, the Japanese Cabinet approved the class action proposal and sent it to the *Shugi-in* (the Japanese House of Representatives) for debate and a vote.[135] The class action law, the Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers (Act No. 96 of 2013),[136] was promulgated on December 11, 2013.[137] The law is set to take effect in 2016, three years after its passage by the Diet.[138] Not everyone is pleased with the law. Before the Cabinet passed it, *Keidanren* (the Japan Business Federation) issued a joint statement with the Japan Chamber of Commerce and Industry in opposition of the

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[129] *Id.*

[130] *See id.* at 6 ("If the business operator disputes the amount or existence of any or all of the consumers' claims as contained in the SQCO's notice, the court will issue a decision relating to the amount or existence of the various consumers' claims.").

[131] *Id.* at 4, 6.

[132] U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 108.

[133] *See* ANDERSON MŌRI & TOMOTSUNE, *supra* note 6, at 1-2.

[134] *Id.*

[135] *Japanese Litigation Update*, QUINN EMANUEL URQUHART & SULLIVAN LLP 9, Dec. 9, 2013, http://www.quinnemanuel.com/media/469099/december%202013%20business%20litigation%20report.pdf; Editorial, *Consumer Protection System*, JAPAN TIMES, Apr. 28, 2013, http://www.japantimes.co.jp/opinion/2013/04/28/editorials/consumer-protection-system/#.Upx8p2RDt3Z (last visited May 17, 2014); Nishigaki & Yoshida, *supra* note 1, at 4.

[136] 2013 Class Action Law, *supra* note 7; ANDERSON MŌRI & TOMOTSUNE, *supra* note 6.

[137] *Act on Special Provisions of court proceedings for civil recovery of the collective property of the casualties of the consumer*, CONSUMER AFFAIRS AGENCY, http://www.caa.go.jp/planning/index14.html (last visited May 23, 2014); Nishigaki & Yoshida, *supra* note 1.

[138] SHŌHISHACHŌ (消費者庁) [CONSUMER AFFAIRS AGENCY], SHŌHISHA NO ZAISAN-TEKI HIGAI NO SHŪDAN-TEKINA KAIFUKU NO TAME NO MINJI NO SAIBAN TETSUDZUKI NO TOKUREI NI KANSURU HŌRITSU NI TSUITE (消費者の財産的被害の集団的な回復のための民事の裁判手続の特例に関する法律について) [FOR THE ACT ON SPECIAL PROVISIONS OF CIVIL COURT PROCEDURES FOR COLLECTIVE RECOVERY OF PROPERTY DAMAGE OF CONSUMERS], *available at* http://www.caa.go.jp/planning/pdf/130419-0_131213.pdf.

proposal.[139] *Keidanren*, a large Japanese organization comprised of 1,300 Japanese companies, debates political issues that are of interest to those companies.[140] Members of the Japanese business community have resisted class action laws as "[s]etting a class-action precedent would . . . be a nightmare for Japanese companies[.]"[141] As SQCOs file class action suits on behalf of consumers, it follows that the natural defendants of such lawsuits—businesses—will resist new laws expanding the potential for those lawsuits. The U.S. Chamber Institute for Legal Reform issued a twelve-page statement on the potential dangers and problems that may arise from Japan's proposal.[142] The statement attacks central elements of class action systems generally, saying that class action lawsuits are "inherently more vulnerable to abuse than individual lawsuits."[143]

Others, such as the editorial staff of The Japan Times, endorsed the Cabinet's proposal.[144] Proponents of the law argued it will allow injured consumers to receive compensation for harm done to them, whereas the previous laws only enabled them to receive injunctive relief.[145] Further, they argued that class action lawsuits and SQCOs' augmented ability to seek damages can "establish meaningful precedents" and "work . . . more efficiently for the overall public good."[146] Consumers International, a pro-consumer group, argued that the new proposal "ha[s] features specifically designed to prevent abuse[.]"[147] Further, proponents note the provision that binds all QCOs to first-stage judicial decisions[148] will "prevent multiple lawsuits on the same issue."[149]

While the Consumer Contract Act first created QCOs in 2007,[150] the 2012 proposal[151] and the 2013 class action law establish *tekikakushou*

[139] *Urgent Proposition on the Japanese Class Action System (Shudan Sosho Seido)*, KEIDANDREN, Mar. 25, 2013, http://www.keidanren.or.jp/en/policy/2013/023.html (last visited May 17, 2014).

[140] *About KEIDANREN*, KEIDANDREN, http://www.keidanren.or.jp/en/profile/pro001.html (last visited Apr. 17, 2014).

[141] Tomohiro Osaki, *U.S.-style class action? Unlikely for Tepco Suits*, JAPAN TIMES, Aug. 5, 2013, *available at* http://www.japantimes.co.jp/news/2013/08/05/reference/u-s-style-class-action-unlikely-for-tepco-suits/#.Uo6rSGR4aDk (last visited May 17, 2014).

[142] U.S. CHAMBER INST. FOR LEGAL REFORM, *supra* note 107.

[143] *Id.* at 2.

[144] *Consumer Protection System*, *supra* note 135.

[145] *Id.*

[146] *Id.*

[147] *Japan Government Considers Group Action Plan*, CONSUMERS INT'L, Apr. 10, 2013, http://www.consumersinternational.org/news-and-media/news/2013/04/japan/#.UsHv-2RDt3Y (last visited May 17, 2014).

[148] *Japanese Litigation Update*, *supra* note 135, at 9.

[149] *Id.*

[150] Sugawara, *supra* note 8, at 6-7.

[151] ANDERSON MŌRI & TOMOTSUNE, *supra* note 6, at 2.

hishadantai (Specified Qualified Consumer Organizations) ("SQCO").[152] Some have speculated that the existing QCOs will be designated SQCOs under the new law.[153] The difference between QCOs and SQCOs is found in their fee structure. The new law incentivizes SQCOs to bring more lawsuits.[154] A QCO cannot charge fees for its litigation, whereas a SQCO is allowed to receive fees and costs from class members who reach the second stage of litigation.[155] The new law allows SQCOs to bring five types of claims, called *Kyotsuu gimu* (common obligations)[156]:

> a) claims for performance based on contractual obligations, b) claims for unjust enrichment, c) claims for damages caused by defaults on contractual obligations, d) claims for damages due to product defect liability, and e) claims for damages caused by unlawful acts (*Fuhoukoui*).[157]

The new law cannot be used for all types of recovery. Recovery for *kakudai songai* (consequential damages), *jinshinsongai* (physical injury), *isharyou* (pain and suffering), and lost profits are not available under the new law.[158]

The new law retains the two-stage approach included in the 2012 proposal.[159] The SQCO files the lawsuit in the first stage,[160] wherein "the court will render a declaratory judgment on the common liabilities of the accused business operator[.]"[161] If the court renders its judgment in favor of the SQCO, the process moves to the second stage, where damages are determined for individual consumers.[162] In the second stage, the SQCO and the defendant, upon the SQCO's request, provide notice to potential claimants.[163] The claimants then allow the SQCO to present their claims before the court.[164] The court allows the defendant to approve or reject the claims—if the claims are approved, then the claimants succeed and the

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[152] Nishigaki & Yoshida, *supra* note 1, at 2.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *See id.*; Takeho Ujino, *Japan: New Class Action System*, INT'L FIN. L. REV., Mar. 24, 2014, http://www.iflr.com/Article/3322767/Japan-New-class-action-system.html (last visited May 7, 2014); JAPAN TIMES Fraud*, supra* note 120.
[161] Ujino, *supra* note 160.
[162] *Id.*
[163] Nishigaki & Yoshida, *supra* note 1, at 3.
[164] *Id.*; Ujino, *supra* note 160.

litigation ends.[165] If the claims are rejected, the court follows a "Simplified Determination Procedure," only examining documentary evidence.[166] "If the consumer objects to a determination reached in a Simplified Determination Procedure, then the case tracks ordinary litigation procedure."[167]

Some expect that the introduction of class actions will increase Japanese courts' caseloads.[168] Larger caseloads may necessitate an increase in the number of Japanese attorneys[169] and could fundamentally change the structure of the Japanese legal system. An increase in attorneys and litigation, coupled with a pro-consumer perspective, may change the Japanese public's perception of the legal system from a shameful option of last resort to a more acceptable method of dispute resolution. As Japan implements its new class action law, Japan should look to the U.S. system to examine potential benefits and drawbacks to class action litigation. As the new law has provisions similar to those found in the United States,[170] this comparison is appropriate. The recent passage of Japan's class action law allows this author to present developing U.S. class action case law in a unique and meaningful way. Japan can examine U.S. case law to anticipate where problems interpreting or applying the new class action law may arise.

IV. CLASS ACTION IN THE UNITED STATES

Class action litigation in the United States is well developed[171] and supported by numerous court decisions and statutes.[172] As explained below, the United States provides an important and practical base for developing Japan's class action system. Indeed, some aspects of Japan's new law have apparent similarities to U.S. law.[173] For example, the U.S. legal system also imposes requirements of commonality and numerosity for class actions.[174]

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[165] Nishigaki & Yoshida, *supra* note 1, at 3.

[166] *Id.*

[167] *Id.*

[168] Ida Torres, *Government Passes Measure for Class-Sction Lawsuits to Seek Monetary Damage*, JAPAN DAILY PRESS, May 24, 2013, http://japandailypress.com/government-passes-measure-for-class-action-lawsuits-to-seek-monetary-damage-2429465/ (last visited May 17, 2014).

[169] *Id.*

[170] *See* Nishigaki & Yoshida, *supra* note 1, at 2-3 (describing "Common Obligations" and stating that "claims [must] relate to damages owed to a 'considerably large number of persons.'").

[171] James Cooper, *Class Action Issues*, REACTIONS, Dec. 2011, *available at* http://www.clydeco.com/uploads/Files/Publications/2012/1112_Legal_analysis.pdf.

[172] *See, e.g.,* FED. R. CIV. P. 23; Class Action Fairness Act of 2005, 28 USCA § 1711 (2005); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Hansberry v. Lee*, 311 U.S. 32 (1940); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

[173] Nishigaki & Yoshida, *supra* note 1, at 2-3 (describing "Common Obligations" and stating that "claims [must] relate to damages owed to a 'considerably large number of persons.'").

[174] *See id.*; FED. R. CIV. P. 23(a).

This Part briefly explains class action lawsuits in the United States, ultimately recommending that Japan should examine portions of U.S. class action laws in order to aid introduction of its new law.

A. Purpose of Class Action Lawsuits

Generally speaking, there are three widely accepted purposes of a class action system: access to justice, efficiency (judicial economy), and deterrence.[175] Class action lawsuits enable plaintiffs to participate in lawsuits that are otherwise financially impracticable.[176] When a plaintiff suffers minimal damages, filing a lawsuit may prove financially infeasible.[177] This comment argues that the stress and costs of a lawsuit may understandably deter a person from filing a lawsuit where they have little to no financial incentives. Class actions allow plaintiffs to spread "litigation costs among numerous litigants with similar claims."[178] The class action allows these plaintiffs to participate (though minimally) in the legal process and recover for small, but meaningful, wrongs done to them.[179]

Class action systems also promote efficiency[180] and consistency in the judicial system.[181] An incident harming thousands of people could substantially tax the legal system if the plaintiffs each filed individual complaints and demanded individual results.[182] Numerous problems arise

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[175] Richard A. Nagareda et al., THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIG. 25-26 (2d ed. 2013); Catherine Piché, *Cultural Analysis of Class Action Law*, 2 J. OF CIVIL L. STUDIES, 101, 103 (2009); *Class Actions in Canada: A Guide for Defendants*, MCCARTHY TÉTRAULT 3 (2002), *available at* http://books.google.com/books?id=wc-yMkw9pbcC&printsec=frontcover#v=onepage&q&f=false; THE Y.B. OF CONSUMER LAW 2008 299 (Christian Twigg-Flesner et al. eds., 2008) *available at* http://books.google.com/books?id=KQBGqoBP-68C&printsec=frontcover#v=onepage&q&f=false.

[176] *See Klay v. Humana, Inc.*, 382 F.3d 1241, 1270 (11th Cir. 2004) ("[C]lass actions often involve 'an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit.'") (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985)).

[177] MCCARTHY TÉTRAULT, *supra* note 175, at 3.

[178] *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 403 (1980).

[179] For example, the Federal Trade Commission settled claims with Airborne and Walgreens regarding misleading advertising on dietary supplements. *See Airborne Cold Remedy Settles Suit For $30M*, CBS NEWS, Aug. 14, 2008, *available at* http://www.cbsnews.com/stories/2008/08/14/health/main4350532.shtml?source=RSSattr=Health_4350532; *FTC Tells Consumers They May Be Due a Refund If They Purchased Walgreens "Wal-Born" Cold and Flu Supplements*, FED. TRADE COMM'N, Nov. 1, 2012, http://ftc.gov/opa/2012/11/walgreens.shtm (last visited May 17, 2014).

[180] TIMOTHY D. COHELAN, COHELAN ON CAL. CLASS ACTIONS § 1.04 (2001); *see* Nagareda et al., *supra* note 175, at 25-26.

[181] Farah Z. Usmani, *Inequities in the Resolution of Securities Disputes: Individual or Class Action; Arbitration or Litigation*, 7 FORDHAM J. CORP. & FIN. L. 193, 206-07 n.107 (2001).

[182] *See Klay*, 382 F.3d at 1270 (stating that "[h]olding separate trials for claims that could be tried together 'would be costly, inefficient, and would burden the court system' by forcing individual plaintiffs to repeatedly prove the same facts and make the same legal arguments before different courts") (quoting *In re Terazosin Hydrochloride*, 220 F.R.D. 672, 700 (S.D. Fl. 2004)).

from this scenario. Courts would waste time sorting through the same fact pattern multiple times, and litigants would be dissatisfied as different courts may reach different conclusions.[183] Combining similar cases into a single action saves the judiciary time and provides a consistent result.[184] Providing parties with consistency can protect the reputation of the judicial system. Additionally, filing the suit as a single action protects judges from an overwhelming workload; court systems may be busy enough without the additional, duplicative claims.[185]

Class action suits deter harmful behavior towards consumers.[186] With the threat of a class action lawsuit and the potential for large fees and damages awards, this comment argues that companies have incentives to avoid class action lawsuits altogether. Companies may find that they can best avoid class action lawsuits if they avoid causing harm to consumers, or potential plaintiffs, in the first place. In a successful class action lawsuit, the defendant may have to pay substantial amounts of money.[187] In addition to their own legal expenses, they may be liable for the plaintiffs' legal expenses,[188] treble damages,[189] and potential fines for illegal activity.[190] As these cases may involve several attorneys, and the harm to plaintiffs may be substantial, class action lawsuits may prove disastrous for defendants. Even the threat of a class action lawsuit can deter a potential wrongdoer.[191]

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[183] *See id.*

[184] *Geraghty*, 445 U.S. at 402-03 (1980) (stating that "[t]he justifications that led to the development of the class action include the protection of the defendant from inconsistent obligations . . . "); *Klay*, 382 F.3d at 1270 (explaining that "class actions 'offer . . . substantial economies of time . . . '") (quoting *In re Terazosin Hydrochloride*, 220 F.R.D. at 700).

[185] *See Klay*, 382 F.3d at 1270.

[186] *See* John C. Coffee Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation* (COLUM. L. AND ECON., Working Paper No. 293, 2006).

[187] *See, e.g.*, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (jury award of USD 5 billion reduced on appeal).

[188] Adele Nicholas, *The Changing Class Action Litigation Landscape* (Aug. 5, 2013), *available at* http://www.insidecounsel.com/2013/08/05/the-changing-class-action-litigation-landscape (observing that "[t]he cost to defend a class action suit can be astronomical, and many statutes allow the lawyers for prevailing class plaintiffs to recover their attorneys' fees from the defendant").

[189] Lynn H. Pasahow et al., TREBLE-DAMAGES REMEDY 9 (1987), *available at* http://books.google.com/books?id=ToFquxup3SoC&pg=PA9&lpg=PA9&dq#v=onepage&q&f=false (last visited May 8, 2014) (noting that "[a] treble-damages claim may proceed as a class action if the usual requirements of Federal Rule of Civil Procedure 23 are met").

[190] Dana Rosenfeld & Daniel Blynn, *The "Prior Substantiation" Doctrine: An Important Check On the Piggyback Class Action*, 2011, *available at* http://www.kelleydrye.com/publications/articles/1537 (explaining that "there is nothing to prevent a private litigant from filing suit against a consumer product advertiser or manufacturer after a regulatory agency takes action against the same company and obtains redress for consumers").

[191] MCCARTHY TÉTRAULT, *supra* note 175, at 3-4.

B. The Structure of the United States' Class Action System

The structure of class action lawsuits in the United States is relatively straightforward. A class action complaint in the United States typically contains one or more of the following causes of action: a consumer rights claim, a securities and antitrust claim, an environmental claim, a mass torts claim, or a civil rights claim.[192] Named plaintiffs file these claims on behalf of the class.[193] The named plaintiffs in a class action lawsuit may receive a financial incentive for acting as class representatives.[194] The class itself may contain hundreds or thousands of plaintiffs.[195]

U.S. class actions begin with the certification process.[196] In the United States, the class action is either allowed to proceed or it ends due to a failed certification.[197] In the U.S., Federal Rules of Civil Procedure 23(a) and (b) set forth the threshold requirements for class certification.[198] Rule 23(a) sets out four requirements: 1) numerosity; 2) commonality; 3) typicality; and 4) adequacy.[199] In more detail, these requirements state:

> (1) [T]he class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[200]

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[192] Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, CONF. ON DEBATES OVER GROUP LITIG. IN COMP. PERSP. 3 (2000), *available at* http://law.duke.edu/grouplit/papers/classactionalexander.pdf.

[193] *See Class Action: An Overview*, LEGAL INFO. INST. (LII), http://www.law.cornell.edu/wex/class_action (last visited Apr. 17, 2014).

[194] Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study* 3 (N.Y.U. L. & ECON., Working Paper, 2005) *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1043&context=nyu_lewp. It is notable that named plaintiffs face costs such as opportunity costs of time, stress related to the case, and risks of retaliation or harm to reputation when they act as named plaintiffs. These costs explain why named plaintiffs may receive financial compensation for their role. *Id.*

[195] *Class Actions Overview: The Basics of Class Actions*, JUSTIA, http://www.justia.com/trials-litigation/class-actions/ (last visited Apr. 17, 2014) [hereinafter Class Action Overview].

[196] *See* Alexander, *supra* note 192, at 6.

[197] FED. R. CIV. P. 23(a).

[198] FED. R. CIV. P. 23.

[199] *Id.* at 23(a); *Wal-Mart Stores, Inc. v. Duke*, 564 U.S. ___, 131 S. Ct. 2541, 2548 (2011); Alexander, *supra* note 192, at 4.

[200] FED. R. CIV. P. 23(a).

Courts will not certify a class if the plaintiffs fail to meet one of these factors.[201]

Although these requirements seem simple, this comment argues that they can create complications for plaintiffs and courts. Plaintiffs who do not follow the class action requirements face the possibility of having their case dismissed.[202] Courts that do not adhere stringently to the certification process may face an overwhelming and complicated lawsuit, requiring the court to pay significant attention to individualized facts and thus removing many of the benefits of class action litigation.[203] Combined, Rule 23(a)'s numerosity, commonality, typicality, and adequacy requirements aim to protect the interests of the class members and ensure that joining plaintiffs' claims reduce the workload of judges.[204]

Once a court certifies the class, the named plaintiffs and their attorneys provide notice to all unnamed plaintiffs who belong to the class.[205] The unnamed plaintiffs are persons who suffered some harm in the same manner or incident as the named plaintiffs, but are not required to appear in court to individually prove the harm they suffered.[206] The unnamed plaintiffs may rely on the named plaintiffs to proceed with the lawsuit.[207] Courts automatically consider unnamed plaintiffs members of the class, but as explained below, sometimes give unnamed plaintiffs the opportunity to opt out of the class litigation.[208] Once the class litigation concludes and if the class is victorious, the unnamed plaintiffs who have not opted out may receive compensation for the harm they suffered.[209]

After meeting the basic requirements of Rule 23(a), a class must meet one of four criteria listed under Rule 23(b).[210] Rule 23(b) is used to specify what type of class action is filed, including a suit where notice is optional, a limited fund action, a civil rights action, or a suit for damages.[211] Not all

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[201] *Id.*

[202] *See* Alexander, *supra* note 192, at 6.

[203] "Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 131–32 (2009) [hereinafter Nagareda 2009]).

[204] *See* Nagareda et al., *supra* note 175, at 25-26.

[205] FED. R. CIV. P. 23(c)(2). Notice requirements differ for 23(b)(1)-(2) classes and 23(b)(3) classes. If the class is a 23(b)(1) or (b)(2) class, "the court may direct appropriate notice to the class." For a 23(b)(3) class, "the court must direct to class members the best notice that is practicable under the circumstances . . . " *Id.*

[206] Class Action Overview, *supra* note 195.

[207] *See id.*

[208] *Wal-Mart Stores*, 131 S. Ct. at 2558; FED. R. CIV. P. 23(b)(3).

[209] *See* Class Action Overview, *supra* note 195.

[210] FED. R. CIV. P. 23(b).

[211] *Id.*

lawsuits are suitable for each category. A suit where notice is optional under Rule 23(b)(1)(A) is appropriate where inconsistent adjudications would result in standards of conduct that are incompatible for parties defendants.[212] Such a class may only seek declaratory or injunctive relief and cannot seek compensatory damages.[213] Further, class members may not opt out of the class.[214] Once the class is certified, all qualified members of the class are included; this is necessary because inconsistent adjudicatory results would impose inconsistent obligations on the defendant.[215]

The second category of class action lawsuits is a limited fund suit.[216] These are properly certified when adjudications made to individual members of a class would be dispositive to the interests of the other class members.[217] These suits likewise do not allow class members to opt out.[218] For example, imagine a limited fund class containing one hundred plaintiffs, with a total of USD 100,000. When individual damages are assessed, each individual is claiming USD 10,000. This means USD 1,000,000 in damages is claimed, but only USD 100,000 is available to satisfy those claims. If each plaintiff were to receive the amount they are fully entitled to from the fund, the fund would only support ten plaintiffs fully and leave the remaining ninety plaintiffs with nothing. A limited fund suit ensures that each class members' interests are partially protected, and that no single class member receives compensation to the detriment of another class member.[219] Each class member is treated equitably.

The third category is for civil rights lawsuits.[220] Rule 23(b)(2) provides that "the party opposing the class has acted or refused to act," making injunctive or declarative relief appropriate.[221] Plaintiffs used this type of class action through the 1970s and 1980s to enforce federal welfare and civil rights laws.[222] Under Rule 23(b)(2), plaintiffs may maintain lawsuits for monetary relief, but this relief must be incidental.[223]

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[212] *Id.* at (1)(A).

[213] *See* GEOFFREY C. HAZARD, JR. ET AL., PLEADING AND PROC. STATE AND FED. CASES AND MATERIALS 800 (10th ed. 2009).

[214] FED. R. CIV. P. 23(c)(2)(A) & (3)(A); HAZARD*, supra* note 213, at 800.

[215] HAZARD*, supra* note 213, at 800.

[216] FED. R. CIV. P. 23(b)(1)(B); Nagareda et al., *supra* note 175, at 26, 219, 240.

[217] FED. R. CIV. P. 23(b)(1)(B).

[218] *Id.* at 23(c)(2)(A) & (3)(A); HAZARD, *supra* note 213, at 800.

[219] FED. R. CIV. P. 23(b)(1)(B); Nagareda et al., *supra* note 175, at 26, 219, 240.

[220] FED. R. CIV. P. 23(b)(2); Nagareda et al., *supra* note 175, at 190-91.

[221] FED. R. CIV. P. 23(b)(2).

[222] Thomas R. Grande, *Innovative Class Action Techniques–The Use of Rule 23(b)(2) in Consumer Class Actions*, 14 LOY. CONSUMER L. REV. 251, 252 (2002).

[223] *See* HAZARD, *supra* note 213, at 801.

The final category of class action lawsuits encompasses damages class actions.[224] In these lawsuits, "the primary function of subsection (b)(3) has been to provide an aggregation device for damages suits, and most class actions in which damages are sought are (b)(3) rather than (b)(1) or (b)(2) suits."[225] Matters brought under Rule 23(b)(3) are subject to additional requirements not demanded of other class action lawsuits.[226] These include the predominance and superiority requirements.[227] The predominance requirement demands that class-wide questions by the class predominate over any individual questions that class members may have.[228] This comment discusses the predominance requirement further in the next section, in the context of *Wal-Mart v. Dukes*[229] and *McReynolds v. Merrill Lynch*.[230] The superiority requirement mandates that a class action lawsuit must be the superior form of adjudicating the matter.[231] Rule 23(b)(3)(A)-(D) provide a list of factors for the judge to consider when evaluating superiority, including whether individuals should control their own case, the extent of litigation already underway, the desirability of concentrating litigation in a particular forum, the difficulties in managing the matter as a class action, and possible alternatives to a class action lawsuit.[232]

C. Tradeoffs in the United States' Class Action System

Class action lawsuits disrupt the traditional American litigation narrative.[233] For example, "[a] fundamental premise of American adjudicative structures is that clients, not their counsel, define litigation objectives."[234] The American class action system turns this premise on its head. Class actions facilitate litigation for a massive number of individual claims but forgo the opportunity and benefits of litigating claims individually.[235] Class action invites the possibility that "the lawyer [will] represent[] an aggregation of litigants with unstable, inchoate, or conflicting preferences."[236] Class actions sacrifice individualized remedies in order to

[224] FED. R. CIV. P. 23(b)(3); *see* Nagareda et al., *supra* note 175, at 92.
[225] HAZARD, *supra* note 213, at 821.
[226] FED. R. CIV. P. 23(b)(3).
[227] *Id.*
[228] *Id.*
[229] *Wal-Mart*, 131 S. Ct. at 2548 (2011).
[230] *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482 (7th Cir. 2012).
[231] FED. R. CIV. P. 23(b)(3).
[232] *Id.* at (A)-(D).
[233] *See* Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1183 (1982).
[234] *Id.*
[235] *See id.*
[236] *Id.*

afford plaintiffs the opportunity to shift focus to structural reforms[237] and institutional practices.[238] For example, the 1966 reform to the class action portions of the Federal Rules of Civil Procedure aided plaintiffs in litigating public, rather than private, issues.[239]

Litigants and courts in the United States traditionally justify class action lawsuits based on economic efficiencies, viewing them as a practical means of providing litigation for claimants.[240] In many instances, "[t]he effect of the conduct under attack on any single individual is too small to justify a traditional lawsuit seeking compensation. But in the aggregate the impact is substantial enough to be a target for redress . . ."[241] This system creates a tradeoff for plaintiffs. Though the system gives claimants the opportunity to bring suit for otherwise financially impractical causes, plaintiffs may lack control over their attorneys.[242] Moreover, class actions may overlook certain subgroups within the class.[243] Still, class action lawsuits make more information available to the courts; such information results from the added resources of having several parties and attorneys involved in the dispute.[244] Providing judges with greater access to information is an example of an economic efficiency that class action lawsuits can provide.

Class actions are important because they provide individuals with a collective problem the opportunity to be heard. As Seventh Circuit Court of Appeals Judge Richard Posner stated, "[t]he *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30."[245] Still, some argue that modern class actions, particularly in the mass tort context, shield defendants and provide

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[237] Rhode, *supra* note 233, at 1186.

[238] One area where class actions have been particularly effective is "institutional litigation." These lawsuits typically seek to rearrange some aspect of a public institution, such as in a prison or a school, and require ongoing judicial supervision of the determined remedy. *Id*. at 1184 ("[I]nstitutional reform class actions have made and continue to make an enormous contribution to the realization of fundamental constitutional values—a contribution that no other governmental construct has proven able to duplicate."); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 467-68 (1980).

[239] Abram Chayes, *Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 5-6 (1982).

[240] *See id.* at 28; Nagareda et al., *supra* note 175, at 25-26.

[241] Chayes, *supra* note 239, at 27.

[242] *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action,* 95 COLUM. L. REV. 1343, 1346 (1995). *But see* Rhode, *supra* note 233, at 1205 (stating that "many attorneys make considerable efforts to appreciate and accommodate the broadest possible spectrum of class sentiment").

[243] Rhode, *supra* note 233, at 1224.

[244] *See* Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 146 (2011); *see* David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 852 (2002).

[245] *Carnegie v. Household Intern., Inc.*, 376 F.3d. 656, 661 (2004) (emphasis in original).

"a means by which unsuspecting future claimants suffer the extinction of their claims even before they learn of their injury."[246] In the mass tort context, this argument is supported by courts' willingness to accept settlement agreements of dubious value, attorneys' fees inducements, and passivity of persons whose harm has not yet arisen.[247]

Another concern with class action lawsuits in the United States is how settlement agreements are paid out.[248] Coupon settlements, where class members are given discounted prices off of products or services,[249] could potentially leave class members with "awards of little or no value."[250] Such settlements may leave plaintiffs in the unpleasant position that their attorneys would receive fees in cash, while plaintiffs themselves would receive coupons redeemable with the company being sued.[251] While the passage of the United States' Class Action Fairness Act of 2005 may have lessened coupon settlement abuses,[252] other concerns remain. For instance, in the certification stage, plaintiffs must struggle to determine the numeric limit of class membership, as having too many class members will attract judicial scrutiny amid concerns of predominating individual issues.[253] Recent Supreme Court decisions show that the plaintiffs' sword is blunted at best.[254]

The next section explores how the American Federal Rules of Civil Procedure and U.S. case law are relevant to the creation of a Japanese class action system. Examining U.S. case law highlights legal confusion and disagreement in American class action law. By looking at the current tensions within the American system, Japanese lawmakers can prepare for and avoid judicial disagreements underway in the United States. Additionally, the next section examines whether the American system achieves the theoretical goals of class action law. This comment examines the *Wal-Mart* and *McReynolds* cases, asking whether Rule 23(a)(3)'s

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[246] Coffee, *supra* note 242, at 1350.

[247] *Id.* at 1351.

[248] *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2 §2(a)(3)(A) (codified at 28 U.S.C.A. § 1711-15).

[249] John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 307 (2010).

[250] Class Action Fairness Act of 2005, Pub. L. No. 109-2 §2(a)(3)(A) (codified at 28 USCA § 1711-15).

[251] John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1446-47 (2005).

[252] Coffee, *supra* note 249, at 307; 28 U.S.C.A. § 1712.

[253] *See Wal-Mart*, 131 S. Ct. at 2556-57.

[254] *See infra* §(IV)(D) (showing that numerosity and commonality may hinder plaintiffs' ability to bring class action lawsuits).

commonality requirement and Rule 23(b)(3)'s predominance requirement undermine those goals.

D. Wal-Mart *and its Impact on Class Certification*

In the three years following the *Wal-Mart v. Dukes* decision, the case has been cited over 1,500 times in cases and over 380 times in law review articles.[255] *Wal-Mart* fundamentally changed the landscape of American class actions.[256] In *Wal-Mart*, a class of 1.5 million current and former female employees sued Wal-Mart, alleging discrimination relating to wages and promotion opportunities.[257] The plaintiffs sued as a Rule 23(b)(2) class, requesting backpay in addition to injunctive and declaratory relief.[258] The district court certified the plaintiffs as a class, and the Ninth Circuit Court of Appeals upheld the certification.[259]

Since classes must demonstrate that they meet Rule 23(a) requirements,[260] including commonality, the *Wal-Mart* plaintiffs were heavily scrutinized.[261] Plaintiffs used statistical evidence, anecdotal reports of discrimination from approximately 120 employees, and testimony by a sociologist to try to satisfy the commonality requirement.[262] The evidence failed to convince the U.S. Supreme Court, however, which determined that the plaintiffs did not meet the commonality requirement.[263] As the Court explained, commonality asks not whether there are common questions, but whether there are common answers.[264] The Court found it difficult to find common answers in *Wal-Mart*: with 1.5 million plaintiffs, the class contained significant differences in job positions, pay, age, and so on.[265] The class members' interests likely diverged.[266] The Court found no single common question uniting the plaintiffs.[267]

The dissent in *Wal-Mart* explained the difficulty with the majority's reasoning, observing that the majority blurred the distinction between Rule

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[255] *See generally Shepard's Report: Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541.

[256] *See* Barry M. Kazan & Gabrielle Y. Vazquez, *Viability of Rule 23(b)(3) Cases After 'Dukes', 'Amgen' and 'Comcast'*, N.Y. L.J. (June 10, 2013), *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202603355401&slreturn=20131102010944.

[257] *Wal-Mart*, 131 S. Ct. at 2547.

[258] *Id.*

[259] *Id.* at 2549.

[260] FED. R. CIV. P. 23(a).

[261] *Wal-Mart*, 131 S. Ct. at 2556-57.

[262] *Id.* at 2549.

[263] *Id.* at 2556-57.

[264] *Id.* at 2551 (quoting Nagareda 2009, *supra* note 203, at 132).

[265] *See id.* at 2556-57.

[266] *See Wal-Mart*, 131 S. Ct. at 2556-57.

[267] *Id.*

23(a)'s commonality requirement and Rule 23(b)(3)'s predominance requirement.[268] The Court refused to certify this class because the differences between class members destroyed commonality, precluding a common answer or adjudication that would be appropriate for every class member.[269] Whether this merged the Rule 23(a) commonality requirement and the Rule 23(b)(3) predominance requirement is up for debate,[270] but nevertheless, the 23(a)(2) commonality requirement is now a higher standard post-*Wal-Mart*.

Wal-Mart and the heightened commonality standard provide a useful starting point for examining commonality and numerosity within the Japanese class action system. Japan's new class action law strengthens the country's existing consumer-based group litigation system.[271] It allows Japanese courts to award compensatory damages for harm done to consumers, but does not allow for emotional or physical damage claims.[272] Although this new system does not go as far as the U.S. system, it is considered a "step toward an American-style class action system."[273] Still, not everyone is convinced that a class action system will work in Japan.[274] When Japan does implement its class action system, understanding the difficulties that U.S. courts have had with commonality and numerosity will be useful.

Wal-Mart began a jurisprudential dialogue on class action certification in the United States. One year after *Wal-Mart*, in *McReynolds v. Merrill Lynch*, the Seventh Circuit evaluated the class certification of 700 securities brokers.[275] Writing for the majority, Judge Richard Posner distinguished *McReynolds* from *Wal-Mart*.[276] Where *Wal-Mart* consisted of "a class action by more than a million current and former employees [and was] unmanageable,"[277] the *McReynolds* case, by contrast, fell on the other side of

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[268] *Id.* at 2565.

[269] *Id.* at 2556-57.

[270] *See id.* at 2561-66 (J. Ginsburg, dissenting).

[271] Yuko Takeo, *Third Arrow Surprise: More Lawsuits?*, WALL ST. J., May 24, 2013, *available at* http://blogs.wsj.com/japanrealtime/2013/05/24/third-arrow-surprise-more-lawsuits/.

[272] *Id.*; 2013 Class Action Law, *supra* note 7

[273] Takeo, *supra* note 271.

[274] Before the law was passed, one attorney stated that "[t]he whole idea of Japan adopting class actions is totally nonsense . . . There is no way that will ever happen." Osaki, *supra* note 141.

[275] *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 672 F.3d 482, 488 (2012). This case is relevant to Japan as it shows a large class seeking individual damages in addition to injunctive relief. In lawsuits similar to this one, individual damage awards may require individual determinations, potentially destroying commonality and predominance. Though Japan's bifurcated system may address these issues, examining them is useful to illustrate a difficult task for judges—evaluating the merit of individual claims in such a large class.

[276] *See generally McReynolds*, 672 F.3d 482.

[277] *Id*. at 488.

the "line that separates a company-wide practice from an exercise of discretion by local managers."[278] The *Wal-Mart* case involved a "policy of [managerial] discretion [which] produced an overall sex-based disparity,"[279] whereas the *McReynolds* policy was a company-wide practice.[280]

The managerial discretion exercised in *Wal-Mart* and *McReynolds* is difficult to distinguish.[281] It is easier to distinguish the cases on other grounds, such as by the number of class members and the fact that *McReynolds* presented fewer case management problems for the presiding judge.[282]

One key difference between the two cases is the use of Rule 23(c)(4) in *McReynolds*.[283] Rule 23(c)(4) states that, "an action may be brought or maintained as a class action with respect to particular issues."[284] Judge Posner explained that "[t]he practices challenged in [*McReynolds*] present a pair of issues that can most efficiently be determined on a classwide basis, consistent with [Rule 23(c)(4).]"[285] After *Wal-Mart* and *McReynolds*, class action litigants face uncertainty in both how to construct their claims and whether those claims are likely to succeed.[286]

Three recent cases have added to the basic framework provided in *Wal-Mart* and *McReynolds*. *Amgen Inc. v. Connecticut Retirement Plans & Trust Funds*[287] and *Comcast Corp. v. Behrend*[288] represent the latest class action case law from the U.S. Supreme Court.[289] *Butler v. Sears, Roebuck & Co.*[290] is the latest response by Judge Posner and the Seventh Circuit to the U.S. Supreme Court. *Amgen* involved a securities fraud complaint where the Court concluded that questions of law or fact do not have to be proven as

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[278] *Id.* at 490.

[279] *Wal-Mart*, 131 S. Ct. at 2556.

[280] *McReynolds*, 672 F.3d at 489-90.

[281] Judge Posner aptly notes: "[T]o the extent that . . . regional and local managers exercise discretion regarding the compensation of the brokers whom they supervise, the case is indeed like *Wal-Mart*." *Id.* at 489.

[282] *McReynold* contained a class of 700 plaintiffs, whereas *Wal-Mart* plaintiffs numbered over one million. *See generally McReynolds*, 672 F.3d 482; *Wal-Mart*, 131 S. Ct. 2541.

[283] *McReynolds*, 672 F.3d at 483.

[284] FED. R. CIV. P. 23(c)(4).

[285] *McReynolds*, 672 F.3d at 491.

[286] For an overview of how courts have treated Rule 23(c)(4) class construction, see generally Jenna Smith, "*Carving at the Joints": Using Issue Classes to Reframe Consumer Class Actions*, 88 WASH. L. REV. 1187 (2013).

[287] *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184 (2013).

[288] *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

[289] *See* Adam Liptak, *Supreme Court Decides 2 Securities Fraud Cases*, N.Y. TIMES, Feb. 27, 2013, *available at* http://www.nytimes.com/2013/02/28/business/supreme-court-rules-in-amgen-and-sec-securities-fraud-cases.html?_r=1&.

[290] *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013)

a prerequisite to class certification.[291] In what could be seen as a step back from *Wal-Mart's* intense examination of commonality, the Court took another course in *Comcast*.[292] In *Comcast*, the Court required that a class be capable of measuring damages on a classwide basis prior to certification.[293] Like *Wal-Mart*, this decision placed heightened demands on plaintiffs' to prove their case.[294] *Butler* was remanded to the Seventh Circuit in light of *Comcast*,[295] providing Judge Posner with another opportunity to soften the impact of the Supreme Court's increased demands on class action plaintiffs.

The claims in *Butler* arose from a defect in Sears washing machines.[296] As Judge Posner explained, the lawsuit was "really two class actions because the classes have different members and different claims . . . One class action complains of a defect that causes mold . . . the other of a defect that stops the machine inopportunely."[297] The U.S. Supreme Court instructed the Seventh Circuit to reevaluate certification based on the *Comcast* decision.[298] Judge Posner concluded that the first issue, the mold defect, constituted a problem that was common to the entire class.[299] He determined that liability could be measured by "individual hearings" and that the "parties probably would agree on a schedule of damages based on the cost of fixing or replacing class members' mold-contaminated washing machines."[300] If problems arose as litigation went on, the class could be broken up into subclasses under 23(c)(4) or (5).[301] For the second issue, the court determined that class certification was appropriate as "it was more efficient for the [defect] issue . . . to be resolved in a single proceeding than for it to be litigated separately[.]"[302]

After explaining why class certification was appropriate for the issues in *Butler*, Judge Posner went on to distinguish *Comcast*.[303] He explained that *Comcast* holds "that 'the first step in a damages study is the translation

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291 *Amgen Inc.*, 133 S. Ct. at 1190.

292 *Comcast Corp.*, 133 S. Ct. at 1433.

293 *Id.*

294 "The unstated assumption underlying the Supreme Court's decision in *Comcast* is that the individualized nature of the damages inquiry in a Rule 23(b)(3) analysis should be weighed against the commonalities in the liability aspects of a claim for purposes of the predominance analysis . . . " Kazan & Vazquez, *supra* note 256.

295 *Butler*, 727 F.3d at 797.

296 *Id.*

297 *Id.*

298 "The question presented by the Supreme Court's remand is one of law—whether the *Comcast* decision cut the ground out from under our decision ordering that the two classes be certified." *Id.* at 798.

299 *Id.* at 798-90.

300 *Id.* at 798.

301 *Butler*, 727 F.3d at 798.

302 *Id.* at 799.

303 *Id.* at 799-800.

of the *legal theory of the harmful event* into an analysis of the economic impact of *that event*.'"[304] In *Comcast*, the damages methodology created a theory of liability and identified damages that may not have been the result of the specific wrong alleged.[305] By contrast, the damages in *Butler* could be attributable only to issues claimed by the class members.[306]

As the calculation of damages in *Comcast* is readily contrasted with the applicable calculation in *Butler*, Judge Posner asked: "[W]hy did the Supreme Court remand the case to us for reconsideration in light of [*Comcast*]?"[307] He explained that the remand must be based on "the emphasis that the majority opinion places on the requirement of predominance and on its having to be satisfied by proof presented at the class certification stage rather than deferred to later stages in the litigation."[308] When a theory of damages liability includes damages that may be attributable to acts other than the claims alleged by the class, it allows for the possibility that questions that affect only individual members might predominate over questions common to the class.[309] This comment argues that such a scenario appears to violate Rule 23(b). This comment argues that in effect, the U.S. Supreme Court's concern over damages calculations in *Comcast* was an extension of its ongoing concern that plaintiffs meet Rule 23(b)'s predominance requirement.[310]

The judicial dialogue between the Seventh Circuit and the Supreme Court is ongoing.[311] It could be some time before plaintiff attorneys have a clear understanding of the scope of Rule 23(b)(3)'s predominance requirement, the permissible uses of Rule 23(c)(4), and what is necessary to satisfy Rule 23(a)'s commonality requirement. At first glance, the *Comcast* decision appears to focus solely on the importance of tying specific damages to specific claims, but this comment argues that the decision also strengthens Rule 23(b)(3)'s predominance requirement.

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[304] *Id.* at 799 (quoting *Comcast*, 133 S. Ct. at 1433) (emphasis in original).

[305] *Butler*, 727 F.3d at 799.

[306] *Id.* at 800.

[307] *Id.*

[308] *Id.*

[309] *Id.*

[310] The Sixth Circuit decided an issue identical to one in *Butler* (the mold issue) in *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838 (6th Cir. 2013). In *Whirlpool*, the Sixth Circuit concluded on remand that Rule 23(b)(3)'s predominance requirement was met. *Id.* at 859.

[311] Though this comment has refrained from significantly analyzing the dissenting opinions in *Wal-Mart*, *Amgen*, and *Comcast*, the Supreme Court itself is engaged in ongoing internal dialogue as to the proper role of Rule 23(a)'s commonality and Rule 23(b)(3)'s predominance. Kazan & Vazquez, *supra* note 256.

V. PREDOMINANCE AND THE IMPLEMENTATION OF A JAPANESE CLASS ACTION LAW

As Japan develops its own class action system, it will help to examine the tensions within U.S. case law over interpreting the commonality and predominance requirements. Japanese lawmakers should be wary of how they construct class action laws, as unclear laws or ambiguities left for judges to resolve may undermine and weaken the class action system as a tool for plaintiffs. If Japanese attorneys are concerned with commonality and predominance issues, they may forgo such a class action suit entirely in favor of joinder, individual actions, or other alternatives, such as arbitration or no lawsuit at all.

Examining the U.S. class action system reveals a number of issues that Japanese lawmakers implementing a class action system will need to consider. Japan should plan how the new class action law will develop over time—whether Japanese plaintiffs will be allowed to structure a class action lawsuit without a SQCO, whether future class members will be able to opt out (such as a Rule 23(b)(3) class) or not opt out (as in a Rule 23(b)(1)(B) limited fund class), or whether members will be required to opt out to preserve individual claims. This Part explains why Japan should observe the current atmosphere around class action law in the United States. Lastly, this comment considers an alternative perspective—whether the United States has more to gain from observing Japan's new class action law—and offers concluding remarks.

A. Japan Should Observe the Case Law Development of the U.S. Class Action System

The U.S. class action system demonstrates the strengths[312] and weaknesses[313] of class actions generally. The jurisprudential dialogue between the Supreme Court and Judge Posner demonstrates that some aspects of class action certification remain unsettled and controversial within the United States.[314] The *Wal-Mart* decision showcases a trade-off between the practicality of trying the case and serving justice.[315] The Court rightly considered the justiciable difficulties that would arise from having a class of

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[312] *See* Alexander, *supra* note 192, at 1.

[313] *See* Ronald Barusch, *Dealpolitik: BofA Settlement Reveals Further Weaknesses of Class Action System*, WALL ST. J., Sept. 28, 2012, *available at* http://blogs.wsj.com/deals/2012/09/28/dealpolitik-bofa-settlement-reveals-further-weaknesses-of-class-action-system/.

[314] *See Wal-Mart*, 131 S. Ct. at 2556-57 (2011); *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 800 (7th Cir. 2013).

[315] *See generally Wal-Mart*, 131 S. Ct. 2541.

one million people, pointing to the likelihood that individual issues would predominate over the issues presented by the class as a whole.[316] The outcome of *Wal-Mart*, however, shows that companies can be "too big to sue."[317] If a company policy harms a large enough number of people—and the policy does not overtly discriminate—the company may argue that a class action is not appropriate because individual issues would predominate due to the class size.

Class actions do not always present David versus Goliath stories. There is a contradiction in a system designed to allow large numbers of plaintiffs with small claims to sue for the sake of efficiency, while simultaneously rejecting classes where excessive size creates a predominance of individual issues. Still, the *Wal-Mart* decision shows that too-large classes can present judicial management problems.[318] Japan should take this into consideration as it implements its own class action law.

Japan's new law does not take effect for a few years,[319] leaving ample time to further research and prepare for potential problems or unwanted consequences of a class action system. Japan should draw from the U.S. experience and develop its own well-articulated class action system.

B. Components of the U.S. Class Action System that Would Benefit Japan's Class Action Development

Japan may benefit by incorporating parts of the U.S. class action system into its own system. First, this section explains how integrating the U.S. class certification process will address some of the problems observed in Japan's legal system. Then it explains why having a legally defined class action system is beneficial to any legal system.

The new Japanese class action law already incorporates pieces of the U.S. class certification process.[320] The new system,[321] includes requirements similar to the U.S. numerosity and commonality certification requirements.[322] These two components will help ensure that Japanese judges certify class actions only when the consumers' claims are similar

[316] *Id.* at 2556-57.

[317] *See* Lila Shapiro, *Walmart: Too Big To Sue*, HUFFINGTON POST, June 20, 2011, http://www.huffingtonpost.com/2011/06/20/walmart-too-big-to-sue_n_880930.html (last visited May 17, 2014); *see also* Laura Flanders, *The Supreme Court's Free Pass on Sexism for Walmart*, THE GUARDIAN, June 21, 2011, http://www.theguardian.com/commentisfree/cifamerica/2011/jun/21/walmart-women-class-action (last visited May 17, 2014).

[318] *See Wal-Mart*, 131 S. Ct. at 2556-57.

[319] *See* SHŌHISHACHŌ (消費者庁) [CONSUMER AFFAIRS AGENCY], *supra* note 138.

[320] *See* Nishigaki & Yoshida, *supra* note 1, at 2-3.

[321] *Supra* Part III.

[322] *See* Ujino, *supra* note 160.

enough to be efficient to resolve in a single action.[323] By requiring a sufficiently large number of plaintiffs who suffered from the same harm, the judiciary can save time by having one fact-gathering session for the entire class.[324] This requirement benefits judges because they do not have to hear the same set of facts numerous times, and it benefits plaintiffs who can rely on a SQCO to represent them in court.

The two-stage process[325] in Japan's new system reduces judicial waste, but it may not provide consistent results for all consumers. Plaintiffs must allow the SQCO to present their claims to the court.[326] Once the SQCO files the consumers' claims with the court, the court allows the defendant to approve or reject claims.[327] Courts may approve some claims, ending those claimants involvement in the litigation,[328] whereas courts may reject others' claims, requiring further litigation.[329] The new law should incorporate a standardized system to determine the result for all plaintiffs. Consistency will protect the reputation of the judiciary and will ensure that each person receives justice equally.

The new class action system does not appear to include the typicality and adequacy components of U.S. Federal Rule of Civil Procedure 23(a).[330] These requirements may be lacking because in the new system class action suits are not brought by individual plaintiffs—they are brought by a SQCO—and there are no named plaintiffs. One benefit of the typicality and adequacy components is that they appear to serve as a second review of the class members, making certain that the harm suffered by the class members is similar enough to warrant group action. Though neither typicality nor adequacy appears to fit within the current framework of Japan's class action system, implementing a mechanism to double-check or review the relationship between members of a proposed class could be invaluable. Mistakenly certifying a class will necessitate a court to do additional and costly fact-finding. Japan should consider including an additional safeguard, such as requiring all SQCOs to provide an independent report for the court; the report could demonstrate the similarities between the harm done to the plaintiffs.

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[323] *See* Nishigaki & Yoshida, *supra* note 1, at 2.

[324] *See* Cohelan, *supra* note 180, at §1.04; *Class Action: An Overview*, *supra* note 193.

[325] The author notes that this two-stage process appears very similar to a U.S. 23(c)(4) class. The first stage determines liability and the second stage resolves damages.

[326] *See* Cohelan, *supra* note 180, at §1.04; *Class Action: An Overview*, *supra* note 193.

[327] *Id.*

[328] *See id.*

[329] *See id.*

[330] FED. R. CIV. P. 23(a); 2013 Class Action Law, *supra* note 7.

Other components of the U.S. class action system may not fit well in Japan, such as the ability for some plaintiffs to receive treble damages[331] for harm done to them. Though it may add to the deterrent effect of class action, that component incentivizes lawsuits and runs counter to the longstanding Japanese philosophy of legal restraint.[332] Japan has long been a state of legal restraint.[333] Professor Yosiyuki Noda of the University of Tokyo has argued that "[t]o an honourable [sic] Japanese the law is something undesirable, even detestable, something to keep as far away as possible . . . To take someone to court . . . is a shameful thing[.]"[334] While consumer redress by means of collective action is important, it should not necessarily produce an increase in litigation generally. Increasing the incentive to file a lawsuit appears inappropriate for Japan.

Most importantly, Japan can look to recent U.S. court decisions on class action law to predict difficulties and questions that may arise within Japan's class action system. As the *Wal-Mart* and *McReynolds* cases demonstrate, there is tension between the ability of judges to adequately manage and address common questions—and find common answers—when there are massive numbers of plaintiffs and the objective of class action lawsuits to promote efficiency, consistency, and fairness. As Japan refines its own class action law, it should examine how U.S. judges have dealt with these issues.

C. *Should the United States Look to Japan for Class Action Answers?*

While the majority of this comment is dedicated to the argument that Japan should examine the U.S. class action law, the confusion and disagreement apparent in current U.S. jurisprudence on class actions suggests that it is the United States who should follow Japan's path. Japan's new class action law is distinct from U.S. class action law because it creates a bifurcated class action system.[335] That is, the judiciary makes an initial determination of liability in the first stage and, if the defendant is found

[331] *See* ABA ANTITRUST SECTION, MONOGRAPH NO. 13: TREBLE-DAMAGES REMEDY 9 (1986), *available at* http://books.google.com/books?id=ToFquxup3SoC&pg=PA9&lpg=PA9&dq=treble+damages+class+action&source=bl&ots=kvcdO3hZ4z&sig=62XueKkDmEVD7kCwIFyU8k9IYAY&hl=en&sa=X&ei=XFEzU96vBYvroASpzIKQAQ&ved=0CDAQ6AEwAA#v=onepage&q=treble%20damages%20class%20action&f=false.

[332] *See* Goodman 2001, *supra* note 38, at 769.

[333] *See id.*

[334] Y. Yoda, *Introduction to Japanese Law*, *in* HIROSHI ODA, *supra* note 27, at 4.

[335] *Supra* note 159.

liable, it is followed by a second stage of individual damage determinations.[336]

Though the new Japanese class action law only allows for limited types of recovery,[337] it provides a blueprint for U.S. class action litigation governed by Rule 23(c)(4). Under Rule 23(c)(4), U.S. courts may certify issue classes.[338] In the United States, a class can theoretically be certified on a singular issue, and litigation can proceed to resolve defendants' liability to that class.[339] If the defendants are found liable, then a second-stage damages determination could proceed.[340] However, in practice, it is very difficult for U.S. plaintiffs to certify classes under Rule 23(b)(3) and 23(c)(4) due to the predominance concerns raised by *Wal-Mart*.[341] Moreover, even where U.S. plaintiffs successfully avoid predominance concerns in the liability phase by becoming certified as an issue class, as they did successfully in *McReynolds*, U.S. courts still express doubt that such plaintiffs could be successfully certified in a subsequent damages phase due to the predominance of individual issues.

To address the predominance and commonality concerns voiced by the U.S. Supreme Court in *Wal-Mart* and *McReynolds*, U.S. litigators should examine how the Japanese two-stage proceeding works, and see whether it substantially burdens the judiciary. Japan's new law provides creative solutions to lighten the burden on the judiciary during the damages phase. For example, where a defendant is found liable in the first phase, a full-fledged trial to determine damages does not necessarily ensue because individual plaintiffs must first submit claims for their damages, giving defendants an opportunity to accept or reject the claims.[342] Only damages claims that are still disputed are sent to a full trial.[343] The United States could look for other alternatives as well. The damages determination could be based upon a damages schedule set by the trial court, wherein the damages awarded are based upon specific conditions being met, or alternatively, class members could be required to arbitrate their damages

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[336] *See supra* Part III.B.

[337] *Supra* note 157.

[338] FED. R. CIV. P. 23(c)(4).

[339] *See McReynolds*, 672 F.3d at 490-91 (allowing certification because although a single proceeding could not resolve all of the class members' claims, "at least it wouldn't be necessary . . . to determine whether the challenged practices were unlawful."); *see also Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006). *But see Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

[340] *Id.*

[341] *Supra* Part IV.

[342] *Supra* Part III.B.

[343] *Id.*

with defendants. By looking to Japan's new law, U.S. litigants can observe the efficacy of the two-stage process.

VI. CONCLUSION

In recent years Japan has made significant changes to its legal system. The creation of new, dedicated-law schools and reforms to the judiciary exemplify these changes. More significantly, Japan passed class action legislation that it will implement within the next three years. The new class action system is another step in reforming the Japanese legal system. Japan's new class action system will include components that are similar to those found in the U.S. class certification process—including the certification prerequisites of numerosity and commonality. These are valuable pieces of a functional class action system because they help promote judicial economy. As shown by U.S. case law, however, numerosity and commonality can give rise to difficult legal questions for the judiciary and impair plaintiffs' access to the court via a class action. As it begins to implement its own class action law, Japan should examine the U.S. system to improve its chances of success. Japan's new class action law is a courageous attempt to protect consumers.

Just as Japan will benefit from examining U.S. class action jurisprudence, the United States can improve its own class action system by examining Japan's new law. The new Japanese law uses a bifurcated process, separating liability and damages phases for class members. This two-stage process can be theoretically implemented in the United States using Rule 23(c)(4). Japan's new law may satisfactorily account for concerns relating to predominance, commonality, and judicial management. U.S. litigants will benefit by observing this system in action. By studying each other, litigants in Japan and the United States may find creative and successful means of litigating class actions.